



International Economic Law Clinic

# **PROPOSED EU REGULATION ON PRODUCTS RELATED TO DEFORESTATION**

A LEGAL ANALYSIS

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## **a) Executive Summary – Q&A**

- **What is the Proposed Regulation?**

*The EU Regulation on Deforestation-Free Products (Proposed Regulation) is a proposal presented by the European Commission on 17 November 2021 to minimize EU-driven deforestation and forest degradation. The Proposed Regulation regulates the placing and making available in the EU market of certain commodities. The European Commission considers that the Proposed Regulation incentivizes a transition toward more sustainable use of the natural resources, contributing to preserving forests, boosting market opportunities for sustainable products, and eliminating unfair competition and environmental impact from unsustainable producers exporting to the EU market.*

- **What is the scope of the Proposed Regulation?**

*The Proposed Regulation establishes that the placing and making available on the European Union market of the following commodities is contingent on them being deforestation-free: cattle, cocoa, coffee, oil palm, soya, and wood (“relevant commodities”) and products thereof as listed in Annex I (“relevant products”). The relevant products include pulp and paper classified in Chapters 47 and 48 of the Combined Nomenclature (based on the Harmonized System). The Proposed Regulation also imposes a deforestation-free requirement as a condition for exporting the relevant products from the European Union.*

- **What does deforestation-free product mean?**

*Deforestation-free products are those produced or originated from areas that were already used for farming (anthropized areas) before December 2020.*

- **Does the Proposed Regulation apply to Brazilian exports?**

*Yes. The Regulation applies to the relevant products produced in the EU and/or any country, which includes Brazil.*

- **Does the Proposed Regulation apply to Brazilian exports of pulp and/or paper?**

*The Proposed Regulation applies to wood (the relevant commodity) and derivatives thereof, which explicitly includes pulp and paper according to Annex I.*

- **Does the regulation provide for review procedures that could lead to the inclusion or exclusion of products from its scope of application? What are the applicable rules and procedures in this regard?**

*The European Parliament and The European Council are still deliberating on the Proposed Regulation. Therefore, the text can still change.*

*Once the Proposed Regulation is adopted, it will be subject to reviews as foreseen in the Regulation itself. According to the Explanatory Memorandum to the Proposed Regulation, those reviews will also assess the feasibility of expanding the scope of the Regulation.*

- **To the extent that there are any review procedures, is there any indication that the scenario may change to include exports currently not covered or exclude exports currently covered?**

*There have been indications that the list of products subject to the Proposed Regulation may change. For instance, the rapporteur's Draft Report on the Proposed Regulation suggests including rubber and its products. Additionally, reviews scheduled to take place after the Regulation is adopted could lead to additions to the list of covered products.*

- **What obligations does the Proposed Regulation establish regarding Brazilian producers/exporters?**

*Brazilian producers/exporters shall ensure that their products originate from areas that were not deforested or degraded (therefore deforestation-free) after the established cut-off date. According to the current text of the Proposed Regulation, the cut-off date is 31 December 2020.*

- **What obligations does the Proposed Regulation establish regarding EU importers?**

*EU market operators and traders shall apply due diligence concerning the commodities and products supply-chain to certify that they are deforestation-free. They must provide the information required by the Competent Authorities and are subject to checks and penalties for violations.*

▪ **What obligations does the Proposed Regulation establish regarding the Brazilian government?**

*There is no express provision of obligations for the governments themselves, including the Brazilian government. However, the Brazilian government's engagement would be important given that the Proposed Regulation establishes requirements that relate to environmental policies and action.*

▪ **What obligations does the Proposed Regulation establish regarding the EU and its Member States?**

*The European Commission will be responsible for implementing the Regulation. The Commission shall produce and publish the country benchmarking exercise and review the Regulation periodically. EU Member States will be responsible for the setting and enforcement of penalties for non-compliance.*

▪ **What are the consequences of non-compliance with the Proposed Regulation?**

*The Proposed Regulation provides for interim measures to determine that the market players take appropriate and proportionate corrective action if risks are identified. There are also the following penalties for non-compliance: (i) confiscation of the relevant commodities, products and revenues, (ii) fines; (iii) suspension or prohibition of relevant economic activities, and (iv) the exclusion from public procurement processes for the operators and traders that violate the Regulation.*

▪ **Is certification a valid risk mitigation?**

*Certification or other third party verified schemes could be used in the risk assessment/mitigation procedure, however, they should not substitute the*



*operator's responsibility as regards to due diligence. Wood products with a valid FLEGT license shall be deemed to follow the legality requirement only.*

▪ **When do the obligations arising from the Proposed Regulation enter into force?**

*Once approved by the European Parliament under EU ordinary legislative procedure and jointly adopted by the Parliament and the European Council, the Proposed Regulation shall enter into force on the twentieth day following publication.*

*However, there will be a transition period before certain obligations enter into force. Operators and traders will have 12 months to adapt. For SMEs, the adaptation period is 24 months.*

▪ **Are there international courts or other forums that could be accessed to challenge the Proposed Regulation's content under international law?**

*The Regulation could be challenged at the Dispute Settlement Body (DSB) of the World Trade Organisation (WTO) by any WTO member other than the EU. The WTO DSB does not entitle individuals, private companies nor non-governmental organisations (NGOs) to bring a complaint. However, these may participate indirectly in a government-to-government dispute. A WTO panel may also accept their participation as an amicus curiae.*

*Another possibility for challenging the Regulation is for the interested party to present a claim at the European Court of Justice.*

*With respect to MERCOSUR members, if and when the Mercosur-EU Trade Agreement enters into force, it will provide another possible forum. The current text of the Agreement will allow members to start consultations and request a Panel of experts to rule on an alleged breach of the provisions on Trade and Sustainable Development, and also provides for a Dispute Resolution Mechanism.*

## b) Introduction

This report analyses an EU-wide initiative addressing the production and trade of pulp and paper products: the Proposal for 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) n° 995/2010, (hereinafter “Proposed Regulation”). The report addresses the current draft of the Proposal as on 30 June 2022.

In 2020, the European Union (EU) approved a commitment to become the first climate neutral continent by 2050.<sup>1</sup> The set of measures taken to achieve this objective is known as the European Green Deal. In 2020, the EU approved the Green Deal as a series of policy initiatives towards climate neutrality in 2050<sup>2</sup>. The Proposed Regulation is one important element in the European Green Deal.

