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Analysis of the European Union Deforestation Regulation under WTO Law and its Impact on the Cocoa and Coffee Sectors in Peru's Economy: Part I*

Part 2 will be published in a subsequent Issue of the GTCJ

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In 2019, the European Union launched the European Green Deal; a project to make the EU a climate-neutral area. As part of this project the EU, in 2023, the European Parliament and the Council of the European Union approved the Regulation (EU) 2023/1115 (EUDR). This regulation established that six commodities and their derived products must not cause deforestation. In this sense, any of these products must not contain, have been fed with or have been made using, relevant commodities that were produced on land that has been subject to deforestation after 31 December 2020.

This paper focuses its analysis on the impact on coffee, cocoa and their derived products in Peru. For this purpose, this paper analyses the compatibility of the EUDR with the WTO commitments assumed by the EU. This paper revives the old debate about the role of Process and Production Methods under WTO law. In this line, this paper analysis the compatibility of the EUDR under the GATT, the TBT and the SPS Agreements.

Keywords: EUDR, PPMs, trade restrictions, WTO

1 Introduction

Today, the world economy is experiencing problems such as the US China trade war and in parallel, the ongoing Russian-Ukraine and Israel-Palestine wars, along with a clearer picture of the impact of climate change. In this context, some WTO Members have implemented carbon pricing mechanisms (Carbon Taxation or Emission Trading System) and crediting mechanisms.[1]

Climate change is a global problem that can only be tackled with a global strategy. In 2015, countries adopted the Paris Agreement. As part of the commitments under this instrument countries agreed on a 45% reduction in emissions by 2030 to keep global warming to no more than 1.5°C and reach zero by 2050.[2] Now, with less than a decade until 2030, some economies are implementing expeditious measures to reduce their carbon footprint.

The European Parliament and the Council of the European Union approved the Regulation (EU) 2023/1115 (hereinafter the EUDR). On 29 June 2023, the EUDR was approved, but its main effects were postponed to 30 December 2024 for larger companies, and to 30 June 2025 for small producers, its terms have warmed foreign producers.[3] Most recently, on 1 October 2024, the European Commission proposed delaying the application of the EUDR for twelve months to allow EU Member States, exporting partner countries, operators, and traders to be better prepared as well as to give more time to traders to implement their due diligence systems covering all relevant commodities and products.[4] On 16 October 2024, the

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1 World Bank Group, *State and Trends of Carbon Pricing Dashboard*, https://carbonpricingdashboard.worldbank.org/ (accessed 7 Nov. 2024).

2 United Nations, *For a Livable Climate: Net-zero Commitments Must Be Backed by Credible Action*, https://www.un.org/en/climatechange/net-zero-coalition#:~:text=To%20keep%20global%20warming%20to,reach%20net%20zero%20by%202050 (accessed 7 Nov. 2024).

3 Euro News, *Supply Chain Disruptions: Are Concerns About the EU's New Deforestation Regulation Justified?* (2024), https://www.euronews.com/green/2024/02/27/supply-chain-disruptions-are-concerns-about-the-eus-new-deforestation-regulation-justified (accessed 7 Nov. 2024).

4 European Commission, *Commission Strengthens Support for EU Deforestation Regulation Implementation and Proposes Extra 12 Months of Phasing-in Time, Responding to Calls by Global Partners* (2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_5009 (accessed 7 Nov. 2024). *See also* European Commission, *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).

European Council approved to extend the application of the EUDR for a period of twelve months.[5]

According to the EUDR coffee, cocoa, oil palm, rubber, soya, cattle, wood, and their derived products must be 'deforestation-free'; which means that these products must not contain, have been fed with or have been made using, relevant commodities that were produced on land that have been subject to deforestation after 31 December 2020.[6] This paper will focus on the trade effects of the EUDR caused by this measure to the cocoa, coffee, and their derived products as these products are very sensitive in the case of Peru. However, the findings of this paper could also be applied to other exporting countries to the EU, such as Brazil, Colombia, and certain African countries.

For better understanding, this research has been divided into two papers. The first paper will analyse the legality of the EUDR in relation to WTO law. The second paper will examine the possibility of justifying the EUDR under Article XX of the GATT and present proposals for finding a middle ground between protecting the environment and ensuring the flow of international trade.

Part I

To analyse the legality of the EUDR under WTO law this paper will resuscitate an old debate. This section will explain how domestic regulation applies to products, which will introduce how Process and Production Methods (PPMs) have been applied in the international trade sphere. Thus, this section will cover how the EUDR functions and its compatibility with the GATT, the Technical Barriers to Trade Agreement (TBT Agreement) and the Sanitary and Phytosanitary Measures Agreement (SPS Agreement).

1.1 *Product regulation and its relationship with PPMs*

Product regulation often refers to the physical properties of a product. In this sense, typical regulation focuses on the risks or dangers for consumers' health due to the ingredients, materials or other characteristics of the product. However, there are some regulations that differentiate between products on an aspect that is not physically incorporated into them.[7] This is called PPMs.

