

WTO Consistency of the EU Deforestation Regulation's Proposed 'Negligible Risk' Country Classification

Abstract

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The European Union's Deforestation Regulation (EUDR) seeks to curb global deforestation by conditioning market access on strict due diligence. In mid-2025, the European Parliament proposed introducing a new "negligible risk" country category that would significantly relax these obligations for commodities from certain countries. This article analyzes the WTO-consistency of the proposed negligible-risk classification under international trade law. It reviews core GATT obligations—Most-Favored-Nation (MFN, Article I) and National Treatment (NT, Article III)—and the requirements of the Technical Barriers to Trade (TBT) Agreement Articles 2.1 and 2.2, as well as the potential relevance of the SPS Agreement's risk assessment and non-discrimination disciplines. It then examines whether GATT Article XX's environmental exceptions could justify the measure. Drawing on WTO jurisprudence, including EC – Seal Products, US – Tuna II (Mexico), EC – Hormones, US – Shrimp, and Brazil – Retreaded Tyres, the article finds that a country-tiered "negligible risk" scheme would likely constitute de facto discrimination by according more favorable treatment to certain imports based on origin. Such distinctions, if not closely calibrated to genuine differences in deforestation risk, risk being deemed arbitrary or unjustifiable. Absent substantial redesign, the negligible-risk exemption would be vulnerable to challenge as inconsistent with WTO obligations, and likely not saved by Article XX's environmental exceptions due to the discriminatory and inadequately calibrated nature of the scheme. The analysis underscores the need for careful calibration of environmental measures to avoid WTO breaches, concluding that the proposed amendment, as formulated, would face significant legal hurdles under WTO law.

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1. Introduction

In May 2023, the European Union adopted a groundbreaking new law, Regulation (EU) 2023/1115, commonly known as the EU Deforestation Regulation (EUDR).¹ The EUDR prohibits the placing of certain commodities on the EU market unless they are “deforestation-free” and mandates rigorous due diligence from operators to prove compliance.² To facilitate enforcement, the Regulation provides for a risk-based benchmarking of source countries, allowing imports from “low-risk” countries to face streamlined checks, while “high-risk” origins undergo enhanced scrutiny.³ In 2025, amid concerns about EUDR’s complexity and trade impact, the European Parliament proposed creating an even more permissive category of “negligible risk” countries. Under this proposal, countries deemed to pose a negligible risk of deforestation would enjoy substantially relaxed requirements – notably, exporters from such countries would be exempt from certain key due diligence obligations (such as providing precise geolocation of harvest plots) and would be subject only to minimal spot-checks by authorities.⁴ Proponents argued this simplification would reduce burdens on industry and regulators where deforestation risk is objectively very low.⁵

The “negligible risk” proposal, however, immediately raised alarms regarding its compatibility with World Trade Organization (WTO) rules. By carving out a lighter compliance regime for certain countries, the EU could be seen as according less favorable treatment to other WTO Members’ products purely on the basis of origin. Indeed, trade partners like Brazil have already objected that the EUDR’s underlying country benchmarking system “imposes different burdens and is unwarranted and unnecessary,” viewing it as inherently discriminatory.⁶ The introduction of an even more preferential tier amplifies such concerns. Would excluding “negligible risk” countries from obligations (like geolocation or full due diligence statements) amount to an unfair advantage that violates the WTO’s cornerstone non-discrimination principles? Could such origin-based differentiation be justified by environmental objectives under exceptions in GATT Article XX? And might the scheme fail separate WTO agreements, such as the TBT Agreement’s disciplines on technical regulations or even the SPS Agreement’s provisions on risk-based measures?

This article addresses these questions through a structured legal analysis of the WTO-consistency of the proposed negligible-risk country classification. Section 2 outlines the legal framework: summarizing the EUDR and the Parliament’s proposed amendment, and identifying relevant WTO provisions. Section 3 assesses potential violations of WTO obligations: examining GATT Articles I and III (most-favored-nation and national treatment), TBT Agreement Articles 2.1 and 2.2 (non-discrimination and necessity for technical regulations), and the SPS Agreement’s requirements (should the measure be characterized as SPS) regarding risk assessment and consistency. It also evaluates whether GATT Article XX’s environmental exceptions might provisionally justify the measure, and if so, whether the discriminatory design could satisfy the Article XX chapeau. Section 4 draws on WTO jurisprudence to shed light on how similar trade-and-environment measures have been treated, discussing key cases that illustrate the boundaries of permissible discrimination and the importance of calibrating environmental measures. Finally, Section 5 concludes that the “negligible risk” scheme, as proposed, would likely be found inconsistent with WTO rules—

principally because it discriminates between countries in a manner not adequately calibrated to the policy goal—and would face difficulty meeting the strict requirements for exception under GATT Article XX. The analysis highlights that while WTO law does allow Members leeway to pursue legitimate environmental objectives, such measures must be carefully designed to avoid unjustifiable discrimination or disguised protectionism.

The stakes of this inquiry are high. A WTO challenge to the EUDR is not hypothetical: several tropical commodity producers have already voiced concerns at the WTO and signaled potential disputes. A finding of non-compliance could force the EU to alter or withdraw aspects of the law, undermining its environmental intent and the EU's credibility as a green trade leader. As the EU navigates the tension between trade obligations and climate imperatives, the negligible-risk country idea serves as a cautionary example of how well-intentioned flexibility could morph into a WTO liability. Ultimately, ensuring the EUDR's durability will require aligning its design with WTO principles—proving that the regulation's environmental benefits can be secured without resorting to origin-based favoritism that the multilateral trading system was designed to prevent.

2. Legal Framework

2.1 The EU Deforestation Regulation and Its Risk-Based Approach

The EUDR (Regulation (EU) 2023/1115) is a landmark EU law aimed at “making available on the Union market... certain commodities and products associated with deforestation and forest degradation” only if they are proven to be deforestation-free and produced in accordance with the laws of the country of origin.¹ In effect, as of its application date, operators who import or sell in the EU commodities such as cattle, cocoa, coffee, palm oil, soy, wood, rubber, and their derivative products must conduct due diligence to ensure the goods were not produced on land that was deforested after a cut-off date (31 December 2020 under the regulation), and that they comply with relevant local laws.² Operators must collect precise information on the supply chain, including geolocation coordinates of the plot of land where the commodity was produced, assess the risk of deforestation, and mitigate any identified risk. They then must file a due diligence statement attesting that the product is deforestation-free and legal, before it can enter the EU market.³

To target enforcement, the EUDR requires the European Commission to categorize source countries (or parts thereof) into risk levels—initially “low” vs “standard” (and implicitly “high” for any not low).⁴ Article 29 of the EUDR empowers the Commission to adopt implementing measures classifying countries based on objectively comparable criteria such as rates of deforestation, the country's forest governance, and international commitments.⁵ Operators sourcing from *low-risk* countries enjoy streamlined due diligence: for example, they may provide less detailed risk assessments and face a lower frequency of official checks on compliance (e.g. 1% of operators/products checked annually, versus 3% for standard-risk and 9% for high-risk countries).⁶ Crucially, however, even “low-risk” country imports are not exempt from the core requirement of being deforestation-free nor from providing geolocation data; they simply benefit from reduced auditing intensity by authorities.⁷ This calibrated

approach was intended to incentivize countries to strengthen forest protection (to attain low-risk status) while concentrating enforcement resources where the deforestation risk is highest.

In May 2025, the European Commission adopted Implementing Regulation (EU) 2025/1093, which set out the initial list of countries assessed as low or high risk pursuant to the EUDR's benchmarking criteria.⁸ Several developing country governments had lobbied intensely during this process, fearing that a high-risk label would stigmatize their exports. The Commission's implementing list was conservative—initially classifying only a handful of countries as “low risk,” with none designated “high risk” (all others by default falling in the standard category).⁹ This cautious approach reflected sensitivity to WTO concerns: a glaring differentiation might trigger formal disputes. Nevertheless, some EU Member States and industry stakeholders remained dissatisfied, arguing that the regulation's obligations were still overly complex and burdensome even for suppliers with minimal deforestation linkage.¹⁰ They urged further simplification of the due diligence system, beyond what the low-risk category provided.

2.2 The Proposed “Negligible Risk” Country Category

Against this backdrop, in June 2025 the European Parliament's Committee on Environment, Climate and Food Safety advanced a Draft Motion for Resolution calling on the Commission to introduce an additional “negligible deforestation risk” category of countries or regions.¹¹ The proposal, spearheaded by several Members of European Parliament (MEPs) through amendments in late 2024 and formalized in the June 17, 2025 resolution, envisioned that countries meeting certain stringent criteria would be deemed “negligible risk” and granted near-complete exemption from the EUDR's due diligence requirements.¹² Specifically, under this scheme, operators sourcing from a listed negligible-risk country would no longer need to collect and report geolocation coordinates for each production plot, and they could apply a *simplified* due diligence procedure amounting effectively to an honor system (with an assumption of compliance except for occasional spot-checks).¹³ In practical terms, commodities from negligible-risk countries could be placed on the EU market with minimal documentation and without the detailed supply chain traceability that the EUDR otherwise requires. This goes further than the Regulation's existing “low-risk” facilitation, amounting to a broad regulatory waiver for favored countries.

The Parliament's resolution justified the negligible-risk category on the basis that some countries have *demonstrably* maintained or increased forest cover and have robust forest governance, such that their commodities present virtually no risk of contributing to deforestation.¹⁴ MEPs pointed in particular to European countries (the EU itself and others) where forest area has grown since 1990, and to strong legal frameworks in certain partners, as evidence that the EUDR's one-size-fits-all approach was unnecessary in those contexts. The draft criteria for negligible-risk status, as discussed in parliamentary debates and documents, included: (i) the country's forest area should be stable or expanding (at least compared to 1990 levels); (ii) the country must be a party to the Paris Agreement on climate change and international conventions on human rights and forest protection; and (iii) the country must strictly enforce domestic laws against deforestation.¹⁵ Countries like Canada or New Zealand,

and possibly EU Member States themselves, were cited as examples that might qualify. Notably, compliance with international agreements and enforcement effectiveness were incorporated to address concerns that the designation would be merit-based, not merely arbitrary.

