WTO implications of the proposed "no risk" amendment to the EUDR

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Executive summary

Context

Following the European Commission's proposal to delay the implementation of the European Union's Deforestation Regulation (EUDR), the European Parliament introduced various amendments aimed at reducing the Regulation's ambition. One such amendment that has been subject to widespread criticism is the proposal to introduce a new category of "no risk" countries under the existing risk benchmarking system. This "no risk" amendment would exempt countries that fall within its scope from two key EUDR requirements, namely: that products placed on the EU market are deforestation-free; and the submission of a due diligence statement. These exemptions would make the "no risk" rating much less stringent than the existing benchmarking system, that categorizes countries as high-risk, low-risk, and standard-risk, according to their perceived risk of producing non-compliant commodities.

According to the authors that proposed the amendments, to fall within the "no risk" exemption countries must meet three criteria: (i) their forest area development must have remained stable or have increased compared to 1990; (ii) they must have signed the Paris Agreement and international conventions on human rights and on preventing deforestation; and (iii) they must strictly implement and enforce regulations on preventing deforestation and forest conservation at the national level.

Ahead of the vote on 3 December 2024, this study undertakes a preliminary assessment of the WTO consistency of the EUDR, with a particular focus on the "no risk" amendment. The analysis finds that, should the "no risk" amendment be adopted, it would likely render the EUDR inconsistent with various provisions of the WTO covered agreements. In particular, a Regulation with a "no risk" exemption would amount to impermissible discrimination in violation of GATT Articles I and III. Moreover, such WTO inconsistencies would not be justifiable under the general exceptions clause of GATT Article XX as the "no risk" exemption would likely constitute arbitrary of unjustifiable discrimination under the chapeau of that provision. Should a panel find the EUDR to be a technical regulation, it would likely also violate Article 2.1. of the TBT Agreement.

Any unresolved inconsistencies with WTO obligations could have significant implications for the EU. It would, for example, increase the likelihood of aggrieved WTO Members successfully challenging the EUDR before a WTO panel. The ultimate outcome of any such WTO dispute settlement process would depend on several variables given the current impasse to appoint appellate adjudicators. Nonetheless, a finding of WTO inconsistency could reinforce pushback from trading partners against the EUDR, risk hurting the EU's credibility as a key player in multilateralism and undermine the EU's pioneering approach to global sustainability.

High-level summary of potential WTO violations

As a preliminary remark, the "no risk" exemption must be challenged within the context of the EUDR. This is because, as acknowledged by the Appellate Body in *EC – Seal*, the prohibitive and permissive elements of a measure have to be considered together in light of their intertwined nature. In this case, the (permissive) "no risk" exemption has little meaning or effect in the absence of the EUDR prohibition. Therefore, the measure at issue for purposes of the subsequent analysis is the EUDR with the "no risk" exemption (i.e., assuming that the "no risk" exemption has become a part of the EUDR).

- *Adding a "no risk" exemption will violate GATT Articles I and III*

The "no risk" amendment, if adopted, will likely violate the most favoured nation (MFN) obligation under GATT Article I. This is because a WTO panel will likely find that products from "no risk" countries are "like" products from countries that fall outside the "no risk" exemption. Moreover, the "no risk" exemption would result in discrimination as it would lead to less favourable treatment for products from countries that fall outside the "no risk" exemption. In this regard, countries that fall within the "no risk" exemption would be exempt from two core EUDR obligations: the obligation that products placed on the EU market are deforestation-free, and the obligation to provide due diligence statements. Moreover, "no risk" countries would benefit from significantly less frequent inspections. The cumulative effect of the "no risk" exemption would thus make it significantly less burdensome for operators to import EUDR covered products from "no risk" countries into the EU compared to products from countries that are not classified as "no risk".

For similar reasons, the "no risk" exemption, would likely also violate GATT Article III, which sets out the national treatment obligation. This is because the exemption will change the conditions of competition between "no risk" countries and those countries that fall outside the scope of the "no risk" exemption. This would become a *de facto* national treatment violation if the "no risk" exemption were to apply to an EU Member State – a situation that is highly plausible.

- *The "no risk" exemption cannot be justified under GATT Article XX*

A measure found to be inconsistent with GATT Articles I and III may nonetheless be justified if it complies with the criteria under the "General Exceptions" clause set out in GATT Article XX. To justify a measure that is inconsistent with GATT obligations under GATT Article XX, it must (i) fall within one of the subparagraphs of GATT Article XX; and (ii) comply with the conditions of the chapeau. In particular, the chapeau of GATT Article XX requires that the measure sought to be justified must not arbitrarily or unjustifiably discriminate between countries where the same conditions prevail; and it must not amount to a disguised restriction on international trade.

A WTO panel will likely find that the EUDR falls within the scope of two environment-related subparagraphs of GATT Article XX: subparagraph (b), which enables a country to adopt or enforce a measure that is "necessary to protect human, animal or plant life or health" and subparagraph (g) which enables a country to adopt or enforce a measure "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption".

However, although provisionally justifiable under subparagraphs (b) and (g), the EUDR with the "no risk" amendment will likely run afoul of the requirements of the chapeau of GATT Article XX. This is because it would amount to arbitrary and unjustifiable discrimination between countries where the same conditions prevail. Such an outcome will be driven by the facts that (i) the criteria that countries must meet to fall within the "no risk" exemption are not rationally related to the policy objective of the EUDR; and (ii) the significant exemptions from key EUDR requirements that products produced in "no risk" countries would enjoy, as well as the reduced enforcement checks, risk creating a loophole to launder non-EUDR compliant products from high risk countries

1. *The criteria for qualification under the "no risk" exemption are not rationally related to the EUDR's policy objective*

Criterion one (forest area development must have remained stable or have increased compared to 1990): Assessing forest area change between 1990 and 2020 is not an accurate indicator of current and future deforestation of products placed on the EU market. Comparing the forest area between these two time periods could entirely overlook deforestation if countries have replanted deforested areas with young, less biodiverse trees, or have grown trees elsewhere. In other words, countries that

have increased their total forest areas in comparison to 1990, by replacing primary forests with plantation forests – a practice that amounts to forest degradation which is prohibited under the EUDR – could qualify as a "no risk" country. This also means that a country can engage in deforestation, as long as such deforestation is compensated with an equivalent area of "plantation forests". Indeed, forest coverage data show that deforestation is often highly concentrated within countries, an overall net increase in forest cover can easily mask significant levels of deforestation and forest degradation. For example, Vietnam, which is a primary supplier of coffee and wooden furniture to the EU, increased its forest cover between 1990 and 2020 by 56%. At the same time, according to the World Resources Institute (WRI) Global Forest Watch, between 2001 and 2023, Vietnam lost over 1 million hectares of forest to commodity-driven deforestation. Thailand similarly has seen net increases in forest area since 1990 and has significant levels of deforestation linked to the expansion of agricultural commodities. And while Europe's forests areas are increasing, its old growth forests are also at significant risk of deforestation.

Criterion two (which requires that countries have signed international treaties such as the Paris Agreement and other unspecified international environmental and human rights conventions): This criterion is not rationally connected to the objective of the EUDR, i.e., to minimize the EU's contribution to deforestation and forest degradation worldwide, by allowing the placing on the EU market, or exporting from the EU, only of deforestation-free products. Indeed, only three countries have not signed the Paris Agreement: Iran, Libya and Yemen. Yet, these three countries are not among the countries with the highest deforestation rates. Conversely, signing the Paris Agreement, even when accompanied with quantifiable targets related to land use and forestry in a country's Nationally Determined Contributions (NDCs) is no proxy for the absence of risk vis-a-vis deforestation and forest degradation. Deforestation has continued to remain at high levels even after the entry into force of the Paris Agreement. Moreover, the lack of specificity in identifying the exact set of human right conventions, as well as those conventions that prevent deforestation, suggest that countries that have signed any type of human rights convention/conventions related to preventing deforestation would fall within the scope of the second half of the second criterion. Doing so does not guarantee the undertaking of forest protection efforts. And even if there would be a specific list of human rights and deforestation prevention conventions that are identified, the fact that a country has signed conventions related to human rights and forest prevention is indicative of a country's commitment to engage with the international legal order on human rights and environmental protection. However, it does not serve as the basis to conclude that a country is at "no risk" to engage in deforestation and forest degradation practices prohibited under the EUDR.