According to the EU, the Proposed Regulation aims at minimizing the EU’s contribution to deforestation and forest degradation. The Proposed Regulation Explanatory Referendum states that the main driver of deforestation and forest degradation is expanding agricultural land to produce commodities. Forest degradation leads to climate change and consequently affects food production.<sup>3</sup>

The Proposed Regulation aims to prevent degradation by establishing a tiered, mandatory due diligence system, relying on a deforestation-free definition, combined with a benchmarking system. The self-declared objective of the Proposed Regulation is to curb deforestation and forest degradation provoked

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<sup>1</sup> EUROPEAN COMMISSION. *2050 long-term strategy*. Available at: [https://ec.europa.eu/clima/eu-action/climate-strategies-targets/2050-long-term-strategy\\_en](https://ec.europa.eu/clima/eu-action/climate-strategies-targets/2050-long-term-strategy_en). (Access 01 July 2022).

<sup>2</sup> The European Green Deal is an initiative to overcome the climate change and environmental degradation. The idea is to transform the EU into a modern, resource-efficient and competitive economy, ensuring: (a) no net emissions of greenhouse gases by 2050; (b) economic growth decoupled from resource use; (c) no person and no place left behind. The European Green Deal is also our lifeline out of the COVID-19 pandemic. One third of the 1.8 trillion euro investments from the “Next Generation EU Recovery Plan”, and the EU’s seven-year budget will finance the European Green Deal. (EUROPEAN COMMISSION. *A European Green Deal: striving to be the first climate-neutral continent*. Available at: [https://ec.europa.eu/clima/eu-action/climate-strategies-targets/2050-long-term-strategy\\_en](https://ec.europa.eu/clima/eu-action/climate-strategies-targets/2050-long-term-strategy_en). (Access 01 July 2022).

<sup>3</sup> Proposed Regulation, Explanatory Memorandum.

by EU consumption and production, to reduce GHG emissions and global biodiversity loss, and to increase EU demand for and trade in legal and 'deforestation free' commodities and products<sup>4</sup>. To achieve this goal, the Regulation conditions the placing and making available in the EU market of relevant commodities. The relevant commodities are: cattle, cocoa, coffee, oil palm, soya and wood. Annex I to the Proposed Regulation sets a longer list of relevant products deriving from these commodities. This list includes, for instance, pulp and paper.

The EU Commission has built the Proposed Regulation on the experience from the European Union Timber Regulation (EUTR)<sup>5</sup>.

Accordingly, the Proposed Regulation will impact the production and export of commodities, including pulp and paper. Brazil is a major player in this area. According to the Brazilian Tree Industry (IBA), Brazil is the largest exporter of cellulose pulp, with US\$ 6 billion exports by value in 2020. One of Brazil's leading destinations is Europe, with a 20% share of Brazilian exports. Pulp accounts for more than 60% of the exported products from the planted tree sector, and paper represents 18%<sup>6</sup>.

As a result, Brazilian producers/exporters must demonstrate that pulp and paper extraction and processing is not part of an expansion of agricultural land and linked to deforestation in order to access the EU market.

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<sup>4</sup> 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) n° 995/2010 at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0706>>. (Access 14 July 2022).

<sup>5</sup> Regulation (EC) No 2173/2005 of 20 December 2005 (the FLEGT Regulation) allowing for the control of the entry of timber to the EU; Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 (the EU Timber Regulation) prohibiting placing of illegal timber and timber products on the internal market; Regulation (EU) No 2017/821 of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, and Directive No 2014/95/EU of 22 October 2014 amending Directive No 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

<sup>6</sup> IBA Annual Report, 2021, p. 39.

# 1. The Status of the Regulation in EU legislative bodies

The Proposed Regulation is part of an initiative by the European Commission to commit the EU to the protection and reforestation of forests around the world.

The Proposed Regulation<sup>7</sup> has been undergoing the European Union ordinary legislative procedure. According to the Treaty on the Functioning of the EU and practice, the following are the basic steps of the legislative procedures:<sup>8</sup>

- (i) The European Commission submits new legislation proposals to the European Council and the European Parliament.
- (ii) Either at the first or second reading, the Council and Parliament adopt legislative proposals.
- (iii) A conciliation committee is formed if the Council and Parliament cannot agree after the second reading.
- (iv) If the conciliation committee agrees the draft is acceptable to the European Council and the Parliament at the third reading, it is jointly adopted as a legislative resolution and published.

The European Commission presented the Proposal for the Proposed Regulation on 17 November 2021. Environmental Commissioner Virginijus Sinkevičius presented the Proposal. On 15 December 2021, the text was sent to the European Parliament's lead Committee on the Environment, Public Health and Food Safety (ENVI), which appointed Deputy Christophe Hansen (European People's Party, Luxembourg) as rapporteur. The text was also sent to the associated committees on the matter: Committee on International Trade (rapporteur Karin Karlsbro) and Committee on Internal Market and Consumer Protection (rapporteur Ana Cavazzini). The three rapporteurs delivered a Draft Report on 31 March 2022, with comments and proposed amendments to the Proposed Regulation.

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<sup>7</sup> Procedure File no. 2021/0366.

<sup>8</sup> Treaty on the Functioning of the European Union, Articles 289 and 294.

Currently, the Regulation is under the assessment of the preparatory bodies. The Environment Committee will vote on a final text to be submitted to the European Parliament Plenary. At the Plenary, the European Parliament may either approve the proposal or amend the text.

When the proposal is approved, the Regulation will proceed to the Council of Ministers. The Council may then adopt the legislation jointly with the Parliament.

On 28 June 2022, the European Council released a negotiation position document (“general approach”) on the Regulation<sup>9</sup>. The document's key points suggest modifying the term 'forest degradation' to cover only structural changes to forest cover, and strengthening the human rights aspects of the texts, notably by adding references to the United Nations Declaration on the Rights of Indigenous People. There is also a suggestion to change the cut-off date of the 'deforestation-free' definition to 31 December 2021.

The European Council also states that the European Parliament is expected to adopt its position in the plenary session of 12 September 2022. Once adopted and into force, the Regulation will be legally binding on the EU Member States.

## **1.1. Entry into force**

The Proposed Regulation shall enter into force on the twentieth day following its publication in the Official Journal of the European Union. Nevertheless, the proposal is to set a transition period for operators, traders and Competent Authorities to adapt. The provisions regarding obligations of traders and operators, including due diligence requirements, the system of checks and controls, and the assessment of substantiated concerns shall apply 12 months from the entry into force of the Proposed Regulation.