Notwithstanding its benign rationale (reducing red tape where the deforestation risk is truly negligible), the proposal drew immediate criticism from civil society and some governments. Environmental NGOs warned that creating a “loophole” for certain countries could encourage *regulatory laundering*, whereby products from higher-risk origins might be routed through negligible-risk countries to evade scrutiny. Additionally, the European Commission itself cautioned that it lacked a mandate from the co-legislators to rewrite core elements of the due diligence system, hinting at legal concerns. Implicit in these objections was the realization that a country-tiered exemption might conflict with international trade rules. If commodities from, say, Country A can enter EU markets with essentially no compliance costs, whereas like commodities from Country B face onerous requirements, this differential treatment on the basis of origin could be seen as de facto discrimination. The Parliament’s resolution did not explicitly address WTO compatibility, but trade experts quickly noted the risk: the negligible-risk amendment “would likely render the EUDR inconsistent with various provisions of the WTO covered agreements,” as one legal analysis commissioned by an NGO concluded.

In December 2024, just days before a key trilogue negotiation, EU institutions tacitly heeded these warnings. They agreed to postpone the EUDR’s enforcement by one year and promised further guidance and “simplifications,” but crucially did not adopt the “no risk” (negligible-risk) exemption in the final compromise.¹⁶ The Commission instead committed to explore less drastic ways to ease implementation burdens “in full compliance with the objectives of the Regulation.”¹⁷ This outcome suggests an awareness that the negligible-risk idea, at least in its originally proposed form, was on legally shaky ground. Nonetheless, the episode is instructive: it presents a concrete scenario for analyzing how far the EU (or any WTO Member) can go in differentiating between supplying countries in pursuit of environmental goals. The analysis below proceeds as if the negligible-risk category were adopted, in order to test its WTO-consistency. This serves to illuminate the boundaries that WTO law imposes on such environmental trade measures—boundaries the EU must navigate as it implements and possibly amends the EUDR.

2.3 Applicable WTO Obligations (GATT, TBT, SPS)

Because the EUDR (with or without a negligible-risk amendment) potentially affects international trade in commodities, several WTO agreements are relevant. The General Agreement on Tariffs and Trade 1994 (GATT) lays down core non-discrimination principles that apply to measures governing importation and internal sale of goods. Two GATT provisions in particular are triggered by an origin-based differentiation like the negligible-risk scheme: Article I:1 (Most-Favored-Nation) and Article III:4 (National Treatment). Article I:1 mandates that any advantage, favor or privilege granted by a WTO Member to products of one country must be accorded “immediately and unconditionally” to like products of all other

WTO Members.¹⁸ This MFN obligation is broad in scope, covering all “rules and formalities in connection with importation and exportation” among other matters, and prohibits WTO Members from discriminating between like products based on origin. A special fast-track for certain countries’ goods (fewer requirements or checks) constitutes an “advantage” in terms of market access conditions that would need to be extended to all like goods to comply with Article I.¹⁹ Article III:4 GATT, by contrast, requires that imported products be accorded treatment “no less favourable” than that accorded to like domestic products in respect of internal regulations and requirements.²⁰ The EUDR by its terms applies equally to domestic EU production and imports (a deliberate design to avoid classic protectionism). However, if in practice EU producers (or those in “negligible risk” countries, which might include some EU trading partners with similar conditions to the EU) are relieved from compliance burdens that other foreign producers must bear, an issue of de facto national treatment discrimination may arise. In short, GATT rules demand that any country-tiering in the EUDR be scrutinized to ensure it does not result in origin-based disparate treatment of like products.

In addition, the Agreement on Technical Barriers to Trade (TBT Agreement) is likely applicable. The EUDR can be characterized as imposing product-related requirements (deforestation-free status and associated due diligence documentation) as a condition for placing goods on the market, which makes it a “technical regulation” under the TBT Agreement’s definition in Annex 1.1 (a document which lays down product characteristics or related processes and production methods, compliance with which is mandatory).²¹ WTO Members must ensure that technical regulations do not discriminate (TBT Article 2.1) and are not more trade-restrictive than necessary to achieve a legitimate objective (TBT Article 2.2).²² These TBT obligations overlap with GATT to some extent but also have independent bite. Article 2.1 of the TBT Agreement essentially prohibits both less favorable treatment of imported products vis-à-vis like domestic products and discrimination between imports of like products from different origins, in the context of technical regulations.²³ A negligible-risk country exemption that differentiates between sources would need to satisfy Article 2.1’s requirement of even-handedness. Article 2.2 of the TBT Agreement will be relevant to assess whether the EUDR’s design (with or without negligible-risk tier) is a proportionate means to pursue its environmental objective, or if there are alternative measures available that are less trade-restrictive. Notably, environmental protection (including conservation of forests) is an explicitly recognized legitimate objective under Article 2.2, but the necessity test requires a balancing of the trade restrictiveness against the contribution to the objective, taking into account reasonably available alternatives.

A question arises whether the EUDR measure could also fall under the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). The SPS Agreement covers measures aimed at protecting human, animal or plant life or health from risks such as pests, diseases, or contaminants. At first glance, the EUDR addresses environmental conservation (deforestation) rather than classical SPS risks like the spread of insects or pathogens. It is not primarily about preventing the introduction of a pest or disease through imports, but about curbing a production practice (deforestation) to protect ecosystems and climate. Thus, most analysis treats EUDR as a technical regulation (TBT) or general environmental measure

(GATT), not an SPS measure.²⁴ However, one could argue that protecting “plant life or health” (forests) in the importing country’s eyes might bring it conceptually within SPS (since SPS Article 2.1 and Annex A refer to measures for protection of life or health of plants). The counterargument is that deforestation is not a disease/pest risk but an intentional land-use activity, so SPS may not apply. In an abundance of caution, this article will briefly consider SPS disciplines as well, in case a WTO panel were to entertain that characterization or if an SPS-based defense were invoked. Key SPS provisions would include the requirement of scientific risk assessment (Article 5.1) and the prohibition of arbitrary or unjustifiable distinctions in levels of protection that result in discrimination (Article 5.5).²⁵ If the negligible-risk classification were seen as an implicit judgment about different levels of risk posed by different countries’ commodities, SPS principles would demand that such judgments have a scientific basis and be consistently applied.

Finally, should the EUDR’s country-differentiation violate a core WTO obligation (e.g. GATT or TBT), the EU would likely invoke GATT Article XX as a defense. Article XX(b) allows exceptions to GATT rules for measures “necessary to protect human, animal or plant life or health,” and Article XX(g) for measures “relating to the conservation of exhaustible natural resources” (if paired with domestic restrictions as well).²⁶ Combating deforestation and protecting forests could fit within one or both of these sub-paragraphs: forests are exhaustible natural resources, and protecting plant life is explicitly covered. However, Article XX’s chapeau requires that even qualifying measures not be applied in a manner constituting “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or a “disguised restriction on international trade.”²⁷ The design of a negligible-risk exemption—expressly creating different rules for different countries—would need to survive the chapeau analysis by demonstrating that those distinctions are not arbitrary or unjustifiable in relation to the policy goal. The WTO jurisprudence on Article XX (including the *US – Shrimp* and *EC – Seal Products* cases) provides guidance on how environmental measures with country-specific aspects can satisfy or fail the chapeau. Therefore, any defense of the EUDR’s amended design would hinge on showing that the country classification is grounded in genuine differences in conditions and is administered fairly.

In sum, the WTO legality of the proposed negligible-risk country classification touches on multiple provisions. The following section conducts the analysis step by step: first identifying any *prima facie* breaches of GATT Articles I and III, and TBT 2.1/2.2 (and briefly SPS), and then examining whether Article XX could justify the measure notwithstanding those breaches.

3. WTO Consistency Analysis

3.1 Most-Favored-Nation Treatment (GATT Article I:1)

GATT Article I:1 (MFN) obligates WTO members to extend any advantage given to products of one country to like products of all WTO members, immediately and unconditionally. The proposed negligible-risk country classification squarely implicates this principle, as it conditions market access procedures on the origin of the product. If Country X is designated negligible-risk, an exporter of, for example, coffee from X would face substantially fewer

requirements to place its coffee on the EU market than an exporter of like coffee from Country Y that is not on the list. This is an “advantage” in the form of a lighter regulatory burden and likely faster, cheaper access. Under MFN, the EU must accord that advantage to coffee from all other WTO Members immediately and unconditionally – which is the opposite of a selective country list.¹⁸ Indeed, a WTO panel would likely find that commodities from negligible-risk countries and those from non-listed countries are “like products” for purposes of Article I. Likeness under GATT is determined by factors such as the products’ physical characteristics, end-uses, consumer preferences, and tariff classifications.²⁸ Here, a coffee bean is a coffee bean; the production history (deforestation footprint) is a process and production method (PPM) attribute that does not alter the physical product per se. Thus, coffee beans from Brazil (hypothetically high-risk) are not physically distinguishable from coffee beans from, say, Peru (hypothetically negligible-risk if it met the criteria). They would be considered “like” under the traditional tests.²⁹ WTO jurisprudence confirms that even PPM-based distinctions, if they do not manifest in the final product, generally do not prevent a finding of likeness for the product itself (as seen in *EC – Asbestos* for health-based bans, or *US – Tuna/Dolphin* under GATT in earlier iterations).³⁰ Accordingly, any favorable regulatory treatment afforded to “like” products of one origin must be extended to the others to satisfy Article I.