Criterion three (the requirement that "regulations on preventing deforestation and forest conservation at national level are strictly implemented and enforced in full transparency and monitored): This criterion is connected to only one part of the EUDRs objective, that is, its legality requirement. However, as the criterion does not prescribe a specific level of ambition vis-à-vis regulations on preventing deforestation and forest conservation, countries that implement less ambitious regulations would still be able to place products on the EU market that are not compliant with the EUDR's main requirement that products are "deforestation-free" per the EUDR's definition – irrespective of the domestic laws and regulations related to forest protection a country has in place. The criterion is, therefore, an inconclusive indicator as to the deforestation situation in the country.

2. *The significant exemptions from key EUDR requirements for products sourced from "no risk" countries, coupled with the reduced enforcement checks, risks creating a loophole whereby "no risk" countries launder non-compliant products*

Under the "no risk" amendment, countries that comply with the above three criteria are considered as posing "no risk" of placing EUDR-incompliant products on the EU market. As a result of such "no risk" assessment, products sourced from countries that fall within the scope of the amendment will be exempt from two core obligations under the EUDR: the deforestation-free obligation and the obligation to carry out due diligence. Moreover, for products sourced from "no risk" countries, only

0.1% of the operators will be subject to checks by enforcement authorities. The absence of due diligence requirements and infrequent inspection would impair the ability to verify their no risk status. Moreover, exemption from due diligence requirements would create a loophole that would risk that "no risk" countries launder non-compliant products from, for example, high-risk countries. While operators must still, upon request, verify that their products are degradation-free, they will no longer have to provide any documentation and no geospatial data, significantly complicating enforcement. Therefore, by significantly relaxing the obligations under the EUDR, the no-risk exemption will create conditions that enable circumvention and undermining of the EUDR objective. These factors, coupled with the fact that most EU Member States will likely meet the criteria under the "no risk" exemption, will also render the measure as a disguised restriction on international trade within the meaning of GATT Article XX.

- *If found to be a technical regulation, the "no risk" exemption to the EUDR would also constitute discrimination under TBT Article 2.1*

Prior WTO disputes suggest a level of ambiguity as to whether the EUDR would constitute a technical regulation and, therefore, fall within the scope of the Technical Barriers to Trade (TBT) Agreement. Ultimately, this would depend on a WTO panel's assessment of whether the EUDR lays down product characteristics or processes and production methods that are *related to the product characteristics*, given that whether a product is deforestation-free is not detectable in the final product. Should a panel find the EUDR to be a technical regulation, it will likely find that the "no risk" exemption also violates TBT Article 2.1 for reasons similar to those relevant under GATT Article XX.

I. Introduction

On 29 June 2023, the Regulation on Deforestation-free Products ("EUDR" or "the Regulation"), one of the flagship achievements of the European Union ("EU") Green Deal, entered into force.[1] In response to concerns about the feasibility of meeting the EUDR's implementation timeline, the European Commission ("Commission") proposed extending the implementation deadline, providing stakeholders additional time to comply with the new Regulation. In doing so, the Commission noted that "the extension proposal in no way puts into question the objectives or the substance of the law, as agreed by the EU co-legislators."[2]

Following the Commission's proposal to delay the EUDR implementation, the European Parliament adopted various amendments that effectively reduce the Regulation's ambition. One such amendment is the introduction of a new category of "no risk"[3] countries to the existing risk benchmarking system. Countries falling within this new "no risk" category would be exempt from the obligation to be deforestation-free and from key due diligence requirements of the EUDR.[4] If adopted, this amendment, which is much less stringent than the existing risk ratings, could significantly weaken the EUDR and undermine its objective to minimize the EU's contribution to global deforestation and forest degradation.[5] It would also risk discriminating against non-EU countries, which could heighten the pushback that the EU has already experienced from key EU trading partners on this issue.[6]

The "no risk" exemption has been introduced in a hurried manner. One critical element that has been overlooked by the European People's Party (EPP) is whether the amendment is consistent with EU obligations under the World Trade Organization (WTO) treaties. Admitting as much, Christine Schneider, the Member of EU Parliament (MEP) who tabled the "no risk" exemption together on behalf of the EPP group noted that its WTO consistency remains unclear.[7] Commentators have also flagged concerns about the possible WTO inconsistency of the "no risk" exemption.[8]

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[1] EC, Regulation on Deforestation-free Products, available at https://environment.ec.europa.eu/topics/forests/deforestation/regulation-deforestation-free-products_en.

[2] EC, Commission strengthens support for EU Deforestation Regulation implementation and proposes extra 12 months of phasing-in time, responding to calls by global partners, 2 October 2024, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_5009.

[3] This paper uses the terms "no risk" amendment, "no risk" exemption, "no risk" category interchangeably depending on the context.

[4] Fern, EU's groundbreaking deforestation law sabotaged by the European Parliament, 14 November 2024, available at https://www.fern.org/publications-insight/eus-groundbreaking-deforestation-law-sabotaged-by-the-european-parliament/; Earthsight, EU conservative bloc's amendments to deforestation law are "a series of loopholes" which would make it "impossible to enforce", 7 November 2024, available at https://www.earthsight.org.uk/news/EUDR-amendments.

[5] Ibid.

[6] Alice Hancock et al., EU backs 'loophole' for member states facing deforestation law, Financial Times, 14 November 2024, available at https://www.ft.com/content/469bf131-5d48-429e-917b-688610747b9e.

[7] Ibid.

[8] Philippa Nuttall, Have MEPs voted to make EU deforestation law WTO incompatible? Sustainable Views, 14 November 2024, available at https://www.sustainableviews.com/have-meps-voted-to-make-eu-deforestation-law-wto-incompatible-aa288ac9/; Helen Bellfield, Toby Gardner, Trase urges EU to reject last minute amendments to deforestation regulations, Trase, 19 November 2024, available at https://trase.earth/insights/trase-urges-eu-to-reject-last-minute-amendments-to-deforestation-regulations; Alice Hancock et al., EU backs 'loophole' for member states facing deforestation law, Financial Times, 14 November 2024.

Ahead of the vote by the European Council and the EU Parliament on the "no risk" exemption on 3 December 2024, [9] this study undertakes a preliminary assessment of the WTO-consistency of the proposed "no risk" amendment to the EUDR. It finds that, should the "no risk" amendment be adopted, it would likely render the EUDR inconsistent with various provisions of the WTO covered agreements. In particular, a Regulation with a "no risk" exemption would amount to impermissible discrimination in violation of GATT Articles I and III. Moreover, such WTO inconsistencies would not be justifiable under the general exceptions clause of GATT Article XX as the "no risk" exemption would likely constitute arbitrary of unjustifiable discrimination under the chapeau of that provision. Should a panel find the EUDR to be a technical regulation, it would likely also violate Article 2.1. of the TBT Agreement.

This study proceeds as follows: section two provides an overview of the key facts underlying the EUDR and the "no risk" amendment that are relevant for an assessment of WTO-consistency. Section three demonstrates that the "no risk" exemption will likely result in discrimination under the most favored nation (MFN) and national treatment (NT) provisions of the GATT. Section four reveals that the measure will likely not be justified under the GATT general exceptions clause. Section five establishes that, should a possible future panel decide to assess the "no risk" exemption under the TBT Agreement, it would likely find that it violates Article 2.1 thereof.

[9] Jennifer Rankin, Former EU environment chief hits out at plans to delay anti-deforestation law, The Guardian, 3 October 2024, available at https://amp.theguardian.com/environment/2024/oct/03/former-eu-environment-chief-criticises-plans-to-delay-deforestation-law.

II. Factual Background

This section discusses the relevant factual background which will serve as the foundation for the subsequent legal analysis of the WTO-consistency of the proposed "no risk" exemption to the EUDR. Part A provides an overview of the EUDR, identifying its main objectives. Part B zooms in on the proposed "no risk" amendment, which, as discussed below, provides an exemption from key obligations under the EUDR.