There has been a long debate on the legality of PPMs in international law. WTO law establishes that trade measures must be applied equally between 'like products'. This is the main characteristic of the non-discrimination principle under the Most-Favoured Nation (MFN) and National Treatment (NT) obligations. In this context, if a Panel concludes that coffee from one country is different from another country because the first one is organic and the latter not, or because the first one did not cause deforestation during its production process while the second did, these products could be considered as different from one another. A WTO Member could use PPMs to implement different trade measures.

1.2 *Incorporated and Non-incorporated PPMs*

There are conflicting opinions surrounding the definition and the legality of PPMs in international trade. Hudec argued that under the so-called 'product-process' doctrine, those distinctions that relied on the characteristics of the production process or of the producer, that are not determinants of product characteristics are illegitimate.[8] A similar approach to the definition has been used by the Organization for Economic Cooperation and Development (OECD). In its 1997 report, it stated that the term PPM referred to 'processes and production methods', which covers 'the way in which products are manufactured or processed and natural resources extracted or harvested'.[9]

Other authors divide PPMs into two distinct groups, those that are product-related PPM (incorporated PPM) and those that are non-product-related PPM (non-incorporated PPM). While the first is used to assure the safety or the functionality of the product, the second is designed to achieve a social purpose that may or may not be of significance to the consumer.[10] For example, a regulation that prohibits the import of cocoa due to deforestation caused is a non-product-related PPM, while a regulation that requires cocoa to be harvested using a particular method to mitigate certain safety concerns is a product-related PPM.

Recently, there has been a rise of PPMs, as this seems to be a useful regulatory tool to implement environmental and labour standards.[11] Some authors have argued that PPMs are not prohibited under international trade law, and this is necessary to find a middle ground between trade and environmental law. In this regard, it has been argued that its origins date back to the GATT Agreement of 1979 on

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[5] European Council, *EU Deforestation Law: Council Agrees to Extend application Timeline* (2024), https://www.consilium.europa.eu/en/press/press-releases/2024/10/16/eu-deforestation-law-council-agrees-to-extend-application-timeline/ (accessed 1 Jan. 2025).

[6] Article 2.13 of the EUDR (2023).

[7] Christiane R. Conrad, *Processes and Production Methods (PPMs) in WTO Law. Interfacing Trade and Social Goals* 11–12 (Cambridge: Cambridge University Press 2011).

[8] Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an Aim and Effects Test*, 32 Int'l L. 624 (1998).

[9] OECD, *Processes and Production Methods (PPMs): Conceptual Framework and Considerations on use of PPM-based Trade Measures* 7 (1997).

[10] Steve Charnovitz, *The Law of Environmental 'PPMs' in the WTO: Debunking the Myth of Illegality*, 27 Yale J. Int'l L. 60, 64–65 (2002).

[11] Andreas Oeschger, *PPMs are Back: The Rise of New Sustainability-Oriented Trade Policies Based on Process and Production Methods* (2023), https://www.iisd.org/articles/policy-analysis/ppms-rise-new-sustainability-oriented-trade-policies-process-production-methods (accessed 7 Nov. 2024).

TBT, which focused on product standards on the production method rather than product characteristics.[12]

After a general definition of PPMs, it is necessary to analyse the compatibility of PPMs with WTO law. This paper will start with the analysis of the non-discrimination principle. This principle covers both the MFN and NT.

Article I of the GATT regulates the MFN obligation. One of the targets of this obligation relates to the reduction of divisiveness in international trade preferences. This means contracting parties will opt to reduce differentiations between potential partners based on foreign policy or national security reasons. Additionally, MFN serves as a tool to extend trade preferences granted between two WTO Members to any third WTO Member.[13]

On the other hand, Article III of the GATT covers the NT obligation. Under this article imported and locally-produced goods, services and Intellectual Property (IP) rights should be treated equally once a similar foreign good, service or IP right has entered the national market.[14] Thus, as Article III applies only to internal measures, it would not be applicable when analysing the EUDR compatibility with WTO law. The EU does not produce neither green coffee nor cocoa, and their derived products established in Annex I of the EUDR such as chocolate or coffee husks, coffee skins or roasted coffee must use deforestation-free cocoa and green coffee respectively.[15] Therefore, the chances to argue a violation of Article III are null. However, the context changes when Articles I:1 and XI of the GATT are applied.

1.3 *EUDR Inconsistency with Article I:1 of the GATT*

Article I:1 of the GATT establishes the MFN obligation. According to this obligation any contracting party shall grant to every other contracting party the same treatment that it grants to any country regarding imports and exports of goods.[16] Article I:1 of the GATT recognizes that any advantage granted to any good of any contracting party shall be accorded immediately and unconditionally to the like product originating from all other contracting parties. Now, this research will analyse whether the EUDR complies with the requirements under Article I:1 of the GATT.

