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Beyond Borders: The European Union's Legislative Approach in Regulating Deforestation

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ABSTRACT

Deforestation and forest degradation is an environmental phenomenon affecting the entire world. In 2021 the EU Commission proposed a Regulation on Deforestation-free Products, which is expected to repeal the EU Timber Regulation in 2023. This study analyzes two of the previous legal policies implemented by the EU to curb deforestation: the FLEGT Action Plan and the EU Timber Regulation. The methodological approach combines the legal doctrinal method and the legal comparative method to analyze the definition of illegal deforestation and the scope of the mandatory due diligence. In relation to the definition of illegal deforestation, this research studies the case of Brazil as an example of local environmental standards in third countries. As for the mandatory due diligence, it reviews the interpretation provided by the Administrative Court of Jönköping in two cases concerning the import of timber to Sweden.

This thesis concludes that the role of the EU as an environmental regulator in deforestation matters has been characterized by the implementation of local regulations with extraterritorial effects. Both the FLEGT Action Plan and the EU Timber Regulation have promising features in relation to forest protection. However, several factors hampered its effectiveness. The new EU Regulation on Deforestation-free Products addresses some of the deficiencies found in the implementation of the mandatory due diligence. However, the broad definition of deforestation-free products can become a legal loophole, as shown in the case of Brazil.

ABBREVIATIONS

art/arts	article/articles
Brazilian Forest Law	Law No. 12.651, of May 25, 2012, which provides for the protection of native vegetation in Brazil and its amendments.
CJEU	Court of Justice of the European Union
EU	European Union
EU Timber Regulation	Regulation No 995/2010 of the European Parliament and of the Council of 20 October 2010
EU proposal for a Regulation on Deforestation-free Products	Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010
FAO	Food and Agriculture Organization of the United Nations
FLEGT	Forest Law Enforcement Governance and Trade
FLEGT Regulation	Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community
Member States	
Relevant Commodities	The commodities included in the proposal for EU Regulation on Deforestation-free products, that is: cattle, wood, palm oil, soy, cocoa, and coffee and their derivate products.

SME's	Micro, small and medium-sized enterprises as defined in Directive 2013/34/EU
TEU	Treaty of European Union
TFEU	Treaty on the Functioning of the European Union
VPAs	Voluntary partnership agreements celebrated between the EU and third countries under the EU Regulation on the establishment of a FLEGT

1. INTRODUCTION

1.1. Background and outline

Deforestation to expand agricultural land has historically been a source of economic growth but it has come at a price for the environment.¹ Forests are important terrestrial carbon sinks, they protect watersheds, provide natural habitat for countless species of flora and fauna², fungi (i.e., biodiversity) and contribute to the livelihoods and well-being of local communities, who depend on forest resources for food, fiber and income.³ Deforestation, defined as the transformation of forest land⁴ into other uses, such as agriculture expansion or reduction of forest for wood harvesting,⁵ has become an irreversible mechanism of soil composition deterioration. This phenomenon has led to soil erosion, siltation in rivers, reduction of primary water sources and species extinction.⁶ Moreover, it provokes the releases of greenhouse gas emissions, thus contributing to global climate change, with severe adverse environmental and social impacts, especially in tropical countries.⁷ There are many different causes for deforestation, and they vary depending on the region, the geographical conditions, the political interest and the economic development of the country.⁸

One of the regions with the largest portion of forest in the world is the Amazon rainforest located in the South American east of the Andes. The Amazon rainforest covers an approximate portion of 5.3 million square kilometers, which is equivalent to 40% of the global tropical forest area. In

¹ Lykke E Andersen, *The Dynamics of Deforestation and Economic Growth in the Brazilian Amazon* (Cambridge University Press 2002).

² Case C-281/11 *European Commission v Republic of Poland* [2013] ECJ.

³ Rahul Kumar, Amit Kumar and Purabi Saikia, 'Deforestation and Forests Degradation Impacts on the Environment' in Vijay P Singh and others (eds), *Environmental Degradation: Challenges and Strategies for Mitigation* (Springer International Publishing 2022) <https://doi.org/10.1007/978-3-030-95542-7_2> accessed 15 May 2023.

⁴ The FAO defines 'forest' as 'Land spanning more than 0.5 hectares with trees higher than 5 meters and a canopy cover of more than 10 percent, or trees able to reach these thresholds in situ'. 'Food and Agriculture Statistics' (*Food and Agriculture Organization of the United Nations*) <<http://www.fao.org/food-agriculture-statistics/en/>> accessed 28 March 2023.

⁵ Jarot Indarto, 'An Overview of Theoretical and Empirical Studies on Deforestation' (2016) <<https://papers.ssrn.com/abstract=4063325>> accessed 28 March 2023.

⁶ Kumar, Kumar and Saikia (n 3).

⁷ Ruth DeFries and others, 'Earth Observations for Estimating Greenhouse Gas Emissions from Deforestation in Developing Countries' (2007) 10 *Environmental Science & Policy* 385 <<https://www.sciencedirect.com/science/article/pii/S146290110700024X>> accessed 3 April 2023.

⁸ Ian Fry, 'Reducing Emissions from Deforestation and Forest Degradation: Opportunities and Pitfalls in Developing a New Legal Regime' (2008) 17 *Review of European Community & International Environmental Law* 166 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-9388.2008.00597.x>> accessed 8 May 2023.

addition, the Amazonian rainforest is the largest and most biodiverse tropical rainforest in the world.⁹ It is well known that the Amazon rainforest plays a key role in global carbon balance and its protection is crucial for mitigating climate change. However, for a long period of time the Amazon has been subject to deforestation and forest degradation, which has led to changes in the region's climate, the regional rainfall patterns and has also led to a greater heat exposure.¹⁰ Scientific studies have shown that if deforestation and forest degradation continue, there will be negative consequences due to an exacerbation of climate change, a loss of biodiversity and long-term impacts on human health, as a result of these changes.¹¹ Now, one of the main factors associated to deforestation is the expansion of agriculture for the production of soy, oil palm, cattle ranching, the extraction of timber and the mining of minerals.¹²

The negative impact that deforestation has on the environment thrust a global trend towards the prevention and eradication of deforestation.¹³ At the EU level, a series of regulations have been enacted to prevent deforestation inside and outside the EU, including the EU Action Plan for Forest Law Enforcement, Governance and Trade (the 'FLEGT Action Plan ') in 2003,¹⁴ the EU Timber Regulation in 2010¹⁵ and more recently, a proposal launched by the EU Commission in 2021 for a new EU Regulation on Deforestation-free Products,¹⁶ that will repeal the EU Timber Regulation. The cornerstone of the EU Timber Regulation and the new EU Regulation on Deforestation-free Products is the mandatory due diligence system that operators in the EU must carry out to verify

⁹ Lincoln Muniz Alves and others, 'Sensitivity of Amazon Regional Climate to Deforestation' (2017) 6 *American Journal of Climate Change* 75 <<http://www.scirp.org/Journal/Paperabs.aspx?paperid=74585>> accessed 15 May 2023.

¹⁰ Beatriz Fátima Alves de Oliveira and others, 'Deforestation and Climate Change Are Projected to Increase Heat Stress Risk in the Brazilian Amazon' (2021) 2 *Communications Earth & Environment* 1 <<https://www.nature.com/articles/s43247-021-00275-8>> accessed 15 May 2023.

¹¹ *ibid.*

¹² Kathryn R Kirby and others, 'The Future of Deforestation in the Brazilian Amazon' (2006) 38 *Futures* 432 <<https://www.sciencedirect.com/science/article/pii/S0016328705001400>> accessed 20 May 2023.

¹³ Simon L Bager, U Martin Persson and Tiago NP dos Reis, 'Eighty-Six EU Policy Options for Reducing Imported Deforestation' (2021) 4 *One Earth* 289 <<https://www.sciencedirect.com/science/article/pii/S2590332221000579>> accessed 26 April 2023.

¹⁴ Communication from the Commission to the Council and the European Parliament - Forest Law Enforcement, Governance and Trade (FLEGT) - Proposal for an EU Action Plan 2003.

¹⁵ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance 2010 (OJ L).

¹⁶ Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 2021.

that certain commodities (as defined in both legal texts) were produced under deforestation-free conditions.

Although these policies could have positive effects in the fight against illegal deforestation, such as the increase on the legal control of wood products entering the European Union, some challenges were identified in their implementation that have brought into question their effectiveness in the protection of the environment.¹⁷ This research will consider two of the challenges found in the implementation of the EU Timber Regulation, as it is the norm that will be repealed by the new EU Regulation on Deforestation-free Products. The first one is the definition of deforestation, as it does not take into account factors that may affect the effectiveness of environmental laws in third countries. As an example of this situation, this thesis analyses the deforestation law provisions in Brazil and the biggest factors affecting their effectiveness. The second one is related to the lack of clarity in the scope of the mandatory due diligence.¹⁸

1.2. Purpose and research question

Policies such as the FLEGT Action Plan, the EU Timber Regulation and the new EU proposal for a Regulation on Deforestation-free Products have as a common goal the protection of the forests that are outside the immediate jurisdiction of the EU. The indirect objective of these policies is to mitigate climate change and protect biodiversity, through the prevention of greenhouse gas emissions coming from deforestation and forest degradation and the maintenance of forest habitat. The direct objective is to control the trade and consumption of commodities produced under deforestation conditions in the European Union. The purpose of this research is to contribute to a better understanding of the different legal approaches that the EU has taken to regulate the import and consumption of goods produced under deforestation conditions.

The main question of this research is:

How has the EU made use of the extraterritorial regulatory legal approach to control the import and trade of goods that are produced under conditions of deforestation?

¹⁷ Metodii Sotirov, Maïke Stelter and Georg Winkel, 'The Emergence of the European Union Timber Regulation: How Baptists, Bootleggers, Devil Shifting and Moral Legitimacy Drive Change in the Environmental Governance of Global Timber Trade' (2017) 81 Forest Policy and Economics 69 <<https://www.sciencedirect.com/science/article/pii/S1389934116301642>> accessed 8 May 2023.

¹⁸ Yulia Levashova, 'How Effective Is the New EU Timber Regulation in the Fight against Illegal Logging?' (2011) 20 Review of European Community & International Environmental Law 290 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-9388.2011.00725.x>> accessed 3 April 2023.

To answer the main question, the following three sub-questions will be explored:

- What are the main characteristics and differences between the three attempts to regulate deforestation by the EU?
- How does the new EU Regulation on Deforestation-free Products modify the EU Timber Regulation in relation to the definition of deforestation and the mandatory due diligence?
- What are the legal challenges and loopholes found in the implementation of the EU Timber Regulation facing the implementation of the new EU Regulation on Deforestation-free Products?