A. Overview of the EUDR

1. Objective of the measure

The EUDR aims to minimize the EU's contribution to deforestation and forest degradation worldwide, by allowing the placing on the EU market, or exporting from the EU, only of deforestation-free products, i.e., products that have been produced on land not subject to deforestation or forest degradation after 31 December 2020. Specifically, the Commission has highlighted that the EUDR aims to (i) avoid that the listed products Europeans buy, use and consume contribute to deforestation and forest degradation in the EU and globally; (ii) reduce carbon emissions caused by EU consumption and production of the relevant commodities by at least 32 million metric tonnes a year; (iii) address all deforestation driven by agricultural expansion to produce the commodities in the scope of the regulation, as well as forest degradation.[10] The broader objectives of reducing greenhouse gas ("GHG") emissions and biodiversity loss are also highlighted in Article 1 of the EUDR.[11]

The objective to avoid placing on the market products that have contributed to deforestation and forest degradation, and the broader objective to reduce GHGs and biodiversity loss are interlinked and complementary. As noted by the Commission, "by promoting the consumption of 'deforestation-free' products and reducing the EU's impact on global deforestation and forest degradation, the new EUDR is expected to bring down greenhouse gas emissions and biodiversity loss."[12]

2. Prohibition and obligations

The EUDR prohibits covered commodities – cattle, cocoa, coffee, oil palm, rubber, soya and wood - and their derivative products, collectively referred to as "products" in this study – from being placed on the EU market, unless they fulfill three conditions: (i) they are deforestation-free (after 31 December 2020)[13] (ii) they have been produced in accordance with the relevant legislation of the country of production; and (iii) they are covered by a due diligence statement.[14]

The EUDR prescribes an extensive due diligence process on the part of operators, that include requirements for collecting information, data and documents, carrying out a risk assessment, and engaging in risk mitigation measures[15]:

[10] EC, Regulation on Deforestation-free Products.
[11] Article 1, Regulation on Deforestation-free Products, L 150.206, Official Journal of the EU, 9 June 2023.
[12] EC, Regulation on Deforestation-free Products.
[13] Article 2(13) of the EUDR defines "deforestation-free" as meaning that "relevant commodities that were produced on land that has not been subject to deforestation after 31 December, 2020" or "from the forest without inducing forest degradation after 31 December, 2020".
[14] Article 3, Regulation on Deforestation-free Products, L 150.206, Official Journal of the EU, 9 June 2023.
[15] Article 8, Ibid.

- *Information requirements*: the collection of information, including a product description; a description of the quantity of the relevant products; the country of production, the geolocation of all land where the commodity was produced; adequate, conclusive and verifiable information that the relevant products are deforestation-free; adequate, conclusive and verifiable information that the relevant commodities have been produced in accordance with the relevant legislation of a country;[16]
- *Risk assessment*: based on the information collected, operators must assess the risk that the relevant products intended to be placed on the market are non-compliant with the EUDR. The risk assessment must take into account numerous elements in the country of production, including: the assignment of risk (low, standard, high) to the country of production; the presence of forests; various factors related to the presence of, and interaction with, indigenous peoples; prevalence of deforestation or forest degradation; the reliability of information received; concerns related to corruption, lack of law enforcement, human rights and armed conflict; complexity of the supply chain; the risk of circumvention; and various other factors;[17]
- *Risk mitigation:* Except where the risk assessment reveals that there is no or only a negligible risk that products are non-compliant, operators are required to take risk mitigating measures. This can include carrying out independent surveys or audits, adopt policies, controls and procedures to mitigate risk, including through model risk management practices, and adopting independent auditing functions.[18]

3. Benchmarking

The EUDR includes a three-tier risk benchmarking system that categorizes countries as high-risk, low-risk, and standard-risk, according to their perceived risk of producing non-compliant commodities. It notes that the classification of low and high-risk by the Commission "shall be based primarily"[19] on three assessment criteria: (i) the rate of deforestation and forest degradation; (ii) the rate of expansion of agriculture land for relevant commodities; (iii) the production trends of relevant commodities and of relevant products.[20]

Other factors that the Commission "may also take into account"[21] in a country's risk classification assessment include: information submitted by relevant stakeholders regarding effective covering of emissions and removals from agriculture, forest and land use in a country's Nationally Determined Contributions ("NDCs") to the UNFCCC; agreements that address deforestation and forest degradation and facilitate compliance of relevant commodities and products with the EUDR; the existence of national and subnational laws in accordance with Article 5 of the Paris Agreement[22] and adoption of enforcement measures to tackle deforestation and forest degradation; existence and compliance with laws protecting human and indigenous peoples, local communities and other customary tenure rights

[16] Article 9, Ibid.
[17] For a full list, see Article 10, Ibid.
[18] For a full list, see Article 11, Ibid.
[19] Article 29(3), Ibid.
[20] Ibid.
[21] Article 29(4), Ibid.
[22] Article 5 of the Paris Agreement states that parties should work to conserve and enhance greenhouse gas sinks and reservoirs, including forests. The parties are also encouraged to implement and support policies for reducing emissions from deforestation and forest degradation, and the role of forest conservation, sustainable management, and carbon stock enhancement in development countries, as well as adopt alternative approaches like joint mitigation and adaptation for sustainable forest management, while emphasizing the importance of incentivizing non-carbon benefits.

holders; and sanctions imposed by the UN Security Council or the Council on imports or exports of relevant commodities.[23]

The EUDR provides for simplified due diligence obligations for operators sourcing commodities entirely from low-risk areas.[24] While these operators would be required to collect relevant information about the commodities, they will not be required to assess and mitigate risks unless the operator is made aware of relevant information including substantiated concerns that would point to a risk that the relevant products do not comply with the Regulation.[25] For high-risk countries, 9% of operators and product quantities must be checked annually, compared to 3% of operators for standard-risk and 1% of operators for low-risk countries.[26]

B. Overview of the "no risk" amendment

The EPP has proposed to add a "no risk" exemption to the existing benchmarking system in the EUDR. Specifically, as set out in Amendment 11 of the Schneider Report, a country, or part thereof, will be considered as bearing "no risk" if it meets the following three criteria:[27]

1. "Forest area development has remained stable or has increased compared to 1990;
2. The Paris Agreement and international conventions on human rights and on preventing deforestation have been signed by those countries and parts thereof;
3. Regulations on preventing deforestation and forest conservation at national level are strictly implemented and enforced in full transparency and monitored."

Relevant commodities and products from the "no risk" countries or regions shall not be placed or made available on the market or exported unless (i) they have been produced in accordance with the relevant legislation of the country of production[28] and (ii) they fulfil the simplified documentation requirements, as set out in Box 1 below.[29] In this manner, countries that fall within the "no risk" category are exempt from two of the three main requirements of the EUDR discussed above, namely, that products placed on the market be deforestation- and forest-degradation-free; and the requirement to submit a due diligence statement.

[23] Article 29(4), Regulation on Deforestation-free Products, L 150.206, Official Journal of the EU, 9 June 2023.
[24] Article 13, Ibid.
[25] Article 13, Ibid.
[26] Article 16, Ibid; Question 6.9, Frequently Asked Questions, Implementation of the EU Deforestation Regulation, Version 3, October 2024.
[27] Amendment 11, Deforestation Regulation: provisions relating to the date of application, Amendments adopted by the European Parliament on 14 November 2024 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2023/1115 as regards provisions relating to the date of application (COM(2024)0452 – C10-0119/2024 – 2024/0249(COD), available at https://www.europarl.europa.eu/doceo/document/TA-10-2024-0031_EN.pdf. The amendment does not clearly specify whether the criteria should be applied cumulatively or individually. For the purposes of this paper, it is assumed that the criteria apply cumulatively.
[28] This wording is similar to the second prohibition set out in EUDR Article 3.
[29] Amendment 6, Amendments adopted by the European Parliament on 14 November 2024.

Box 1: Information requirements of the "no risk" exemption

The basic information requirements that products from "no risk" countries would have to comply with, are as follows:

- Basic information about the product: trade name, type and quantity of the relevant products, the country of production and, where relevant, parts thereof;
- Basic information (name, postal address, and email address) of any business or person from whom they have been supplied with the relevant products;
- Basic information (name, postal address, and email address) of any trader or operator from whom they have been supplied with the relevant products;
- Adequately conclusive and verifiable information that the relevant products are free of forest degradation;
- Adequately conclusive and verifiable information that the relevant commodities have been produced in accordance with the relevant legislation of the country of production.