The negligible-risk scheme would fail this test. By design, it grants an advantage (exemption from certain EUDR requirements) only to a subset of countries that meet the EU’s criteria. Products from those countries receive more favorable treatment than products from other countries, which amounts to an origin-based discrimination. Article I:1 has been interpreted very broadly: it covers not only border tariffs but also “all rules and formalities in connection with importation” and internal measures affecting imports.¹⁹ The EUDR’s due diligence and documentation requirements are “rules... in connection with importation” and internal sale, so they fall within Article I’s scope. A helpful analog is the *EC – Seal Products* dispute, where the EU banned seal products but created exceptions (e.g. for indigenous-hunted seal goods) that in practice benefited certain countries more than others. The WTO Appellate Body found that the EU’s scheme violated MFN because it did not immediately and unconditionally offer the same access conditions to all like seal products; instead, the conditions varied by origin in a way that some foreign products (e.g. from Greenland’s Inuit hunt) were allowed and others (Canadian seal products) were not.³¹ Similarly, here the exemption for negligible-risk origins is a conditional advantage: only those countries that meet the EU’s forest-cover and governance criteria get the benefit. This conditionality is the antithesis of “unconditional” MFN treatment. A country outside the list cannot qualify for the lighter regime unless and until the EU deems it to have fulfilled the criteria – effectively making the advantage contingent on origin-related conditions.

It is also irrelevant under Article I analysis that the criteria for negligible-risk status are in principle open to any country to meet (i.e. not explicitly a closed list or political favor). Even a formally origin-neutral requirement can breach MFN if it results in advantage to some countries and not others. For example, in *Indonesia – Autos*, an Indonesian policy granted tax benefits to cars with a certain percentage of local content or those produced under a national

car program; the panel found an MFN violation because European car imports didn't get the benefit that, say, Korean imports assembled in Indonesia did.³² In our case, although the negligible-risk designation is ostensibly based on objective environmental performance criteria, in practice it distinguishes among trading partners. Some countries (likely developed countries or a few developing ones with low deforestation rates) would enjoy the relaxed regime, others (particularly tropical commodity exporters) would not. Therefore, it constitutes a de facto discrimination among countries. Brazil's critique of the EUDR's benchmarking as "discriminatory" and "unnecessary" highlights this exact concern at the WTO: that differing treatment based on where a product comes from contravenes MFN principles.

Unless the EU were to offer the same streamlined import procedure to all WTO Members' products (which would nullify the concept of a risk-based distinction entirely), the negligible-risk amendment creates an inherent tension with Article I. The violation, if demonstrated, is prima facie – meaning the EU would have to seek justification under a WTO exception (discussed in Section 3.5). There is no built-in exception in Article I itself; the only possible defense would be to justify under GATT Article XX, as we analyze later. For now, we conclude that the negligible-risk country classification *likely violates MFN* by granting an advantage to imports of certain countries not accorded to like products of other WTO Members.

3.2 National Treatment (GATT Article III:4)

GATT Article III:4 (National Treatment) requires that imported products be treated no less favorably than domestic like products with respect to internal laws and regulations. The EUDR's design carefully extends its due diligence requirements to both imported and domestically produced commodities placed on the EU market, in order to avoid overt protectionism.³³ On its face, the regulation does not distinguish between EU-origin soy and Brazilian-origin soy: both must be deforestation-free and comply with due diligence. However, the introduction of a country-based risk exemption could indirectly upset this parity. Specifically, if *EU Member States* (or regions thereof) are effectively considered "negligible risk" by virtue of their stable forest area and strong laws, then EU producers could argue they fall under the negligible-risk category. Even if the formal list is only for non-EU countries, the practical result is that EU domestic production will inherently meet the criteria (the EU collectively has had net reforestation in recent decades¹⁴) and thus EU-based commodities would carry negligible risk of deforestation. The Parliament's debate in fact cited the increase in Europe's forest cover as motivation for the exemption. If domestic operators in the EU have significantly lighter compliance burdens (either de jure by being covered in the negligible-risk list if the EU itself or parts of it are listed, or de facto because all domestic produce is low risk), and imported goods from many foreign countries still face full burdens, this raises a national treatment issue.

Under Article III:4, the analysis is: (1) whether the imported and domestic products are "like"; (2) whether the measure is a "law, regulation, or requirement affecting internal sale, offering for sale, purchase, etc."; and (3) whether the treatment of imported products is less

favorable than that of like domestic products.³⁴ Here, products (e.g. beef, coffee, etc.) are unquestionably like regardless of origin, as discussed under MFN. The EUDR due diligence rules are internal regulations affecting the sale of products (goods cannot be sold without the requisite due diligence statement). The crux is the comparative treatment. If EU-origin commodities enjoy a procedural exemption or simplified compliance due to EU's negligible-risk status, while imports must undergo onerous due diligence, then imported products are placed at a competitive disadvantage. WTO adjudicators often articulate the test as whether the measure modifies the conditions of competition to the detriment of imported products.³⁵ Imposing higher compliance costs and potential delays on imported goods from certain foreign sources, while domestic goods avoid those costs, clearly would modify competitive conditions in favor of domestic goods.

It is important to clarify that the EUDR itself (without the negligible-risk amendment) was designed to be origin-neutral in terms of domestic vs. foreign: both have to meet the same standards and file the same statements. Assuming the Commission and Member States also apply enforcement equally, the base regulation likely does not violate national treatment on its face.³⁶ The low-risk country concept in the original EUDR did not include domestic production because it's aimed at country benchmarking for imports. However, since EU Member States are not "third countries," the regulation inherently treats them akin to default (standard risk) unless one imagines an internal classification. The negligible-risk concept, though, opens the door to either explicitly or implicitly favoring domestic production. The EP's motion did not explicitly say "count the EU as negligible risk," but logically if negligible risk is defined by criteria that the EU meets (in terms of forest trends and law enforcement), then EU-grown products would qualify. Alternatively, even if the negligible-risk list is formally about foreign countries, one must consider if any discrimination between groups of imported products could also result in an *indirect* advantage to domestic products. For instance, if most temperate-climate agricultural products (grains, dairy, etc.) from the EU face no deforestation issues and thus EU producers bear little compliance burden, whereas tropical commodities (which by nature are imported from tropical countries) have heavy burdens, that dynamic could be seen as a de facto tilt favoring domestic EU agriculture over foreign tropical agriculture. This argument would be complex, as it's not a like product comparison (soy vs. milk are not "like"), but it highlights the backdrop of competitive impact.

A cleaner national treatment comparison is possible for commodities that the EU does produce domestically. Timber is a good example: EU countries harvest and sell wood, which is subject to the EUDR for domestic sales too. If the EU classified itself or certain EU countries as negligible risk (given strong forest management in, say, Finland or Germany), then an EU harvester's wood might move to market without geolocation reporting, whereas wood from Indonesia or Brazil must have precise coordinates and extensive due diligence. In that scenario, foreign wood products are not getting equal treatment on the EU market. Similarly, beef: there is EU beef production and beef imported from, say, Argentina. If Argentina were not negligible risk and faced full controls while domestic beef was implicitly

seen as negligible deforestation risk (since EU does not significantly convert forests to pasture anymore), one could argue imported beef is disadvantaged in the regulatory process.

WTO case law confirms that a formally origin-neutral measure can breach Article III:4 if it disproportionately burdens imported goods in practice. The Appellate Body in *Korea – Beef* emphasized looking at the overall equality of competitive opportunities for imported vs. domestic like products.³⁵ In *Korea – Beef*, even though the law did not facially single out imports, it enforced a dual retail system that effectively limited opportunities for imported beef. By analogy, an EUDR with a negligible-risk carve-out effectively creates a dual system: one (lenient) for products from certain origins (which could include domestic), and another (strict) for others (mostly imported). The result is an inherent bias. In trade law terms, imported products from excluded countries would receive “less favorable” treatment than domestic (negligible-risk) like products, because only the former must bear the full cost of compliance. The Tulip Consulting study succinctly concluded that a “no risk” exemption would violate both MFN and National Treatment obligations under GATT, if viewed in the context of the broader EUDR measure.

It’s worth noting that unlike MFN, national treatment isn’t concerned with discrimination between foreign countries, only foreign vs. domestic. So the fact that some foreign countries get the exemption while others do not is an MFN issue; NT focuses on whether domestic goods are advantaged. If in practice the EU doesn’t actually exempt itself (for political optics, the EU might say the list is only for non-EU countries), one could argue domestic and (some) foreign are both under full obligations, thus no direct NT violation. However, even then, if negligible-risk category spares some foreign goods from requirements, EU producers could complain that *they* have to comply while those foreign producers do not. That would be reverse discrimination (foreign favored over domestic), which GATT Article III technically doesn’t prohibit (it forbids less favorable treatment of imports, not more favorable). WTO law doesn’t discipline a country for giving imports a break that locals don’t get. So interestingly, if the EU did *not* count itself as negligible risk but gave, say, Norway or New Zealand that status, EU domestic producers might be relatively worse off, but that’s not a violation of WTO rules (it’s unilateral disarmament). The likely scenario, however, is that EU would ensure its producers aren’t unduly burdened compared to foreign, so presumably they would also benefit from lighter requirements—either directly or indirectly.

In conclusion, the negligible-risk scheme as conceived risks a GATT Article III:4 violation because it could modify the conditions of competition in a way that disadvantages imported products from non-listed countries versus like domestic products (or even versus like products from listed foreign countries, though that latter point is MFN). It’s a somewhat nuanced NT claim but given the overlap of MFN and NT here (especially if EU domestic meets criteria), it is safer to say the scheme would violate National Treatment as well. Thus, the EU would again need to seek justification, likely under GATT Article XX, to excuse such differential treatment.

3.3 Technical Barriers to Trade (TBT Agreement Articles 2.1 and 2.2)

If the EUDR is considered a technical regulation subject to the TBT Agreement, the proposed negligible-risk classification must also be analyzed under TBT obligations. Article 2.1 of the TBT Agreement prohibits technical regulations from discriminating against imported products *either* in favor of domestic products *or* in favor of some foreign origins over others, where the products are alike.²³ In other words, TBT 2.1 encapsulates both the MFN and NT concepts in one provision, without the need to label one as “like” domestic and another as “like” foreign—any less favorable treatment of an import on the basis of origin can breach 2.1. Article 2.2 of the TBT Agreement requires that technical regulations not be more trade-restrictive than necessary to achieve a legitimate objective, taking account of the risks non-fulfillment would create. Environmental protection (e.g. conserving forests, mitigating climate change) is undoubtedly a legitimate objective under 2.2, but the measure’s design and alternatives must be examined for proportionality.