1.3. Delimitation

Although the starting point of this research is the scientific evidence around the environmental degradation associated with deforestation and forest degradation,¹⁹ this research will not study the scientific data around this situation. Instead, this research will be focused on the analysis of the policies and legal acts that the EU has implemented to regulate the import and trade of good produced under deforestation conditions, as described in Section 1.1. Furthermore, this research will concentrate in analyzing the modifications incorporated on the new EU proposal for a Regulation on Deforestation-free Products and the challenges that its implementation may have, based on the challenges found on the implementation of the EU Timber Regulation. This thesis does not compare all the provisions introduced in the new EU proposal for a Regulation on Deforestation-free Products in relation to the EU Timber Regulation, it focuses on those related to the definition of deforestation and the mandatory due diligence. In relation to the definition of deforestation in the EU Timber Regulation and the challenges found in its implementation, this research will explore the case of Brazil as an example of local environmental standards in third countries, as it is the largest exporter of timber from Latin America to the EU. Finally, in relation to the lack of clarity of the mandatory due diligence under the EU Timber Regulation, this thesis analyses only two cases of the national Courts in Sweden, due to the low number of CJEU cases

¹⁹ Manuel A Zambrano-Monserrate and others, 'Deforestation as an Indicator of Environmental Degradation: Analysis of Five European Countries' (2018) 90 *Ecological Indicators* 1 <<https://www.sciencedirect.com/science/article/pii/S1470160X18301341>> accessed 28 March 2023.

analyzing this Regulation and considering that Sweden is one of the EU countries with largest forest cover.²⁰

1.4. Methodology

In order to successfully answer the questions, this research will combine the legal doctrinal method and the legal comparative method. The legal doctrinal method studies the *doctrina* which means the instruct or precept.²¹ This method includes the synthesis of rules, principles, norms and values, that serve as justification of the law. It makes use of the legal way of thinking, the rational observation of the law and the prepositions established in the case law, to solve problems related to the law, legal systems, legal policies and/or judgments. The legal doctrinal method is used to find logical conclusions on legal issues and propose solutions to problems connected to the law or any legal factor.²² Some of the objectives of the legal doctrinal method are: creation on new legal theories or doctrines, propose an application of legal doctrines, principle or legal theories, guiding the legal professionals in the understanding and implementation of legal texts and proposing new legal theories to solve a legal problem. This method was chosen in this research as the main purpose of it is analyze the role of the EU as legislator in environmental law matters, the legal provisions implemented to regulate deforestation and forest degradation in the EU, the new EU proposal for a Regulation on Deforestation-free Products, all in the light of the extraterritoriality effect of the law. As all the factors considered in this research are related to the description of the law, its interpretation and modifications, then the legal doctrinal method is the most appropriate. When applying the legal doctrinal method, relevant sources of law will be analyzed, as well as other academic investigations, including the analysis of national law, European law along with the doctrine, case law and legal concepts.

This investigation also uses the comparative legal method to identify the main changes implemented in the new EU proposal for a Regulation on Deforestation-free Products in relation to the legal provisions on the EU Timber Regulation. The comparative legal method seeks to

²⁰ Iris Maria Hertog, Sara Brogaard and Torsten Krause, 'Barriers to Expanding Continuous Cover Forestry in Sweden for Delivering Multiple Ecosystem Services' (2022) 53 *Ecosystem Services* 101392 <<https://www.sciencedirect.com/science/article/pii/S2212041621001509>> accessed 24 May 2023.

²¹ Pradeep M.D., 'Legal Research- Descriptive Analysis on Doctrinal Methodology' [2019] *International Journal of Management, Technology, and Social Sciences* 95 <https://srinivaspublication.com/wp-content/uploads/2019/12/10.LegalResearch_FullPaper.pdf> accessed 24 May 2023.

²² *ibid.*

describe two or more legal systems and compare them. It can compare national legal systems with foreign legal systems or national legal provisions in a same legal system. This research compares some provisions of the EU Timber Regulation with the new EU Regulation on Deforestation-free Products; thus, the comparative legal method is used.²³

²³ Mathias Siems, *Comparative Law* (Cambridge University Press 2022).

2. EU regulatory approach in environmental law matters

In the environmental law field, the role of the EU as a regulator has had different approaches through the history of the European Union.²⁴ In its initial stages, it was aimed at promoting the integration of the internal market, but, nowadays, encompasses many environmental issues, ranging from local to regional and even global scale.²⁵ One of the strategies adopted by the EU to promote the global reach of its environmental policies is through the implementation of legal measures with extraterritorial effects. This Section reviews the jurisdiction of the EU as a legislator in environmental matters and the concept of extraterritoriality of the EU environmental law.

2.1. Jurisdiction of the EU in environmental law matters

The EU action in environmental matters has its first legal base in the Single European Act of 1987. According to the Title VII of the Single European Act, the environmental objectives of the Community were the preservation, protection, and improvement of the environment.²⁶ Around the 90s, the sustainability issue began to gain relevance in the agenda of the European Union and the EU started to stand out as an important player both in the development of national and international environmental policies.²⁷ This situation generated a debate among the Member States, that perceived the intervention of the European Union in environmental matters as a centralization of the environmental governance.²⁸ Despite that, the EU has implemented environmental policies seeking to homogenize some environmental standards, especially in areas that, if regulated individually by each Member State, may result in potential barriers to the internal market.²⁹

The TFEU recognizes the competence of the EU in environmental matters as shared with the Member States (Art 4 TFEU). Art 3 (3) TEU states that the Union “shall work for the sustainable development of Europe (...) and a high level of protection and improvement of the quality of the environment”. Title XX TFEU states some of the competences of the EU in environmental law

²⁴ Helen Wallace, Mark A Pollack and Alasdair R Young, *Policy-Making in the European Union* (Oxford University Press 2015).

²⁵ Suzanne Kingston, Veerle Heyvaert and Aleksandra Čavoški, *European Environmental Law* (Cambridge University Press 2017).

²⁶ Single European Act 1986 (OJ L).

²⁷ Van Zeven and Josephine A W, ‘Subsidiarity in European Environmental Law: A Competence Allocation Approach’ (7 June 2016) <<https://papers.ssrn.com/abstract=2791617>> accessed 17 May 2023.

²⁸ Christian Zuidema, *Decentralization in Environmental Governance: A Post-Contingency Approach* (Taylor & Francis 2016).

²⁹ Zeven and W (n 27).

matters. According to art 191 TFEU, one of the objectives of the EU is the preservation and protection of the environment, and the improvement of its quality. It also states that the principles guiding the EU, when implementing environmental measures, are the precautionary principle and the polluter pays principle. The precautionary principle means that in case of uncertainty of a possible risk to the environment, protective measures must be taken before the risk occurs.³⁰ The polluter pays principle means that those who caused the damage to the environment should be the ones responsible for paying for the damages.³¹

In the international sphere, art 191 (4) TFEU states that the EU shall cooperate with third countries on the celebration of agreements to protect the environment.³² The CJEU has interpreted this article as an expression of the principle of concurrent competence of the EU to celebrate international environmental agreements with third countries or international institutions.³³

Art 193 TFEU states that Member States are allowed to maintain or introduce more stringent protective measures. The CJEU has interpreted this statement as of “minimum harmonization” of the environmental EU law.³⁴ This means that Member States are allowed to implement more stringent measures as those implemented by the EU,³⁵ with the requirement that such measures are compatible with the TFEU and notified to the EU Commission.³⁶

As the competence to regulate environmental matters is not exclusive to the EU, it is supposed to be limited by the principle of subsidiarity. This principle suggests that in areas that are not of exclusive competence, the EU could act only if the objectives proposed cannot be sufficiently

³⁰ Case C-499/18 P *Bayer CropScience AG and Bayer AG v European Commission* [2021] ECJ paras 79-81; Case C-616/17 *Criminal proceedings against Mathieu Blaise and Others* [2019] ECJ para 41; Case C-77/09 *Gowan Comércio Internacional e Serviços Lda v Ministero della Salute* [2010] ECJ.

³¹ Case C-188/07 *Commune de Mesquer v Total France SA and Total International Ltd* [2008] ECJ paras 69-72; Case C-293/97 *The Queen v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte HA Standley and Others and DGD Metson and Others* [1999] ECJ.

³² Case C-377/12 *European Commission v Council of the European Union* [2014] ECJ para 30.

³³ Case T-9/19 *ClientEarth v European Investment Bank* [2021] GC para 9; Case C-1/03 *Criminal proceedings against Paul Van de Walle, Daniel Laurent, Thierry Mersch and Texaco Belgium SA* [2004] An Chúirt Bhreithiúnais.

³⁴ Case C-2/10 *Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl v Regione Puglia* [2011] ECJ paras 51-54.

³⁵ Case C-379/08 *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others* and C-380/08 *ENI SpA v Ministero Ambiente e Tutela del Territorio e del Mare and Others* [2010] ECJ Joined cases C-379/08 and C-380/08 para 45.

³⁶ Case C-534/13 *Ministero dell’Ambiente e della Tutela del Territorio e del Mare and Others v Fipa Group srl and Others* [2015] ECJ para 61; Case C-129/16 *Türkevei Tejtermelő Kft v Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség* [2017] ECJ paras 60-63.

achieved by the Member States, because of the scale or effects of the proposed action.³⁷ In *Commission of the European Communities v Kingdom of Belgium*³⁸ the CJEU interpreted this article and stated that there are some environmental measures whose purpose and scope need to be regulated by the EU (such as the Birds Directive), thus, of competence of the EU.

In light of the competences attributed in environmental matters, the EU has implemented regulations, directives, decisions, recommendations, and opinions. It has also implemented strategies to verify their implementation, enforcement, and monitoring. Additionally, it has created environmental action programs, horizontal strategies, international environmental cooperation agreements, environmental impact assessment strategies, and public participation strategies.³⁹

2.2. Extraterritoriality effects of the EU environmental law

Although the policies and legal provisions implemented in the EU are only binding within its territory, some of them have an extraterritorial effect.⁴⁰ When analyzing extraterritoriality effect of the law it is important to consider the concept of jurisdiction. In international law, the principle of territorial jurisdiction of a state is defined as the power of the states to perform legislative, judicial, and executive acts within its territory.⁴¹ This principle assumes that the general rule is that a state performs functions in its own territory and that another state performs extraterritorial functions over a different state is an exception. However, the exercise of extraterritorial functions by states has taken various forms. This research considers the EU Internal Environmental Measures with Extraterritorial Implications (IEMEs).⁴²

³⁷ Case C-264/18 *Philip Morris Brands SARL and Others v Secretary of State for Health* [2016] ECJ Case C-547/14 para 215; *P M and Others v Ministerraad* [2019] ECJ para 20.

³⁸ Case 247/85 *Commission of the European Communities v Kingdom of Belgium* [1987] ECJ.

³⁹ 'Environment Policy: General Principles and Basic Framework | Fact Sheets on the European Union | European Parliament' (30 November 2022) <<https://www.europarl.europa.eu/factsheets/en/sheet/71/environment-policy-general-principles-and-basic-framework>> accessed 22 May 2023.

⁴⁰ Cliff Dlamini and Yves Montouroy, 'Governing Sustainable Forest Management Issues in Polycentric Governance: The EU FLEGT Action Plan as a Regulatory Catalyser' (2017) 19 *Environmental Law Review* 6 <<https://doi.org/10.1177/1461452917691863>> accessed 26 April 2023.

⁴¹ Bernard H Oxman, 'Jurisdiction of States' in Rudolf L Bindschedler and others (eds), *Encyclopedia of Disputes Installment 10* (Elsevier 1987) <<https://www.sciencedirect.com/science/article/pii/B9780444862419500683>> accessed 20 May 2023.

⁴² Ioanna Hadjiyianni, 'The Extraterritorial Reach of EU Environmental Law and Access to Justice by Third Country Actors' (2017) 2017 2 *European Papers - A Journal on Law and Integration* 519542 <https://www.europeanpapers.eu/en/e-journal/extraterritorial_reach_of_eu_environmental_law_and_access_to_justice_by_third_country_actors> accessed 3 May 2023.