Source: Amendment 9, Deforestation Regulation: provisions relating to the date of application, Amendments adopted by the European Parliament on 14 November 2024 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2023/1115 as regards provisions relating to the date of application (COM(2024)0452 – C10-0119/2024 – 2024/0249(COD), available at https://www.europarl.europa.eu/doceo/document/TA-10-2024-0031_EN.pdf.

Moreover, for products and commodities produced in countries classified as "no risk", only 0.1 percent of operators must be subject to annual checks.[30]

According to the EPP, the aim of "no risk" related amendments is to streamline compliance for countries and regions with robust, verified anti-deforestation measures, and reduce administrative burdens for regulators and businesses.[31] It assumes that in countries with stable or increasing forest area development, the risk of deforestation under the regulation is negligible or non-existent.[32] The EPP also states that the amendment will reward countries actively protecting their forests, enable the EU to focus resources on higher-risk areas, provide an opportunity for countries to strengthen national deforestation laws, and commit to international climate and human rights conventions.[33] Moreover, reduced checks for the "no risk" category would allow resources and attention to be focused on regions with higher deforestation risks, maximizing the regulation's impact.[34]

[30] Amendment 10, Ibid.

[31] Justification to Amendment 11, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2023/1115 as regards provisions relating to the date of application, 2024/0249(COD), available at https://www.euractiv.com/wp-content/uploads/sites/2/2024/11/EPP-amendments-EUDR-resize.pdf. The justifications referenced in this paper are derived from this document. The tabled amendments are no longer available on the EU Parliament's website.

[32] Ibid.

[33] Ibid.

[34] Justification to Amendment 10, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2023/1115 as regards provisions relating to the date of application, 2024/0249(COD).

III. The “no risk” exemption will likely result in discrimination under GATT Articles I and III

The “no risk” exemption to the EUDR will likely render the measure inconsistent with the MFN obligation under GATT Article I and the national treatment obligation under GATT Article III.

As a preliminary remark, the “no risk” exemption must be challenged within the context of the EUDR. This is because, as acknowledged by the Appellate Body in *EC – Seal*, the prohibitive and permissive elements of a measure have to be considered together in light of their intertwined nature.[35] In this case, the (permissive) “no risk” exemption has little meaning or effect in the absence of the EUDR prohibition. Therefore, the measure at issue for purposes of the subsequent analysis is the EUDR with the “no risk” exemption (i.e., assuming that the “no risk” exemption has become a part of the EUDR).

A. GATT Article I

A cornerstone principle of non-discrimination under the WTO is the MFN principle in GATT Article I. This provision requires WTO Members to accord equal treatment to “like” imports from all countries, immediately and unconditionally.[36] Specifically, to establish an MFN violation, four conditions must be established: (i) the measure at issue falls within the scope of application of Article I:1; (ii) the imported products at issue are “like” products within the meaning of Article I:1; (iii) the measure at issue confers an “advantage, favor, privilege, or immunity” on a product originating in the territory of any country; and (iv) the advantage so accorded is not extended “immediately” and “unconditionally” to “like” products originating in the territory of all Members.[37] These four conditions are present with regard to the EUDR (including the “no risk” exemption), likely resulting in a violation of GATT Article I.

First, the measure falls within the scope of Article I, which applies to customs duties, charges, methods of levying them, rules of importation and exportation, and “all matters referred to in paragraphs 2 and 4 of Article III”.[38] GATT Article III:4, in turn, relates to “laws, regulations and requirements affecting [] internal sale, offering for sale, purchase, transportation, distribution or use”. The measure at issue, i.e., the EUDR, constitutes a law or regulation, as it imposes legally binding obligations that operators must fulfill to place covered products on the EU market.[39] By linking market access to compliance, the amendment affects the internal sale, offering for sale, purchase, transportation, distribution, and use of the covered products.[40]

Second, a determination of "likeness" entails an "examination of the nature and extent of the competitive relationship between and among products".[41] In considering the existence of a competitive relationship, WTO adjudicators have usefully relied on a framework of four criteria for the determination of “likeness”: (i) the physical characteristics of the products; (ii) their end uses; (iii)

[35] Appellate Body Report, *EC – Seal Products*, para. 5.20.
[36] Article I:1, GATT 1994.
[37] Appellate Body Report, *EC – Seal Products*, para. 5.86.
[38] Article I:1, GATT 1994.
[39] Panel Report, *India – Solar Cells*, para. 7.310.
[40] Panel Report, *China – Publications and Audiovisual Products*, para. 7.1450.
[41] Appellate Body Report, *Philippines - Distilled Spirits*, para. 168.

consumer tastes and habits; and (iv) tariff classification of the products. Process and production methods (PPMs) are only relevant to the assessment of "likeness" if they have an impact on the competitive relationship between and among the products concerned. This could be the case, for example, because the relevant PPM is reflected in the physical characteristics of the product or because it influences consumers' perceptions about the product.

It seems highly likely that a WTO panel will find that all likeness criteria are present in the current case. The end uses and tariff classification are the same for a covered product produced in a country that falls within the "no risk" category, and for covered products produced in a country that is not covered by the "no risk" exemption. Physically, the alleged lower risk of being produced without deforestation in a "no risk" country would not render the product "non-like" to covered products produced in a country not covered by the "no risk" exemption. Indeed, whether, for instance, cocoa, palm oil, or coffee has been produced as a result of deforestation or not is a non-product related process and production method (NPR PPM) that would not be physically visible in a product.

With respect to consumer preferences, previous WTO panels have looked at the substitutability between the two products at issue: when products are substitutable, it contributes to their "likeness".[42] In this case, substitutability would refer to the willingness of consumers to substitute a covered product produced in a "no risk" country with the same covered product produced in a country that falls outside the "no risk" category. In this case, the risks associated with deforestation in the exporting country could influence EU consumers' tastes and habits to such an extent that a sufficiently competitive relationship between the imported and domestic products at issue may not exist. However, such an argument is likely to be unpersuasive, particularly in the absence of any distinguishing mark or feature in the final products communicating deforestation risks to EU consumers. Moreover, the EUDR does not foresee the implementation of a labelling scheme, pursuant to which products from "no risk" countries would be labelled as such. In other words, a consumer would not have a means of distinguishing between the products that are otherwise "like" such that the risk categorization of a product is unlikely to impact consumer tastes and preferences with regards to the products covered by the EUDR.

Third, the "no risk" exemption to the EUDR would result in substantially less favorable treatment for products from countries that fall outside the "no risk" exemption, as the application of the measure "modifies the conditions of competition between like imported products to the detriment of the third country imported products at issue."[43] Products sourced from countries that are categorized as "no risk" under the amendment would be exempt from two core-EUDR obligations: the obligation that products placed on the EU market (i) are deforestation-free (after 31 December 2020), and (ii) are covered with a due diligence statement. These two obligations apply to products sourced from all countries that fall outside the "no risk" exemption, whether they are classified as low, standard, or high risk.[44] Instead, operators that source products from countries that fall within the "no risk" exemption must only provide basic information requirements (see section II.B above) and provide such information only "upon request". Finally, for countries that fall within the scope of the "no risk" exemption, only 0.1% of operators and product quantities of "no risk" countries would need to be checked, compared to much higher numbers for countries outside the "no risk" exemption.[45]

[42] See, e.g., Appellate Body Report, *EC – Asbestos*, para. 117.
[43] Appellate Body Report, *EC – Seal Products*, paras 5.90/5.115.
[44] However, as noted in section II.B, operators sourcing commodities entirely from low-risk areas must only comply with simplified due diligence requirements, unless they are made aware of substantiated concerns indicating that the products may not comply with the Regulation.
[45] Nine percent of operators and product quantities from high-risk countries must be checked annually, three percent of operators for standard-risk, and one percent of operators for low-risk countries.

Thus, products sourced from countries that fall within the "no risk" exemption have a significant advantage over "like" products sourced from countries that do not qualify as "no risk". The cumulative effect of the "no risk" exemption would make it significantly less burdensome and costly for operators to import EUDR covered products from "no risk" countries compared to products from countries outside the "no risk" category. Accordingly, it would likely incentivize importers to prioritize products sourced from countries that are categorized as "no risk" over those sourced from countries that fall outside the" no risk" category. This is expected to further alter the competitive opportunities between EUDR covered products, in favour of those from countries classified as "no risk", and to the detriment of those from countries that are not classified "no risk".

Thus, it is likely that the "no risk" amendment to the EUDR will result in a violation of the MFN principle as set out in GATT Article I.