TBT Article 2.1 (Non-Discrimination): The analysis under TBT 2.1 will resemble the GATT analysis but with some nuanced differences developed in WTO jurisprudence. A complainant would need to show that the EUDR with a negligible-risk exemption accords to products imported from certain WTO members (negligible-risk listed countries) more favorable treatment than to like products imported from other WTO members, or than to like domestic products, *in a manner such that the differential treatment does not stem exclusively from a legitimate regulatory distinction.*³⁷ The Appellate Body in *US – Clove Cigarettes*, *US – Tuna II (Mexico)*, and *US – COOL* clarified that under Article 2.1, once a disparate impact on competitive opportunities is shown, the defending Member can attempt to demonstrate that this stems from a legitimate regulatory distinction rather than discrimination *per se*.³⁸ In *Tuna II*, for example, the U.S. dolphin-safe labeling scheme was found to afford less favorable treatment to Mexican tuna products, and the AB concluded this was not justified by legitimate differences because the measure was not “even-handed” – it was insufficiently calibrated to the actual risks to dolphins in different fisheries.³⁹

By creating an origin-based exemption, the EU measure would clearly result in less favorable treatment of products from non-exempt countries (they face stricter procedures) compared to like products from exempt countries. That establishes a *prima facie* disparate impact. The key question becomes whether this asymmetry is “legitimately related” to the objectives of the regulation, or whether it reflects arbitrary discrimination. Given WTO case law, a panel would examine if the distinction between, say, Indonesian coffee and Colombian coffee (one on the negligible-risk list, one not) is even-handed with respect to the goal of preventing deforestation. If the risk of deforestation in the supply chain of both is effectively the same or if risk exists in both but one is excused for extraneous reasons (e.g. because it signed the Paris Agreement, which, while laudable, does not directly guarantee deforestation-free coffee), then the distinction may appear arbitrary. The Appellate Body in *US – Tuna II* (compliance) used the concept of “calibration” – the measure should be calibrated to the risks or situations, not over- or under-inclusive in a way that is biased against certain imports.⁴⁰ Applying that notion, an even-handed EUDR would calibrate any flexibility to demonstrable differences in actual deforestation risk posed by the commodity’s production. The negligible-risk category attempts to do this by criteria (forest cover stability, etc.), but it may be too

blunt. For example, consider two countries with similar low deforestation rates; if one misses out on negligible-risk due to a technical criterion (e.g. not a party to a certain convention), the resulting discrimination in treatment might not be genuinely linked to higher risk from that country's products – it's more linked to a policy/political factor. That would likely be viewed as not stemming from a legitimate regulatory distinction, but rather from convenience or politics, thus violating TBT 2.1.

Moreover, the exemption undermines the core regulatory goal (ensuring all products are deforestation-free) by introducing a sizeable hole in coverage. This calls into question its legitimacy. As the Tulip analysis noted, the same factors that make the exemption arbitrary under GATT Article XX's chapeau also make it problematic under TBT 2.1 – the two tests start to align. If a measure's discrimination is arbitrary/unjustifiable in an environmental exception sense, it's likely not a "legitimate distinction" under TBT's even-handedness requirement.⁴¹ Indeed, the Appellate Body has cross-referenced the Article XX chapeau jurisprudence when examining TBT 2.1 discrimination.⁴² So, unless the EU could convincingly argue that negligible-risk countries truly present qualitatively different circumstances warranting essentially zero scrutiny – an argument difficult to sustain, given even low-deforestation countries can produce or transship risky commodities – a panel would likely find a TBT 2.1 violation, paralleling the GATT findings.

TBT Article 2.2 (Necessity/proportionality): Even apart from discrimination, a complainant might argue that the negligible-risk approach, or the EUDR as a whole, is more trade-restrictive than necessary to achieve its objective of stopping deforestation. This could seem counter-intuitive since creating an exemption is actually *less* restrictive for some trade. However, 2.2 might come into play in two ways: (1) If looking at the regulation *as a whole*, with or without exemptions, is this the least trade-restrictive way to ensure deforestation-free supply chains? Could the EU have pursued its goal through alternative means that disrupt trade less? And (2) if considering the *lack* of an exemption for others, one could say the EU should either exempt everyone (which would defeat the goal) or have chosen a cooperative approach rather than unilateral trade measures, etc. More concretely, a country like Indonesia or Brazil could say: "You banned our non-compliant products and demand onerous traceability; you could achieve the same forest protection objective via bilateral agreements, capacity-building, or recognizing our certification schemes, etc., which would be less trade-restrictive." The EU would counter that the measure is necessary given the urgency of stopping deforestation and that it's designed as narrowly as possible (targeting only commodities associated with deforestation after 2020, etc.). With the negligible-risk exemption in play, though, the EU's necessity case could be undercut. The inconsistency of excluding some suppliers entirely from requirements might indicate that the EU is willing to accept a certain level of risk from those sources (for political or administrative ease), undermining the claim that the strict due diligence is strictly necessary across the board. In *Brazil – Retreaded Tyres*, for instance, the existence of an exemption (imports from Mercosur) was considered when evaluating the necessity of the import ban; it weakened Brazil's case that the ban was vital for health, since Brazil itself carved out a hole in it.⁴³ A

panel might similarly view the negligible-risk carve-out as evidence that the EUDR is not finely tailored solely to risk.

However, it is also plausible that in a WTO dispute, a panel would focus on the discrimination arguments (2.1, GATT I/III) and might not formally rule on 2.2 if it finds a clear violation elsewhere. If it did, the EU would argue that no reasonably available alternative measure achieves the same level of forest protection with less trade impact. One alternative could be an *absolute* standard applied equally (no country categories at all, just require traceability for all). That would be more trade-restrictive in a sense (everyone faces full costs) but more equal. Another alternative might be bilateral agreements where producer countries themselves certify deforestation-free compliance (like the FLEGT VPA model for timber). This might be less trade-disruptive by leveraging local systems, but the EU might argue it's not as effective or timely. Article 2.2 does allow consideration of the "risk of non-fulfillment" of the objective – here the risk of failing to stop deforestation. The EU can justify a stringent measure by pointing to the severity of that risk (climate change, biodiversity loss). That said, a measure with internal contradictions (like excluding some countries) might be seen as not maximizing fulfillment of the objective either. It's a double-edged sword: either it's too restrictive on some, or too lenient on others, implying it's not optimally calibrated.

Given current information, the most acute legal vulnerability is TBT 2.1 (discriminatory impact), rather than 2.2. It is highly likely that a WTO panel would find the negligible-risk country differentiation violates Article 2.1 of TBT (in parallel to GATT violations), as it does not meet the standard of even-handed, legitimate regulatory distinctions. Unless the EU could prove that negligible-risk countries' products are genuinely so different in relevant risk that they are not "like" or that the distinction is justified by radically different conditions, the violation stands. As for TBT 2.2, it would be an additional argument that complainants could use to portray the EUDR as disproportionate. But resolving that would require a detailed weighing of evidence about alternatives, which goes beyond the scope of this analysis. We note simply that the negligible-risk amendment, by injecting a somewhat political exception, might weaken the EU's case that the EUDR is finely tuned to necessity.

3.4 SPS Agreement Considerations (Risk Assessment and Non-Discrimination)

As discussed, it is debatable whether the EUDR's deforestation-focused requirements fall under the SPS Agreement's domain. The SPS Agreement (Article 1 and Annex A) covers measures applied to protect human, animal or plant life or health from risks such as pests, diseases, additives, contaminants, toxins, disease-causing organisms, or from the entry/spread of pests, and also measures to protect biodiversity from pest risks.²⁵ The EUDR is aimed at preventing environmental harm abroad (deforestation) and climate/biodiversity impacts globally, rather than preventing a pest or disease from entering the EU. Hence, it's fundamentally not an SPS-type measure. However, *if* one stretched the interpretation to say the EUDR protects plant life or health (forests) from the risk of deforestation (which is not a natural "risk" so much as a certainty given certain practices), one could test the measure against SPS disciplines. This is more of a hypothetical exercise, but instructive in highlighting the importance of scientific grounding and consistency.

Two main SPS obligations would be relevant: (a) Article 5.1 – risk assessment, and (b) Article 5.5 – consistent levels of protection (no arbitrary discrimination), along with Article 2.3 which contains a similar non-discrimination principle. Article 5.1 of SPS requires that any SPS measure be based on a risk assessment appropriate to the circumstances, which in essence means a scientific evaluation of the risks the measure seeks to address.²⁵ In *EC – Hormones*, the Appellate Body held that the European Communities’ ban on hormone-treated beef violated Article 5.1 because it was not based on a risk assessment that evaluated the potential adverse health effects and their likelihood.⁴⁴ The EU had invoked the precautionary principle, but without a proper scientific risk assessment, that was insufficient. By analogy, if the EUDR’s country classifications were seen as an SPS measure, the EU would need to have conducted a rigorous risk assessment for each country it labels as high, standard, low, or negligible risk – essentially quantifying or at least qualitatively assessing the probability that commodities from that country would be linked to illegal or significant deforestation. The original EUDR does require the Commission to use data on deforestation rates, etc., so there is some analysis. But the proposed negligible-risk category introduces criteria that go beyond pure science (joining treaties, enforcement of laws). While forest cover change can be a scientific data point, criteria like “has the country signed the Paris Agreement” do not speak to risk of a given shipment causing deforestation. A panel might find that an exemption based partly on political criteria is not “based on” a scientific risk assessment of plant health. Moreover, SPS risk assessments typically deal with pathogen spread probabilities or toxin levels; here the “risk” is that consumption of commodity will drive deforestation abroad. It’s a different kind of risk (not incidental or natural, but behavioral/economic). The SPS Agreement may not comfortably apply.