For operators that are Small and Medium Enterprises (SMEs) established by December 31, 2020, the implementation is deferred to 24 months from the entry into force. However, this extended period does not include products covered in

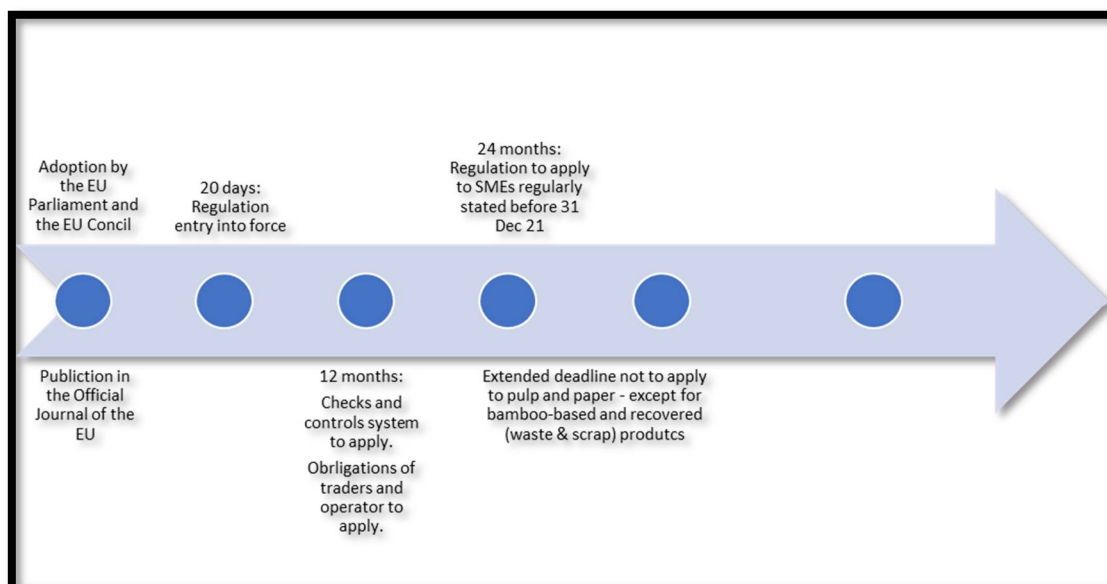
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<sup>9</sup> General approach from the EU Presidency regarding the Proposed Regulation. File no. 10284/22 under COD Procedure File no. 2021/0366.

European Union Timber Regulation,<sup>10</sup> which includes pulp and paper of Chapters 47 and 48 of the Combined Nomenclature, except for bamboo-based and recovered (waste and scrap) products<sup>11</sup>. Therefore, companies of all sizes must observe the 12-month transition period for pulp and paper in general.

At the end of the transition period (*vacatio legis*), operators and traders will have to be able to comply with all obligations arising from the Regulation and demonstrate that commodities on their supply chain were not produced or harvested on land deforested or degraded beyond the cut-off date. According to the current text, the cut-off date is 31 December 2020<sup>12</sup>.

The picture below illustrates the implementation timeframe:



Players that may be affected by the Proposed Regulation, should become familiar with its terms, and make good use of the twelve-month transition period to prepare themselves to meet the Proposed Regulation's requirements before

<sup>10</sup> The EU Timber Regulation (EUTR) is a legal provision prohibiting the placing and trading of illegally harvested timber and its products on the EU market. It covers both pulp and paper. The Proposed Regulation does not replace the EUTR obligations and checks system, and works as a complementation to the existing rules.

<sup>11</sup> Proposed Regulation, art. 36.

<sup>12</sup> Id.

it is effective, particularly taking into account that the cut-off date is currently 31 December 2020.

## 2. Scope of the Regulation

The scope of the Proposed Regulation addresses both the set of covered goods and the ecosystem where these goods originate. Regarding the covered goods, the Proposed Regulation applies to the placing and making available on the Union market, as well as to the export from the Union, of two set of goods: “relevant commodities” and “relevant products”<sup>13</sup>. Relevant commodities consist of six groups of goods: cattle, cocoa, coffee, oil palm, soya, and wood.

The relevant products are a breakdown of the first group: a list of products derived from relevant commodities enclosed to the Proposed Regulation as Annex I. This list constitutes the “covered goods” under the Proposed Regulation<sup>14</sup>.

The following are the relevant products in the ‘wood’ group:

- 4401 Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms; wood in chips or particles; sawdust and wood waste and scrap, whether or not agglomerated in logs, briquettes, pellets or similar forms
- 4403 Wood in the rough, whether or not stripped of bark or sapwood, or roughly squared
- 4406 Railway or tramway sleepers (cross-ties) of wood
- 4407 Wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or end-jointed, of a thickness exceeding 6 mm
- 4408 Sheets for veneering (including those obtained by slicing laminated wood), for plywood or for other similar laminated wood and other wood, sawn lengthwise, sliced or peeled, whether or not planed, sanded, spliced or endjointed, of a thickness not exceeding 6 mm

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<sup>13</sup> Proposed Regulation, art. 1.

<sup>14</sup> Annex I lists several products derived from relevant commodities, including “Pulp and paper of Chapters 47 and 48 of the Combined Nomenclature, with the exception of bamboo-based and recovered (waste and scrap) products”.



- 4409 Wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rebated, chamfered, V-jointed, beaded, moulded, rounded or the like) along any of its edges, ends or faces, whether or not planed, sanded or end-jointed
- 4410 Particle board, oriented strand board (OSB) and similar board (for example, waferboard) of wood or other ligneous materials, whether or not agglomerated with resins or other organic binding substances
- 4411 Fibreboard of wood or other ligneous materials, whether or not bonded with resins or other organic substances
- 4412 Plywood, veneered panels and similar laminated wood
- 4413 00 00 Densified wood, in blocks, plates, strips or profile shapes
- 4414 00 Wooden frames for paintings, photographs, mirrors or similar objects
- 4415 Packing cases, boxes, crates, drums and similar packings, of wood; cabledrums of wood; pallets, box pallets and other load boards, of wood; pallet collars of wood (Not including packing material used exclusively as packing material to support, protect or carry another product placed on the market.)
- 4416 00 00 Casks, barrels, vats, tubs and other cooper's products and parts thereof, of wood, including staves
- 4418 Builders' joinery and carpentry of wood, including cellular wood panels, assembled flooring panels, shingles and shakes
- **Pulp and paper of Chapters 47 and 48 of the Combined Nomenclature, with the exception of bamboo-based and recovered (waste and scrap) products**
- 9403 30, 9403 40, 9403 50 00, 9403 60 and 9403 90 30 Wooden furniture 9406 10 00 Prefabricated buildings of wood

**[emphasis added]**

The relevant products are understood to be linked to deforestation and forest degradation. The Proposed Regulation aims to curb EU-driven deforestation<sup>15</sup> and therefore prohibits importation of the relevant products into the EU and their exportation from the EU unless they are deforestation free. To that effect, the Proposed Regulation requires agents to perform mandatory due diligence to demonstrate that the products they trade are deforestation-free.