IEMIEs are environmental legal provisions adopted by the EU and, even when they are not binding in third countries, they have impacts on them, take place on them, or seek to influence their business practices or regulatory approach. A large amount of IEMIEs have been adopted in the past years in the EU seeking to have impacts on the protection of the environment in third countries.⁴³ There is many reasons that justify the implementation of environmental regulations with extraterritorial effects by the EU. One of this is the alleged existence of legal gaps in third countries legal systems.⁴⁴

The IEMIEs have operated mainly in two ways. On the one hand, some IEMIEs have sought to influence the regulatory approaches or its enforcements in third countries through the implementation of incentives (mostly economic incentives). These measures do not impose any particular requirement or obligation. They do not include either any negative consequence if the environmental standards are not followed. But if third countries adjust their standards, implement them or enforce them in a certain way, then they (or their enterprises) get some benefits in the EU. One example of this measures is the sustainable criteria for biofuels stated in Directive 2009/28.⁴⁵ This Directive includes some sustainability standards for biofuels, but those that are not in compliance with these criteria are not excluded from the EU market. However, its compliance is a requirement for EU operators seeking to apply for funding on the consumption of biofuels.

On the other hand, some IEMIEs have been designed as a mandatory condition or partial restriction to access the EU market, which end up influencing regulatory changes in other countries.⁴⁶ This is for example the case of EU of measures conditioning the access to the European market to products that do not meet certain environmental, quality, safety or production standards.⁴⁷ An example of this kind of measures is the EU Timber Regulation, which requires operators in the EU to make sure that producers of timber in third countries comply with the environmental local legal standards, in order to trade and import those products in EU. These measures are usually followed

⁴³ *ibid.*

⁴⁴ Natalie L Dobson, 'The EU's Conditioning of the "Extraterritorial" Carbon Footprint: A Call for an Integrated Approach in Trade Law Discourse' (2018) 27 *Review of European, Comparative & International Environmental Law* 75 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/reel.12226>> accessed 21 May 2023.

⁴⁵ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (Text with EEA relevance) 2009.

⁴⁶ Hadjiyianni (n 42).

⁴⁷ *ibid.*

by a prohibition. In the case of the EU Timber Regulation, it prohibits operators in the EU to import or sale timber that was produced in illegal conditions of deforestation. These measures do not seek to influence the modification of local standards in third countries, they seek to influence their enforcement by imposing a prohibition of the importers in Europe to import and trade products that are not complying with those legal standards.⁴⁸

The CJEU has analyzed the effects of legal provisions with extraterritorial effect in the light of the principles of customary international law. In the case *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*⁴⁹ the CJEU analyzed the extraterritorial effect of the Directive 2008/101, which regulates the greenhouse emissions from flights, in the light of principles such as sovereignty of a state over its space. In this case it was discussed if the provisions on Directive 2008/101, that extends its application to aircrafts operators in third countries, was in accordance with the principles of customary international law, such as the sovereignty over its space and the principle of freedom to fly over the high seas. The CJEU noted that customary international law is binding for the EU institutions, but it does not prevent the EU, *per se*, to enact legal provisions having extraterritorial effects, such as the Directive 2008/101. The CJEU highlighted that Directive 2008/101 its indented to apply to flights departing or arriving from/to the EU and not to any aircraft operator in third countries. Thus, the Court concluded that, even when the Directive may affect aircraft operators in third countries, this only occurs because the aircraft enters the territory of a Member State. In *Intel*⁵⁰ the CJEU also analyzed the effect of an EU law in relation to the customary international law. In this case the Court concluded that the extraterritorial effects of the EU competition law may be justified if the conduct in question has an immediate and substantial effect in the EU.

The CJEU also analyzed the extraterritorial effects of the EU law, in cases that it may overlap or be in conflict with laws in third countries. In *Zuchtveh-Export*⁵¹ the CJEU analyzed the application of Regulation 1/2005, that regulates the transportation of animals during the entire trip, even if some part of the transportation take place in third countries. The discussion in this case related to the possible overlap of legal provisions applicable to the transport of animals in Europe and in

⁴⁸ Sotirov, Stelter and Winkel (n 17).

⁴⁹ Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECJ paras 121-130.

⁵⁰ Case C-413/14 *Intel Corp v European Commission* [2017] ECJ P para 49.

⁵¹ Case C-424/13 *Zuchtvieh-Export GmbH v Stadt Kempten* [2015] ECJ paras 17-19.

third countries. Regulation 1/2005 requires the transport of animals taking place in the EU, even if it has as a final destination a third country, to comply with the provisions of the Regulation. The applicant in this case argued that the provisions of the Regulation should have not been applicable to the transportation of the animals outside the EU. However, the Court concluded that the Regulation was still applicable in the sense that, for a Member State to authorize the transport of animals departing from an EU country, the transporter must comply with the requirements of the Regulation, even if some parts of the journey are taking place outside the EU. Thus, justifying the extension of the effect of the Regulation to acts taking place in a third countries.

In relation to the scope of the legal provisions with extraterritorial effects the CJEU provided an analysis of this effect in *Google v CNIL*.⁵² The case relates the interpretation of Directive 95/46 and the Regulation 2016/679 in relation to the obligation of a search engine operator to de-reference a person from its online platform, including de de-reference in all versions of its search engine. The analysis of the Court to determine the scope of the obligation was in relation to the extraterritorial effects of the Directive 95/46 and the Regulation 2016/679. The Court concluded that, when a search engine operator grants a request for de-referencing, it is not required to carry out the de-referencing process on all versions of the research engine (this means, in third countries), but only the versions corresponding to all Member States. The reasoning in this case was that the rules concerning data protection are aimed to provide a high level of protection to the persons within the EU and is supposed to be carried out in respect to all Member States, but it does not go beyond their territory.

In conclusion, the CJEU has consistently validated the effects of the EU legal provisions with extraterritorial effects in two ways. On the one hand, by the confirmation of legality of secondary legislation having effects in third countries (such as in the case *European Federation for Cosmetic Ingredients v Secretary of State for Business*⁵³). On the other hand, by the interpretation of the scope of that secondary legislation that regulates activities taking place in third countries (such as in *Zuchtveh-Export* or in *Q and Others v United Airlines, Inc*⁵⁴).

⁵² Case C-507/17 *Google LLC, successor in law to Google Inc v Commission nationale de l'informatique et des libertés (CNIL)* [2019] ECJ.

⁵³ Case C-592/14 *European Federation for Cosmetic Ingredients v Secretary of State for Business, Innovation and Skills and Attorney General* [2016] ECJ para 45.

⁵⁴ Case C-561/20 *Q and Others v United Airlines, Inc* [2022] ECJ.

3. Findings: EU multiple attempts to regulate deforestation

This section analyzes three of the legal approaches with extraterritorial effect that the EU has implemented in relation to deforestation and forest degradation. That is, the FLEGT Action Plan (including the FLEGT Regulation), the EU Timber Regulation and the most recent proposal for an EU Regulation on Deforestation-free Products. Section 4 analyzes these findings in the light of the theoretical approach of the Internal Environmental Measures with Extraterritoriality Implications (as described in Section 2 before).

3.1. EU Action Plan for Forest Law Enforcement, Governance and Trade (2003)

The FLEGT Action Plan was adopted in 2003 and is one of the biggest initiatives implemented in the EU to fight illegal logging and promote the protection of the forest.⁵⁵ One of the main objectives of the FLEGT Action Plan is the promotion of governance reforms and capacity building, through the development of complementary multilateral co-operation strategies between two parties: the supplying party (i.e., third countries exporting wood to the EU) and the demanding party (i.e., operators placing timber within the EU or consumers). The second one is to prevent illegal timber and timber products from being imported, marketed, and consumed in the EU.⁵⁶

In relation to the first objective, the FLEGT Action Plan promotes for the celebration of voluntary partnership agreements (so-called “VPAs”) with third countries that export timber to the EU, in order to prevent illegally harvested timber and strengthen the collaboration with them.⁵⁷ The FLEGT Action Plan recognizes the importance of working together with third countries that harvest and export timber to the EU, since it is under the regulations of these countries that timber production takes place.⁵⁸ A VPA is thus an international agreement between the EU and a third country under which the parties agree to cooperate and support the FLEGT Action Plan, and to

⁵⁵ Jonathan Zeitlin, *Extending Experimentalist Governance?: The European Union and Transnational Regulation* (OUP Oxford 2015).

⁵⁶ Communication from the Commission to the Council and the European Parliament - Forest Law Enforcement, Governance and Trade (FLEGT) - Proposal for an EU Action Plan (n 14).

⁵⁷ *ibid.*

⁵⁸ Zeitlin (n 55).

implement the FLEGT scheme⁵⁹, based on the issuance of a FLEGT license to timber producers.⁶⁰ Under a VPA the parties regulate the placing of timber and timber products in the EU and verify that the timber was produced under legal conditions and in accordance with the legislation applicable in the place of origin. The FLEGT Action Plan also includes a license scheme to certificate the legality of the harvested timber that is exported to the EU. Thus, the partner countries issue FLEGT licenses that corroborate that the wood is produced in compliance with legal deforestation regulations. The FLEGT Action Plan promotes not only the protection of the environment but the affectation in terms of labor rights and indigenous community rights, among others.⁶¹

The conclusion of a VPA with the EU involves a procedure in which the parties agree on the general conditions under which the harvest of timber would be legal in the national law and the way in which compliance with these legal provisions will be monitored by the competent authorities in third countries.⁶² The conclusion of a VPA entails the review of the legal provisions related to deforestation in the country that is celebrating the agreement with the EU. Furthermore, it requires the EU to agree on a definition of the legal conditions to harvest timber. Considering these characteristics, VPAs have been seen as a mechanism used under the FLEGT Action Plan by the EU to achieve forest governance in third countries that supply timber to the EU.⁶³

However, although the FLEGT Action Plan was implemented in 2003 as of November 2021, the EU had entered into VPAs with only nine countries: Cameroon, the Central African Republic, Ghana, Indonesia, Liberia, the Republic of the Congo, Vietnam, Honduras and Guyana; And had negotiations ongoing with other six countries: Côte d'Ivoire, the Democratic Republic of the Congo, Gabon, Laos, Thailand, and Malaysia. Only one of those agreements (the one celebrated with Indonesia) has started operating in 2016, being Indonesia the only country that has issued

⁵⁹ Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community 2005 (OJ L).

⁶⁰ Lesne Prace Badawcze-Forest Research Papers, 'Forest Protection in the European Union' [2019] Forest Research Papers <https://www.academia.edu/44716401/Forest_Protection_in_the_European_Union> accessed 29 March 2023.

⁶¹ Elisabeth V Henn, 'Protecting Forests or Saving Trees? The EU's Regulatory Approach to Global Deforestation' (2021) 30 *Review of European, Comparative & International Environmental Law* 336 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/reel.12413>> accessed 14 April 2023.

⁶² Rebecca L Rutt and others, 'FLEGT: Another "Forestry Fad"?' (2018) 89 *Environmental Science & Policy* 266 <<https://www.sciencedirect.com/science/article/pii/S1462901118304878>> accessed 26 April 2023.

