

DEFINITION OF DEFORESTATION IN THE NEW EUROPEAN REGULATION AND IMPLICATIONS

On September 13, 2022, the European Parliament approved the Deforestation Regulation, a proposal to create a rule banning the trade, import and export of agricultural products associated with deforestation. However, what exactly does “deforestation” mean for the European Union: just illegal deforestation or any form of land-use conversion, even if authorized by Brazilian laws?¹

The evolution of the wording along the law-making process in the European Parliament helps us to answer this question. Originally, the Deforestation Regulation proposed by the European Commission (on November 17, 2021) required a risk analysis for products traded in the European Union (EU) to demonstrate two requirements:

- i. that the products do not come from “deforestation and/or forest degradation” as of 2020, and
- ii. that they followed the legislation from the country of origin (i.e., land-use and environmental regulations).²

Nevertheless, at the first voting session in the European Parliament, the wording was amended.³ Members of the European Parliament (MEPs) approved amendments that included the “conversion of ecosystems” and “use for agriculture” extensions to the concept of deforestation. The purpose was to recognize that the degradation of an ecosystem can also be caused by “excessive agricultural activities.”⁴

Amendments to the rule indicate that the prevailing intention among MEPs was that the new green regulation would not only include trading products from illegal deforestation, but

also from the conversion of land use as a whole, including the consolidated legal use for agriculture.⁵ The vocabulary concern is explained by the European Union's fear that legal loopholes would be exploited by countries of origin to circumvent environmental requirements. For this precise reason, the wording has never expressly mentioned “illegal deforestation.”

The wording approved by the Parliament will now be sent to the European Council for deliberation. While the Parliament represents the population of Europe, the Council represents the member countries, somewhat like a bicameral system, with a Chamber of Deputies and a Senate (i.e., initiating and reviewing house).⁶

At the European Council, the “countries” speak out. Sweden has started the discussions and has publicly expressed the lack of clarity in the wording. In particular, it claimed that, by not restricting the definition of “deforestation,” the wording is inaccurate, since decisions on the use and management of soil and forests would interfere with the competence of national laws.⁷

The European decision does not take place in the vacuum of international “rules” on the commercial relationship between nations.

In the Tuna/Dolphin case,⁸ the World Trade Organization (WTO) decided whether the United States’ requirement for the protection of aquatic mammals should be followed by Mexico, that is, the appropriateness of the extraterritoriality of the American law. In this case, the US regulated the Dolphin Protection Consumer Information Act,⁹ requiring documents proving that tuna fishing was not carried out in dolphin areas. Mexico filed a complaint, alleging that the

American demand was violating national fishing rules and standards and, therefore, it constituted a discriminatory and arbitrary commercial measure.¹⁰ In its ruling, the WTO Panel stated that countries cannot, through trade rules, impose requirements on other countries, disregarding national laws.¹¹

The ruling of the European Union must also have implications for the right of sovereignty. As stated by Sweden, in its submission to the European Parliament, the authority to manage land use and forest resources is national. It should be noted that sovereignty is a basic principle of International Law and accepted as a custom; one country cannot interfere with the domestic affairs of another, as underscored by the International Court of Justice in the leading case *Nicaragua v. United States*.¹²

The right to sovereignty is also present in international treaties (Hard Law), such as in the United Nations Charter,¹³ in Environmental Declarations (Soft Law), such as Rio 92,¹⁴ and in the United Nations General Assembly resolutions, including Resolution 1803 of 1962 (Declaration on Permanent Sovereignty over Natural Resources),¹⁵ which establishes the countries' sovereign right to manage their natural resources.

In this respect, Brazil has an extensive infrastructure to managing its natural resources. The National Institute for Space Research (INPE), which carries out satellite monitoring of clear-cut deforestation in Brazilian biomes,¹⁶ provides interactive maps of deforestation, and annual rates and increments of deforestation, which is a powerful tool for identifying deforestation activities in the country.

The Brazilian Forest Code (Federal Law no. 12651/2012), with the Rural Environmental Registry¹⁷ and Environmental Compliance Programs,¹⁸ complement this monitoring, as they guarantee the environmental compliance of rural properties. With the Rural Environmental Registry, farmers must inform the competent authority of the environmental status of their

property, identifying potential deficits in Permanent Preservation Areas and/or Legal Reserves, as well as consolidated areas of use. If vegetation deficits are found, farmers must enroll in the Environmental Compliance Program in order to cover their forest liabilities.¹⁹

In short, if, on the one hand, the country has research institutions that monitor deforestation via satellite, on the other hand, the Brazilian Forest Code has tools — such as the Rural Environmental Database and Environmental Compliance Programs — that complement these monitoring efforts. Crossing the information provided by each of these tools ensures that deforestation monitoring takes place macroscopically, via satellite, and microscopically, via Rural Environmental Registry and Environmental Compliance Programs.