Products that were produced on land that has not been subject to deforestation after 31 December 2020 are 'deforestation-free' in the sense of the Proposed Regulation.

Regarding harvested wood in particular, in order to be deemed deforestation-free, it must have been harvested from the forest without inducing forest degradation after 31 December 2020. 'Forest degradation' means harvesting operations that are not sustainable and cause 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.<sup>16</sup>

With respect to the covered ecosystem, the Proposed Regulation relies on the concept of forest provided by the Food and Agriculture Organization (FAO): "land spanning more than 0.5 hectares with trees higher than 5 m and a canopy cover of more than 10% (land-cover criteria), or trees able to reach these thresholds *in situ*. This concept does not include land that is predominantly under agricultural or urban land use"<sup>17</sup>.

Pulp and paper companies must therefore have not contributed to forest degradation after 31 December 2020. This obligation is without prejudice to complying with the relevant legislation in the country of production.

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<sup>15</sup> Proposed Regulation, art. 1.

<sup>16</sup> Id., Article 2(6).

<sup>17</sup> FAO, GLOBAL FOREST RESOURCE ASSESSMENT - TERMS AND DEFINITIONS, 2020. Available at <<https://www.fao.org/3/I8661EN/i8661en.pdf>>. (Access 04 June 22).



### **3. Review Procedures**

The Proposed Regulation is still under discussion and is therefore subject to review before it is enacted. Moreover, the current text of the Proposed Regulation has specific procedures for the revision of the Regulation after it enters into force.

#### **3.1. Revisions to the text of the Proposed Regulation before it is enacted**

As the European Parliament and Council are still discussing the Proposed Regulation, the text is subject to changes. The Committee on the Environment, Public Health and Food Safety Draft Report from the European Parliament (2019-2024)<sup>18</sup> is likely to be influential in that regard. 75 amendments have been suggested so far. Proposals have attributed to deforestation the increase in carbon dioxide emission and global warming and called for stronger action by the bodies such as the EU Forest Law Enforcement Governance and Trade (FLEGT).

The Proposed Regulation's suggested amendments indicate that there will be increasing pressure on the preservation of forests and local communities.

#### **3.2. Review procedures once the Regulation is enacted**

Article 32 establishes the rules governing the revision of the Proposed Regulation ("review procedures"). Article 32 is divided into three paragraphs setting three types of reviews.

Paragraph 1 provides for an initial review process by the European Commission to take place no later than two years after the entry into force. This review will focus "on the need for and feasibility of expanding the scope of the Regulation

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<sup>18</sup> European Parliament (2019-2024), Committee on the Environment, Public Health and Food Safety, 31.3.2022.

to other ecosystems beyond forests and further commodities”.<sup>19</sup> The outcome of the review will be a report and potential legislative proposals by the European Commission to the Parliament and the Council.

Paragraph 2 sets forth a general review process by the European Commission to take place six years after the Regulation enters into force and “at least every five years thereafter”.<sup>20</sup> As with the initial review process, the general review will result in a report and potential legislative proposals by the European Commission to the Parliament and the Council. The first report shall include in an evaluation of: (a) “the need for and feasibility of additional trade facilitation tools to support the achievement of the objectives of the Regulation including through recognition of certification schemes”; (b) “the impact of the Regulation on farmers, in particular smallholders, indigenous peoples and local communities and the possible need for additional support for the transition to sustainable supply chains”.<sup>21</sup>

Paragraph 3 focuses on the review of relevant products listed in Annex I. This review will take place two years from the entry into force of the Regulation and every two years thereafter. These reviews shall be based on an assessment of the effect of the relevant commodities and products on deforestation and forest degradation, and take into account changes in consumption, as indicated by scientific evidence. The Commission will address whether it is appropriate to amend or extend the relevant products to ensure that the list covers all products that contain (or have been fed with or have been made of) relevant commodities.<sup>22</sup> Like the other reviews, the outcome will be a report to the European Parliament and Council that may include legislative proposals. The

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<sup>19</sup> Proposed Regulation, art. 32.1.

<sup>20</sup> Id., art. 32.2

<sup>21</sup> Id.

<sup>22</sup> Id., art. 32 (3), which also foresees an exception for products where demand has a negligible effect on deforestation.

European Commission may also amend the list of products in Annex I through delegated act.<sup>23</sup>

Businesses should pay attention to the possibility that the Regulation is expanded both in terms of the relevant commodities and products and ecosystems. However, changes do not seem likely regarding the inclusion of pulp and paper products in the scope of the Proposed Regulation.

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<sup>23</sup> Proposed Regulation, art. 32 (4).

## 4. Obligations arising from the Proposed Regulation

### 4.1. Prohibition plus due diligence

The Proposed Regulation establishes a prohibition on the placing of relevant commodities and products on the EU market or exporting therefrom unless they are (i) deforestation-free, (ii) forest degradation-free and (iii) produced in compliance with the relevant legislation in the country of production.<sup>24</sup>

To ensure that the prohibition is respected, the Proposed Regulation establishes mandatory **due diligence procedures**.<sup>25</sup> Businesses placing on the EU market or exporting therefrom the relevant products or commodities must perform a due diligence procedure to ascertain that there is a "negligible risk"<sup>26</sup> of non-compliance before the transaction.

The due diligence protocol is three-pronged and consists of: information collection<sup>27</sup>, risk assessment<sup>28</sup>, and risk mitigation<sup>29</sup>.

### 4.2. Actors subject to the Proposed Regulation

The following actors are subject to the Proposed Regulation:

- (i) **European Commission**: It is the executive branch of the EU and represents it internationally. It proposes and enforces legislation, implements policies and the EU budget, and upholds EU treaties<sup>30</sup>.

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<sup>24</sup> Proposed Regulation, art. 3.

<sup>25</sup> Id., art. 3 (c); art. 4 (2) and art. 8.

<sup>26</sup> "Negligible risk" implies a complete review of both the product-specific and the general information on the observation of Articles 3 (a) and 3 (b) by relevant commodities or products - that establish the prohibition of non-compliance -, indicating no reason for concern. Proposed Regulation, art. 2 (16).

<sup>27</sup> Id., art. 8 (a) and art. 9.

<sup>28</sup> Id., art. 8 (b) and art. 10.

<sup>29</sup> Id., arts. 8 (c) and art. 10.

<sup>30</sup> EUROPEAN UNION. Regras e princípios. Comissão Europeia - European Commission. Available at: [https://ec.europa.eu/info/funding-tenders/rules-and-principles\\_pt](https://ec.europa.eu/info/funding-tenders/rules-and-principles_pt), (Access 13 April 2022).