⁶³ *ibid.*

FLEGT licenses under a VPA.⁶⁴ Although the key regions identified on the Action Plan to work together with the EU in relation to deforestation through the celebration of VPAs are Central Africa, Tropical South America and Southeast Asia, none of the VPAs that the EU has celebrated include a country in Tropical South America, including Brazil the larger exporter of timber to the EU coming from this region.

3.2. The EU Timber Regulation (2013)

In 2013 came into force the EU Timber Regulation⁶⁵ as a part of the implementation of the FLEGT Action Plan, which lays down the obligations for operators placing timber or timber products for the first time in the EU market. The main objective of the EU Timber Regulation is to set the rules for the trade of timber or timber products within the EU. One of the main differences between the FLEGT Regulation and the EU Timber Regulation is that the first one applies to products imported from countries that have celebrated a VPA with the EU and that are operating licensing schemes. The second one applies to products imported from countries that have not celebrated VPAs with the EU or that are not operating FLEGT licenses under the FLEGT Regulation.

The EU Timber Regulation provides two elements in the fight against illegal logging: a mandatory due diligence system and a prohibition to trade illegal timber or timber products within the EU. The mandatory due diligence requires operators placing timber products in the EU to verify the legality of the production before placing the timber in the EU (the specifications of the mandatory due diligence under the EU Timber Regulation are explained in detail in Section 3.2.3 of this research). Additionally, the EU Timber Regulation prohibits operators in the EU from trading timber or timber products that have been produced under illegal conditions and places the role of verifying compliance with these obligations in the hands of member states. This section analyzes the characteristics of these two elements and the main challenges in their implementation.

⁶⁴ Commission Staff Working Document Fitness Check on Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (the EU Timber Regulation) and on Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community (FLEGT Regulation) Accompanying the document Proposal for a Regulation of the Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 2021.

⁶⁵ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance.

3.2.1. Definition of illegal deforestation under the EU Timber Regulation

According to art 2 of the EU Timber Regulation the legality of the deforestation is defined by the compliance of harvesting regulations and applicable law in the country of harvest. Likewise, illegal harvest is defined as timber or timber products that are harvested in violation of applicable laws in the country of harvest. From this definition it can be understood that the focus of the EU Timber Regulation is to verify the legality of the timber that is placed in the EU in relation to the legal standards of the country of origin.⁶⁶ This means that if the timber was legally harvested under the laws of the country of harvest, it is assumed under the EU Timber Regulation that the production of the timber had sufficient controls to verify factors such as that it is sustainable, that biodiversity and local livelihoods were protected, among others.⁶⁷ Although these factors were not mentioned in the main provisions of the EU Timber Regulation section 3 of its preamble states that illegal timber corresponds to the timber that has been produced affecting the biodiversity, contributed to desertification and soil erosion, had social and economic implications and generally threatened livelihoods and local communities.⁶⁸

The definition of legal and illegal deforestation in the EU Timber Regulation has brought up some concerns related to the effective protection of the environment. As will be illustrated with the case of the deforestation regulation in Brazil, the characteristics and enforcement of environmental local standards in developing countries may be affected by other factors that are not contemplated in the EU Timber Regulation.

3.2.2. Generalities of Brazil as exporter of goods produced under deforestation conditions

The Amazon rainforest is recognized as one of the most important forest ecosystems worldwide and contribute a range of crucial benefits people depend on.⁶⁹ The Amazon is considered the

⁶⁶ D Brack, 'Illegal Logging and the Illegal Trade in Forest and Timber Products' (2003) 5 *International Forestry Review* 195.

⁶⁷ Claudia Ituarte-Lima, Amelie Dupraz-Ardiot and Constance L McDermott, 'Incorporating International Biodiversity Law Principles and Rights Perspective into the European Union Timber Regulation' (2019) 19 *International Environmental Agreements: Politics, Law and Economics* 255 <<https://doi.org/10.1007/s10784-019-09439-6>> accessed 14 May 2023.

⁶⁸ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance.

⁶⁹ Marjorie L Reaka-Kudla, Don E Wilson and Edward O Wilson, *Biodiversity II: Understanding and Protecting Our Biological Resources* (Joseph Henry Press 1996).

world's largest continuous tropical rainforest⁷⁰ and one of the most biodiverse forests in the world.⁷¹ However, deforestation in the Brazilian Amazon has increased considerably since 2008, reaching the highest rate for two years in a row in 2019.⁷² Deforestation in tropical countries like Brazil can have different causes, such as industrial growth and infrastructure development, agricultural expansion and mineral extraction.⁷³ Deforestation in Brazil has not only affected natural resources, but it has also had a huge impact in indigenous communities forcing them to abandon the forest because of the agricultural use of land.⁷⁴

The new EU regulation on Deforestation-free products includes a variety of commodities such as cattle and beef, palm oil, soy, cocoa, coffee, and rubber. Brazil produces a large number of these products and is one of the largest producers of soy and soy products worldwide.⁷⁵ The production of soy in Brazil generates substantial economic income but is also a great source of deforestation.⁷⁶ The EU is one of the biggest importers of Brazilian soy, which affects carbon emission coming from both legal and illegal deforestation.⁷⁷ EU countries also import coffee,⁷⁸ beef meat,⁷⁹ and

⁷⁰ Caroline A Schmidt and Constance L McDermott, 'Deforestation in the Brazilian Amazon: Local Explanations for Forestry Law Compliance' (2015) 24 *Social & Legal Studies* 3 <<https://doi.org/10.1177/0964663914552213>> accessed 7 April 2023.

⁷¹ Martin Delaroche, François-Michel Le Tourneau and Marion Daugeard, 'How Vegetation Classification and Mapping May Influence Conservation: The Example of Brazil's Native Vegetation Protection Law' (2022) 122 *Land Use Policy* 106380 <<https://www.sciencedirect.com/science/article/pii/S0264837722004070>> accessed 18 April 2023.

⁷² Maria-Augusta Paim, 'Zero Deforestation in the Amazon: The Soy Moratorium and Global Forest Governance' (2021) 30 *Review of European, Comparative & International Environmental Law* 220 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/reel.12408>> accessed 7 April 2023.

⁷³ Kayla Stan and others, 'Simulating Deforestation in Minas Gerais, Brazil, under Changing Government Policies and Socioeconomic Conditions' (2015) 10 *PLOS ONE* e0137911 <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0137911>> accessed 17 April 2023.

⁷⁴ Ivan Bond, *Incentives to Sustain Forest Ecosystem Services: A Review and Lessons for REDD* (IIED 2009).

⁷⁵ Paim (n 72).

⁷⁶ *ibid.*

⁷⁷ Raoni Rajão and others, 'The Rotten Apples of Brazil's Agribusiness' (2020) 369 *Science* 246 <<https://www.science.org/doi/full/10.1126/science.aba6646>> accessed 7 April 2023.

⁷⁸ Andrea Cerasa and Daniela Buscaglia, 'Do the EU Countries Import at the Same Price? The Case of Coffee' (2017) 48 *Agricultural Economics* 397 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/agec.12342>> accessed 18 May 2023.

⁷⁹ Fernanda de Tavares Canto Guina and Janaina de Moura Engracia Giraldo (eds), 'The Evaluation of Brazilian Beef in Europe: Consumers, Importers and Exporters' Perspectives' [2013] *International Food and Agribusiness Management Review*.

palm oil⁸⁰ from Brazil. The EU is one of the biggest importers of products that are produced under deforestation conditions coming from Brazil.⁸¹

(i) Legal framework in Brazil in relation to the deforestation in private lands

The main legal provisions in Brazil related to the protection of the forest can be found in the Law No. 12.651 on the protection of Native Forests (the "Brazilian Forest Law of 2012").⁸² The Brazilian Forest Law establishes the main rules for the protection of vegetation, preservation and conservation of legal reserve areas, forest exploitation, supply of forest material, control of the origin of forest products and control and prevention of forest fires.⁸³ The provisions enacted in this law are applicable to lands owned by private parties (not to public protected areas, which are governed by other legal provisions). The reason of this is due to the amount of native vegetation and that remains in private lands.⁸⁴ The Brazilian Forest Law in 2012 is a modification of previous environmental legislation (Brazilian Forest Code – 1965).⁸⁵

The objective of the Brazilian Forest Law is to limit deforestation and promote forest restoration in illegally deforested areas. It has several guiding principles that aim to protect the forest while maintaining its role in the economic development of the country. Some of the guiding principles of the Brazilian Forest Law are that: (i) forests must be considered as an assets of common interest to all inhabitants in Brazil, (ii) the Brazilian state is committed to the protection and preservation of its forests and other kind of native vegetation and biodiversity (including soil, water, climate), (iii) the role of economic production in the recovery and maintenance of forests and the importance of sustainability in agricultural production, (iv) the creation of a sustainable development model, combining the productive use of land with the protection of the forest, (v) the importance of governmental action when protecting the forests, (vi) the common responsibility of different tiers

⁸⁰ Alberto A Villela and others, 'Status and Prospects of Oil Palm in the Brazilian Amazon' (2014) 67 *Biomass and Bioenergy* 270 <<https://www.sciencedirect.com/science/article/pii/S0961953414002542>> accessed 18 May 2023.

⁸¹ Rajão and others (n 77).

⁸² 'L12651' <http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/lei/L12651.htm> accessed 17 April 2023.

⁸³ Art 1 of the Brazilian Forest Law.

⁸⁴ Paulo André Tavares and others, 'Testing Temporal Benchmarks Effects on the Implementation of the New Brazilian Forest Act' (2021) 126 *Environmental Science & Policy* 213 <<https://www.sciencedirect.com/science/article/pii/S1462901121002768>> accessed 18 April 2023.

⁸⁵ Nature Portfolio Earth and Environment Community, 'The Brazilian Forest Code and the Fate of Natural Vegetation Cover in Private Lands 10 Years after Its Last Review of 2012' (*Nature Portfolio Earth and Environment Community*, 12 April 2023) <<http://earthenvironmentcommunity.nature.com/posts/the-brazilian-forest-code-and-the-fate-of-natural-vegetation-cover-in-private-lands-10-years-after-its-last-review-of-2012>> accessed 19 May 2023.

of government and the inhabitants of Brazil in the implementation of policies to preserve and restore the native vegetation and its ecological and social functions, (vii) the promotion of innovation for sustainable land use and, (viii) the implementation of legal and economic incentives to promote the protection and restoration of forests.⁸⁶

The modifications introduced to the Brazil Forest Law in 2012 were criticized for being more flexible in relation to the environment protection with respect to the former Forest Code.⁸⁷ As will be seen below, some of the amendments introduced in the Brazilian Forest Law reduce the requirements for conservation and restoration of large areas of vegetation.⁸⁸ The main characteristics of the Brazilian Forest Law are:

- (ii) Mandatory recovery of the permanent preservation areas (*Áreas de Preservação Permanente* - APP) and Legal Forest Reserve

The Brazilian Forest Law includes some instruments for conservation and restoration on private lands: Permanent Preservation Areas and the Legal Forest Reserves (Articles 61 to 68 of the Brazilian Forest Law).