The EU ruling is the result of an open political process in the European Parliament with different interests at stake, including the interest to protect the European farmers. If the European interpretation of preventing imports of products associated with any form of land use conversion prevails, disregarding national laws, documents, and official data from the country of origin, international trade rules would, most likely, be disrespected. Such arbitrary measure would allow countries to challenge the Deforestation Regulation at the WTO, with a solid argument of an unjustified trade barrier.

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References

[1] See 2021/0366(COD). Available at: [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2021/0366\(COD\)&=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2021/0366(COD)&=en)

[2] See Article 3 of the Deforestation Regulation: "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; [...]." The national laws of the country of production means: "relevant legislation of the country of production" means the rules applicable in the country of production concerning the legal status of the area of production in terms of land use rights, environmental protection, third parties' rights and relevant trade and customs regulations under legislation framework applicable in the country of production; Available at: [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2021/0366\(COD\)&=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2021/0366(COD)&=en)

[3] See propositions by Chrysoula Zacharopoulou, Irena Joveva, Pascal Durand, Michal Wiezik, Martin Hojsík, Frédérique Ries, Nicolae Ștefănuță, Catherine Chabaud, María Soraya Rodríguez Ramos e Marie Toussaint (PE730.104, PE731.627, PE731.626, PE731.628 PE731.704). Available at: [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))

[4] See Amendments adopted by the European Parliament on 13 September 2022 on the proposal for a regulation of the European Parliament and of the Council on 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: "(1a) 'ecosystem conversion' means the change of a natural ecosystem to another land use or change in a natural ecosystem's species composition, structure or function; this includes severe degradation or the introduction of management practices that result in a substantial and sustained change in the ecosystem's species composition, structure or function; (2a) 'agricultural use' means the use of land for any or more of the following: cultivation of temporary or annual crops that have a growing cycle of one year or less; cultivation of permanent or perennial crops that have a growing cycle of more than one year, including tree crops; cultivation of permanent or temporary meadows or pastures as well as animal husbandry; and temporarily fallow land." Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0311_EN.html

[5] The amendments have also changed the original limit date from 31//2020 to 31//2019

[6] See European Ordinary Legislative Procedure, available at: https://eur-lex.europa.eu/procedure/EN/2021_366

[7] Available at: [https://www.europarl.europa.eu/RegData/docs_autres_institutions/parlements_nationaux/com/2021/0706/SE_PARLIAMENT_AVISCOM\(2021\)0706_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institutions/parlements_nationaux/com/2021/0706/SE_PARLIAMENT_AVISCOM(2021)0706_EN.pdf)

[8] United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products

[9] United States Code, Title 16, Section 1385

[10] Mexico's other appellant's submission, para. 4 (referring to Appellate Body Report, US – Shrimp, para. 161).

[11] See Panel Report of United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, para. 4.198: "Unilateral trade-related actions such as the dolphin-safe labelling measures that have the objective of pressuring developing countries into conforming their behaviour to the dictates of developed countries cannot be not tolerated under the WTO system. Thus, this case is important not only to Mexico and the Mexican tuna industry, but also for the future operation of the WTO system." Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:WT/DS/381R.pdf&Open=True>

[12] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Available at: <https://www.icj-cij.org/en/case/70/judgments>

[13] See Article 2.1 of the Charter of the United Nations

[14] See Principle 2 of the Rio Declaration on Environment and Development

[15] Article 1: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned." Available at: https://legal.un.org/avl/ha/ga_1803/ga_1803.html

[16] Available at: <http://terrabrasilis.dpi.inpe.br/>

[17] See Article 29 of Federal Law no. 12651/2012: "É criado o Cadastro Ambiental Rural - CAR, no âmbito do Sistema Nacional de Informação sobre Meio Ambiente - SINIMA, registro público eletrônico de âmbito nacional, obrigatório para todos os imóveis rurais, com a finalidade de integrar as informações ambientais das propriedades e posses rurais, compondo base de dados para controle, monitoramento, planejamento ambiental e econômico e combate ao desmatamento."

[18] Idem supra, Article 59

[19] See <https://www.car.gov.br/#/sobre>