If it did, one might say the EU should have assessed, for example, “what is the risk that cocoa from Country A is from newly deforested land compared to Country B?” and then set categories accordingly. The negligible-risk label presumably implies that risk is (virtually) zero for those countries. Is that backed by evidence? Some countries with net forest increase might still have pockets of commodity-driven deforestation (they might be reforesting in some areas, cutting in others). Without a scientific study for each candidate country, the designation could be seen as not objectively justified. In *Japan – Agricultural Products II*, the AB required Japan to provide scientific evidence for discriminating between different product conditions (varietal testing). The EU would face a similar demand: show the science that negligible-risk countries truly pose negligible risk such that exempting them won’t contribute to deforestation. If it cannot, Article 5.1 could be violated for lack of a risk-based foundation.

Article 5.5 of the SPS Agreement provides that Members must avoid arbitrary or unjustifiable distinctions in the levels of protection they consider appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on trade.²⁵ This is aimed at preventing a country from being strict in one case and lenient in another without valid reasons, especially if that benefits themselves or certain partners. The classic example is again *EC – Hormones*, where the EU was arguably inconsistent (banning hormone residues in beef but tolerating other similar risks). In our context, if the EU deems “zero deforestation” as the appropriate level of protection for commodities from most countries (meaning it

demands full assurance and traceability), but for negligible-risk countries it is effectively willing to tolerate a different level of protection (perhaps relying on those countries' assurances, and possibly letting in products that might not meet the strict definition of deforestation-free due to lack of monitoring), that is a different level of protection. The EU might be implicitly accepting some uncertainty or risk from negligible-risk sources that it would not accept from others. Unless this distinction is justified by genuine differences in risk, it could be "arbitrary or unjustifiable." For instance, imagine Country A and Country B both have 0.5% deforestation rates. Exempting A but not B because A is politically aligned or has a national law (which B might lack) could be seen as arbitrarily inconsistent if the outcome (risk of deforestation in imports) is similar. SPS Article 5.5 would then be breached because the EU applied a stricter standard to B's goods than to A's, without a valid reason, amounting to discrimination. The chapeau of Article XX GATT similarly targets such inconsistency, so this mirrors that analysis.

We note that SPS Article 2.3 echoes this: "Members shall ensure that their SPS measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail," especially between their own territory and others'.²⁵ The negligible-risk scheme potentially violates that as well, since if similar conditions (low deforestation) prevail in two places, but one is treated differently, it's suspect. The EU would argue conditions are not the same – negligible-risk countries have better governance or treaties, etc. A complainant would question the scientific relevance of those factors.

In summary, while the SPS Agreement might ultimately not be the forum for a legal challenge to the EUDR's design (complaints would more likely focus on GATT/TBT), the SPS principles reinforce the idea that measures must be grounded in objective risk and applied consistently. The negligible-risk category as formulated could be viewed as lacking a rigorous risk assessment basis and introducing arbitrary distinctions (thus hypothetically violating SPS Arts. 5.1 and 5.5). This adds weight to the argument that the measure is vulnerable to claims of arbitrary discrimination. It underscores that from any angle—be it GATT, TBT, or SPS—the EU would need to demonstrate that its country differential is firmly justified by differences in risk levels and not simply convenience or political considerations.

3.5 Justification Under GATT Article XX

If the proposed negligible-risk country classification is found to breach GATT Articles I and/or III (and potentially TBT provisions), the EU's recourse would be to invoke the **general exceptions in GATT Article XX** to defend the measure as a permissible departure in service of legitimate objectives. Article XX provides that, subject to the requirement of the chapeau (non-discriminatory application), a measure can be excused if it falls under one of the listed exception categories (such as those for health or conservation). Two sub-paragraphs of Article XX are most pertinent to the EUDR and its environmental purpose:

- **Article XX(b)**, which covers measures "necessary to protect human, animal or plant life or health." Protection of forests (plant life) and by extension wildlife habitats and even human health (via climate regulation) could be argued here. The EU can claim the EUDR (and any amendments like negligible-risk) is aimed at protecting plant life

and health globally by curbing deforestation, which has direct impacts on biodiversity (animal/plant health) and climate (indirect human health). WTO panels have recognized environmental protection as potentially falling under XX(b) when a link to life or health is present (e.g. preventing spread of invasive species to protect plant health, etc.).

- **Article XX(g)**, which covers measures “relating to the conservation of exhaustible natural resources,” if coupled with domestic restrictions. Forests are generally accepted as exhaustible natural resources; the Appellate Body in *US – Shrimp* held that living creatures (like sea turtles) are exhaustible natural resources, and in principle, the same logic covers forests.⁴⁵ The EUDR’s aim to conserve global forests could squarely come under XX(g). The EUDR also applies to domestic production (EU producers can’t sell non-compliant timber, for instance), which helps satisfy the requirement that measures under XX(g) be made effective in conjunction with domestic restrictions.⁴⁶

To succeed under Article XX, the EU must demonstrate both that the measure qualifies under one of these subparagraphs **and** that it meets the conditions of the *chapeau*, which prohibits “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” and bans “disguised restrictions on trade.”²⁷ The *chapeau* is often the more difficult hurdle for environmental measures that differentiate between countries.

3.5.1 Article XX(b) and (g): Environmental Objectives

The overarching objective of the EUDR—halting EU-driven deforestation—maps onto legitimate concerns recognized by XX(b) and XX(g). Past WTO disputes lend support to this view. For instance, in *Brazil – Retreaded Tyres*, the Appellate Body accepted that measures to reduce the health and environmental hazards of tire waste addressed genuine health concerns (Mosquito-borne diseases, pollution) under XX(b).⁴⁷ In *US – Shrimp*, shrimp harvest bans to protect sea turtles were found to relate to conservation under XX(g), even though the turtles were outside the U.S. territory.⁴⁵ Similarly, the EU can argue that protecting forests (wherever located) is critical to conservation of exhaustible natural resources and to protecting plant life and health (as deforestation leads to loss of plant species and ecosystems). It helps that the EUDR’s ends are clearly environmental and not a guise for trade protection of EU industry (the EU doesn’t gain a trade advantage by discouraging deforestation; it’s incurring costs on itself as well).

Under **XX(b)**, the EU would need to show the measure is “necessary” to achieve the level of protection of plant/animal life or health it deems appropriate (here, essentially near-zero tolerance for deforestation in its supply chain). Panels and the AB assess “necessity” by weighing the importance of the objective, the measure’s contribution to it, and the trade restrictiveness, alongside possible alternatives.⁴⁸ Preventing deforestation and climate harm is extremely important (perhaps even “vital” in WTO terms). The measure’s contribution can be significant—cutting off market access for non-compliant goods can reduce the economic drivers of deforestation. However, an alternative measure analysis might ask: could the EU pursue its forest protection goal through a multilateral agreement or cooperative mechanism

instead of a unilateral regulation? The EU might counter that attempts at global forest agreements have failed, hence the unilateral step. The original EUDR arguably could be seen as necessary given the urgency. The *negligible-risk exemption*, however, complicates the necessity argument. If the EU itself voluntarily forgoes stringent controls on some countries' goods, a panel might doubt the measure's coherence and necessity. It suggests that the EU is balancing trade facilitation against environmental rigor, which is fine as policy, but legally it means perhaps an alternative exists: uniformly apply the due diligence (for maximal effect) or else acknowledge that agreements with low-risk countries to maintain their performance could suffice (less trade restrictive via mutual recognition). In sum, while XX(b) could cover the general concept, the necessity of this particular design (with carve-outs) is not straightforward.

Under XX(g), the requirement is that the measure be "relating to" conservation of exhaustible natural resources. "Relating to" has been interpreted to mean there is a close and genuine relationship between the measure and the conservation goal – essentially, the measure is primarily aimed at that goal.⁴⁹ The EUDR easily meets this on paper: its stated aim is conservation of forests and preventing forest degradation. If anything, one might argue the negligible-risk amendment weakens the relationship (by potentially letting some deforestation slip through from those countries), but by and large it still relates to conservation (it's a modulated approach to the same goal). Additionally, XX(g) requires that the measures be made effective in conjunction with restrictions on domestic production or consumption. The EUDR does apply to EU domestic producers who must also not place deforesting products on the market, satisfying the parity aspect. The negligible-risk list presumably wouldn't exempt *domestic* production – it's about countries – and the EU wouldn't exempt itself separately (except if one considers EU as a whole negligible risk, but then EU producers are anyway bound by EU law to not deforest domestically via other regulations). Realistically, the EU can show it isn't just targeting foreign producers; domestic operators are under the due diligence obligations too. So XX(g) could provisionally justify the measure, including any differential treatment inherent to it, so long as it is in service of conservation.

The biggest challenge, however, lies in the chapeau of Article XX.

3.5.2 Chapeau: Absence of Arbitrary or Unjustifiable Discrimination

The chapeau of Article XX is effectively a stringent anti-abuse clause. It tests whether a measure, even if falling under (b) or (g), is applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on trade.²⁷ The WTO's leading cases on environmental measures underscore that a well-intended measure can falter at the chapeau if it unfairly discriminates among different exporting countries or vis-à-vis the importing country. The *US – Shrimp* case is instructive: the U.S. had a law banning imports of shrimp caught without turtle-excluder devices. This was for conservation (turtles) and fell under XX(g). But the way the U.S. applied it was deemed unjustifiably discriminatory because it afforded some countries (in the Caribbean) more flexibility through negotiated agreements, while others (Asian nations) were cut off without serious negotiation – even if the conditions (turtle

migration, fishing methods) were similar.⁵⁰ The AB famously noted that the U.S. measure was a legitimate environmental measure but failed the chapeau because of its inflexibility and the unequal treatment of countries that were “similarly situated” in terms of the problem addressed.⁵⁰ It emphasized that a balance must be struck between trade and environment, and one must not use environmental goals as a cover for arbitrary discrimination.

Applying that lens, the negligible-risk classification is at high risk of being viewed as arbitrary or unjustifiable discrimination under the Article XX chapeau. Consider the phrase “countries where the same conditions prevail.” If two countries both have low deforestation rates (say 0.1% per year), but one signed certain treaties and one did not, are the “same conditions” prevailing? In terms of deforestation risk – arguably yes, both are low risk. If the EU exempts one and not the other due to the treaty criterion, the other country could claim discrimination despite prevailing similar conditions (low deforestation). The EU’s defense would be that broader conditions differ (commitment to international frameworks is different, governance maybe different). The chapeau doesn’t forbid all discrimination – only that which is arbitrary or unjustifiable. So we ask: is there a rational justification related to the policy for why Country A is treated differently from Country B? If the justification is “Country A has virtually zero deforestation and strong enforcement, whereas Country B, though low deforestation now, lacks comparable enforcement so it might spike later,” that could be debated. But if evidence doesn’t strongly support a difference, it looks arbitrary.