1.3.1 *Scope of MFN and definition of 'Advantage' under Article I:1 of the GATT*

Under the first requirement of Article I:1 of the GATT, it is necessary to verify whether the EUDR falls under the scope of this provision. Article I:1 of the GATT covers both border measures and internal measures. Border measures include custom duties, import and export prohibitions and quotas, tariff quotas, among others. Internal measures include internal taxes on products and internal regulation that affects the sale, distribution, or use of products.[17]

The EUDR is a border measure. As stated in its Article 3 relevant commodities, e.g., cattle, cocoa, coffee, oil palm, rubber, soya, wood, and relevant products, e.g., products listed in Annex I of the EUDR that contain, have been fed with or have been made using relevant commodities, cannot be placed or made available on the EU market or exported, unless, among other conditions, they are deforestation-free. Consequently, the EUDR impacts both the import and export phases, turning it into a border measure.

The second element of Article I:1 of the GATT refers to whether the measure at issue grants an 'advantage'. In the case *EC-Bananas III*, the Panel held that any 'advantage' creates a more favourable competitive opportunity or affects the commercial relationship between products of different origins.[18] Later, in *Canada-Autos*, the Appellate Body (AB) explained that the words of Article I:1 of the GATT referred to 'any advantage' granted to 'any product' and to like products originating in or destined for 'all other' WTO Members.[19] Therefore, an 'advantage' under Article I:1 of the GATT refers to any type of more favourable opportunity granted by a WTO Member to any like product from or for another WTO Member.

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[12] Charnovitz, *supra* n. 10.

[13] Michael J. Trebilcock, *Understanding Trade Law* 36–37 (Edward Elgar Publishing Limited 2011).

[14] WTO, *Principles of the Trading System*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#:~:text=2.,local%20trademarks%2C%20copyrights%20and%20patents (accessed 30 Dec. 2024).

[15] It is true that the EU produces chocolate and roasted coffee. However, these derived products require that the relevant commodities used (cocoa and green coffee) are deforestation-free to either sell the derived products in the EU market or export them from the EU. Since the relevant commodities must always be deforestation-free, the derived product will also be deforestation-free too. Therefore, the analysis under Art. III should focus on the relevant commodities (green coffee and cocoa). According to EU data, green coffee and cocoa are not produced within the EU territory. Therefore, the analysis under Art. III of the GATT is not possible. Ministry of Foreign Affairs of The Netherlands, *What is the Demand for Cocoa on the European Market?* (2024), https://www.cbi.eu/market-information/cocoa/what-demand (accessed 30 Dec. 2024). Ministry of Foreign Affairs of The Netherlands, *The European Market Potential for Roasted Coffee* (2024), https://www.cbi.eu/market-information/coffee/roasted-coffee/market-potential#:~:text=Italy%20and%20Germany%20are%20the,62%25%20of%20total%20EU%20production.&text=Europe%20is%20also%20the%20largest%20exporter%20of%20roasted%20coffee%20in%20the%20world (accessed 30 Dec. 2024).

[16] John H. Jackson, *The World Trading System. Law and Policy of International Economic Relations* 157 (second ed., Massachusetts Institute of Technology 2000).

[17] Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* 346–347 (Cambridge: Cambridge University Press, second ed. 2008).

[18] EC – Bananas III (1997), Panel Report, para. 7.239.

[19] Canada – Autos (2000), Appellate Body Report, para. 79.

Regarding the EUDR, this regulation grants more favourable treatment to non-EU products that are deforestation-free. In this regard, referring back to Article 3 of the EUDR, commodities and relevant products (derived products) that are not deforestation-free cannot enter the EU market, thereby creating a more favourable situation for non-EU countries that comply with this requirement. Now, this paper will analyse the likeness test.

1.3.2 *Likeness test under Article I:1 of the GATT: The Role of PPMs*

The third element of Article I:1 of the GATT covers the likeness test. MFN applies only to products that are considered 'like products'. In this sense, only between products that are considered 'like products' discrimination may occur; i.e., a different treatment is valid between products that are not considered 'like products'.[20] In this regard, if this paper concludes that deforestation and non-deforestation products are like products, a different treatment between these products will be forbidden.

As it was stated before, the non-discrimination principle in the GATT forbids any different treatment between 'like products'. However, neither the GATT, nor its contracting parties defined the term 'likeness'. For Christiane R. Conrad the term 'like' cannot be defined in an abstract way. Besides, there are not two identical products, so 'likeness' in the framework of the non-discrimination principle is a matter of degree rather than a question that could be answered with yes or no.[21] In fact, the AB in the case *Japan-Alcoholic Beverages II*, using the metaphor of an accordion, explained that the degree of similarity, and therefore the likeness test, varies from one provision to another, even within the paragraphs of the same provision.[22]

The *Report on Border Tax Adjustment*, a report issued by the Working Party of the GATT, concluded that 'likeness' should be determined on a case-by-case basis providing some guidelines: (1) products' end-use in a given market, (2) consumers' taste and habits, and (3) the product's properties, nature and quality.[23] Later, in the case *Japan-Alcoholic Beverages II* the AB included the use of tariff classification as an element of the likeness test.[24] Some scholars have proposed to include new factors in the likeness test.[25] One of the new factors that has been proposed as part of the likeness test is PPM.