- (ii) **EU Member States**: They act on their behalf in this system and are also represented via two different mechanisms on the subnational level: (ii.1) **Competent Authorities**<sup>31</sup>: Each Member State must designate one or more Competent Authorities to oversee the enforcement of the Proposed Regulation; (ii.2) **Customs Authorities**<sup>32</sup>: These are responsible for controlling the correct due diligence declaration of relevant commodities and products entering or leaving the EU market.
- (iii) **Businesses**: The Proposed Regulation divides business into three types: **Operator**<sup>33</sup>: any natural or legal person who places relevant commodities or products on the UE market or export therefrom during commercial activity. **Trader**<sup>34</sup>: any natural or legal person in the supply chain other than the operator who, during commercial activity, makes available relevant commodities and products on the EU market. Traders who are **SMEs**<sup>35</sup> have certain exemptions and simplified due diligence procedures. **Authorized Representative**<sup>36</sup>: any natural or legal person designated within the EU who has received a written mandate from an operator to operate on its behalf to specific tasks concerning the operator's obligations under the Proposed Regulation.
- (iv) **Third countries**: **Country of production** represents the country or territory responsible to produce the relevant commodity or product<sup>37</sup>.

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<sup>31</sup> Proposed Regulation, art. 2 (22)

<sup>32</sup> Id., art. 2 (23).

<sup>33</sup> Id., art. 2 (12).

<sup>34</sup> Id., art. 2 (13)

<sup>35</sup> Micro, Small and Medium-sized enterprises. Proposed Regulation. art 2 (20).

<sup>36</sup> Id., art. 2 (17)

<sup>37</sup> Id., art. 2 (15).



### **4.3. Obligations regarding traders and operators**

The obligations on Operators and Traders are similar, except that the Proposed Regulation has exceptions regarding due diligence particularly for Traders that are SMEs<sup>38</sup>.

Operators and Traders must refrain from placing on or exporting from the EU market products that are not deforestation-free or that imply forest degradation. In addition, Operators and Traders cannot import or export from the EU products and relevant commodities that do not comply with the relevant legislation in the country of production concerning land use rights, environmental protection, rights of third parties, and relevant trade and customs regulations<sup>39</sup>.

Operators and Traders must perform due diligence as established by the Proposed Regulation to avoid sourcing into or out of the EU relevant products and commodities that are associated with risks of illegal production or deforestation. They must maintain and regularly evaluate their due diligence system, reviewing it annually and adapting it, if necessary, and reporting its results publicly<sup>40</sup>.

#### **4.3.1. Information collection obligations**

A due diligence statement must substantiate each relevant product or commodity<sup>41</sup> at issue. The statement is a certification by Operators and Traders that the product has negligible or low-risk concerning legal non-compliance and is deforestation-free. The statement must be submitted before the Operator or Trader seeks approval for import or export.

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<sup>38</sup> Proposed Regulation, art. 6 (5).

<sup>39</sup> Id., art. 3 (a-b).

<sup>40</sup> Id., art. 4.

<sup>41</sup> Id., Article 4 (2).

The statement<sup>42</sup> must be made available to Competent Authorities through an online information system<sup>43</sup> and contain the information provided within Annex II of the Proposed Regulation. This includes the Operator's or Trader's name and address, the concerned customs codes, the quantities of the relevant commodity or product, the country of production, and all plots of land of production, including geo-localization coordinates.

The Proposed Regulation sets the obligation for Operators to collect the geographic coordinates or geolocation (through the latitude and longitude) of all plots of land used in the production process of the relevant products and commodities. The purpose is to ensure that these products do not influence deforestation and forest degradation through changes in land use.

**Despite the need for further clarification of such obligation, Brazilian producers and exporters can help Operators and Traders in this regard by using the Union's satellite Positioning, Navigation and Timing (PNT) technology (EGNOS/Galileo) and its own Earth observation and monitoring system (Copernicus).**

#### **4.3.2. Risk Assessment obligation**

In the risk assessment<sup>44</sup> phase, Operators and Traders shall verify and analyse information collected by themselves or by the Authorized Representatives<sup>45</sup>. Risk assessments shall document and review information annually. They must be available to Competent Authorities upon request.

Operators and Traders must evaluate different types of risk, including the risk that sourced raw materials are not deforestation-free or that they were not following the country's relevant legislation. The Operator or Trader will evaluate

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<sup>42</sup> Proposed Regulation, art. 3 (c) and art. 4 (2).

<sup>43</sup> The online information system will be linked to the EU Single Window Environment for Customs. It will permit Authorities to record the outcome of controls on due diligence statements. Enabling the risk profiling of Operators, Traders, relevant commodities, and products to identify high-risk consignments Proposed Regulation, art. 8.

<sup>44</sup> Id., art. 10.

<sup>45</sup> Id., art. 10 (1).

the risk of “mixing” - the risk that commodities within their supply chain have inadvertently or accidentally mixed with other raw material of unknown origin or that may have a higher risk profile. Operators or Traders must document the risk assessment and demonstrate how they attributed the risk at issue<sup>46</sup>.

For commodities or products from a low-risk country or region, Operators and Traders are allowed to conduct "simplified due diligence". This includes the information collection stage indicating that the relevant commodities and products are legal and deforestation-free but excludes the risk assessment and the risk mitigation phases<sup>47</sup>.

### **4.3.3. Risk mitigation obligations**

In the risk mitigation phase<sup>48</sup>, Operators and Traders will apply controls and procedures to mitigate and manage risks when required. They shall use adequate and proportionate policies, controls, and procedures to mitigate and manage risks to reach no or negligible risk before placing on the EU market or exporting the relevant products and commodities therefrom.

The text of the Proposed Regulation does not establish an exhaustive protocol for meeting risk mitigation obligations. However, there may be solutions such as certification systems. Certification or other third-party verified schemes could be helpful in the risk assessment/mitigation procedure but should not replace the Operator’s and the Trader’s responsibilities regarding due diligence<sup>49</sup>. For instance, wood products with a valid FLEGT<sup>50</sup> license have an accepted proof of legality concerning the relevant legislation of the country of production. But, Operators and Traders will have to perform all the due diligence obligations anyway<sup>51</sup>.

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<sup>46</sup> Proposed Regulation, art. 10 (2, g-h).

<sup>47</sup> Id., art. 12.

<sup>48</sup> Id., art. 10.

<sup>49</sup> Id., preamble (35) and art. 10 (2, j).

<sup>50</sup> European Union Forest Law Enforcement, Governance and Trade Action Plan.

<sup>51</sup> Id., art. 3 (a-b).

As already mentioned, the Proposed Regulation distinguishes between obligations applicable to large Traders and to Traders that are SMEs.