Permanent Preservation Areas are natural areas with a specific protection and designation, since its preservation has been identified as vital for the conservation of essential functions of the ecosystems.⁸⁹ These areas serve purposes, such as, ensuring water supply, regulating climate cycles, protecting the stability and essential characteristics of the land, and conserving biodiversity. This can be the case of lakes, mangroves, wetlands, steep slopes, among others. According to the Brazilian Forest Law, the vegetation in the Permanent Preservation Areas must be conserved intact and, therefore, cannot undergo any alteration. This law also establishes specific restrictions according to the geographical conditions and physical attributes of each preserved area.

On the other hand, legal forest reserves correspond to percentages of land in a private property area that landowners must maintain as a legal forest reserve (regardless of the size of the

⁸⁶ 'L12651' (n 82).

⁸⁷ 'Brazil's Congress Approves Controversial Forest Law' *BBC News* (26 April 2012) <<https://www.bbc.com/news/world-latin-america-17851237>> accessed 19 May 2023.

⁸⁸ Community (n 85).

⁸⁹ Alexandre Rosa dos Santos and others, 'Influence of Relief on Permanent Preservation Areas' (2016) 541 *Science of The Total Environment* 1296 <<https://www.sciencedirect.com/science/article/pii/S0048969715308421>> accessed 19 May 2023.

property).⁹⁰ The legal forest reserve is a portion of the property that must maintain the native vegetation, without any type of alteration that may affect it. One of the main objectives of the legal forest reserve is to guarantee the biodiversity conservation, the maintenance of the ecosystem's services and the sustainability on the use of natural resources on private land.⁹¹ The proportion that should be allocated to the legal reserve depends on several factors, such as the type of vegetation and the biome. The legal reserve can vary from 20% in the Cerrado⁹² to 80% if the property is located in the legal Amazon.⁹³

Although the protection of the land in Brazil through the Permanent Preservation Areas and Legal Forest Reserves it has been found that since the modification of the Brazilian Forest Law in 2012 around 54% of deforestation in private lands in the Amazon occurred in the Legal Forest Reserves.⁹⁴ Additionally, instruments such as de Permanent Preservation Areas and the Legal Forest Reserve have been criticized by the agribusiness sector and some political parties for being restrictive in relation to the owner's property rights.⁹⁵ These critics have opened the debate before the Brazilian parliament towards a flexibilization on the protection of forest, for example, through the reduction of penalties for past illegal deforestation.⁹⁶ When the Brazilian Deforestation Law was discussed in 2012, one of the points that generated controversy and criticism was the mechanisms that make it possible to substantially reduce the amount of native vegetation protected by the legal reserve.⁹⁷ According to article 68 of the Brazilian Forest Law, if the native vegetation was converted without any violation of the legal provisions applicable to the time of the conversion, the landowners could be waived from the legal forest reserve obligation. More recently, in 2019, the Brazilian Senate presented a project aimed to remove completely the forest

⁹⁰ Paulo André Tavares and others, 'Unfolding Additional Massive Cutback Effects of the Native Vegetation Protection Law on Legal Reserves, Brazil' (2019) 19 *Biota Neotropica* e20180658 <<http://www.scielo.br/j/bn/a/hwppWd46HzJb8STk3639Scp/abstract/?lang=en>> accessed 19 April 2023.

⁹¹ Jean Paul Metzger and others, 'Why Brazil Needs Its Legal Reserves' (2019) 17 *Perspectives in Ecology and Conservation* 91 <<https://www.sciencedirect.com/science/article/pii/S253006441930118X>> accessed 19 April 2023.

⁹² The "Cerrado" is a tropical and subtropical biome in Brazil, with a big variety of ecosystems, vegetation and species. 'Cerrado: Brazil's Tropical Woodland' (*Mongabay*) <<https://rainforests.mongabay.com/cerrado/>> accessed 24 May 2023.

⁹³ Tavares and others (n 84).

⁹⁴ Community (n 85).

⁹⁵ Metzger and others (n 91).

⁹⁶ Reuters, 'Brazil "invites Deforestation" with Overhaul of Environmental Laws' *The Guardian* (1 March 2018) <<https://www.theguardian.com/world/2018/mar/01/brazil-amazon-protection-laws-invite-deforestation-ngo>> accessed 19 April 2023.

⁹⁷ Tavares and others (n 84).

legal reserve (*Projeto de Lei n. 2362/19*).⁹⁸ Some of the arguments that motivated this proposal was the stimulation of the economic development in Brazil.⁹⁹ Although this law proposal was withdraw¹⁰⁰, it shows the effects that the political interest of the transitory government may have in the approach of the environmental legal provisions.

(iii) Special regime under the Brazilian Forest Law

The Brazilian Forest Law includes a special regime, with some exceptions, for properties in which the illegal clear-cut was carried out prior to July 2008. Pursuant to this provision, the owners of land in which illegal deforestation occurred prior to July 2008 may access special benefits if they make part of the Environmental Regularization Program (*Programa de Regularização Ambiental - PRA*). The benefits for the owners that make part of this program include the application of more flexible requirements in relation to the conservation of the Permanent Preservation Areas and the Legal Forest Reserve.¹⁰¹

In relation to the Permanent Preservation Areas the special regime reduces the extent of land that must be restore by landowners. Additionally, the special program also eliminates the obligation for the owners of these lands to recover the areas that were illegally deforested before 2008.

(iv) Rural Environmental Registry – CAR

The Environmental Rural Registry in Brazil (the “CAR”) is a mandatory registration for owners of private forest lands in Brazil.¹⁰² It was introduced in the Brazilian Forest Law (Article 29) and has a main purpose the integration of all the information of properties with forest land and provide a database with the most important information needed to monitor the forests. The CAR includes geo-referential system and satellite data to keep track of forest coverage in Brazil. The CAR gathers information related to the Permanent Preservation Areas, the Legal Reserves, the forests and remnants of native vegetation, among others.¹⁰³ The main purpose of the CAR is to promote

⁹⁸ ‘PL 2362/2019 - Senado Federal’ <<https://www25.senado.leg.br/web/atividade/materias/-/materia/136371>> accessed 19 May 2023.

⁹⁹ Metzger and others (n 91).

¹⁰⁰ ‘PL 2362/2019 - Senado Federal’ (n 98).

¹⁰¹ ‘L12651’ (n 82).

¹⁰² ‘The Environmental Rural Registry (CAR)’ <<http://redd.mma.gov.br/pt/pub-noticias-principais/item/280-the-environmental-rural-register-car>> accessed 19 May 2023.

¹⁰³ *ibid.*

the implementation and enforcement of the deforestation law in Brazil and protect the environment.

The enforcement of the Brazilian Forest Law is a key point to protect the biodiversity of the entire country. According to a research comparing a scenario of full implementation of the Brazilian Forest Law with a non-enforcement one, the negative impact that the lack of law enforcement could have would result in the loss of forest, but also the loss of natural habitats and species.¹⁰⁴ According to this study, in a scenario of low law-enforcement, at least five percent of the species could lose their habitat.¹⁰⁵ On the other hand, if the environmental law is enforced, there could be an increase in the number of species as their habitat would be protected.¹⁰⁶

Another reason that motivated the creation of the CAR was the need to centralize in the federal government the registration of the private forest lands in Brazil, in order to create a national registry with all the information of the private owners of the forest land. The CAR is one of the most important steps taken in Brazil to regularize the rural properties, consolidate a registry of private lands and identify critical areas.¹⁰⁷ Although the registration process in the CAR has been significant across the country, there has been challenges in the phase of analysis and validation of the information provided by the owners of the land, due to inconsistencies found¹⁰⁸.

(v) Documento de Origem Florestal – DOF

In addition to the CAR, Brazil also implemented a domestic timber traceability tool called *Documento de Origem Florestal* – DOF. The DOF is a federal tracking system to keep control of the harvest, transport and storage of forest products from native forests in Brazil. One of the objectives of having a DOF system is to collect all the information related to the places where harvesting takes place and increase the efforts to enforce deforestation laws in these places.

¹⁰⁴ Rebecca Catherine Brock and others, ‘Implementing Brazil’s Forest Code: A Vital Contribution to Securing Forests and Conserving Biodiversity’ (2021) 30 *Biodiversity and Conservation* 1621 <<https://doi.org/10.1007/s10531-021-02159-x>> accessed 17 April 2023.

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*

¹⁰⁷ Iris Roitman and others, ‘Rural Environmental Registry: An Innovative Model for Land-Use and Environmental Policies’ (2018) 76 *Land Use Policy* 95 <<https://www.sciencedirect.com/science/article/pii/S026483771730159X>> accessed 24 May 2023.

¹⁰⁸ Andrea A Azevedo and others, ‘Limits of Brazil’s Forest Code as a Means to End Illegal Deforestation’ (2017) 114 *Proceedings of the National Academy of Sciences* 7653 <<https://www.pnas.org/doi/10.1073/pnas.1604768114>> accessed 19 May 2023.

Although the DOF system has been seen as a sophisticated tool to control trade in products produced under conditions of illegal deforestation, it has not been completely effective as it is not fraud-proof.¹⁰⁹ This has allowed irregularities to appear in relation to the legal limits of deforestation, without having been registered in the DOF.¹¹⁰

3.2.3. Mandatory due diligence in the EU Timber Regulation

Both EU Timber Regulation and the new Proposal for a Regulation on Deforestation-free Products provide for a mandatory due diligence that operators must carry out before placing certain kind of products within the EU. This section analyzes the definition and general characteristics of a due diligence process, and the specific characteristics of the mandatory due diligence under the EU Timber Regulation. It also includes a review of two important cases solved by the local courts in Sweden (*Skogsstyrelsen v Almträ Nordic and Skogsstyrelse v Pimpanel*) in which the Courts interpreted the mandatory due diligence in the EU Timber Regulation and provided some criteria to define its scope.

(i) General characteristics of a due diligence procedure

The mandatory due diligence provided in the EU Timber Regulation requires the adoption of a management system which serves to identify, avoid and reduce risks from illegal timber harvesting.¹¹¹ The term due diligence comes from the Latin *diligentia* which means care. The opposite of diligence is negligence, and the degree of diligence required will depend on the circumstances in which it is applied. In general, in the private and corporate sector, a due diligence has been defined as process that serves to manage business risks.¹¹² The objective of a due diligence in the business field most of the times is to confirm facts related to the company or data that is been analyzed and compare these findings with the value of the company, the price and the risks associated with a commercial transaction related to that company.¹¹³ The risks that are

¹⁰⁹ Metodi Sotirov and others, 'Policy Options to Regulate Timber and Agricultural Supply-Chains for Legality and Sustainability: The Case of the EU and Brazil' (2022) 144 *Forest Policy and Economics* 102818 <<https://www.sciencedirect.com/science/article/pii/S1389934122001319>> accessed 7 April 2023.

¹¹⁰ Franco Perazzoni, Paula Bacelar-Nicolau and M Painho, 'Geointelligence against Illegal Deforestation and Timber Laundering in the Brazilian Amazon' (2020) 9 *ISPRS International Journal of Geo-Information* 398.

¹¹¹ Henn (n 61).

¹¹² Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28 *European Journal of International Law* 899 <<https://doi.org/10.1093/ejil/chx042>> accessed 28 April 2023.

¹¹³ *ibid.*

identified in a due diligence can be of many types: (i) legal, to identify non-compliance with local regulations, (ii) financial, to identify inconsistencies in the company's economy or (iii) operational, to identify risks associated with the operation of the business.¹¹⁴ The verification of compliance with local environmental standards is usually located in the legal analysis during the due diligence.