B. GATT Article III

GATT Article III:4 sets out the national treatment obligation. It requires that imported products must not be treated less favorably than "like" domestic products. Three elements must be satisfied to establish a violation of Article III:4: (i) the imported and domestic products at issue must be "like" products; (ii) the measure at issue must be a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; (iii) the imported products must be found to be accorded "less favorable treatment" than that accorded to "like" domestic products.[46]

A WTO panel will likely find all three criteria to be present in the present case. Section III.A above has already established that: (i) products within the scope of the EUDR produced from countries within the "no risk" category are "like" products produced in countries that do not fall within the "no risk" category; and (ii) the measure at issue constitutes a law or regulation within the scope of GATT Article III:4.

This brings us to the third element that must be present for a finding of a GATT Article III violation, i.e., whether the measure modifies the conditions of competition in the relevant market to the detriment of imported products.[47] According to the Appellate Body in *EC – Asbestos*, this means that "the imported products must be found to be accorded 'less favorable treatment' than that accorded to like domestic products, such that the measure accords to the group of 'like' imported products 'less favorable treatment' than it accords to the group of "'like' domestic products.[48] As highlighted in section III:A, the "no risk" exemption will change the conditions of competition between countries that fall within the scope of the "no risk" exemption and those countries that fall outside its scope. As an EU Member State could plausibly qualify under the "no risk" exemption, a product sourced from EU Member States would have an advantage over a "like" product from an importing country that does not meet the "no risk" criteria. As such, the exemption would constitute a national treatment violation.[49] As further discussed in section IV.B.2 below, such a situation is highly plausible as the "no risk" exemption appears to have been designed to reduce the bureaucracy for EU farmers.[50] For these reasons, there is a high likelihood that the adoption of the "no risk" exemption under the EUDR will also violate GATT Article III.

[46] Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.
[47] Appellate Body Report, *Korea – Various Measures on Beef*, paras. 135-137. See also Panel Report, EU – Energy Package, para. 7.539.
[48] Appellate Body Report, *EC – Asbestos*, para. 100.
[49] Panel Report, *Canada – Autos*, paras. 10.80 and 10.84-10.85. See also Panel Report, *Brazil – Taxation*, paras. 7.65-7.66.
[50] EPP Group, Press conference - Deforestation Law: Make it fit for purpose, Youtube, 14 November 2024, available at https://www.youtube.com/live/pO6vCUJ50Hg.

IV. The "no risk" exemption will likely not be justified under GATT Article XX

The previous section has demonstrated that there is a high likelihood that the "no risk" exemption to the EUDR will result in discrimination in violation of GATT Articles I and III. This, however, is not the end of the analysis as a measure found to be inconsistent with GATT Articles I and III may still be justified if it meets the requirements of the "General Exceptions" clause in GATT Article XX. This section analyses whether the EUDR – as incorporating the "no risk" exemption – could be justified under GATT Article XX.

An examination of whether a measure is justified under Article XX is a two-step process: first, the measure must fall within one of the subparagraphs of GATT Article XX to be provisionally justified thereunder; and, second, the measure must comply with the requirements under the chapeau of Article XX, i.e. it does not arbitrarily or unjustifiably discriminate between countries where the same conditions prevail; and it is not a disguised restriction on international trade.[51] Even if the EU demonstrates that the EUDR falls within two subparagraphs of GATT Article XX (b) and (g) and could, therefore, be provisionally justified, it will be significantly more difficult for it to demonstrate that the "no risk" exemption to the EUDR does not arbitrarily or unjustifiably discriminate against countries where the same conditions prevail; and that the measure is not a disguised restriction on trade. As a result, a WTO panel will likely find that the EUDR, as incorporating a "no risk" exemption, cannot be justified under GATT Article XX.

This section will, first, assess whether the EUDR falls within relevant subparagraphs of Article XX and can, thus, be provisionally justified, and second, assess whether the measure could be justified under the chapeau of GATT Article XX.

A. The EUDR will likely fall within the subparagraphs of GATT Article XX

Two environment-related subparagraphs to GATT Article XX could be potentially relevant to the "no risk" exemption to the EUDR.[52] These include subparagraph (b), which enables a country to adopt or enforce a measure that is "necessary to protect human, animal or plant life or health" and subparagraph (g), which enables a country to adopt or enforce a measure "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption." The sections below assess the applicability of each of these subparagraphs to the measure at issue.

1. "necessary to protect human, animal or plant life or health"

[51] See, e.g., Appellate Body Report, *US – Gasoline*, p. 23.

[52] To recall, and as highlighted above, the measure sought to be justified under Article XX would not be the "no risk" exemption in isolation, but the "no risk" exemption together with the prohibitions under the EUDR. Thus, the measure at issue contains both permissive and prohibitive elements.

under GATT Article XX(b)

Given that the EUDR has an environmental objective,[53] a panel will likely find that it could be provisionally justified under subparagraph (b), which covers measures that are "necessary to protect human, animal or plant life or health". The party invoking the exception must establish (i) that the *policy* in respect of the measures for which the provision was invoked falls within the range of policies designed to protect human, animal or plant life or health; (ii) that the inconsistent measures for which the exception is being invoked is *necessary* to fulfil the measure's policy objective."[54] The *necessity* of the measures requires the "weighing and balancing" of three factors: (i) the extent of the measure's contribution to the achievement of its objective; (ii) the measure's trade restrictiveness in light of the importance of the interests or values at stake and; (iii) the availability of less trade-restrictive alternatives with equivalent contributions.[55]

In this case, the EUDR tackles deforestation and forest degradation, which would appear to fall within the broad objective of protecting human, animal or plant life or health. To argue that the EUDR is necessary to achieve its policy objective, it is imperative to first define the objective of the EUDR.

While there is no requisite level of specificity in defining the objective of a measure, previous panels have typically formulated the objective of the measure by focusing on its relative, immediate and direct objective. For example, in *US – Tuna II (Mexico)*, the panel identified the objectives of the U.S. dolphin-safe labelling measure as including the "objective of preventing consumers of tuna products from being deceived by false dolphin-safe allegations" and stated that measure's objective fell "within the broader goal of preventing deceptive practices"."[56] Similarly, in *EU – Palm Oil (Malaysia)*, the panel noted that the direct objective of the measure at issue, i.e., reducing illegal land use change, would necessarily also fulfil the higher-level objective of mitigating climate change.[57] To the extent the panel found that the objectives were interlinked, it did not consider necessary a separate inquiry of the relevant obligations against the higher level objective.

As set out in section II.A.1, the objective of the EUDR has been formulated both in a direct and more high-level manner. The more direct objective of the EUDR is to minimize the EU's contribution to deforestation and forest degradation worldwide, by allowing placing on the EU market or exporting from the EU, only of deforestation-free agricultural products, i.e., products that have been produced on land not subject to deforestation or forest degradation after 31 December 2020.[58] At a higher level, the EUDR also aims to reduce GHG emissions and biodiversity loss.[59] These broader and more specific objectives of the EUDR are both interlinked and complementary. As noted by the Commission, "by promoting the consumption of 'deforestation-free' products and reducing the EU's impact on global deforestation and forest degradation, the new EUDR is expected to bring down greenhouse gas emissions and biodiversity loss."[60] Therefore, and in light of the jurisprudence, it is prudent to define the objective of the EUDR more directly, i.e., **to minimize the EU's contribution to deforestation and forest degradation worldwide, by only allowing placing on the EU market or**

[53] "The current law punishes those who already practice sustainable forestry while failing to address real issues – such as illegal deforestation." EPP, Member States' block on the Deforestation Law is irresponsible! 20 November 2024, available at https://www.eppgroup.eu/newsroom/member-states-block-on-deforestation-law-is-irresponsible.
[54] Panel Report, *US – Gasoline*, para. 6.20.
[55] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.
[56] Panel Report, *US – Tuna II (Mexico),* para. 7.437.
[57] Panel Report, *EU – Palm Oil (Malaysia),* para. 7.220.
[58] European Council, EU deforestation law: Council agrees to extend application timeline, 16 October 2024.
[59] Article 1, Regulation on Deforestation-free Products, L 150.206, Official Journal of the EU, 9 June 2023.
[60] EC, Regulation on Deforestation-free Products.

exporting from the EU, deforestation-free products, i.e., products that have been produced on land not subject to deforestation or forest degradation after 31 December 2020.[61]

As the EUDR prohibits the importation of agricultural commodities linked to deforestation and forest degradation, it would likely be considered as contributing to the objective of the measure. Further, the EU could argue that its previous forest-related trade regulations (such as the EU Timber Regulation) were less trade-restrictive measures, which had *not* achieved the desired level of forest protection. As a result, the EU would likely argue that the EUDR was introduced since there were no less restrictive alternatives, and accordingly, its restrictiveness was adequately tailored to the objective at stake. While the degree of the contribution made by the EUDR to its objective is diminished by the proposed no-risk category, a panel would likely focus on the EUDR as a whole.

