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Committee on Trade and Environment

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**EUROPEAN UNION REGULATION ON DEFORESTATION AND FOREST
DEGRADATION-FREE SUPPLY CHAINS****COMMUNICATION FROM ARGENTINA, BRAZIL, COLOMBIA, ECUADOR, GUATEMALA,
HONDURAS, MEXICO, PARAGUAY AND PERU**

The following communication, dated 9 November 2023, is being circulated at the request of the delegations of Argentina, Brazil, Colombia, Ecuador, Guatemala, Honduras, Mexico, Paraguay and Peru.

1. At the Committee on Trade and Environment¹ meeting of 2 February 2022, the European Union (EU) presented the main elements of the draft deforestation regulation (RD/CTE/206).

2. On 13 June 2023, the European Union circulated document [WT/CTE/GEN/30](#) to "inform the Members of the Committee on Trade and Environment that on 9 June 2023 it has published the text of Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No. 995/2010 (the "Deforestation Regulation")", and that the Regulation would enter into force 20 days following its publication in the Official Journal of the European Union, i.e. 29 June 2023.

3. During the WTO's Trade and Environment Week, held within the framework of the Committee on Trade and Environment from 12 to 16 June 2023, the European Union organized a briefing on its Deforestation Regulation in which it invited Members to discuss the Regulation and its implementation with representatives of the European Commission.

4. The Members sending this communication participated in the briefing, in which they expressed concern about this unilateral standard that imposes a trade measure that could generate higher costs or barriers to trade, especially for small businesses and producers in chains of great importance to our countries.

5. It is particularly worrying that many aspects of the European regulation remain unclear or require supplementary regulations, which means that the actual time frame operators and all actors involved in these chains have to implement the adjustments needed to ensure compliance will be far shorter than the 18-month time frame set out for implementation.

6. Under the European regulation, countries shall, in principle, be unilaterally assigned a deforestation risk rating, the specific criteria and methodology for which have not been communicated or coordinated with the countries potentially affected.

7. In addition, the Members making this submission would like to thank the European Union for arranging briefings. However, in the absence of sufficient time during briefings to address all

¹ The aim of this Committee is to make international trade and environmental policies mutually supportive. Sustainable development and protection and preservation of the environment are fundamental goals of the WTO. They are enshrined in the Marrakesh Agreement, which established the WTO, and complement the WTO's objective to reduce trade barriers and eliminate discriminatory treatment in international trade relations.

questions and of a formal notification with a deadline for comments, they wish to ask the following questions, to which they hope replies may be provided in writing:

8. How does the EU intend to minimize the negative impact on trade for developing or least-developed countries that are highly dependent on agriculture and certain commodities, particularly taking into account the costs and structural challenges associated with demonstrating compliance that may lead European operators to switch supplying countries?

9. How does the EU plan to prevent costs incurred in the implementation of traceability and due diligence systems from being borne by producers in third countries?

10. The EU stated that the Deforestation Regulation does not involve the extraterritorial application of measures, since compliance is required only from products that are intended to be "ma[de] available on the Union market". In this connection:

- a. How will a legal change in land use in a country be prevented from affecting its risk rating and, by extension, not only production intended for the EU but also all other domestic production?
- b. How does the EU intend to offset or further recognize each country's legal deforestation, which shall, in any event, be deemed prohibited by this legislation?

11. The cut-off date for determining the existence of deforestation (31 December 2020) and the requirements laid down in the Regulation fail to account for countries' common but differentiated responsibilities and for the EU's responsibility for historical emissions and deforestation. In this connection:

- a. What mechanism does the EU plan to put in place to address these issues?
- b. How does the cut-off date established in the EU Regulation address restoration commitments such as those included in the recently adopted Kunming-Montreal Global Biodiversity Framework?

12. How does the EU intend to contribute to mitigating the costs of adaptation to demonstrate compliance with the measures provided for in its Regulation? How does the "cooperation" that the EU can provide to third countries compare to domestic support for its producers?

13. What mechanisms does the EU have in mind to provide certainty to producers and exporters from third countries and avoid unnecessary or unclear requests for information from European operators?

14. Article 1 - Subject matter and scope:

Regarding cattle and cattle products, the geolocation requirements under the Regulation refer to the geographical location of each of the establishments where the cattle were raised. However, there also appears to be a requirement for the feed used for livestock to be deforestation-free (see recital 39 of the preamble to the EU Regulation).