Another angle: The negligible-risk exemption arguably benefits mostly developed or politically friendly countries, while high-deforestation developing countries remain under strict rules. That could be perceived as a disguised restriction or power-based favoritism. In *EC – Seal Products*, the EU measure (a ban on seal products) had exceptions for products of indigenous hunts and certain hunts for marine resource management, which in practice favored Canadian Inuit and Greenland (Danish territory) Inuit hunts differently, and allowed some products to enter from Greenland that were denied from Canada/Norway.³¹ The AB found this to be unjustifiable discrimination under the chapeau because the EU did not adequately explain why the animal welfare objective was met by allowing one and not the other (the conditions of animal welfare concern were similar, but exceptions were not evenly available).⁵¹ By analogy, if the EU allows commodities from negligible-risk countries to bypass full due diligence, while disallowing others, it must ensure that this differential is closely tied to the objective (i.e., negligible-risk countries truly don’t contribute to the problem). Should there be any indication that the exemption was motivated by reducing frictions with certain allies or by internal EU pressure to lighten the load for imports from favored partners (rather than purely by objective risk), a panel would likely deem it unjustifiable discrimination. The requirement that discrimination not be “disguised restriction on trade” is also relevant: if, for instance, the negligible-risk criteria were set such that mostly EU neighbors or rich countries qualify, one might suspect a disguised tilt against tropical producers (who incidentally compete with EU farmers in some sectors). While the EU’s intention is environmental, perceptions matter in WTO dispute settings.

The consistent theme in WTO case law is *calibration and flexibility*. A measure that is properly calibrated to differences in conditions and offers flexibility to foreign countries to

reach the desired standard tends to fare better under the chapeau (as seen in the *US – Shrimp* compliance phase, where the U.S. fixed its approach to allow more cooperation and consideration of foreign programs, and that was upheld).⁵² The negligible-risk scheme could be seen as the opposite of flexibility for high-risk countries—it simply gives a free pass to some and keeps high demands on others, rather than helping the others improve. Indeed, one could argue it reduces the EU’s incentive to partner with medium-risk countries to improve their status, since the Commission would just focus on declaring a few negligible and not adjusting much for the rest (aside from labeling some low or high risk). In *Brazil – Tyres*, the Mercosur exemption was fatal under the chapeau because it undermined the environmental rationale (Brazil allowed in waste tyres from Mercosur partners due to a trade agreement obligation, even though that equally caused harm, so the discrimination was considered arbitrary).⁵³ With negligible-risk, the EU is effectively saying “We are so confident goods from these countries are fine that we waive the rules for them.” If any of those goods later turn out to not be fine (say, a negligible-risk country has a scandal of hidden deforestation), then the discrimination was clearly detrimental and arbitrary relative to the goal.

Finally, it’s important to emphasize that the chapeau demands a high standard of justifying discrimination. The onus would be on the EU to prove why its different treatment of countries is not arbitrary. The criteria chosen (stable forest since 1990, etc.) could be scrutinized. Why 1990? Why not 2000? Why require signing the Paris Agreement – deforestation can be low even without that, so is that criterion relevant or just political? The more those criteria appear only loosely connected to ensuring negligible risk of deforestation in actual shipments, the more “unjustifiable” the discrimination appears. If a country not on the list can demonstrate “hey, our conditions regarding deforestation are just as good as those of a listed country, yet we are treated worse,” the EU will have a hard time convincing a panel otherwise.

In conclusion, while GATT Article XX(b) or (g) could conceptually cover an environmental regulation like the EUDR, the negligible-risk country exemption would likely fail to meet the chapeau’s requirements, due to the appearance (if not the reality) of arbitrary discrimination. The WTO Appellate Body in *EC – Seal Products* warned that even well-meaning public moral or environmental measures must be applied without such unjustifiable distinctions.⁵¹ The negligible-risk plan, in our analysis, creates exactly the kind of distinction that prior cases struck down: favoring certain countries in a way that is not entirely aligned with the core policy aim, thereby undermining the uniformity and fairness expected under the chapeau.

Therefore, even if the EU could invoke environmental exceptions, it is unlikely that the negligible-risk scheme (as proposed) would survive the full Article XX scrutiny. The EU would be advised to pursue its environmental goals through less discriminatory means – for instance, by strengthening bilateral cooperation or providing all exporting countries with equal opportunity to demonstrate compliance – rather than categorically exempting a few based on broad criteria.

4. Guidance from WTO Jurisprudence

To contextualize the above legal analysis, it is useful to examine how analogous situations have been treated in past WTO disputes. A number of landmark cases illustrate the fine line between permissible environmental measures and those that fall afoul of trade rules due to discriminatory design. In particular, the following cases offer precedents relevant to a “negligible risk” country classification: *EC – Seal Products*, *US – Shrimp*, *Brazil – Retreaded Tyres*, *US – Tuna II (Mexico)*, and *EC – Hormones*. Each provides insights into concepts like de facto discrimination, justification under Article XX, and the importance of scientific risk assessment. We briefly discuss each in turn and draw parallels to the EUDR scenario.

4.1 *EC – Seal Products* (2014): Permissible Objective, Problematic Exceptions

The EU Seal Products case³¹ concerned an EU regulation that banned the import and sale of seal products to address public moral concerns about seal welfare. The measure, however, exempted products resulting from hunts conducted by indigenous communities and those from hunts regulated for marine resource management purposes. While the Appellate Body accepted that addressing public moral concerns (animal welfare) was a legitimate objective potentially justifying the trade restriction (thus falling under GATT Article XX(a), the public morals clause), it found the EU’s application of the measure to be *inconsistent with the Article XX chapeau*. Specifically, the way the EU crafted its exceptions was deemed to create arbitrary/unjustifiable discrimination between countries. For example, Canadian Inuit seal products did not fully qualify under the indigenous exception as implemented, whereas Greenland (Danish territory) effectively benefitted from a broader interpretation – this meant Canadian and Norwegian seal products were mostly banned while some from Greenland could enter, even though conditions (the nature of the hunts) were similar.⁵¹ The AB zeroed in on the lack of even-handedness: if the EU was concerned about seal suffering, distinguishing between hunts based on indigenous cultural status or particular management programs without clear connection to animal welfare outcomes was not justifiable. The AB also noted procedural fairness issues – how the exceptions were administered.

The parallel to the negligible-risk issue is striking. Both involve an EU measure with an environmental or ethical aim, and both introduce exceptions that differentiate between sources. In *Seal*, the exceptions were ostensibly origin-neutral on paper (based on type of hunt, not country per se) but in practice advantaged certain origins over others – akin to how “negligible risk” criteria, while ostensibly neutral (forest cover, treaties), would advantage some countries over others. The *Seal* AB report signals that WTO scrutiny is intense when origin-linked exceptions are present: the EU was essentially told that its measure, though valid in aim, was undermined by the way it carved out certain trade flows in a discriminatory way. For the EUDR, the lesson is that any country-based differentiation must be tightly connected to the objective. If the EU were to defend negligible-risk under “public morals” (ethical duty to save forests) or under “conservation,” *Seal Products* suggests the panel would examine whether exempting those countries truly doesn’t undermine the objective or arbitrarily favor some suppliers.

Another point from *Seal* is that MFN was violated separately: the AB agreed that granting access to Greenland’s products while denying Canada’s was an MFN breach.³¹ They did not

excuse that under Article XX because the chapeau wasn't met. For negligible-risk, similarly, MFN violation is clear and would need Article XX justification – which *Seal* indicates is unlikely if the differences aren't strictly policy-driven. In short, *EC – Seal Products* underscores that an environmental measure with origin-based exemptions must be designed and executed with great care or it will fail the chapeau test. Applied to our case, a WTO tribunal would likely see the negligible-risk exemption as analogous to the flawed exemptions in *Seal*: well-meant perhaps, but resulting in uneven treatment not rigorously correlated with the regulatory purpose, and thus “arbitrary or unjustifiable.”

4.2 *US – Shrimp* (1998 & 2001): Conservation Measures and Equal Application

*US – Shrimp*⁵⁰ involved a U.S. ban on imports of shrimp harvested without using turtle excluder devices (TEDs) to prevent the incidental killing of endangered sea turtles. The initial WTO panel and Appellate Body in 1998 found the measure violated GATT Article XI (quantitative restriction) and was not justified under Article XX because it failed the chapeau. The U.S. measure was aimed at conservation of turtles (qualifying under XX(g)), but the AB concluded that the way it was applied was unjustifiably discriminatory: the U.S. had negotiated TED agreements with some countries (in the Caribbean/western hemisphere) giving them time and assistance to comply, but had not offered the same opportunities to Asian countries like Malaysia, India, and Thailand – instead imposing an immediate ban on them.⁵⁰ Also, the U.S. rigidly required the adoption of essentially the same regulatory program (use of TED technology) as itself, without sufficient regard for equivalent measures or different conditions elsewhere. The AB famously said that *the U.S. measure was a legitimate environmental measure but implemented in a manner that constituted arbitrary discrimination*, and it highlighted the lack of “flexibility” and due process extended to the affected countries.⁵⁰

After losing, the U.S. adjusted its policy and its implementation (e.g. engaging in negotiations with Asian countries, allowing for consideration of alternative turtle protection methods). In the compliance proceedings (2001), a panel and the AB found that the revised U.S. measure *did* pass muster under Article XX.⁵² The change was not that the U.S. lifted the ban—it remained—but that the cooperation and flexibility removed the earlier arbitrary discrimination. Malaysia still challenged it, but the WTO was satisfied that the U.S. was now treating countries more equally given similar conditions and was not just imposing its will arbitrarily.⁵²

From *US – Shrimp*, the key takeaways for the negligible-risk analysis are:

- Environmental measures should be applied *flexibly and cooperatively* to avoid a finding of arbitrariness. If the EU categorically exempts some countries but not others, it might be seen as inflexible (a binary list rather than a continuum or cooperative graduation).
- The process matters: In *Shrimp*, the U.S. was faulted for not seriously negotiating or considering foreign conditions for some countries. By analogy, has the EU engaged all exporting countries on how they can meet the EUDR requirements or improve

their risk status? The negligible-risk idea came from internal EU debate, not from agreements with outside countries. Those excluded might say the EU acted arbitrarily by not involving them.