SMEs traders are only required to collect a record of their suppliers and customers, maintain that information for at least five years, and provide this information to Competent Authorities upon demand<sup>52</sup>. SMEs traders must act and inform the Competent Authorities if new information becomes available regarding the non-compliance of their commodities and products. They are exempted from the risk assessment and risk mitigation processes and are subject to simplified checks.

#### **4.4. Obligations regarding the EU and its Member States**

The Proposed Regulation places a series of duties on EU institutions and Member States. The EU Commission and the EU Member States (via Competent Authorities and Customs Administrations) are the two main EU-related actors to perform these duties.

The Commission will be responsible for further detailing the Proposed Regulation. It will also guide the Member States in implementing their obligations, mainly through developing the aforementioned Information System with a customs database and coordinating information sharing between the Member States, EU organs, and society.<sup>53</sup> This will take place through an electronic interface based on the EU Single Window Environment for Customs<sup>54</sup>.

The Commission will also implement a country benchmarking system containing a central risk assessment database and a three-tier system for assessing countries and regions within them into low, standard, or high risk of deforestation. As a result, the Commission will periodically publish a list of low-

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<sup>52</sup> Proposed Regulation, art. 6 and 16.

<sup>53</sup> Id., art. 7.

<sup>54</sup> Id., art. 26.

and high-risk countries through the Information System. Initially, all countries will hold a standard risk level<sup>55</sup>.

The Commission has been charged with stepping up cooperation programs to secure that EU partners can benefit from the new EU rules on deforestation. This arrangement is expected to comprise structured dialogues with partner countries, administrative arrangements, and provisions in existing agreements or agreements that help producer countries transition to an agricultural production that enables the compliance of relevant commodities and products with the requirements of the Proposed Regulation<sup>56</sup>.

In turn, Member States will designate one or more Competent Authorities to oversee the enforcement of the Proposed Regulation, provide assistance to Operators and Traders (especially SMEs), and exchange and disseminate relevant information<sup>57</sup>; carry out checks<sup>58</sup>, and develop rules on penalties within their jurisdictions<sup>59</sup>. Operators and Traders with a consistent history of compliance should be entitled to a reduced frequency of inspections<sup>60</sup>.

Member States' Customs Authorities will control the correct declaration of relevant products and commodities entering or leaving the EU market, as part of their obligation to check the due diligence information<sup>61</sup>.

#### **4.5. Obligations regarding the Brazilian government**

According to the Proposed Regulation, Countries of Production such as Brazil can benefit from EU support and funding through Forest Partnerships to adapt

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<sup>55</sup> Proposed Regulation, art. 27.

<sup>56</sup> Id., art. 28.

<sup>57</sup> Id., art. 13.

<sup>58</sup> Id., art. 14.

<sup>59</sup> Id., art. 23.

<sup>60</sup> Id., art. 14 and 15.

<sup>61</sup> Id., art. 24.

to the described measures. According to the Proposed Regulation, cooperation programs may strengthen forest governance and create socio-economic opportunities<sup>62</sup>.

Moreover, as described above, countries or some parts of their territories will be categorized into low, standard, or high-risk (countries or areas). This can press commodity producing countries and subnational entities into adopting measures to be classified as low risk.

#### **4.6. Obligations regarding Brazilian producers/exporters**

The Proposed Regulation impacts Brazilian producers and exporters by imposing a prohibition on certain trade and due diligence requirements on their EU customers (i.e., Operators and Traders). Therefore, Brazilian companies will have to produce deforestation-free products and comply with Brazilian law to be able to export relevant commodities and products to the EU market.

Brazilian producers and exporters will also need to cooperate with Operators and Traders to meet the information and mitigation requirements that the Proposed Regulation imposes. This can include keeping and providing detailed documents and information on the product description, nomenclature, quantity, country of production, geo-localization coordinates, specific permission to use the area in the production procedure, date or time range of production, and any other important information to prove relevant commodities and products are deforestation-free<sup>63</sup>.

The Proposed Regulation will replace the EU Timber Regulation, but many of the due diligence obligations are similar and no import or export will be allowed unless a due diligence statement is submitted on the Information System and certifies compliance.

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<sup>62</sup> Proposed Regulation, art. 28.

<sup>63</sup> Id., art. 9.

## 5. Consequences of non-compliance

The Competent Authorities shall carry out checks to establish whether Operators and Traders comply with their obligations under the Proposed Regulation and whether the relevant commodities and products comply with the Proposed Regulation<sup>64</sup>.

Competent Authorities may take immediate measures (*interim measures*) if they detect possible serious shortcomings or risks in light of the obligations under the Proposed Regulation. These include the *seizure* or *suspension* of the placing or making available on and exporting from the Union market of the relevant commodities and products at issue.<sup>65</sup> In that case, Competent Authorities shall also require the Operator or Trader to take appropriate and proportionate corrective action to bring the non-compliance to an end.<sup>66</sup>

Corrective action shall include at least one or more of the following:

- (i) rectifying any formal non-compliance;
- (ii) preventing the relevant commodity or product from being placed, made available on or exported from the UE market;
- (iii) withdrawing or recalling the relevant commodity or product immediately;
- (iv) destroying the relevant commodity or product or donating it to charitable or public interest purposes.

Whenever the Operator or Trader fails to take corrective action or where the non-compliance persists, Competent Authorities shall ensure that the product is withdrawn or recalled, or that its trade is prohibited or restricted inside or outside of the EU.

The Competent Authorities can adopt these measures without prejudice to the penalties that may apply due to non-compliance. The Proposed Regulation does

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<sup>64</sup> Proposed Regulation, arts. 14, 15, 16.

<sup>65</sup> Id., art. 21.

<sup>66</sup> Id., art. 22.

not specifically set forth these penalties. Rather, it establishes that Member States shall lay down rules on penalties applicable to infringements.<sup>67</sup>

Penalties shall be effective, proportionate, and dissuasive and include as a minimum:

- (i) fines proportionate to the environmental damage and the value of the relevant commodities or products. The level of fines must ensure that they effectively deprive the infringers from the economic benefits of their infringements. Fines should gradually increase for repetition of the infringement. The maximum amount of the fines shall be at least 4% of the operators or trader's annual turnover in the Member State or Member States concerned.
- (ii) confiscation of the relevant commodities and products concerned from the operator and/or trader.
- (iii) confiscation of revenues of the operator and/or trader from a transaction with the relevant commodities and products concerned.
- (iv) temporary exclusion from public procurement processes.

Interested parties should bear in mind that compliance with the obligations established by the Proposed Regulation is without prejudice to the setting of penalties by Member States

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<sup>67</sup> Proposed Regulation, art. 23 (1).