- a. How can this be determined?
- b. What information or documentation will be required in this regard?

15. Article 8 - Due diligence:

The due diligence regime provided for in the Regulation grants European operators broad discretion in terms of the specific documentation that each may require from producers and exporters from third countries. Individual European operators may be more or less averse to the risk of being exposed to sanctions under the Regulation. This could entail a different trade impact for the same exporting country:

- a. How will the EU or the competent authorities of member States assess whether the "excessive" reactions or requirements of European operators are arbitrary or discretionary?
- b. How can such situations be avoided?
- c. Will channels be established for third-country suppliers or their governments to present their concerns about these practices?

16. Article 9 - Information requirements:

- a. How does the EU intend to respond to the logistical challenges posed by some of the products covered in situations where trade logistics dictate that products from several producers are mixed together?

With respect to the geolocation of all plots of land where the relevant commodities that the relevant product contains, or has been made using, were produced (Article 9.1(d)):

- i. Will the EU require the use of a specific digital tool (e.g. Google Earth or Copernicus)?
- ii. Will the EU (or the competent authorities of member States) accept or recognize programmes and systems for satellite mapping, geolocation and information developed by third countries that export to the EU?
- iii. How will equivalence between the various programmes, platforms or systems presented by the private sectors of supplying countries be ensured? In other words, how will the definitions and methodologies for measuring deforestation be harmonized to ensure neutrality for European operators between the options open to them?
- b. What information will be considered "adequately conclusive and verifiable" for the purpose of demonstrating that products are deforestation-free (Article 9.1(g)) and that the relevant commodities have been produced in accordance with the relevant legislation of the country of production (Article 9.1(h))?
- c. What steps will the EU take to ensure that the discretion given to seek information does not constitute a barrier to trade?
 - i. What will be the limit to operators' power in this regard?

17. Article 10 - Risk assessment:

The criteria to be taken into account in the risk assessment carried out by European operators would appear to punish conservation efforts while rewarding past deforestation. Could the EU shed light on the following questions concerning several of the criteria under Article 10.2 of the Regulation?

- (b) *the presence of forests in the country of production or parts thereof*

Does the conservation that has allowed these forests to be maintained to date imply a possible higher risk and a requirement of more documentation?

- (c) *the presence of indigenous peoples in the country of production or parts thereof*

Does the existence of indigenous peoples imply a higher level of risk and a requirement of more documentation?

- (d) *the consultation and cooperation in good faith with indigenous peoples in the country of production or parts thereof*

Could the EU clarify how it believes that consultations with indigenous peoples should be held? What criteria should be applied in order for a particular land tenure claim to be considered representative and reasoned?

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- (h) *concerns in relation to the country of production and origin or parts thereof, such as level of corruption, prevalence of document and data falsification, lack of law enforcement, violations of international human rights, armed conflict or presence of sanctions imposed by the UN Security Council or the Council of the European Union*
 - i. Could the EU clarify what bases, indicators and criteria European operators should take into account to assess, in an objective and accurate manner, a country's performance in terms of compliance with laws, corruption, falsification of documents or human rights violations? How will the type of sources that operators may use for this analysis be determined?
 - ii. Does the Commission plan to provide member States with a list of databases and indicators that it considers objective in this regard? If so, can the databases considered reliable be mutually agreed with the third country being assessed?
 - iii. How will risk assessments carried out by EU operators be verified? What criteria will be used to measure the objectivity of their findings?
 - iv. Is a mechanism envisaged to enable third countries to challenge risk assessments carried out by operators?
 - v. More generally, what is the relationship between, for example, compliance with laws and respect for international human rights law, on the one hand, and the EU Regulation's objective of preventing deforestation and forest degradation, on the other?
 - (i) *the complexity of the relevant supply chain and the stage of processing of the relevant products, in particular difficulties in connecting relevant products to the plot of land where the relevant commodities were produced*