Indeed, there has been a long-time debate in the WTO on how PPMs could be used to disqualify 'likeness' between products. In the *Tuna I* case, from the GATT era, the Panel held that US domestic regulation which provided a differential treatment based on the method of harvesting tuna was not covered by the Note Ad of Article III of the GATT because it did not have an implication on the sale of tuna and could not affect the tuna as a product.[26] An identical conclusion was found by the Panel in the *Tuna II* case.[27] Later, in the *Tuna III* case, Mexico casted doubt on the US 'dolphin safe' labelling. Even though Mexico argued that the dolphin safe labelling violated Articles I:1 and III:4 of the GATT the Panel did not rule on these issues because it found the measure inconsistent with Article 2.1 of the TBT Agreement and therefore, it exercised judicial economy.[28] Additionally, the AB decided that the obligation under Article 2.1 of the TBT Agreement, Articles I:1 and III:4 of the GATT was not substantially the same. However, it did not rule on the dolphin safe labelling validity because Mexico had requested a ruling on Articles I:1 and III:4 of the GATT only if the AB did not find a violation under Article 2.1 of the TBT Agreement. As the AB confirmed that dolphin safe labelling was inconsistent with Article 2.1 of the TBT Agreement, it did not rule on Articles I:1 and III:4 of the GATT, leaving aside the opportunity to clarify if PPM could be included in the likeness test.[29] However, based on the *Tuna I* and *Tuna II* cases, it could be argued that non-incorporated PPMs were declared inconsistent with the GATT. In fact, there has not been a Panel that has found two physically identical products to be considered unlike.[30]

Genetic modification may be regarded as part of the production process of certain products, and in this regard constitutes a PPM. In the case *EC-Biotech*, the US casted doubt on the measures adopted by the European Communities (EC) that prohibited the import of biotech

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[20] Van den Bossche, *supra* n. 17, at 329.

[21] Conrad, *supra* n. 7, at 164.

[22] Japan – Alcoholic Beverages II (1996), Appellate Body Report, at 21.

[23] Report of the Working Party on Border Tax Adjustment, adopted on 2 Dec. 1970 (L/3464), para. 18.

[24] Japan – Alcoholic Beverages II, *supra* n. 22, at 22.

[25] Robert L. Howse & Donald H. Regan, *The Product/Process Distinction: An Illusory Basis for Disciplining Unilateralism in Trade Policy*, 11, No. 2, E.I.J.L. 262–268 (2000), doi: 10.1093/ejil/11.2.249.

[26] DS21/R (1991) (unadopted). United States – Restrictions on imports of tuna, para. 5.14. Besides the fact that PPMs do not affect the likeness between products, it has been argued that allowing PPMs would restrict the basis of international trade, i.e., the capacity of WTO Members to exploit their comparative advantage in the economy. Alan Swinbank, *Like Products, Animal Welfare and the World Trade Organization*, (40)4 J. World Trade 698 and 702 (2006), doi: 10.54648/TRAD2006035.

[27] DS29/R (1994). United States – Restrictions on imports of tuna, paras 5.8–5.9.

[28] United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (2011), Panel Report, para. 7.748.

[29] United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (2012), Appellate Body Report, paras 405–406.

[30] Jason Potts. *The Legality of PPMs under the GATT. Challenges and Opportunities for Sustainable Trade Policy* 15 (International Institute for Sustainable Development 2008).

products. The question of whether products derived from genetic modification differ from non-modified products was not addressed explicitly by the Panel as the disputing parties' main claims were focused on the SPS Agreement. Indeed, the Panel refrained from analysing the 'likeness' between modified and non-modified products as it considered that Argentina failed to prove that imported products were treated less favourably that domestic products in the context of Article III:4.[31]

Another interesting case in which a Panel decided not to rule on the likeness between genetically modified products and non-genetically modified products was the *EC – Hormones (US).* In this case the US claimed the inconsistency in some of the EC regulation, that prohibited the import of meat and meat products treated with certain hormones, under Articles III and XI of the GATT, and some provisions of other instruments. The EC argued that European consumers perceived treated meat as a different product than regular meat. The Panel chose to exercise judicial economy and refrain from issuing a conclusive judgment on the comparison between meat products produced with certain hormones and their hormone-free counterparts.[32]

Later, the AB in the case *EC- Asbestos* established the four elements of the likeness test that should be used to determine the likeness between two products. Furthermore, the AB held that the 'health risk' may be relevant in assessing the 'competitive relationship in the marketplace' between like products under Article III:4 of the GATT[33]; something that could be used to justify the inclusion of PPMs as part of the likeness test.