Thus, the EUDR can likely be provisionally justified under subparagraph (b) of GATT Article XX.

2. "[r]elate[s] to the conservation of exhaustible natural resources" under Article XX(g)

In addition, the EUDR could also be provisionally justified under subparagraph (g), which exempts measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." To fall within subparagraph (g), the measure must (i) be "related to" (ii) the conservation of "exhaustible natural resources. To be "related to" has been interpreted by panels to mean "a close and genuine relationship of ends and means"[62] or be "primarily aimed at".[63] The measure must also be implemented in an even-handed manner, i.e., alongside similar measures imposed on domestic production or consumption.

"Exhaustible natural resources" must be read "in light of contemporary concerns of the community of nations about the protection and conservation of the environment."[64] In previous disputes, this provision has been interpreted broadly to encompass, for example, clean air and sea turtles.[65] Presumably, forests and trees would also be considered as exhaustible natural resources. The EUDR can also be considered "related to" the preservation of forests and trees, given that tackling deforestation is its direct objective, as set out in section IV.A.1 above. By strictly regulating the imports of deforestation-free agricultural products, the EUDR reflects a genuine relationship of ends and means, and therefore can be said to *relate to* the conservation of exhaustible natural resources.

It could be argued that the "no risk" exemption to the EUDR would weaken the connection between the measure and the preservation of exhaustible natural resources, given that it would not be primarily aimed at protecting forests. However, for the purpose of identifying whether a measure falls within one of the subparagraphs, a panel would likely look at the design of the EUDR broadly - and not specifically or solely at the effect of the application of the exemption.

The final condition to fall within subparagraph (g) is to demonstrate that the measure must be brought into effect together with measures on domestic production or consumption of natural resources.[66] The EUDR applies to all covered products placed on the EU market, covering both imported products and products produced in the EU. Therefore, the regulation can be said to be

[61] To the extent that the objective of the measures is defined at a very high level of generality in terms of e.g. "climate change mitigation" and "avoidance of biodiversity loss", the range of measures that might validly be considered as "alternatives" might become commensurately very expansive. Panel Report, *EU – Palm Oil* (Malaysia), para 7.228.

[62] Appellate Body Reports, *China – Rare Earths*, para. 5.94.

[63] Appellate Body Report, *US – Gasoline*, p. 19.

[64] Appellate Body Report, *US – Shrimp*, para. 129.

[65] Panel Report, *US – Gasoline*, para 6.37; Appellate Body Report, *US – Shrimp*, para 131.

[66] Appellate Body Report, *US – Gasoline*, p. 20.

implemented in an even-handed manner. Thus, the EUDR can likely be provisionally justified under subparagraph (g) of GATT Article XX.

B. The "no risk" exemption is likely inconsistent with the requirements under Article XX chapeau

Having established that the EUDR could be provisionally justified under subparagraphs (b) and (g) of GATT Article XX, this section assesses whether the "no risk" exemption to the EUDR would meet the requirements of the chapeau of GATT Article XX. Specifically, the chapeau requires that the measure sought to be justified does not result in arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[67] It also requires that the measure not constitute a disguised restriction on international trade. This section finds that the "no risk" exemption to the EUDR will most likely not meet the criteria of the chapeau in GATT Article XX.

1. The "no risk" exemption arbitrarily and unjustifiably discriminates between countries where the same conditions prevail

The chapeau of GATT Article XX requires a measure to not arbitrarily or unjustifiably discriminate between countries where the same conditions prevail. The "no risk" exemption to the EUDR will likely run afoul of this requirement.

(a) Discrimination between countries where the same conditions prevail

First, the "no risk" exemption discriminates between countries where the same conditions prevail. Sections III.A and III.B have already established that the "no risk" exemption will likely constitute discrimination between products sourced from countries that would fall within the "no risk" exemption and "like" products sourced from countries that would not meet the criteria of the "no risk" exemption, in violation of GATT Articles I and III. The circumstances relevant to the discrimination analysis under GATT Articles I and III can be similar to the circumstances that establish discrimination under GATT Article XX[68] – even if, in contrast to GATT Articles I and III, which focuses on discrimination between products, GATT Article XX focuses on discrimination between countries. Thus, of relevance here is the fact that products sourced from countries that fall within the "no risk" amendment enjoy significant advantages over countries that do not fall within the "no risk" exemption[69] - both with regards to the requirements they have to fulfill under the EUDR, as well as enforcement.

Moreover, the "no risk" exemption not only discriminates between "like" products, but also between countries where the same conditions prevail. The term "conditions" has been interpreted to have various meanings, including "the state of something" and "the physical state of something".[70] More specifically, the Appellate Body in *EC – Seal Products* has highlighted that "only conditions that are relevant for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue and the circumstances of a particular case should be considered under the chapeau."[71] Relevant conditions include those related to the particular policy objective they seek to serve under the subparagraphs[72], in this case the protection of plant life or

[67] Appellate Body Report, *US – Shrimp*, para. 150.
[68] Appellate Body Reports, *EC – Seal Products*, para. 5.298.
[69] 9% of operators and product quantities from high-risk countries must be checked annually, 3% of operators for standard-risk and 1% of operators for low-risk countries.
[70] Appellate Body Report, *EC – Seal Products*, para. 5.299-5.301.
[71] Appellate Body Report, *EC – Seal Products*, para. 5.299-5.301.
[72] Appellate Body Report, *EC – Seal Products*, para. 5.299-5.301.

health and the conservation of exhaustible natural resources, through tackling deforestation and forest degradation associated with products covered by the EUDR.

The "no risk" exemption to the EUDR will likely be found to discriminate between countries in which the same conditions prevail given that countries with similar deforestation and forest degradation practices are treated differently. As discussed below, the criteria that countries must meet to fall within the "no risk" exemption are not rationally related to the objective of the EUDR. They are, at best, ineffective and inaccurate indicators of the state of deforestation or forest degradation practices associated with the agricultural products covered by the Regulation and placed on the EU market. As a result, the criteria do not accurately reflect risk of deforestation, as some countries that continue to be engaged in significant levels of deforestation linked to agricultural production would be covered by the "no risk" exemption, and thus, be exempt from key disciplines of the EUDR. Other countries that engage in the same deforestation practices but do not meet the "no risk" exemption, would be subject to all requirements of the Regulation. Thus, the application of the "no risk" exemption will likely discriminate between countries where the same conditions prevail.

(b) arbitrary and unjustifiable discrimination

Second, the "no risk" exemption to the EUDR results in discrimination that is arbitrary and unjustifiable. To establish that discrimination is not arbitrary or unjustifiable, it must be shown that "the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX."[73] In other words, for the "no risk" exemption from the EUDR to be justified, the exemption must be rationally related to the objective of the EUDR, i.e., to minimize the EU's contribution to deforestation and forest degradation worldwide, by allowing placing on the EU market or exporting from the EU only of deforestation-free products.

In this case, the "no risk" exemption will likely be found to be not rationally related to the policy objective of the EUDR, given that (i) the criteria used to define "no risk" are ineffective and inaccurate indicators of the actual risk that products prohibited under the EUDR continue to be placed on the EU market; and (ii) because the lack of a due diligence statement, coupled with reduced inspection requirement, removes any checks and balances to ensure that products sourced from countries in the "no risk" category are in fact, compliant with the EUDR. This would risk creating a loophole to launder covered products that are non-compliant with the EUDR. The aggregate effect of the "no risk" amendment would thus allow operators to place non-compliant products on the EU market with impunity – in violation of the objective of the EUDR.

(i) The criteria used to define "no risk" are not rationally connected to the objective of the EUDR.