In addition to tariff escalation for products from developing countries, is the processing of commodities in developing countries penalized through a possible higher level of risk and a requirement of more documentation?
 - (j) *the risk of circumvention of this Regulation or of mixing with relevant products of unknown origin or produced in areas where deforestation or forest degradation has occurred or is occurring*
 - i. Aside from the additional cost incurred as a result of the geographical location of some countries - such as landlocked developing countries - is the need to tranship and consolidate cargoes again in seaports in third countries of transit penalized through a possible higher level of risk and a requirement of more documentation?
 - ii. How will the risk of triangulation of mixed products with others of unknown origin be avoided?
 - iii. What happens if the mixing of products occurs in European territory? To what extent can third-country exporters be held responsible?
 - (n) *complementary information on compliance with this Regulation, which may include information supplied by certification or other third-party verified schemes, including voluntary schemes recognised by the Commission under Article 30(5) of Directive(EU) 2018/2001 of the European Parliament and of the Council, provided that the information meets the requirements set out in Article 9 of this Regulation*
 - i. How will the EU articulate the relationship between voluntary schemes for the certification of the sustainability criteria set out in the Renewable Energy Directive for commodities used as biofuels or to produce biofuels, on the one hand, and the certifications or information required by the Deforestation Regulation, on the other?

- ii. How will the European Commission or the competent authorities of EU member States recognize the traceability protocols or systems developed by third countries (either by the private sector and value chain or officially) that export products covered by the Regulation to the EU market?
- iii. Will "equivalence" approaches be considered to establish applicable protocols tailored to the situation in each country and to the specific characteristics of the sector or product concerned?

The Regulation indicates that the Commission should assess the deforestation and forest degradation risk at the level of a country or parts thereof based on a range of criteria that reflect quantitative, objective and internationally recognized data, and indications that the countries are actively engaged in fighting deforestation and forest degradation. It also states that, in order to ensure appropriate transparency and clarity, the Commission should in particular make publicly available the data being used for benchmarking, the reasons for the proposed change of classification and the reply of the country concerned.

- a. When will these data be available?

Articles 9, 10 and 11, together with other provisions of the Regulation, establish procedures but no time frames for any of them.

- a. Will the EU establish specific time frames for the procedures under the Regulation in order to provide greater certainty to businesses?

18. Article 15 - Technical assistance, guidance and exchange of information:

Although Article 15.5 of the Regulation states that the Commission "may facilitate the harmonised implementation of this Regulation, by issuing relevant guidelines", there is no detailed information on these guidelines.

- a. Does the EU have more information on these guidelines? Will they be general or product-specific? Will they establish what information will be required? Will the same information be considered sufficient to meet due diligence requirements by all member States? Will these guidelines be mandatory or indicative?
- b. Could the EU clarify the status of the "focus groups" announced by the Commission to develop traceability and due diligence guidelines for each sector of commodities and by-products covered by the Regulation?
- c. Could the EU clarify how it will be possible to establish protocols tailored to the situation in each country and to the specific characteristics of the sector or product concerned?
- d. Will the Commission take into account the traceability and certification protocols or systems developed by third countries (either by the private sector and value chain or officially) under these guidelines?

We understand that there will be guidelines to develop some aspects of the Regulation, provide greater clarity and facilitate its implementation. Given the different circumstances and capabilities of suppliers of products to the EU, it will be important to have this guidance prior to the entry into force of the Regulation and for 18 or 24 months after its issuance.

- a. When is it expected that guidance or clarifications will be provided on how to implement processes and satisfy requirements under the Regulation?

19. Article 16 – Obligation to carry out checks:

Why is it necessary for each competent authority to establish different national risk criteria? This could lead to a non-uniform enforcement of the Regulation.

20. Article 17 – Relevant products requiring immediate action:

What criteria shall be used to identify situations where "relevant products present such high risk of non-compliance ... that they require immediate action by competent authorities"? How will the EU ensure a uniform enforcement of the Regulation if it is the competent authorities of each member State that identify situations where immediate action is required?

21. Article 18 – Checks on operators and non-SME traders:

- a. Could the EU clarify who will cover the cost of the additional checks listed in Article 18(2)? Will they apply to operators only in the event of non-compliance?
- b. How long will these checks take? Considering, in particular, their implications for exporters or producers in third countries.

22. Article 21 – Cooperation and exchange of information:

This provision appears to focus on the exchange of information in the event of non-compliance. Article 21(4) provides, for example, that competent authorities "shall immediately alert competent authorities of other [m]ember States and the Commission when they detect any potential non-compliance with this Regulation and serious shortcomings that could affect more than one [m]ember State".