This paper argues that non-incorporated PPM cannot be considered part of the 'likeness test' under WTO law. In fact, in the case *EC- Asbestos* the AB used the 'health risk' element as part of the 'physical characteristics' criterion under the likeness test. Thus, the 'health risk' component was associated with the toxicity of the product (asbestos and PCG fibres) and the derived product (cement of asbestos and cement of PCG fibres),[34] not with a non-incorporated PPM of the fibres or the derived product (cement). In this sense, the case *EC- Asbestos* cannot be used to argue the inclusion of non-incorporated PPM as part of the likeness test.

Returning to the EUDR, its Article 3 grants a different treatment between domestic and foreign like products based on whether relevant commodities and relevant products have caused deforestation during their production process. Article 3 of the EUDR establishes that only commodities and products listed in its Annex 1 (relevant products or derived products) that are (1) are deforestation-free; (2) have been produced in accordance with the relevant legislation of the country of production; and (3) are covered by a due diligence statement can be placed, made available or exported to the EU market.

Under the EUDR 'deforestation' means the 'conversion of forest to agricultural use, whether human-induced or not', and 'forest' refers to 'land spanning more than 0,5 hectares with trees higher than five metres and a canopy cover of more than 10%, or trees able to reach those thresholds in situ, excluding land that is predominantly under agricultural or urban land use'. Under these terms, relevant commodities and relevant products can only be placed, made available or exported to the EU market if these are deforestation-free. In fact, the EUDR defines 'deforestation-free' as (1) a relevant product that contains, has been fed with or has been made using, relevant commodities that were produced on land that has not been subject to deforestation after 31 December 2020; and (2) in the case of relevant products that contain or have been made using wood, that the wood has been harvested from the forest without inducing forest degradation after 31 December 2020.

In this sense, under the EUDR there is a different treatment based on whether relevant commodities were produced in a forest that was deforested after 31 December 2020. In the case of the list of relevant products listed in Annex 1, these can't contain, have been fed with or have been made using relevant commodities that were produced in a forest that has been subject to deforestation after 31 December 2020. In this sense, the EUDR contains non-incorporated PPMs as these requirements do not affect the end-product or commodity. As explained above, PPMs are not covered under Article I:1 of the GATT. Consequently, the different treatment included by the EUDR is not consistent with the likeness test under Article I:1 of the GATT.

1.3.3 *Immediate and unconditional treatment*

The last element of Article I:1 of the GATT relates to whether the treatment granted to the products from a contracting party are accorded 'immediately' and 'unconditionally' to any like product originating in or destined for the territories of all other contracting parties.

In respect to the 'immediately' requirement, this means that the treatment shall be granted without delay. In this sense, a lapse of time should not be present between granting an advantage to a product and extending that advantage to the like product from the rest of WTO Members.[35]

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[31] EC – Approval and Marketing of Biotech Products (2006), Panel Report, para. 7.2516.

[32] EC – Hormones (US) (1997), Panel Report, paras 8.272–8.273.

[33] EC – Asbestos (2001), Appellate Body Report, para. 115.

[34] EC – Asbestos (2001), Appellate Body Report, paras 114–115.

[35] Van den Bossche, *supra* n. 17, at 331–332.

Returning to the EUDR, the 'advantage' consists of having access to the EU market. Ideally this advantage should be granted to the commodities and relevant products listed in the Annex I of the EUDR from any WTO Member. However, this advantage is only granted under the condition that the commodities and relevant products are deforestation-free. As it was explained above 'deforestation-free' means that:

> (a) the relevant products contain, have been fed with or have been made using, relevant commodities that were produced on land that has not been subject to deforestation after 31 December 2020; and (b) in the case of relevant products that contain or have been made using wood, that the wood has been harvested from the forest without inducing forest degradation after 31 December 2020.

In this sense, getting access to the EU market is not granted immediately, because operators and traders, as established under Articles 4 and 5 of the EUDR, must prove, among other conditions, that relevant commodities and products are deforestation free under Article 3 of the EUDR.