- Demanding uniformity vs. recognizing equivalence: The U.S.’ insistence on the exact TED usage was seen as unjustified; the remedy was allowing different methods as long as effective. For the EU, if it insists on its own due diligence system except for friends whom it fully trusts, that’s inconsistent. A better approach (from a WTO perspective) would be to allow any country to propose an equivalent system to ensure deforestation-free products and, if it’s effective, get relief. In fact, the EUDR does envision partnerships and possibly benchmarking improvements, but the negligible-risk exemption doesn’t require an equivalent system—it just waives requirements, which is less defensible.

In summary, *US – Shrimp* teaches that a measure like the EUDR must be even-handed and give comparable opportunities to countries “where the same conditions prevail.” If Country X and Y both have an endangered species (or in our case, both have similar deforestation profiles), you can’t treat them differently without offering a good justification and process. The negligible-risk exemption as conceived likely wouldn’t meet the *Shrimp* standard in its original form; it would need a much more open, criteria-based process where all countries can aspire to an equivalent level of compliance (or exemption) through good practices – effectively making it a cooperative arrangement rather than a closed list. Without that, *US – Shrimp* indicates WTO inconsistency.

4.3 Brazil – Retreaded Tyres (2007): Avoiding Arbitrary Exemptions

In *Brazil – Retreaded Tyres*⁵³, Brazil banned the importation of used/retreaded tyres to prevent environmental and health hazards from tire waste accumulation. The ban was justified in principle under GATT Article XX(b) as necessary to reduce dengue fever and other risks from tire piles. However, Brazil had a Mercosur tribunal ruling that obliged it not to enforce the ban against Mercosur partner countries (Argentina, Uruguay, Paraguay). As a result, imports of retreaded tyres from those Mercosur countries were allowed (or continued) while imports from others (e.g., the EU) were banned. The WTO panel and Appellate Body found this situation to violate the Article XX chapeau. The exemption for Mercosur was deemed “unjustifiable discrimination,” because the policy aim (reducing waste tyres) was compromised by allowing in tyres from some sources. The AB noted that *even though the discrimination arose from Brazil’s need to comply with another international obligation, it still had the effect of arbitrarily discriminating between countries (the EU vs Mercosur countries) where similar conditions prevailed (both produce retreaded tyres that contribute to waste)*.⁵⁴ Essentially, Brazil’s measure was internally inconsistent: if waste tyres are such a health risk, letting in a bunch from certain countries undermined the argument that the import ban was necessary and applied fairly. The AB said this kind of discretion/exemption was not permissible under the chapeau, absent a valid justification directly related to the policy (which a Mercosur legal obligation was not). Brazil’s ban was thus not entitled to Article XX

exemption due to the Mercosur carve-out, and Brazil had to find another way (they ultimately faced retaliation from the EU).

The lesson from *Brazil – Tyres* for the EUDR negligible-risk idea is powerful: *if you create an exemption that undercuts the overall efficacy and consistency of an environmental measure, it likely constitutes arbitrary/unjustifiable discrimination*. In our case, one could argue that letting “negligible risk” countries off the hook undermines the overall fight against deforestation because it creates potential leakages or at least unequal scrutiny. Countries with similar conditions (low deforestation levels) might or might not be exempt depending on political criteria. Brazil in the tyres case couldn’t credibly claim that conditions differed between the EU and Uruguay in terms of tyre waste impact; it was purely a legal carve-out. The EU with negligible-risk might likewise have trouble proving a substantive difference in risk between an included and excluded country if the numbers are similar, making it appear arbitrary.

Moreover, *Brazil – Tyres* highlights that being forced by another agreement (Mercosur) didn’t excuse the discrimination. For the EU, the negligible-risk concept isn’t even forced; it’s voluntary self-imposed discrimination. So a panel would be even less sympathetic. The AB there effectively suggested Brazil could have tried to mitigate the discriminatory effects (perhaps by not enforcing ban across the board, or by negotiating with Mercosur to allow an environmental exception). Similarly, the EU could mitigate WTO risk by not implementing such an exemption in the first place, or by ensuring any flexibility is uniformly available.

In sum, *Brazil – Retreaded Tyres* stands for the proposition that an environmental measure must be applied consistently and without favor or it will fail Article XX’s chapeau. A selective country exemption is a red flag. The EU’s negligible-risk plan fits the mold of the Mercosur exemption: a hole in the scheme that benefits some countries’ trade and not others, which is very hard to defend as non-arbitrary. The case therefore strongly suggests the negligible-risk classification would not survive a WTO challenge.

4.4 US – Tuna II (Mexico) (2012 & 2018): Even-Handedness under TBT 2.1

The *US – Tuna II (Mexico)* case³⁹ dealt not with GATT but with the TBT Agreement’s non-discrimination obligation (Article 2.1). The U.S. had a voluntary “dolphin-safe” labeling scheme for tuna products. To carry the dolphin-safe label, tuna had to be caught in compliance with certain requirements primarily affecting tuna caught in the Eastern Tropical Pacific (ETP) ocean region where purse-seine nets were known to harm dolphins. Mexico, whose fleet fished in the ETP, challenged the criteria as discriminatory because virtually all Mexican tuna was disqualified from the label (since they used the purse-seine method with dolphin sets), whereas most U.S. and other nations’ tuna (caught by other methods or in other oceans) could get the label easily. So Mexican tuna, even if not actually harming dolphins, was denied the label due to stricter requirements in the ETP, affecting its competitiveness on the U.S. market.

The WTO panel and Appellate Body found the U.S. labeling scheme violated TBT 2.1 because it was not even-handed: it imposed different requirements in different fisheries that

disproportionately disadvantaged Mexico, and these differences were not calibrated to the actual risks to dolphins in those fisheries.³⁹ Essentially, the U.S. scheme was stricter where Mexico fished and more lenient elsewhere, without sufficient justification that conditions warranted that disparity (dolphin bycatch occurred outside the ETP too with other methods, but the U.S. criteria didn't address that adequately). The AB introduced the notion that a measure must be "calibrated" to the risks – in the later compliance proceedings in 2018, the U.S. finally prevailed by adjusting its rules to more closely match the dolphin-bycatch risk levels in different areas, thereby removing the discriminatory effect.⁴⁰

How does *Tuna II* apply to the EUDR? It is a clear warning under TBT 2.1 that if a regulation's distinctions are not carefully calibrated to relevant differences, they will be deemed discriminatory. The negligible-risk category would likely be seen as not properly calibrated. It simply draws a line: some countries good, others not, based on broad criteria. It doesn't necessarily account for the continuum of risk or for variations within non-listed countries. For example, a non-listed country might have regions with no deforestation and very responsible producers, yet they are still subject to full due diligence – whereas a listed country might have a small deforestation problem that slips through with no checks. This lack of fine calibration is similar to Tuna's original flaw: blanket strictness for one group vs. laxity for another, without proportionate reasoning.

Another insight from *Tuna II* is that discrimination can be de facto – the U.S. didn't explicitly discriminate against Mexico by name, but the criteria had that effect. The EU's negligible-risk would also be de facto discrimination (it doesn't say "treat developing country exports worse," but that could be the outcome). WTO law doesn't allow a facially neutral design to escape scrutiny if impact is skewed.

Tuna II also underscores that under TBT, unlike GATT, there is no general exceptions provision to fall back on (Article XX is a GATT thing; the TBT Agreement doesn't have an equivalent general exceptions clause). So if a measure violates TBT 2.1, that's it – one cannot justify it by saying "but environment". The only defense is arguing it's not discriminatory because it's a legitimate distinction. In the compliance phase, the U.S. basically had to tweak the measure to remove discrimination, not defend it on principle. Likewise, the EU can't justify a TBT 2.1 breach of negligible-risk by saying "forests are important so it's okay to discriminate" – they would have to show that in truth they are not discriminating because the situations aren't comparable or the distinctions are legitimate. That is an uphill battle given the analysis in Section 3.3.

In conclusion, *US – Tuna II (Mexico)* demonstrates that origin-neutral regulations that nonetheless put certain countries' products at a disadvantage must be structured in an even-handed way that corresponds to genuine differences in risk or circumstances. The negligible-risk carve-out appears not even-handed; it's more of a binary shortcut. The case suggests that to survive under TBT 2.1, the EU would need to redesign its risk benchmark approach to be more continuous and evidence-based (for instance, varying the level of checks proportionally to risk metrics for each country, which EUDR actually does to an extent with percentages, but not to the extent of exempting some entirely). A wholesale exemption is the opposite of a

nuanced calibration; it's an "on/off" switch that is inevitably under- and over-inclusive in parts. Thus, *Tuna II* implies the EU's measure in current form would be found inconsistent with TBT Article 2.1 due to lack of even-handed calibration, reaffirming what we found in Section 3.3.

4.5 EC – Hormones (1998): Scientific Basis and Risk Assessment

Finally, *EC – Hormones*⁴⁴ is relevant from the perspective of SPS obligations and the role of science in justifying regulatory distinctions. In that case, the European Communities banned the import of beef treated with certain growth hormones, citing human health concerns. The WTO dispute (brought by the US and Canada) centered on the SPS Agreement. The panel and Appellate Body found the ban inconsistent with SPS Article 5.1 because it was not based on a risk assessment that could support the prohibition. The scientific evidence did not conclusively show a health risk from residues of at least some of those hormones, and the EC's own studies were deemed insufficiently specific or risk-evaluative to qualify as a proper risk assessment.⁴⁴ The AB famously said that a risk assessment under SPS must evaluate "the probability of occurrence of adverse effects" and that a Member cannot justify measures on mere hypothetical or unquantified risks. The case illustrated that even a popular, precautionary measure (the hormone ban was supported by European consumers) would be struck down if it lacked a rigorous scientific basis or if it was applied inconsistently (the EC allowed naturally occurring hormones in meat, etc., which raised a 5.5 inconsistency issue as well).