The concept of due diligence has been mostly used in the business field as a voluntary due diligence.¹¹⁵ However, the mandatory due diligence has gained relevance in the last decades, such as the one provided by the EU Timber Regulation,¹¹⁶ and other kind of regulations focus on the compliance with social standards of production.¹¹⁷ Now, the difference between a voluntary due diligence and a mandatory one is that, when carrying out the first one, the company is usually interested in knowing the risks of the other company before continuing with the transaction. In other words, it is their responsibility that the due diligence is carried out efficiently and identifies as many risks as possible.¹¹⁸ Otherwise, the company may enter into a highly risky transaction. On the contrary, the mandatory due diligence, like the one required in the EU Timber Regulation, is based on a legal obligation that requires a company to verify the risks taken by another company. However, the company carrying out the due diligence does not have an interest, *per se*, in exercising the due diligence or achieving certain degree of results.¹¹⁹ This may constitute a challenge on the effectiveness of the mandatory due diligence under the EU Timber Regulation.

(ii) Mandatory due diligence under the EU Timber Regulation

¹¹⁴ Arthur H Rosenbloom, *Due Diligence for Global Deal Making: The Definitive Guide to Cross-Border Mergers and Acquisitions, Joint Ventures, Financings, and Strategic Alliances* (John Wiley & Sons 2010).

¹¹⁵ David Weihrauch, Sophia Carodenuto and Sina Leipold, 'From Voluntary to Mandatory Corporate Accountability: The Politics of the German Supply Chain Due Diligence Act' n/a Regulation & Governance <<https://onlinelibrary.wiley.com/doi/abs/10.1111/rego.12501>> accessed 24 May 2023.

¹¹⁶ Heike Krieger, Anne Peters and Leonhard Kreuzer, *Due Diligence in the International Legal Order* (Oxford University Press 2021).

¹¹⁷ John Humphrey and Hubert Schmitz*, 'Governance in Global Value Chains' (2001) 32 IDS Bulletin 19 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1759-5436.2001.mp32003003.x>> accessed 24 May 2023.

¹¹⁸ Eva Van Der Zee, 'How Voluntary and Mandatory Due Diligence Requirements Affect Corporate Compliance: Insights from Motivational Crowding Theory' (European University Institute 2022) Working Paper <<https://cadmus.eui.eu/handle/1814/74563>> accessed 24 May 2023.

¹¹⁹ *ibid.*

The EU Timber Regulation requires operators¹²⁰ to exercise a due diligence in relation to the timber or timber products¹²¹ that are placed in the EU. The mandatory due diligence under this Regulation has as three general purposes: being an incentive for timber producers around the world to comply with environmental laws; prevent companies in the EU from importing illegal timber to the EU and prevent European consumers from consuming timber that was produced under illegal deforestation conditions.¹²²

As a specific purpose, the mandatory due diligence seeks to secure that the information related to the production of the goods and the conditions in which the timber or timber products were produced is trustful.¹²³ The EU Timber Regulation requires that the mandatory due diligence include, at least, the following three elements: (i) collection of information about the supplier's compliance of the law, (ii) a risk assessment procedure and (iii) a risk mitigation procedure (art 6 of the EU Timber Regulation).

When carrying out the first step, that is, identifying the procedures that will be used in order to collect all relevant information, the operator has to consider information such as the origin of the timber, its properties, the information of the supplier, the country of harvest, the compliance of the product with local forestry law in the country of origin, among others (art 6 of the EU Timber Regulation).

After recollecting the relevant information of the supplier, the operator must carry out a risk assessment (art 6 of the EU Timber Regulation). During the risk assessment the operator has to analyze the information collected about the product, the supplier and the place of origin, in order to identify risks related to the non-compliance with local standards on deforestation. In general, when assessing the impacts of an activity on the environment, operators shall consider all factors

¹²⁰ According to the EU Timber Regulation 'operators' means "any natural or legal person that places timber or timber products on the market" (art 2 of the EU Timber Regulation).

¹²¹ According to art 2 of the EU Timber Regulation the definition of "timber" and "timber products" is "the timber and timber products set out in the Annex, with the exception of timber products or components of such products manufactured from timber or timber products that have completed their lifecycle and would otherwise be disposed of as waste, as defined in Article 3(1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste".

¹²² Boelling Niels (ENV), 'Expert Group on the EU Timber Regulation and the Forest Law Enforcement, Governance and Trade (FLEGT) Regulation Guidance Document - Due Diligence' <<https://policycommons.net/artifacts/3367786/expert-group-on-the-eu-timber-regulation-and-the-forest-law-enforcement-governance-and-trade-flegt-regulation-guidance-document/4166450/>> accessed 3 May 2023.

¹²³ Zeitlin (n 55).

related to the activity that is been assessed and that can generate a risk.¹²⁴ As stated in art 6 of the EU Timber Regulation, this may include certifications or verified schemes carry out by third parties.

As a last step, in case the operator finds during the risk assessment that there is a potential risk, they should carry out a risk mitigation procedure. The main objective of the risk mitigation procedure is for the operator to verify that the timber or timber products were legally produced. On this stage the operator can, for example, request more information from the importer or, if necessary, request an audit by an independent third party to guarantee the legality of the timber. The EU Commission pointed out that, if after this procedure the operator does not have enough evidence about the legality of the timber, it should refrain from placing that timber on the EU market and choose another supplier.¹²⁵ Now, the EU Timber Regulation provides for two exceptions to the mandatory due diligence. When the timber or the timber products have a CITES license or a FLEGT license originating from a FLEGT partner country, they are considered as been harvested under legal conditions, thus, the operator is exempted to carry out a due diligence (art 3 of the EU Timber Regulation).

The implementation of the mandatory due diligence laid out in the EU Timber Regulation has been problematic due to its lack of clarity. Although the objective of the mandatory due diligence is to verify that the timber and timber products were produced under legal conditions, it has been argued that the scope of the requirement is not clear and the obligation lacks description.¹²⁶ However, the Administrative court in Jönköping, Sweden, ruled in two renewed local cases (in 2016 and 2019) providing an interpretation of the mandatory due diligence under the EU Timber Regulation and clarifying its scope.

Skogsstyrelsen v Almträ Nordic (2016)

¹²⁴ John Glasson and Riki Therivel, *Introduction to Environmental Impact Assessment* (Routledge 2013).

¹²⁵ Commission Staff Working Document Fitness Check on Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (the EU Timber Regulation) and on Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community (FLEGT Regulation) Accompanying the document Proposal for a Regulation of the Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (n 64).

¹²⁶ Levashova (n 18).

In October 2016 the administrative court in Jönköping, Sweden ruled in *Skogsstyrelsen v Almträ Nordic*¹²⁷ and concluded that the company was in breach of the EU Timber Regulation. The Skogsstyrelsen, national competent authority in Sweden responsible for the enforcement of the EU Timber Regulation,¹²⁸ initiated an administrative procedure against the company Almträ Nordic for an alleged breach of the mandatory due diligence. According to the Administrative court of Jönköping the due diligence carried out by the company on a teak shipment from Myanmar was not sufficient to verify the legality of the harvest, transport, and trade. The Court found that the due diligence carried out by the company only consisted of a folder with documents (the ‘Green Folder’) which included permits issued by a company that owns the monopoly of selling timber in Myanmar (the ‘Myanmar Timber Enterprise’).¹²⁹

This was the first case in Sweden in which a court clarified the scope of the mandatory due diligence under the EU Timber Regulation. According to the court, the reliance on documents such as the ones in the ‘Green Folder’ was not a sufficient due diligence. The Court pointed out at least two measures that operators importing timber from another country must implement in order to comply with the mandatory due diligence. First, when the timber is imported from a country with high risk of illegality the operator must be able to track the timber to the place where it was harvested from. There can be inspections, audits or laboratory analysis in order to identify the place where the timber is coming from. Second, the risk assessment must provide information regarding the legality of the harvest. In the case of Myanmar, the Court highlighted that, considering the history of illegal timber in Myanmar, the risk assessment should have shown that the license and other documents provided in the ‘Green Folder’ were not enough to mitigate the risk.¹³⁰

Swedish Forest Agency v Pimpanel

¹²⁷ Förvaltningsrätten Jönköping (Administrative Court Jönköping) 5 October 2016, Case nr. 2095-16, *Almträ Nordic AB v Skogsstyrelsen*.

¹²⁸ Swedish Forest Agency, ‘Swedish Forest Agency’ (2023) <<https://www.skogsstyrelsen.se/en/>> accessed 20 April 2023.

¹²⁹ ‘Swedish Court Rules Myanmar “Green Book” Inadequate for EU Importers’ (*Ecosystem Marketplace*) <<https://www.ecosystemmarketplace.com/articles/swedish-court-rules-myanmar-green-book-inadequate-eu-importers/>> accessed 7 May 2023.

¹³⁰ Preferred by Nature, ‘Swedish Court Case Clarifies Due Diligence Required for Myanmar Timber’ (*Preferred by Nature*, 12 January 2016) <<https://www.preferredbynature.org/newsroom/swedish-court-case-clarifies-due-diligence-required-myanmar-timber>> accessed 24 May 2023.

In June 2019 the Swedish Forest Agency initiated another administrative investigation against the company Pimpanel for placing timber from an Ukrainian company related to Viktor Sivets, a person known for having investigations related to corruption in the Ukraine's forestry agency. The investigation concluded on an imposition of a ban by the Swedish Forest Agency against Pimpanel, preventing it to import timber or timber products (as defined by the EU Timber Regulation) until an appropriate due diligence was carried out in order to verify the legality of the timber. Despite the notification to the company of the ban in 2019, it continued to import timber from the Ukrainian company, without following the recommendations made by the Swedish Forest Agency. In order to avoid the legal consequences of not complying with the ban the company received the imported timber through a subsidiary. However, in May 2021 the administrative court in Jönköping fined the company a total of SEK360.000 (\$43,000 approx.) for noncompliance with the EU Timber Regulation.¹³¹

As was seen in this Section, the EU Timber Regulation describes in general the steps and requirements of the mandatory due diligence. However, two of the biggest challenges in relation to the effective implementation of the Regulation relates to the definition of legal/illegal deforestation (as shown in the case of Ukraine) and the lack of clarity on the interpretation and the scope of the mandatory due diligence (as shown in the case of Myanmar).

3.3. The new EU Regulation on Deforestation-free Products (2021)

The policies implemented through the FLEGT Action Plan, the FLEGT Regulation and the EU Timber Regulation were focused on the environmental issues associated with the illegal harvesting of timber and timber products. Nonetheless, on 17 November 2021, as part of the EU Green Deal, the European Commission launched a proposal for a new EU Regulation on Deforestation-free Products, which will repeal the EU Timber Regulation.¹³² The main objective of this proposal is to curb deforestation provoked from the EU import, consumption and production of other kind of commodities, and not only timber, as show below.

¹³¹ Earthsight, 'Swedish Court Fines Company for Ukrainian Timber Purchases That Flouted EUTR, Following Earthsight Investigation' (2021) <<https://www.earthsight.org.uk/news/blog-swedish-court-fines-company-for-ukrainian-timber-purchases-that-flouted-EUTR-following-earthsight-investigation>> accessed 24 May 2023.

¹³² Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (n 16).