Regarding the 'unconditionally' requirement, in the case *Belgium-Family Allowances*, a GATT dispute, the Panel decided on whether a Belgian law that imposed a charge on certain foreign products, but provided exceptions from this charge to those countries with an equivalent family allowance system was consistent with Article I of the GATT. The Panel considered that the benefit provided to some contracting parties was under certain conditions, which constituted a discrimination in the terms of Article I:1 of the GATT.[36] In this case the Panel refrained from examining the likeness test and instead directed its attention to the matter of exceptions granted under specific conditions. Consequently, the question of likeness could have been perceived as irrelevant.[37] This Panel report has been interpreted in the same manner by the Panel in the case *Indonesia-Autos.*[38] Certainly, this case may serve as a compelling argument that the policy requirements implemented by an exporting country are not part of the 'likeness' requirement under Article I:1 of the GATT, as these fall under the 'unconditional' requirement. Nevertheless, if these policy requirements were categorized as 'conditions', the 'likeness' test would become irrelevant.[39]

Later, in *Canada – Autos*, the Panel argued that the inconsistency of the 'conditions' attached to the import of a product relied on whether those 'conditions' discriminate between products based on their origin.[40] Later, in the case *EC – tariff preferences*, the Panel had a more general understanding of the 'unconditional' requirement. It stated that the preference shall not be limited by or subject to any conditions.[41]

Turning back to the EUDR, and considering that the 'unconditional requirement' should differ from the likeness test explained above, it could be argued that the EUDR as such does not create an additional condition for the products at issue.

In a nutshell, the EUDR grants a different treatment between relevant commodities and relevant products from WTO Members. The different treatment is based on the type of land used to grow crops and feed livestock. This is a non-incorporated PPM. As it was explained above, non-incorporated PPMs are not considered part of the likeness test under Article I:1 of the GATT. Additionally, the EUDR provides an advantage that is not granted 'immediately' to any WTO Member. Therefore, the EUDR violates Article I:1 of the GATT.

1.4 *EUDR inconsistency with Article XI of the GATT*

Article XI covers both border and internal measures. The Panel in the dispute *Indonesia – Raw Materials* stated that Article XI is not a non-discrimination provision as Article III:4. Article XI:1 applies to the importation of any product as well as to the exportation to any product, which reflects a border measure provision. However, Article XI:1 also applies to the 'sale for export of any product destined for the territory of any other contracting party', which reflects an internal measure.[42] As it was explained above, the EUDR is a border measure because it applies as a restriction to the import of relevant products and relevant commodities, which cannot be placed or made available on the EU market or exported, unless, among other conditions, they are deforestation-free.

In the *Tuna I* and *Tuna II* cases, Panel found that the import ban on certain yellowfish tuna and yellowfish tuna products from Mexico were inconsistent with Article XI:1 of the GATT.[43] Later, in the *US-Shrimp* case, the Panel

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[36] Belgium-Family allowances (1952), Panel Report, para. 3.

[37] Steve Charnovitz, *Belgian Family Allowances and the Challenge of Origin-Based Discrimination*, 4(1) World Trade Rev. 11 (2005).

[38] Indonesia-Autos (1998), Panel Report, paras 14.143–14.144.

[39] Conrad, *supra* n. 7, at 194.

[40] Canada – Autos (2000), Panel Report, para. 10.29.

[41] EC – Tariff Preferences (2004), Panel Report, para. 7.59.

[42] Indonesia – Raw Materials (2022), Panel Report, para. 7.59.

[43] United States – Restrictions on imports of tuna, DS21/R (1991) (unadopted), para. 5.18. DS29/R (1994), para. 5.10.

concluded that under section 609 the US imposed an import ban on shrimp and shrimp products from those non-certified countries, which constitutes a prohibition or restriction under Article XI:1 of the GATT.[44]

The Panel in the case *EU – Energy Package*, indicated that a measure is inconsistent with Article XI:1 of the GATT if the complaining Member proves that the measure (1) falls within the scope of the phare 'quotas, import or export licences or other measures', and (2) the measure constitutes a prohibition or restriction on the importation or on the exportation or sale for export of any product.[45] The same reasoning was concluded by the AB in the case *Argentina – Import Measures.* In this case the AB reaffirmed that only measures that limit the importation or exportation of products are inconsistent with Article XI:1 of the GATT. Regarding the limitation effect, the AB stated that the design, architecture and structure of the measure will be enough to demonstrate it. It is not necessary to quantify the limiting effects.[46] In a more recent case, the Panel ruled that the terms 'restrictions … on the importation' under Article XI:1 of the GATT require that 'a measure applies on or in relation to the action of importation, in addition to having trade-limiting effects'. These measures could be related to the action of importation, the process of importation or the action of importation.[47]

Some may argue that the EUDR does not prohibit the import of certain products, but rather it states certain conditions to allow the entrance of relevant products and relevant commodities to the EU market. The AB in the case *China – Raw Materials* defined 'prohibition' as a 'legal ban on the trade or importation of a specified commodity', while 'restriction' was defined as a 'thing which restricts someone or something, a limitation on action, a limiting condition or regulation'.[48] The Panel in *India – Autos* stated that a measure constitutes a restriction on importation under Article XI of the GATT when the product is allowed into the market without an express quantitative restriction, but it is only allowed under certain conditions which make the entrance more difficult than if the condition had not existed.[49]

Coming back to the EUDR, this regulation sets restrictions on the import of certain commodities and products if during their production process, these have contributed to the deforestation of forests. This qualifies as an 'other measure' that restricts the importation of commodities and products. Therefore, the EUDR falls under the scope of Article XI:1 of the GATT. Moving to the 'limitation effect', the EUDR shows that this measure will constitute a restriction on the import of certain relevant commodities and relevant products. Thus, causing a violation of Article XI:1 of the GATT.