Could the EU clarify how the *favourable* results of checks will be shared with a view to preventing them from being required again by other member States?

23. Article 23 – Interim measures:

- a. Could the EU clarify how the interim measures are lifted and after how long?
- b. How will the EU ensure a uniform enforcement of the Regulation if these measures will be taken by the competent authorities in accordance with the provisions of each member State?
- c. How will the EU provide predictability for exporters, whose products may be subject to interim measures, despite being sent with the required information and with the due diligence completed by the European operators?

24. Article 24 – Corrective action in the event of non-compliance and Article 25 – Penalties:

- a. Could the EU clarify what is the difference between interim measures and corrective action?
- b. How will the EU ensure a uniform enforcement of the Regulation if the corrective action and penalties will be assessed and determined by each member State?

25. Article 29 – Assessment of countries:

- a. Considering the deadline for the initial list of high- and low-risk countries, we would be grateful if the EU could clarify the following points:
 - i. What sources of information will the EU use to assess the criteria laid down in Article 29?
 - ii. Will the sources of information and assessment criteria be mutually agreed with the country to be assessed? Will the criteria and sources be adapted to each national reality?
 - iii. When and how will data be requested from trade partners?

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- b. Among the criteria to be taken into account for the classification of countries are "production trends of relevant commodities and of relevant products" (Article 29(3)(c)).
- i. When assessing the rate of expansion of agriculture land for relevant commodities, will consideration be given to instances of expansion of agriculture land due to climatic variability, soil improvement, product adaptation to specific soil types and/or implementation of sustainable agricultural practices, together with the development of appropriate policies that minimize the negative impacts on forests and promote a more harmonious development between agriculture and forest conservation?
 - ii. Will an increase in production be considered negatively and punished with a higher level of risk and more documentation requirements? How is this consistent with the attainment of some Sustainable Development Goals (SDGs) such as SDG 2?
 - iii. How does the EU intend to take into account sustainable intensification, recognized by the recently adopted Kunming-Montreal Global Diversity Framework as a biodiversity friendly practice?
 - iv. What would be the involvement of non-state actors in the identification and collection of data? How will the EU assess and verify that the information provided by third countries, NGOs and/or civil society is objective, true and accurate?
 - v. What right to object and/or reply will a country to be assessed have in relation to the sources used and the assessment made?
- c. Since the EU Regulation includes a definition of "forest degradation" that is not internationally agreed:
- i. Under what conditions and parameters, and on the basis of which elements, will the "forest degradation" criterion be identified, verified and measured?
 - ii. Will the concept of "forest degradation" apply to all products/sectors covered by the Regulation or only to the timber sector and products that contain or have been made using wood?
 - iii. How will the EU take into account third-country legislation that permits "legal deforestation"? Could the EU clarify what criteria will be used to assess the forestry policies, projects and standards of these countries? How will the environmental benefits of these policies be assessed? How will the EU take into account the legal deforestation "compensation" approaches that are currently permitted?
 - iv. Will the EU recognize as equivalent the environmental measures to combat deforestation adopted by exporting third countries which, although they may diverge from the EU project, are pursuing the same goals?
- d. Article 29(4)(a) of the Regulation states that the assessment may take into account "information submitted by the country concerned, regional authorities concerned, operators, NGOs and third parties, including indigenous peoples, local communities and civil society organisations, with regard to the effective covering of emissions and removals from agriculture, forestry and land use in the nationally determined contribution to the UNFCCC":
- i. Could the EU clarify the information submitted by which "operators" will be taken into account under this provision?
 - ii. Could the EU clarify which "NGOs" information will be considered eligible under this provision?
 - iii. Could the EU clarify what level of representativeness will be necessary to objectively be considered representative of an indigenous people, within the meaning of this provision?