Although the text of this proposal keeps some of the provisions and characteristics from the EU Timber Regulation, it introduces changes that aim to expand the scope of protection of the forests in relation to the deforestation caused by the production of other commodities (and not only timber). This section compares the main changes and innovations introduced in the proposal for a EU Regulation on Deforestation-free Products in relation to the EU Timber Regulation.

3.3.1. Current legal debate for the implementation of a new deforestation regulation

The proposal for a new EU Regulation on Deforestation-free Products was first announced on the Commission Communication on Stepping up EU Action to Protect and Restore the World's Forests in 2019,¹³³ where the EU Commission committed to implement additional measures of deforestation free supply chains. This commitment was also included in the European Green Deal,¹³⁴ the Biodiversity Strategy for 2030,¹³⁵ and the Farm to Fork Strategy.¹³⁶ There were at least three main reasons exposed by the EU Commission that motivated the proposal for a new EU Regulation on Deforestation-free Products. First, the scientific evidence around the effects of deforestation in the environment, not only associated to the logging of timber but also in relation to the production of other kind of products. Second, the need to implement strategies at EU level to combat the greenhouse gas emission coming from deforestation and forest degradation, recognizing that both the EU and the international trade are main drivers of deforestation and forest degradation worldwide. Last, the need of improve the inefficiencies found in the implementation of the previous legal systems applicable to illegal deforestation in the EU (the FLEGT Regulation and the EU Timber Regulation).¹³⁷ As stated in the preamble of the proposal for a new EU Regulation on Deforestation-free Products this will repeal the EU Timber Regulation, however this proposal it's still on debate in the European Parliament.

¹³³ Communication From the Commission to The European Parliament, The Council, The European Economic and Social Committee Stepping up EU Action to Protect and Restore the World's Forests 2019.

¹³⁴ Communication From the Commission to The European Parliament, The Council, The European Economic and Social Committee Stepping up EU Action to Protect and Restore the World's Forests 2019.

¹³⁵ Communication From the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions EU Biodiversity Strategy for 2030 Bringing nature back into our lives 2020.

¹³⁶ Social Committee and the Committee of the Regions, A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, COM/2020/381 final.

¹³⁷ Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (n 16).

On October 2020 the EU Parliament adopted a resolution requesting the EU Commission to propose a new legal framework to reverse EU-driven global deforestation (based on art 225 TFEU). The report on the proposal for the new Regulation on Deforestation-free Products was launched by the EU Commission on November 17, 2021. On September 9, 2022, the first debate took place in the European Parliament and on September 13 of that same year the European Parliament reported the amendments adopted (in the light of art 294 TFEU). At the date of filing this research (May 24, 2023), the most recent update in the debate process of the new Regulation on Deforestation-free Products was on April 19, 2023, date in which the European Parliament issued a legislative resolution after the first reading by the EU Parliament of the proposal for new Regulation on Deforestation-free Products.¹³⁸ This new regulation is expected to be ratified in 2023.¹³⁹

3.3.2. Main changes introduced in the new EU Regulation on Deforestation-free Products

(i) Scope of application

One of the main changes introduced in the new EU Regulation on Deforestation-free Products in relation to EU Timber Regulation is the extension of the scope *ratione materiae* to the agricultural use of land on the production of other relevant products (and not only timber), such as cattle, palm oil, soy, cocoa, coffee and their derivative products, as listed in Annex 1 of the proposal (this research will make reference to the relevant products and their derivatives as the "Relevant Commodities").¹⁴⁰

The extension on the scope of the new regulation to the Relevant Commodities was due to the scientific evidence showing two things. First, that the production of those products was directly related to global deforestation. Second, that the EU consumption of at least six of those eight kinds

¹³⁸ 'Procedure File: 2021/0366(COD) Legislative Observatory European Parliament' <[https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2021/0366\(COD\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2021/0366(COD))> accessed 24 May 2023.

¹³⁹ European Parliament, 'Parliament Adopts New Law to Fight Global Deforestation | News | European Parliament' (19 April 2023) <<https://www.europarl.europa.eu/news/en/press-room/20230414IPR80129/parliament-adopts-new-law-to-fight-global-deforestation>> accessed 26 April 2023.

¹⁴⁰ The relevant commodities that are covered in this proposal are: cattle, wood, palm oil, soy, cocoa, and coffee and their derivative products. Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.

of products (palm oil, soy, wood, cocoa, coffee and beef) was representing the largest share of EU-driven deforestation.¹⁴¹

(ii) Definition of operator

The new EU Regulation on Deforestation-free Products modified the definitions of operator and trader, clarifying that the operator needs to place the Relevant Commodities on the market in the course of a commercial activity. Additionally, it incorporates a difference between large traders (that are not SME's) and SME's. It recognizes that large traders may have an influence on supply chains, thus play a key role to ensure that the Relevant Commodities are deforestation-free. Therefore, it differentiates between obligations applicable to large traders and obligations applicable to SME's.

Table 1: Comparison of art 2 (c) and (d) of the EU Timber Regulation and art 2 (12) and (13) of the proposal for a new EU Regulation on Deforestation-free Products

	EU TIMBER REGULATION	NEW REGULATION ON DEFORESTATION FREE PRODUCTS
Definition of operator	'operator' means any natural or legal person that places timber or timber products on the market; 'trader' means any natural or legal person who, in the course of a commercial activity, sells or buys on the internal market timber or timber products already placed on the internal market	'operator' means any natural or legal person who, in the course of a commercial activity, places relevant commodities and products on the Union market or exports them from the Union market; 'trader' means any natural or legal person in the supply chain other than the operator who, in the course of a commercial activity, makes available on the Union market relevant commodities and products

(iii) Definition of deforestation

Another of the main changes introduced in the new EU Regulation on Deforestation-free Products in relation to the EU Timber Regulation was on the definition of "deforestation-free". As was explained in the section 3.2 of this research, under the EU Timber Regulation the production of timber or timber products was considered legal if the timber was harvested in compliance with the legislation of the country of harvest. Nevertheless, the EU Commission impact assessment of the effectiveness of the EU Timber Regulation showed the necessity of setting common requirements for the commodities that are placed on the EU, in order to prevent loopholes on the legal

¹⁴¹ *ibid* para 27 of the Preamble.

deforestation.¹⁴² Therefore, new EU Regulation on Deforestation-free Products clarified the conditions for a Relevant Commodity to access the EU market: (i) the products must be deforestation-free; (ii) the products must have been produced in accordance with the relevant legislation of the country of production; (iii) the products are covered by a due diligence statement in accordance with Article 4 (2) of the Regulation.

Table 2: Comparison of art 2 (f) of the EU Timber Regulation and art 3 of the proposal for a new EU Regulation on Deforestation-free Products

	EU TIMBER REGULATION	NEW REGULATION ON DEFORESTATION FREE PRODUCTS
Definition of deforestation	‘Legally harvested’ means harvested in accordance with the applicable legislation in the country of harvest	Relevant commodities and products may be placed or made available on the Union market, or exported from the Union market only if all the following conditions are fulfilled: (a) they are deforestation-free; (b) they have been produced in accordance with the relevant legislation of the country of production; and (c) they are covered by a due diligence statement as laid down in art 4(2)

As seen before, although the new proposal for an EU Regulation on Deforestation-free Products keeps the requirement that commodities must be produced in accordance with the relevant legislation in the country of production, it introduces two other criteria to define whether a product can be placed in the EU.

In relation to the "deforestation-free" definition, the new Regulation states in the preamble that it “should be sufficiently broad to cover both deforestation and forest degradation”¹⁴³ and provides some criteria that can serve to identify the scope of this term. According to art 2 (6) a commodity is considered to be produced under forest degradation conditions if the harvesting operation was not sustainable, causing a “reduction or loss of the biological or economic productivity and complexity of forest ecosystems, resulting in the long-term reduction of the overall supply of benefits from forest, which includes wood, biodiversity and other products or services”.

¹⁴² COWI and others, *Impact Assessment Study for the Revision of the Product Scope of the EU Timber Regulation: Final Report* (Publications Office of the European Union 2019) <<https://data.europa.eu/doi/10.2779/77513>> accessed 24 May 2023.

¹⁴³ Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 para 26 of the Preamble.

Additionally, it states that a ‘sustainable harvesting operations’ implies the maintenance of elements such as soil quality and biodiversity to reduce negative impacts on the environment when harvesting. Finally, it sets a cut-off date for the definition of deforestation-free to be applicable and is December 31, 2020. This means that the entry of Relevant Commodities in the EU is prohibited if they were produced under conditions of deforestation or forest degradation only after that date.

(iv) Mandatory due diligence

The new EU Regulation on Deforestation-free Products, following the EU Timber Regulation, established as a cornerstone the mandatory due diligence system. One of the main objectives of the new Regulation is to improve the procedures set up in the EU Timber Regulation in relation to the mandatory due diligence.¹⁴⁴ According to art 4 of the new Regulation, operators placing Relevant Commodities must carry out a due diligence to ensure that only deforestation-free products are marketed within the EU. It also states that the main purpose of the mandatory due diligence is to verify that the Relevant Commodities placed in the EU comply with art 3 (a) and (b) of the Regulation and it needs to include, at least, the following sections: a collection of information, a risk assessment and a risk mitigation procedure.

Table 3: Comparison of art 6 of the EU Timber Regulation and art 8 of the proposal for a new EU Regulation on Deforestation-free Products

	EU TIMBER REGULATION	NEW REGULATION ON DEFORESTATION FREE PRODUCTS
Characteristics of the due diligence	The due diligence system for operators includes the following measures: (i) Measures and procedures that allow the access to relevant information of the operator’s supply of timber or timber products. (ii) Risk assessment procedures to allow the operator to evaluate the risk of illegality of the timber or the timber products. And (iii) When there is a risk identified in the risk assessment procedure, the operator shall carry out a risk mitigation procedure to minimize those risks.	Prior to placing relevant commodities and products on the market or before exporting them, operators shall exercise due diligence with regard to all relevant commodities and products supplied by each particular supplier. The due diligence shall include: (a) the collection of information and documents needed to fulfil the requirements set out in Article 9; (b) risk assessment measures as referred to in Article 10; (c) risk mitigation measures as referred to in Article 10.

¹⁴⁴ COWI and others (n 142).

In relation to the first requirement, that is, the *collection of information*, the new EU Regulation on Deforestation-free Products brings a more detailed explanation of the scope of this requirement, compared to the EU Timber Regulation. Section 9 of new EU Regulation on Deforestation-free Products provides a list of the information that must be collected by the operator. One of the biggest innovations of the new Regulation is the requirement to collect information related to the geo-location coordinates, latitude and longitude of the plots of land where the Relevant Commodities and products were produced. The EU Commission highlighted in the proposal that the geo-location of the land is essential to monitor the conditions of deforestation. In this way, requiring the operator for the exact coordinates of the place of production and the geographical information of the plot of land facilitates the verification of information and the legality of production. The Geolocation Requirement in the new EU Regulation on Deforestation-free Products has already generated concerns by industry stakeholders.¹⁴⁵ It has been argued that this requirement could increase the exclusion of smallholders from EU supply chains, considering that the provision of geo location information requires an economic investment that not all smallholders could afford. Additionally, it was argued that the increase in the costs of production could result in an increase on the prices of the Relevant Commodities, affecting consumers in the EU.¹⁴⁶

Moving on to the second requirement, that is, the *risk assessment*, the new EU Regulation on Deforestation-free Products provides some criteria that must be consider by operators when carrying out the risk assessment. According to it, operators shall analyze the information collected to verify if there is a risk that the Relevant Commodities are not in compliance with the requirements of the Regulation. It prohibits operators to place the Relevant Commodities in the EU if they cannot demonstrate that the risk of non-compliance is negligible. Additionally, it includes a list of criteria that must be considered by the operator when carrying out the risk assessment. Some of these criteria relates to the sources of the information collected, its reliability, validity, the level of corruption in the country of origin, lack of law enforcement, among others.