1.5 *Inconsistency of the EUDR with the TBT and SPS Agreements*

Both the TBT Agreement and the Agreement on the Application of SPS Agreement cover 'processes and production methods'. However, it is not clear whether the use of non-incorporated PPMs can be justified under these treaties. In this section, this paper will demonstrate that these instruments cannot justify the application of the EUDR by the EU.

1.5.1 *TBT Agreement*

Annex 1 of the TBT Agreement establishes that both technical regulation and standards are applied to 'processes and production methods'. There is a common understanding that this wording covers measures having a physical impact on the final product. In this sense, only those PPMs altering the physical characteristics of a product, i.e., incorporated PPMs, are covered by the TBT Agreement.[50] Therefore, the EUDR is not justified by this instrument.

Some scholars have proposed extending the scope of the TBT Agreement to all sorts of PPM, whether these be incorporated or not, and subject to the principle of proportionality.[51] Other scholars pointed out the necessity of covering both incorporated and non- incorporated PPM in the TBT agreement. Otherwise, PPM would be subject to a less stringent set of provisions under the GATT (mostly Articles III and XI), while non-PPM technical regulations will be subject to the TBT Agreement.[52] On the other hand, some scholars have considered that the exclusion of non-incorporated PPM from the TBT Agreement would create an interesting scenario, as GATT disciplines would be less strict than those included in the TBT Agreement. In this sense, one of the most remarkable differences between the GATT and TBT agreement consists in the standard that regulations must

Notes

[44] US – Shrimp (1998), Panel Report, paras 7.16–7.17.

[45] EU – Energy Package (1998), Panel Report, para. 7.243.

[46] Argentina – Import Measures (2015), Appellate Body Report, paras 5.216–5.218.

[47] European Union and certain Member States – Certain measures concerning palm oil and oil palm crop-based Biofuels (2025), Panel Report, para. 7.972.

[48] China – Raw Materials (2012), Appellate Body Report, paras 319–320.

[49] India – Autos (2001), Panel Report, paras 7.269–7.270.

[50] Conrad, *supra* n. 7, at 377–378.

[51] Thomas Cottier, Matthias Oesch & Thomas Fischer M.A., *International Trade Regulation. Law and Policy in the WTO, the European Union and Switzerland* 762 (2005).

[52] Gabrielle Marceau & Joel P. Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade. A Map of the World Trade Organization Law of Domestic Regulation of Goods*, 36(5) J. World Trade 861 (2002).

comply. Article 2.2 of the TBT Agreement states that technical regulations must not be more trade-restrictive than necessary, while GATT does not include this requirement expressly in the non-discrimination provisions or under Article XI. However, under GATT, WTO Members must comply with Article XX to justify their measures in case a dispute arises. Therefore, some scholars have proposed that to avoid conflicts, when it comes to interpreting Article XX and the TBT agreement, both, incorporated and non-incorporated PPM, should be regulated under the TBT Agreement.[53]

Annex I of the TBT Agreement states:

> 1. Technical regulation
> 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.

This paper considers that the TBT Agreement must be interpreted in good faith in accordance with the ordinary meaning of the terms following Article 31 of the Vienna Convention on the Law of Treaties. In this sense, this paper will analyse the term 'product characteristics' and 'related processes and production methods'.

Regarding the term 'related processes and production methods', based on an interpretation under the ordinary meaning of the Annex I of the TBT Agreement, this paper concludes that only those technical regulations relating to incorporated PPM are covered by the TBT Agreement.[54]

In respect to the term 'product characteristics', the AB ruled, in the case *EC-Asbestos*, that this term includes any objectively definable feature, qualities, attributes or other distinguishing mark of a product. The AB mentioned that Annex 1.1 of the TBT Agreement provides certain examples of product characteristics such as terminology, symbols, packaging, marking or labelling requirements.[55] Furthermore, the AB in the case *EC – Sardines* emphasized that product characteristics include not only 'features and qualities intrinsic to the product', but also those related to it, such as means of identification.[56]

Later, the AB in the case *EC-Seal Products* elaborated on the connection between 'product characteristics' and their related PPMs. The AB argued that the word 'their', that precedes the words 'related processes and production methods', refers back to 'product characteristics'. Thus, a technical regulation may refer to a PPM that is related to product characteristics. However, to determine whether a measure lays down 'related PPMs', a Panel must examine whether the PPMs prescribed by the measure have a sufficient nexus to the characteristics of a product to be considered related to those characteristics.[57]