## **6. Challenging the Regulation**

Considering the possible *fora* or jurisdictions that would appear to be amenable for claims against the Proposed Regulation, there are four main legal options: (a) Access to Justice under the Proposed Regulation; (b) the European Court of Justice; (c) WTO's Dispute Settlement Body (DSB); and (d) Mercosur-EU Free Trade Agreement. This Section describes these options without examining the merits of potential claims or their prospects.

### **6.1. Access to Justice in the Proposed Regulation**

First, an interested party may challenge measures by Competent Authorities under the Proposed Regulation. The Proposed Regulation expressly provides for access to a court or another independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the Competent Authorities.<sup>68</sup> This right to remedies applies to any natural or legal person having sufficient interest.<sup>69</sup> The domestic law of EU Member states may require the exhaustion of administrative review procedures prior to recourse to judicial proceedings.

### **6.2. The WTO Dispute Settlement Body (DSB)**

The Proposed Regulation appears to be a trade-related environmental regulation that interferes with production activities (i.e., so-called Processes and Production Methods - PPMs) outside the regulating state, while regulating the trade of relevant products and commodities.

Although WTO law does not prohibit this kind of measure<sup>70</sup>, the Proposed Regulation may be in tension with WTO disciplines, including the most-favoured-

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<sup>68</sup> Proposed Regulation, art. 30.

<sup>69</sup> This includes those having submitted substantiated concerns. Natural or legal persons shall be entitled to submit substantiated concerns to competent authorities when they deem, based on objective circumstances, that one or more operators or traders are failing to comply with the legal provisions (Proposed Regulation, art. 29).

<sup>70</sup> See e.g., Steve Charnovitz, 'The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality' (2002) 27 *Yale Journal of International Law* 59, 60–79; and Gracia Marin

nation (MFN) treatment obligation<sup>71</sup> and the national treatment (NT) obligation<sup>72</sup> under the General Agreement on Tariffs and Trade (GATT) or the requirements of the Technical Barriers to Trade (TBT) Agreement.

WTO members must not discriminate between 'like' products imported from different countries, and shall not accord more favourable treatment to domestic products than to foreign like products.

### **6.2.1. WTO procedures**

WTO Members can bring disputes to the Dispute Settlement Body (DSB) whenever a member applies a measure (*de jure or de facto*) inconsistent with WTO rules. Accordingly, a potential WTO challenge to the Regulation would necessarily take place as a government-to-government procedure. In any case, an interested party could bring claims to the government, which would then move forward with a WTO complaint. The government can raise the issue at the Technical Barriers to Trade (TBT) Committee meeting or initiate a dispute at the Dispute Settlement Body (DSB). In Brazil, the Chamber of Foreign Trade (CAMEX) analyses and may authorize the request of WTO consultations at the DSB.<sup>73</sup>

Brazil would then notify the EU with a request for consultations to solve the issues in 60 days<sup>74</sup>. A Consultation Request will briefly describe the measure challenged<sup>75</sup> and the legal grounds for the complaint. Members can exchange their views to reach a mutually agreed solution.<sup>76</sup>

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Durán, 'NTBs and the WTO Agreement on Technical Barriers to Trade: The Case of PPM-Based Measures Following *USTuna II* and *EC-Seal Products*' (2015) 6 EYIEL 87, 90–94 and 109–110

<sup>71</sup> GATT, Article I:1 and TBT, art. 2.1.

<sup>72</sup> GATT, Article III:4 and TBT, art. 2.1.

<sup>73</sup> Brazilian Decree no 10.044/2021, art. 3, III.

<sup>74</sup> DSU, art. 4.1.

<sup>75</sup> *Id.*, art. 4.4.

<sup>76</sup> *Id.*, art. 3.6.

If the parties fail to settle a dispute within 60 days, the complaining party may request the establishment of a panel<sup>77</sup>, which will consist of three well-qualified governmental and/or non-governmental individuals.<sup>78</sup> The panel sets a timetable to issue its report with recommendations<sup>79</sup>. The DSB can adopt the Panel Report,<sup>80</sup> or a party may notify its decision to appeal.<sup>81</sup> If a party files an appeal, the Appellate Body<sup>82</sup> will revise the panel's report.

The Respondent must implement the recommendations in a reasonable period of time<sup>83</sup>, or it can face a suspension of concessions (retaliation) from the Complainant<sup>84</sup>.

The following flowchart demonstrates the main procedural steps of a WTO complaint:

#### Flowchart of a WTO dispute

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<sup>77</sup> DSU, art. 4.7.

<sup>78</sup> Id., art. 8.1.

<sup>79</sup> Id., art. 12.9.

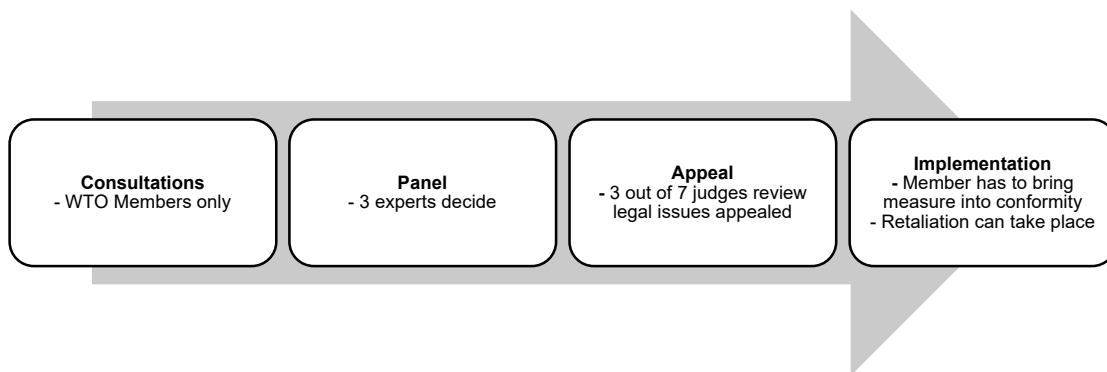
<sup>80</sup> Id., art. 16.1.

<sup>81</sup> Id., art. 16.4.

<sup>82</sup> The Appellate Body is a permanent body composed by 7 members (persons) appointed by WTO Members. However, the United States has been refusing to agree to the appointment of any member as members' terms expired. Currently, the Appellate Body is not functioning due to lack of members. However, WTO Members are still entitled to an appeal, which may lead the procedures to a limbo. In order to maintain the efficacy of the WTO rules and for members to continue to have access to an independent appeal process for dispute settlement, 16 WTO members set up a separate appeal system for trade disputes in March 2020, called the Multiparty Interim Appeal Arbitration Arrangement (MPIA). This is an alternative system for resolving WTO disputes that are appealed by a WTO Member, in the absence of a functioning and staffed WTO Appellate Body. (GENEVA TRADE PLATFORM, *Multi-Party Interim Appeal Arbitration Arrangement (MPIA)*, Available at: <[https://wtoplurilaterals.info/plural\\_initiative/the-mpia](https://wtoplurilaterals.info/plural_initiative/the-mpia)>, (Access 28 June 2022).