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- iv. Could the EU clarify how it will select the "civil society organizations" whose information will be taken into account under this provision?
 - v. How does the EU intend to assess the criteria laid down in the multilateral agreements on climate change?
 - vi. How does the EU plan to require third countries and third parties to provide information not foreseen in the multilateral agreements on climate change?
 - e. Article 29(4)(b) of the Regulation states that "agreements and other instruments between the country concerned and the Union and/or its [m]ember States that address deforestation and forest degradation" may be taken into account. In this regard:
 - i. What type of agreements and other instruments between the country concerned and the Union and/or its member States, which facilitate compliance with the Regulation, will be taken into account?
 - ii. What will be the relative importance of each type of agreement or instrument? Will agreements concluded at the member State level and agreements concluded with the EU bloc have the same validity or weight? Or will the latter take precedence?
 - iii. What type of practices must these agreements contain for them to be considered as being in accordance with the Regulation and conducive to its implementation?
 - f. Article 29(4)(c) of the Regulation states that the assessment may take into account whether a country "applies penalties of sufficient severity to deprive of the benefits accruing from deforestation or forest degradation". What criteria must the penalties applied by third countries meet in order to be considered of sufficient severity to ensure compliance with domestic laws?
 - g. Pursuant to Article 29(4)(d) of the Regulation, a country's deforestation risk assessment may take into account "the existence ... of laws protecting human rights, the rights of indigenous peoples, local communities and other customary tenure rights holders":
 - i. What relationship is the EU establishing between the risk of deforestation and the protection of human rights in third countries?
 - ii. What transparency criteria will the EU apply when assessing the information available on human rights, and the rights of indigenous peoples and local communities to customary land tenure?
 - iii. What will be the verifiable information (specific documentation that must be submitted), and what criteria or indicators will the EU take into account in its assessment of these aspects?
 - h. In accordance with Article 29(5) of the Regulation, "[t]he Commission shall engage in a specific dialogue with all countries that are, or risk to be classified as, high risk, with the objective to reduce their level of risk ":
 - i. What type of information must the country concerned provide in the context of this dialogue?
 - ii. How will mechanisms be developed through which these countries' level of risk may be reduced? Who will finance these mechanisms?
 - iii. What type of follow-up is envisaged under these programmes?
 - i. The EU includes a benchmarking system to assess the risk of non-compliance with the Regulation's deforestation-free requirement, and to classify countries of production as low, standard or high risk. We would like to know how countries' particular circumstances and

capacities and the actions taken to date with regard to this classification will be taken into account.

- i. How will the EU ensure that the competent authorities of all its members and the operators conducting due diligence do not violate the principles of national treatment and most-favoured-nation treatment?
- ii. Should an exporter not agree with the result of the due diligence conducted by an operator, to which authority can the exporter turn for a review or to complain?
- j. If this classification is based on general rates, how will the particular circumstances and capacities of third countries be taken into account so as not to negatively affect producers and exporters from low-risk areas, putting them at a disadvantage vis-à-vis like products in other countries?

26. Article 30 - Cooperation with third countries:

- a. Could the EU clarify how the cooperation objectives will be achieved to help producers meet the Regulation's requirements and provide assurances in the context of due diligence? How does this include the possibility of working on "equivalence" approaches?
- b. Can the EU foster direct investment and direct funds from public and private financial platforms for trading partners in the context of these dialogues?

27. Article 33 – Information system:

- a. Could the EU provide information on what progress is being made towards establishing the information system?
- b. How will the favourable results of checks be shared in advance so that they do not have to be carried out again by other member States?
- c. What type of access will third parties have to the information system being developed by the Commission?

28. Article 34 - Review:

Even before the implementation of this Regulation, the Commission's impact assessment ("COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT - minimising the risk of deforestation and forest degradation associated with products placed on the EU market") determined that "[m]aize and rubber account for the smallest fraction of embodied deforestation among the commodities analysed, while their trade volumes are very large (around EUR 2.8 billion per year for maize and 17.6 billion for rubber). Including these two commodities in the scope would require a very large effort and significant financial and administrative burden, with limited return in terms of curbing deforestation driven by EU consumption." Nonetheless, *rubber* was included in the Regulation. In the light of Article 34 of the Regulation:

- a. Could the EU clarify whether there is a possibility that a review would demonstrate that the Regulation is burdensome and creates excessive trade restrictions for a very limited environmental impact and, thus, whether there is a mechanism for excluding commodities and associated products from the scope of the Regulation?
- b. Bearing in mind that the restoration commitment falls mainly to developed countries, while developing countries' commitments are focused on conservation, does the EU envisage a review mechanism that may establish an earlier cut-off date for the EU and other developed countries?