In a recent case, a Panel refused to analyse the consistency of a PPM under the TBT Agreement as 'the characteristics' of the Technical Regulation were identified in the case. In the case *EU and Certain Member States – Palm Oil (Malaysia)* Malaysia questioned the consistency of RES II (EU regulation) with the TBT Agreement. Malaysia argued that the risk cap of indirect land use change (ILUC-risk cap) and the phase-out did not lay down 'product characteristics' because these standards do not apply based on the composition of the biofuels concerned, they apply to the manner in which the energy was produced, either under a high ILUC-risk or not. Therefore, Malaysia argued that the high ILUC-risk cap and phase-out required by the EU laid down a related PPM within the meaning of Annex 1 of the TBT Agreement. The EU rejected Malaysia's argument as it considered that in order to fall under the scope of Annex 1.1 the PPMs have to be 'related' to 'product characteristics'. The Panel refused to analyse Malaysia's argument as the characteristics of the product were identifiable under Article 26(1) and (2) of the RES II complying with Annex I of the TBT.[58]

Returning to the EUDR, the non-deforestation requirement must have a sufficient nexus with the characteristics of the relevant commodities or relevant products to be justifiable under the TBT Agreement. However, this may face some challenges as the non-deforestation requirement does not create an intrinsic feature or quality, or a means of identification. Additionally, even if this paper considers that the EUDR satisfies the definition under the Annex I of the TBT Agreement, the EU must prove that this regulation also satisfies the necessity test under Article 2.2 of the TBT Agreement.

1.5.2 *SPS Agreement*

Much like the TBT Agreement, the SPS Agreement does not contain a definition of the term PPM. While it could be argued that under the principle of effective treaty interpretation non-incorporated PPM could be covered

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[53] Conrad, *supra* n. 7, at 380–381.

[54] Arthur E. Appleton, *Environmental Labelling Schemes Revisited: WTO Law and Developing Country Implications*, in *Trade, Environment, and the Millenium* 239–240 (Gary P. Sampson & W. Bradnee Chambers eds 2002).

[55] EC – Asbestos (2001), Appellate Body Report, para. 67.

[56] EC – Sardines (2002), Appellate Body Report, para. 189.

[57] EC – Seal Products (2014), Appellate Body Reports, para. 5.12.

[58] EU and Certain Member States – Palm Oil (Malaysia) (2024), Panel Report, para. 7.108.

by the SPS agreement because PPMs relate to product characteristics, this might not be enough to include non-incorporated PPM under the coverage of the SPS Agreement. Annex A of the SPS Agreement states clearly that SPS measures serve exclusively to protect certain values within the territory of the Member imposing that measure. Considering that non-incorporated PPMs do not generate any physical difference in the end-product, these measures will not be covered by the SPS agreement. Therefore, only incorporated PPM, the ones that cause a physical change in the end-product, such as the use of a particular additive that causes a particular disease, could be covered under the SPS Agreement.[59]

A similar approach was followed by the OECD. This organization stated that environmental requirements addressing production externalities usually take the form of restrictions on input use or requirements that certain techniques be adopted at the early stages of a product's life-cycle, e.g., management for forest conservation, regulation related to animal welfare, performance requirements which specify pollutant limits or technology requirements which establish the technology to be applied in the production process. The OECD held that the scope of the TBT and SPS agreement covers PPM requirements related to the characteristics of a product, and it does not cover non-product-related PPM requirements.[60]

Returning to the EUDR, the deforestation-free requirement does not change any physical aspect of the relevant commodity or product that could protect the life or health of animals, plants or humans from risks arising from the entry of organisms, additives in foods, diseases carried by animals, plants or products thereof, or the spread of pests in the territory of the EU. In this sense, the EUDR can't be justified under the SPS Agreement.

2 Conclusions Part I

As stated in the Article 2.13 of the EUDR 'deforestation-free' products include those relevant products (coffee and chocolate) produced using relevant commodities (green coffee and cocoa) on land that has not been subject to deforestation after 31 December 2020. Therefore, coffee and cocoa and their derived relevant products produced in Peru or other WTO Members on land subjected to deforestation after this date will be forbidden from entering the EU Market. This measure will have a tremendous impact on exports of green coffee, cocoa and their derived relevant products from all WTO Members to the EU market.

Part I of this research has demonstrated that the EUDR, as a non-incorporated PPM, constitutes a border measure. Regarding the consistency of this regulation under WTO law, this paper has demonstrated that a violation of Article I:1 and Article XI of the GATT will be verified. Additionally, this measure is not within the scope of the SPS Agreement, and while it could fall under the scope of the TBT Agreement, section 2.1.4 of the second paper will explain how this regulation fails to comply with the necessity test required under Article 2.1 of the TBT Agreement in light of the caseload under Article XX of the GATT.

Notes

[59] Conrad, *supra* n. 7, at 420–421 . Marceau & Trachtman, *supra* n. 52, at 862.

[60] OECD, *supra* n. 9, at 11.