To recall from section II.B above, countries will fall within the scope of the "no risk" exemption if they meet the following three criteria:

1. "Forest area development has remained stable or has increased compared to 1990;
2. The Paris Agreement and international conventions on human rights and on preventing deforestation have been signed by those countries and parts thereof;
3. Regulations on preventing deforestation and forest conservation at national level are strictly implemented and enforced in full transparency and monitored."

These criteria are, at best, ineffective and inaccurate indicators of the presence of deforestation and degradation. Turning to criterion one, assessing forest area change between 1990 and 2020 is not an

[73] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.316.

accurate indicator of current and future deforestation of products placed on the EU market.[74] Comparing the forest area between these two time periods could entirely overlook deforestation if countries have replanted deforested areas with young, less biodiverse trees, or have grown trees elsewhere.[75] In others words, countries that have increased their total forest areas in comparison to 1990, by replacing primary forests with plantation forests – a practice that amounts to forest degradation which is prohibited under the EUDR – could qualify as a "no risk" country. This also means that a country can engage in deforestation, as long as such deforestation is compensated with an equivalent area of "plantation forests". Indeed, forest coverage data show that deforestation is often highly concentrated within countries, an overall net increase in forest cover can easily mask significant levels of deforestation and forest degradation.

For example, Vietnam, which is a primary supplier of coffee and wooden furniture to the EU, increased its forest cover between 1990 and 2020 by 56%.[76] At the same time, according to the World Resources Institute (WRI) Global Forest Watch, between 2001 and 2023, Vietnam lost over 1 million hectares of forest to commodity-driven deforestation.[77] Thailand similarly has seen net increases in forest area since 1990, and has significant levels of deforestation linked to the expansion of agricultural commodities.[78] And while Europe's forests areas are increasing, its old growth forests are also at significant risk of deforestation.[79] As such, compliance with the first criterion does not suggest a country is at "no risk" to engage in deforestation and forest degradation linked to EU consumption, which are prohibited by the EUDR.

Likewise, criterion two, which requires that countries have signed international treaties such as the Paris Agreement and other unspecified international environmental and human rights conventions to fall within the "no risk" exemption, is not rationally connected to the objective of the EUDR. Indeed, only three countries have not signed the Paris Agreement: Iran, Libya and Yemen. Yet, these three countries are not among the countries with the highest deforestation rates. Conversely, signing the Paris Agreement, even when accompanied by quantifiable targets related to land use and forestry in a country's Nationally Determined Contributions (NDCs) is no proxy for the absence of risk vis-a-vis deforestation and forest degradation. Indeed, deforestation has continued to remain at high levels even after the entry into force of the Paris Agreement.[80] This could be explained by the fact that compliance with NDCs is not a legally mandatory obligation.[81] Similarly, while Article 5 of the Paris Agreement encourages the parties to conserve and enhance greenhouse gas sinks, including forests, this provision is hortatory.

Criteria 2 also includes a reference to the signing of international conventions on human rights and on preventing deforestation. It does not specify which international conventions on human rights and on preventing deforestation must be signed in order to qualify for the "no risk" exemption. In *EC – Seal Products*, the Appellate Body found that ambiguity in the criteria to qualify for an exemption to the seals ban, and the broad discretion this provided was an important feature of the measure at

[74] World Resources Institute. Statement: Proposed Amendments to EU Deforestation Law Create Dangerous Loopholes and Uncertainty. November 18, 2024, available at: https://www.wri.org/news/statement-proposed-amendments-eu-deforestation-law-create-dangerous-loopholes-and-uncertainty
[75] Ibid.
[76] FAO, cited in ibid.
[77] Ibid.
[78] Helen Bellfield, Toby Gardner, Trase urges EU to reject last minute amendments to deforestation regulations, Trase, 19 November 2024.
[79] Ibid.
[80] Mikaela Weisse et al., Forest Pulse: The Latest on the World's Forests, 4 April 2024, available at https://research.wri.org/gfr/latest-analysis-deforestation-trends?utm_campaign=treecoverloss2022&utm_medium=bitly&utm_source=PressKit.
[81] Jennifer Allan and Lynn Wagner, The Paradox of Pledging, IISD, 13 October 2021, available at https://enb.iisd.org/articles/paradox-pledging.

issue that pointed to its arbitrary and unjustifiable nature.[82] Likewise, in this case, the lack of specificity in identifying the exact set of human right conventions, as well as those conventions that prevent deforestation, suggest that countries that have signed any type of human rights convention/conventions related to preventing deforestation would fall within the scope of the second half of the second criterion. The vagueness and breath of this part of the second criterion suggests that there is no rational connection between the second half of the criterion and the objective of the EUDR, since signing such conventions do not guarantee the undertaking of forest protection efforts. And even if there would be a specific list of human rights and deforestation prevention conventions identified, the fact that a country has signed conventions related to human rights and forest prevention is indicative of a country's commitment to engage with the international legal order on human rights protections and environmental protection. However, it is, in no way a basis to conclude that a country is at "no risk" to engage in deforestation and forest degradation practices prohibited under the EUDR.

Criterion three requires that "regulations on preventing deforestation and forest conservation at national level are strictly implemented and enforced in full transparency and monitored." This criterion is connected to only one part of the EUDR's objective, that is, its legality requirement. However, as the criterion does not prescribe a specific level of ambition vis-à-vis regulations on preventing deforestation and forest conservation, countries that implement less ambitious regulations would still be at risk of placing products on the EU market that are not compliant with the EUDR's main requirement that products are "deforestation-free" per the EUDR's definition – irrespective of the domestic laws and regulations related to forest protection a country has in place. The criterion is, therefore, an inconclusive indicator as to the deforestation situation in the country.

Thus, the three criteria that countries must meet in order to be considered as posing "no risk" to placing EUDR non-compliant products on the EU market, are not rationally connected to the objective of the EUDR.

(ii) The "no risk" exemption risks to the EUDR risks creating a loophole that would undermine the EUDR's objective

The arbitrary and unjustifiable nature of the "no risk" exemption goes beyond the criteria. Indeed, this can also be derived from the consequences of falling in the "no risk" exemption. Despite having adopted criteria that are not rationally connected to the objective of the EUDR, countries that comply with these criteria are considered as posing "no risk" to placing EUDR-incompliant products on the EU market. As a result of this alleged "no risk", products sourced from countries that fall within the scope of the amendment are exempt from two core obligations under the EUDR, i.e., the deforestation-free obligation and the obligation to carry out due diligence. Moreover, for products sourced from "no risk" countries, only 0.1% of the operators are required to be subject to checks by enforcement authorities. The absence of due diligence requirements and infrequent inspection would impair the ability to verify their no risk status. Moreover, exemption from due diligence requirements would create a loophole that would risk that "no risk" countries launder non-compliant products produced, for example, in high-risk countries. While companies must still, upon request, verify that their products are degradation-free, they no longer have to provide any documentation and no geospatial data, significantly complicating enforcement.[83] Therefore, by significantly relaxing the obligations under the EUDR, the no-risk exemption creates conditions that enable circumvention and undermining of the EUDR objective.

2. The "no risk" exemption as a disguised restriction on

[82] Appellate Body Report, *EC – Seal Products*, Para. 5.338.

[83] World Resources Institute, Statement: Proposed Amendments to EU Deforestation Law Create Dangerous Loopholes and Uncertainty, November 18, 2024.

international trade

The "no risk" exemption in its design and operation would likely constitute a disguised restriction. The concept of a disguised restriction on trade is closely linked to the concepts of arbitrary and unjustifiable discrimination. The Appellate Body in *US – Gasoline* held that "a disguised restriction … may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. … The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."[84] Therefore, arguments advanced to establish an arbitrary and unjustifiable discrimination may also help argue the presence of a disguised restriction on trade. Thus, to the extent the preceding analysis has established that the "no risk" exemption is based on criteria that are not rationally related to the objective of the EUDR, these arguments can also be used to establish that "no risk" exemption is a disguised restriction on trade.