Finally, in relation to the third requirement, that is, the *risk mitigation*, the new EU Regulation on Deforestation-free Products follows the same pattern of the EU Timber Regulation, without

¹⁴⁵ Michael Rice, ‘Getting to “Deforestation-Free”’: Clarifying the Traceability Requirements in the Proposed EU Deforestation Regulation’.

¹⁴⁶ *ibid.*

introducing any big change. According to art 9 of the new EU Regulation on Deforestation-free Products, if the operator cannot conclude that there is no risk in relation to the production of the Relevant Commodities, it shall adopt a risk mitigation procedure.

(v) Difference between operators and traders

The new EU Regulation on Deforestation-free differentiates between the due diligence requirement for operators and for traders, imposing the mandatory due diligence requirement to traders that are not SMEs.

Table 4: Comparison of art 4 (2) (3) and art 5 of the EU Timber Regulation and arts 4 and 6 of the proposal for a new EU Regulation on Deforestation-free Products

	EU TIMBER REGULATION	NEW REGULATION ON DEFORESTATION FREE PRODUCTS
Due diligence requirement for <u>operators</u>	Operators shall exercise due diligence when placing timber or timber products on the market and shall maintain and regularly evaluate the due diligence system which it uses, except where the operator makes use of a due diligence system established by a monitoring organization.	Operators are required to perform a due diligence in relation to all the Relevant Commodities prior to place them in the EU market. Operators are also required to inform the competent authorities of any new information that becomes available after the submission of the due diligence.
Due diligence requirement for <u>traders</u>	Traders in the supply chain are not required to carry out a due diligence. They are only required to identify the operators or traders who have supplied them or whom they have supplied timber or timber products. Traders are required to keep this information for at least five years and provided to the competent authority if required.	Large traders are subject to the same obligations as the operators, including the mandatory due diligence in art 4 of the Regulation. SMEs are required to keep a record of the suppliers and customers for at least five years and make the information available to the competent authority if requested. They are also requested to inform the competent authorities about any relevant information in relation to non-compliance of their commodities.

4. Analysis of the findings

The EU environmental policies analyzed in this research (FLEGT Action Plan, EU Timber Regulation and the new EU proposal for a Regulation on Deforestation-free Products) have as a common goal to curb deforestation and forest degradation, not only within the EU territory but also in third countries. This research found that all these policies have a common feature, that if effectively applied, could create a wave that will change the view of environmental responsibility in Europe and contribute to combat climate change. This feature is the EU's recognition of its responsibility for the consumption of goods that were produced under deforestation conditions or affecting the environment, even when deforestation is done outside the EU.

This research found that the implementation of the FLEGT Action Plan had as a strategy the negotiation of agreements with governments in third countries (where deforestation is carried out) to jointly define environmental protection standards against deforestation. This approach sought to influence the improvement of environmental standards in third countries through the agreement with them on the definition of those standards. Under the IEMEs, the FLEGT Action Plan sought to reach effects in third countries by the creation of incentives, but not through the implementation of prohibitions. As was seen in Section 3.1, when a country celebrates a voluntary partnership agreement (VPA) with the EU, it can implement the licensing scheme in the FLEGT Regulation. This means that the timber produced in a third country and that had a FLEGT license could be marketed in the European Union without any additional restrictions (at least not of an environmental nature). The emission of FLEGT licenses served as an incentive for third countries to celebrate VPAs with the EU, since their national companies could apply for an environmental certification (FLEGT license) and get access to the European market.¹⁴⁷ The implementation of the FLEGT Action Plan did not include any restriction or limitation to access the European market, which means that exporters from countries that had not celebrated a VPA with EU were not ban from accessing this market. Nevertheless, they had to comply with other legal requirements or controls.

¹⁴⁷ Christine Overdevest and Jonathan Zeitlin, 'Experimentalism in Transnational Forest Governance: Implementing European Union Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreements in Indonesia and Ghana' (2018) 12 Regulation & Governance 64 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/rego.12180>> accessed 22 May 2023.

Although the FLEGT Action Plan was seen as an innovative strategy to regulate deforestation, its implementation was not as effective, and it was even seen as a "passing fad".¹⁴⁸ One of the critics made to the FLEGT Action Plan was the complexity on the process to celebrate and implement VPAs.¹⁴⁹ As it was seen in Section 3.1, from the VPAs that the EU has celebrated only one is operating the FLEGT Regulation and issuing FLEGT licenses (Indonesia).

Unlike the FLEGT Action Plan, the EU Timber Regulation adopted a coercive and prohibitional approach. It imposed a prohibition to import and trade timber or timber products that were not produced legally, in accordance with the local environmental standards in third countries. This Regulation does not seek to influence, *per se*, the modification or implementation of new environmental standards in third countries. It seeks to promote the compliance of the applicable environmental standards in third countries, through the imposition of a restriction to operators in the EU. In this way, if timber producers do not comply with environmental standards in the country of harvest, EU operators are banned to import and trade their products in the EU. Under this Regulation, the responsible for carrying out this verification is the operator in the EU, through the execution of the mandatory due diligence.

This research found that the extraterritorial approach of the EU Timber Regulation had at least two effects. First, it involved companies in the EU in the verification of the compliance of their suppliers with the local environmental laws, unlike the FLEGT Action Plan and the FLEGT Regulation, that put verification of the compliance with environmental laws on the states. Under the EU Timber Regulation the responsibility of verifying the compliance with environmental standards is not only on the third states, but also becomes a responsibility for operators and consumers in EU countries. However, it was also found that the implementation of the mandatory due diligence requirement became a challenge for the operators, as showed in two court cases analyzed in Sweden, due to its lack of clarity. A further challenge is that the CJEU has not provided enough guidelines for the interpretation of the EU Timber Regulation. This can lead to a heterogeneous interpretation of this Regulation by different local courts.

Since the EU Timber Regulation focuses on enforcing local standards of deforestation, this thesis looked at the protection of the forests in third countries, using the case of Brazil. As shown

¹⁴⁸ Dlamini and Montouroy (n 40).

¹⁴⁹ *ibid.*

previously (Section 3.2.1 of this research), it was found that there are many factors that can affect the protection of forests in third countries, and that are not considered in the EU Timber Regulation. Local environmental laws in Brazil can easily be modified in the midst of political changes and the effective protection of the environment made more flexible. Additionally, the analysis in the case of Brazil showed possible challenges in the monitoring and enforcement of the national forest protection law, affecting the effectiveness of the EU Timber Regulation.¹⁵⁰ Finally, this research found that the forthcoming proposal on a Regulation on Deforestation-free Products seeks to remedy many of the challenges and deficiencies of the EU Timber Regulation.

The new Proposal for an EU Regulation on Deforestation-free Products also implements local measures with extraterritorial effects. However, unlike the EU Timber Regulation, the new Proposal seeks to impact deforestation in the EU and in other countries, in two different ways. On the one hand, as the EU Timber Regulation, it implements a mandatory due diligence. However, it specifies in detail each of the requirements of the obligation and the criteria that operators must consider when collecting the information and carrying out the risk assessment. This will overcome one of the great challenges in the implementation of the EU Timber Regulation, since the clarity on the scope of the mandatory due diligence will help operators to clarify the scope of the obligations and will provide the EU local Courts the legal criteria to assess its compliance. On the other hand, the new Proposal broadens the definition of deforestation, so as not to limit it to compliance with local law environmental standards but that products are actually deforestation-free. As seen before, the approach of the EU in relation to the due diligence was to define in detail each of the criteria and requirements to comply with this obligation. But in relation to the definition of deforestation, its approach was to broaden its scope and allow the inclusion of other parameters to verify if the product is deforestation-free.

¹⁵⁰ Environmental Due Diligence in EU Law Considerations for Designing EU (Secondary) Legislation by: David Krebs Geulen & Klinger Rechtsanwälte, Berlin publisher: German Environment Agency. TEXTE 97/2021 Ressortforschungsplan of the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety Project No. (FKZ) 3718 13 102 0 Report No. FB000388/ZW,2,ENG. <https://www.umweltbundesamt.de/publikationen/environmental-due-diligence-in-eu-law>. pp. 32

5. Conclusions

This study analyzed three legal strategies implemented by the EU to curb deforestation and forest degradation: the features and implementation of the FLEGT Action Plan, the definition of illegal deforestation and mandatory due diligence in the EU Timber Regulation, and the challenges for the effective implementation of those two provisions. To exemplify the challenge related to the definition of illegal deforestation, this research discussed the deforestation law in Brazil. In relation to the interpretation of due diligence, this investigation examined two cases resolved by the Administrative Court of Jönköping in Sweden.

This research concluded that the FLEGT Action Plan, the EU Timber Regulation, and the new EU Proposal for a Regulation on Deforestation-free Products, constitute EU environmental internal measures with extraterritorial effects. The EU has made use of the extraterritoriality legal approach to control the import and trade of timber produced under deforestation conditions in two ways. First, through the implementation of incentives for third countries, if they promote compliance with environmental standards or ensure that their producers comply with them. Second, through the imposition of prohibitions or obligations to operators in the EU, in relation to the import and trade of timber produced under deforestation conditions.

The main difference between the FLEGT Action Plan, the EU Timber Regulation and the new EU Proposal on Deforestation-free Products is the scope of the products covered by them. The first two seek to protect the deforestation and forest degradation related to harvest of timber or timber products. The last one includes in its scope the production of cattle, cocoa, coffee, oil palm, soya and wood and their derivate products. The second main difference between the three legal texts is the identification of the person that has to verify if the goods were produced in deforestation-free conditions. The FLEGT Action Plan seeks that the states verify whether producers are complying with deforestation environmental standards, in accordance with the provisions of the VPA. On the contrary, the other two Regulations seek to impose on the EU operators the obligation of verifying the compliance with the applicable environmental law, through the execution of a mandatory due diligence.

The new EU proposal on a Regulation on Deforestation-free Products with respect to the EU Timber Regulation implemented at least three main changes. **First**, it broadened the scope of

protection to deforestation associated with the production of the goods mentioned in the previous paragraph. **Second**, it defined three criteria to authorize the importation and trade of the products in the EU market: (i) that the products are deforestation-free, (ii) that they have been produced in accordance with the law of the place of production (as in the EU Timber Regulation) and (iii) that a due diligence has been carried out. **Last**, it provides a description of the requirements that operators must met when exercising the due diligence, specifying the type of information that must be collected and the different kind of factors that must be considered when analyzing the veracity of the information and the risks.

Despite the great efforts of the EU in implementing regulations to fight deforestation, it is necessary to improve the process of enforcement and compliance with the law. The new EU proposal on a Regulation on Deforestation-free Products is an important contribution to global efforts to stop deforestation and further research should analyze whether the interpretation of this new Regulation has achieved its expected effects.

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