<sup>83</sup> DSU, art. 21.3.

<sup>84</sup> Id., art. 22.2.



### 6.2.2. Non-State actors as amici curiae at the WTO

Despite not being parties to WTO disputes in a formal sense, individuals, companies, NGOs and other entities based in a WTO Member may be admitted as “amicus curiae” during panel proceedings<sup>85</sup> and appeals.<sup>86</sup> Therefore, those organizations may have a legal avenue to express their concerns in case a dispute involving the Proposed Regulation takes place. Since 1998,<sup>87</sup> non-state actors have submitted their views on the issues under debate, regardless of their host country being or not in the dispute. However, it is up to panels’ and the Appellate Body Members’ discretion to consider amicus curiae briefs.

### 6.3. Court of Justice of the European Union (CJEU)

If companies are affected by the Regulation, it is possible to challenge it at the Court of Justice of the European Union (CJEU)<sup>88</sup>. The CJEU is competent to

<sup>85</sup> WT/DS58/AB/R, US – Shrimp, para. 105-108, adopted 6 November 1998.

<sup>86</sup> WT/DS138/AB/R, US – Lead and Bismuth II, para. 41, adopted 7 June 2000.

<sup>87</sup> WT/DS58/AB/R, US – Shrimp, para. 110, adopted 6 November 1998. The Appellate Body confirmed the legal right of using briefs of private actors on their reports: “[...] we consider that the Panel acted within the scope of its authority under Articles 12 and 13 of the DSU in allowing any party to the dispute to attach the briefs by non-governmental organisations, or any portion thereof, to its own submissions”.

<sup>88</sup> THE COURT OF JUSTICE OF THE EUROPEAN UNION, Section 5, articles 251 to 281 of the Treaty on the functioning of the European Union. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>. For a general overview of the Court of Justice of the European Union (CJEU), its statute, website, and Rules of Procedures, see [https://curia.europa.eu/jcms/jcms/Jo1\\_6308/](https://curia.europa.eu/jcms/jcms/Jo1_6308/). (Access 04 July 2022).

review the legality of legislative acts, acts of the Council, the Commission and the European Central Bank, other than recommendations and opinions, and acts of the European Parliament and the European Council intended to produce legal effects vis-à-vis third parties.<sup>89</sup> The CJEU consists of two courts, the Court of Justice and the General Court. The Court of Justice has exclusive jurisdiction over actions between the institutions and those brought by a Member State against the European Parliament and/or against the Council.<sup>90</sup> The General Court has jurisdiction, at first instance, in all other actions of this type, particularly in actions brought by individuals and by Member States against the Commission.<sup>91</sup>

In general, parties may appeal judgments by the General Court of first instance to the Court of Justice, but this is limited to points of law.

States can also bring claims before the CJEU. In *Venezuela v. Council (Venezuela)*, the Grand Chamber of the Court of Justice of the European Union made a pronouncement on a procedural point: it held that Venezuela had *locus*

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<sup>89</sup> TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, Article 263 (ex Article 230 TEC). The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>. (Access 04 July 22).

<sup>90</sup> TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, Article 263 paragraph 2 It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>. (Access 04 July 22).

<sup>91</sup> TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION Article 256 (ex Article 225 TEC) 1. The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>. (Access 04 July 22).

*standi* to challenge restrictive measures adopted by the European Union (EU).<sup>92</sup> The conclusion was that a third country is a legal person for the purposes of the fourth paragraph of Article 263 TFEU. From this perspective, states other than EU members may also be entitled to bring claims to the CJEU.

#### **6.4. MERCOSUR-EU Trade Agreement**

Although the Trade Agreement signed among the Mercosur's countries and European Union is not in force at the date of writing,<sup>93</sup> it has specific provisions connecting trade and sustainable development<sup>94</sup>. These provisions might dialogue with the Proposed Regulation, opening the possibility for joint work on trade and sustainable development<sup>95</sup>. The Agreement also creates a Sub-Committee on Trade and Sustainable Development and Contact Points, allowing senior officials (or their delegates) to monitor the effective implementation of Trade and Sustainable Development Provisions.<sup>96</sup>

Similarly to the proceedings at the WTO, the parties may resort to the Dispute Settlement mechanism if they consider that another Party has failed to comply with one or more obligations under the trade part of the agreement. As a first step in the process, consultations allow for an amicable resolution of the dispute.<sup>97</sup> If consultations fail, the complaining Party may request the establishment of an arbitration panel composed of three arbitrators with expertise and experience in law and international trade.<sup>98</sup>

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<sup>92</sup> INFO CURIA. Jurisprudence. available at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=243242&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3461028> (Access 28 June 2022).

<sup>93</sup> EUROPEAN COMMISSION, EU-MERCOSUR Trade Agreement. Available at [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercotur/eu-mercotur-agreement\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercotur/eu-mercotur-agreement_en) (Access 30 May 2022).

<sup>94</sup> MSR-EU Trade Agreement, Chapter on Trade and Sustainable Development, articles 6, 8 and 11, respectively.

<sup>95</sup> *Id.*, art. 13.

<sup>96</sup> *Id.*, art. 14, 3(a).

<sup>97</sup> MSR-EU Trade Agreement, Chapter on Dispute Settlement, art. 4.

<sup>98</sup> *Id.*, art. 7.1.

Transparency is an important part of dispute settlement. Hearings are open to the public, and interested persons are entitled to make their own submissions to the panel in the form of amicus curiae briefs.<sup>99</sup>

The panel's report is final – not subject to appeals – and binding on the parties. Any party found to be in breach of its obligations must bring itself into compliance. The complainant can put in place temporary remedies if the infringing party fails to comply.<sup>100</sup>

Apart from panel procedures, there is also a detailed mediation procedure to help the parties find an amicable solution to their dispute. Recourse to mediation requires mutual consent and the parties can resort to it at any time, i.e., before a party initiates a dispute or even in parallel to panel proceedings.<sup>101</sup>

Without entering the merits of the discussion, affected parties have options to challenge the Proposed Regulation. The success of the challenge will depend on whether the Proposed Regulation violates the treaties/law at issue.

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<sup>99</sup> MSR-EU Trade Agreement, Chapter on Dispute Settlement , art. 10.5.

<sup>100</sup> Id., art. 18.

<sup>101</sup> Id., art. 5.

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