Another key factor that could indicate that the no risk exemption is a disguised restriction on trade is the fact that it appears to have been designed to benefit EU Member States. Indeed, MEP Christine Schneider, when announcing the amendment in the EU Parliament, repeatedly stated that her aim is to reduce the bureaucracy burden for EU farmers.[85] Certainly, most EU Member States would likely meet the criteria to fall within the "no risk" exemption. According to data from the Food and Agriculture Organization (FAO), all EU Member States, except Sweden and Portugal, would meet the first criterion, i.e., stable or increased forest area since 1990.[86] With regards to criterion two, all EU Member States have signed the Paris Agreement, and one or more human rights convention[87]/convention related to preventing deforestation such as the Convention on Biological Diversity, the Glasgow Leaders' Declaration on forests and Land Use and the New York Declaration on Forests. The third criterion, which calls for a strict implementation and enforcement of regulations to prevent deforestation and forest degradation, will also likely be met many EU Member States[88], given that they have the necessary resources, institutional capacity, and enforcement mechanisms — compared to many other countries —to satisfy this requirement. Therefore, the no-risk exemption criteria, by creating favorable conditions for EU members in relation to its trading partners, would be discriminatory against its trading partners, and could amount to a disguised restriction on trade.

[84] Appellate Body Report, *US – Gasoline*, p. 25.

[85] EPP Group, Press conference - Deforestation Law: Make it fit for purpose, Youtube, 14 November 2024. https://www.youtube.com/live/pO6vCUJ50Hg.

[86] FAO, Global Forest Resources Assessment, available at https://www.fao.org/forest-resources-assessment/en/.

[87] UN Office of the High Commission of Human Rights, Status of Ratification Interactive Dashboard, available at https://indicators.ohchr.org.

[88] However, the Court of Justice of the European Union (CJEU) has ruled that Estonia, Poland, Slovakia, Sweden and Romania have not adequately implemented existing forest conservation regulations. Fern, Enforcing EU law: Defending forests and biodiversity, from complaint to Court, 13 July 2022, available at https://www.fern.org/publications-insight/enforcing-eu-law-defending-forests-and-biodiversity-from-complaint-to-court-2546/.

V. If found to be a "technical regulation" the "no risk" exemption to the EUDR would likely constitute discrimination under TBT Article 2.1

A. Ambiguity exists as to whether the EUDR is a technical regulation

While the EU has not notified the EUDR as a technical regulation to the WTO TBT Committee,[89] it could be argued that the EUDR falls within the scope of the TBT Agreement. Indeed, several WTO Members have argued that the EUDR would amount to a measure covered under the TBT Agreement.[90]

Legally, to be a technical regulation, the EUDR would need to be a "document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."[91] The Appellate Body has established a three-prong test that must be met to establish that a measure is a "technical regulation": (i) the document must apply to an identifiable product or group of products; (ii) the document must lay down one or more characteristics of the product (either intrinsic or related to the product); and (iii) compliance with the product characteristics must be mandatory.[92]

The EUDR applies to an identifiable group of agricultural commodities - cattle, cocoa, coffee, oil palm, rubber, soya and wood, and derivates – and is mandatory. An open question, however, would be whether the EUDR lays down product characteristics or processes and production methods that are *related to the product characteristics*,[93] given that whether a product is deforestation-free is not detectable in the final product. In *EC – Seals*, a dispute concerning the regulation of imported seal products based on *how* the seals were hunted, the Appellate Body found that the regulation did not relate to product characteristics, given that "the EU Seal Regime does not prohibit seal-containing products merely on the basis that such products contain seal as an input. Rather, such prohibition is based on the criteria relating to the identity of the hunter or the type of purpose of the hunt from which the product is derived."[94]

However, in the recent *EU – Palm Oil (Malaysia),* the panel found a product characteristic to exist in relation to a European regulation concerning land-use change. Specifically, it reasoned that "the quality of a given product being produced (or not) from a specific raw material or input would in principle fall within the broad category of "product characteristics".[95] It found, therefore, that the

[89] This is based on the minutes of the Committee on Technical Barriers to Trade (TBT) from 23 July 2024.
[90] Ibid.
[91] Annex 1.1 of the TBT Agreement.
[92] Appellate Body Report, *EC – Sardines*, para. 176 (referring to Appellate Body Report, *EC – Asbestos*, paras. 66-70).
[93] Appellate Body Report, *EC – Seal Products*, para. 5.12.
[94] Appellate Body Report, *EC – Seal Products*, para. 5.41.
[95] Panel Report, *EU – Palm Oil (Malaysia),* para. 7.97.

quality of biofuel being produced as "food or feed crops for which a significant expansion of the production area into land with high-carbon stock is observed…qualifies as a 'product characteristic'."[96]

The EUDR does not regulate the import of products based on an inherent raw material input. Rather, the EUDR, by basing itself on whether an imported product is linked to deforestation or not, lays down PPMs that bear a close nexus to the product characteristic of being deforestation-free. Whereas the finding in *EC – Seals* would suggest that the degree of deforestation that has occurred in the production of the covered agricultural products in the EUDR would not be considered a product characteristic, the reasoning in *EU – Palm Oil (Malaysia)* would suggest that the degree of deforestation, i.e., conversion of forests to agricultural use, that occurred in the production of the product could qualify as a product characteristic. Thus, following the reasoning of *EU – Palm Oil (Malaysia)*, a panel could potentially find that the EUDR constitutes a technical regulation within the meaning of Annex 1.1.

Should the EUDR be considered a technical regulation within the scope of the TBT Agreement, it would violate the provisions of TBT Article 2.1.

B. The "no risk" exemption will likely violate TBT Article 2.1

TBT Article 2.1 requires, with regards to technical regulations, that "products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country." This provision contains both the GATT Article I (MFN) and GATT Article III (NT) obligations, as it prohibits discrimination between imported products, and between imported and domestic products. Thus, to the extent there is a high likelihood for the "no risk" exemption to constitute discrimination under both GATT Articles I and III, there will be a high likelihood that the panel finds that the "no risk" exemption to the EUDR detrimentally impact competitive opportunities in the context of TBT Article 2.1.

However, under TBT Article 2.1, countries can justify the discrimination in situations where the detrimental impact on imports stems exclusively from legitimate regulatory distinctions.[97] Thus, if the "no risk" exemption can be found to stem exclusively from a legitimate regulatory distinction, it would justify the discrimination under TBT Article 2.1. To analyze whether any detrimental impact on imports stems exclusively from a legitimate regulatory distinction requires scrutiny of the "circumstances of the case, that is, the design, architecture, revealing structure, operation and application of the technical regulation at issue, and in particular, whether it is even-handed."[98]

The Appellate Body has noted that the considerations informing the assessment of arbitrary and unjustifiable discrimination under the chapeau of GATT Article XX are valid under TBT Article 2.1.[99] Thus, given that there is a high likelihood that the "no risk" exemption to the EUDR constitutes arbitrary and unjustifiable discrimination, as set out in section IV.B.1, the "no risk" exemption to the EUDR will likely not be considered to stem exclusively from a legitimate regulatory distinction. Thus, there is a high likelihood that, if considered a technical regulation, the EUDR will be found to be inconsistent with TBT Article 2.1.

[96] Panel Report, *EU – Palm Oil (Malaysia*), para. 7.107.
[97] Appellate Body Report, *US – Clove Cigarettes*, para. 174.
[98] Appellate Body Report, *US – Clove Cigarettes*, para. 182.
[99] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.92.

VI. Conclusion

This study has provided a preliminary legal analysis of the proposed "no risk" exemption to the EUDR. Should the "no risk" exemption be adopted, there is a high likelihood that the EUDR would violate key WTO principles. Under the GATT, there is a high likelihood that the "no risk" exemption would constitute discrimination in violation of the MFN principle set out in GATT Article I, and the NT principle in GATT Article III. Moreover, the discrimination will likely not be justifiable under the general exceptions clause of GATT Article XX as the "no risk" exemption would likely constitute arbitrary of unjustifiable discrimination under the chapeau of that provision. Should a panel find the EUDR to be a technical regulation, it would likely also violate Article 2.1. of the TBT Agreement.

Any unresolved inconsistencies with WTO obligations could have significant implications for the EU. It would, for example, increase the likelihood of aggrieved WTO Members successfully challenging the EUDR before a WTO panel. The ultimate outcome of any such WTO dispute settlement process would depend on several variables given the current impasse to appoint appellate adjudicators. Nonetheless, a finding of WTO inconsistency could reinforce pushback from trading partners against the EUDR, risk hurting the EU's credibility as a key player in multilateralism and undermine the EU's pioneering approach to global sustainability.