Transposing this to the EUDR, if we hypothetically consider SPS-type scrutiny: the EU would need to justify the differential treatment of countries with a sort of "risk assessment" showing negligible risk countries have effectively zero risk of producing non-compliant (deforestation-linked) goods, whereas others have higher risk. It would also have to show it isn't arbitrarily tolerant of risk in one context but not another (analogous to SPS Article 5.5). As noted in Section 3.4, the negligible-risk idea likely lacks a detailed scientific risk analysis aside from broad data on national deforestation trends. If challenged under an SPS lens, the EU might be asked "what is the scientific evidence that, say, Country X's soy never contributes to deforestation post-2020?" Unless the EU has compelling data, they'd be in trouble as the EC was in *Hormones*. Additionally, any whiff of inconsistent approach (like being strict on small farmers in one country but lenient on bigger players in another) could be portrayed as arbitrary.

Even outside SPS, *Hormones* is instructive on the importance of grounding regulations in evidence to defend them in WTO. The EU in EUDR did note that it used FAO data, Global Forest Watch, etc., to shape the regulation. But carving out negligible-risk countries, especially if it's influenced by factors like trade relationships or general governance, might not align purely with deforestation data. The AB in *Hormones* didn't accept the EC's justifications that were not backed by a risk assessment – similarly, a WTO panel might not accept "we think these countries are good actors" without hard evidence that their commodities pose effectively no risk of deforestation.

That said, *EC – Hormones* also underscores a political reality: the EU ultimately did not remove its hormone ban despite losing; it accepted retaliation instead, because of internal political considerations (public opinion, etc.). With EUDR, the EU might also be willing to face a dispute and even retaliation rather than dilute a flagship Green Deal law. However, our focus is legal compliance: and legally, the hormones case warns that WTO rules demand a rational, evidence-based justification for differential trade restrictions. Measures perceived as rooted more in politics or public sentiment than in demonstrable risk can be invalidated. If the negligible-risk exemption were argued to be not purely evidence-based, a panel could take issue.

In conclusion, the body of WTO jurisprudence highlighted in Sections 4.1–4.5 consistently emphasizes *non-discrimination, proportionality, and scientific rationality*. The European Parliament’s proposed negligible-risk country classification runs into the same kinds of problems identified in those cases: it risks being a trade measure that is not applied uniformly (Seal, Shrimp, Tyres), not calibrated to actual risk (Tuna II), and not fully backed by scientific assessment (perhaps analogous to Hormones). Each case on its own raises a red flag for the EU proposal; taken together, they strongly suggest that unless substantially revamped, the negligible-risk scheme would be found WTO-incompatible by a dispute panel or the Appellate Body (were it operational). The EU would need to redesign the approach—perhaps by integrating more flexibility and cooperation (like Shrimp compliance), clearer risk-based calibration (like Tuna compliance), and thorough justification for any distinctions—to have a chance of surviving a challenge.

5. Conclusion

The European Parliament’s push to introduce a “negligible risk” country classification into the EU Deforestation Regulation reflects understandable domestic pressures to simplify the law’s implementation. However, when this proposal is viewed through the lens of international trade law, it becomes apparent that such a country-tiered exemption would face serious challenges under WTO rules. The core problem is that the negligible-risk scheme, as formulated, draws distinctions between countries that are likely to be deemed discriminatory and insufficiently justified.

The analysis in this article demonstrates that the proposed differentiation would violate the fundamental non-discrimination obligations of the GATT. By according more favorable treatment to commodities from designated negligible-risk countries than to like products from other countries, the EU would breach Article I:1 (MFN). If EU domestic producers also benefit (directly or indirectly) from easier requirements vis-à-vis foreign producers, it could breach Article III:4 (National Treatment) as well. Under the TBT Agreement, treating imports differently based on origin in a technical regulation contravenes Article 2.1 unless the distinction is legitimately related to the policy objective. Here, the carve-out does not pass the even-handedness test – it is not calibrated purely to risk and appears to be a blunt favor to certain sources. This amounts to de facto discrimination, as underscored by analogous cases like *US – Tuna II*. Moreover, while environmental protection is a legitimate objective, **the measure is likely more trade-restrictive than necessary** in parts (imposing heavy burdens

on some suppliers) and simultaneously too permissive in others, calling into question its balance under TBT Article 2.2. If SPS rules were hypothetically applied, the lack of a rigorous risk assessment for the exemption and the arbitrary nature of the distinctions would violate SPS Articles 5.1 and 5.5, reinforcing the conclusion that the scheme is not grounded in consistent, science-based criteria.

Could the measure nonetheless be saved by the GATT Article XX exceptions as a bona fide environmental measure? In principle, the EUDR's aim of halting deforestation could qualify under Article XX(b) (protection of plant life/health) or XX(g) (conservation of exhaustible natural resources). However, the specific design of the negligible-risk exemption would likely fail the chapeau of Article XX, which is the ultimate gatekeeper for discriminatory measures. WTO jurisprudence (*US – Shrimp*, *EC – Seal Products*, *Brazil – Tyres*) indicates that one cannot justify a measure that arbitrarily favors certain countries without strong, objective reasons closely tied to the policy goal. The negligible-risk category, as proposed, seems to exemplify the sort of arbitrary discrimination the chapeau prohibits – a point explicitly recognized by legal analysts who predict that including such an exemption “would likely constitute arbitrary or unjustifiable discrimination under the chapeau” of Article XX. The exemption risks being viewed as a political compromise at the expense of equal treatment, rather than a necessity for achieving the environmental objective.

Importantly, this conclusion is not merely theoretical. Already, major trading partners have raised concerns in WTO forums about the EUDR's benchmarking system being discriminatory and more trade-restrictive than needed. Introducing an even higher tier of preferential treatment for some countries would intensify those complaints and almost invite a WTO challenge. If such a dispute were litigated, the likely outcome based on precedent is that the panel (and Appellate Body, if functioning) would find the measure inconsistent with WTO obligations. The EU would then be faced with a stark choice: amend or remove the negligible-risk scheme or suffer authorized trade retaliation from the complainant(s). The very prospect of this outcome influenced the EU's decision-makers to drop the “no risk” idea during late-stage negotiations, as noted by the December 2024 compromise where the exemption was omitted and a delay/clarifications route taken instead.¹⁶ The EU's own internal legal assessment and the Commission's unease about overstepping their mandate likely reflected, at least in part, an understanding of the WTO legal risks.

Going forward, if the EU still desires to ease EUDR compliance for certain low-risk partners, it will need to pursue approaches more compatible with WTO rules. Possible avenues include: negotiating bilateral or regional agreements where partner countries enforce equivalent anti-deforestation measures (thus avoiding unilateral discrimination), developing a universally applicable framework for recognizing commodity certification schemes regardless of origin (so any producer meeting high standards gets relief), or offering technical and financial assistance to help all exporting countries meet the EUDR requirements (thus addressing the “necessity” critique by reducing burdens through cooperation rather than exemption). Any differentiation in treatment should be narrowly tailored and based on transparent, objective indicators of risk that are applied consistently – for example, if satellite monitoring shows near-zero deforestation in a region, perhaps reduce inspection frequency

but not waive core requirements, and do so for all suppliers meeting that criterion. The guiding principle must be calibration: aligning the stringency of requirements with the actual level of risk posed, in a manner that any country in similar conditions would receive the same treatment. This would stand a far better chance at withstanding WTO scrutiny, as it could be framed as genuine even-handed regulation rather than favoritism.

In conclusion, while the goal of optimizing the EUDR's implementation is legitimate, the "negligible risk" country classification in its proposed form is a highly problematic solution under international trade law. It would likely constitute *de facto* discrimination, subject the EU to claims of unjustified trade restrictions, and fail to meet the stringent tests of WTO exceptions. The European Union, as a proponent of the rules-based trading system, has generally sought to design its Green Deal measures in a WTO-consistent way. In this instance, the wiser course is to abandon or substantially rethink the negligible-risk exemption. The EU can still achieve regulatory simplification and focus enforcement where it matters by utilizing the existing low/standard risk framework and cooperative arrangements, without crossing the line into WTO-inconsistency. The broader lesson for policymakers is that environmental regulations with global impact must be carefully calibrated and justified, not only to be effective, but also to ensure they do not erode the international legal principles that guard against protectionism and unfair discrimination. In the delicate balance between combatting deforestation and respecting WTO obligations, the proposed country-tiered exemption tilts too far away from the latter, and thus, however well-intentioned, cannot be endorsed as a sound legal mechanism. The EU's environmental objectives can and should be pursued through means that maintain a level playing field – a principle that lies at the heart of both WTO law and the credibility of the EU's leadership in sustainable trade.

Footnotes

1. Regulation (EU) 2023/1115 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, OJ L 150, 9.6.2023, p. 206. This "EUDR" replaced the EU's earlier Timber Regulation and extends due diligence obligations to a broader range of commodities.
2. *Id.* art. 3 & 4. Article 3 of Regulation 2023/1115 prohibits placing relevant commodities on the EU market unless they are "deforestation-free" and produced in accordance with the producer country's laws, and requires a due diligence statement.
3. *Id.* art. 4 & 10. Operators must collect information including geolocation coordinates of production plots, assess risk using criteria in art. 10(2) (such as prevalence of deforestation in area, prevalence of illegal harvesting), and mitigate any non-negligible risk. They then submit a due diligence statement attesting compliance. Traders (downstream sellers) have lighter obligations.
4. *Id.* art. 29. The Commission, by implementing act, is to categorize countries (or parts thereof) as low, standard or high risk, taking into account rate of deforestation, etc. "Low risk" countries allow for simplified due diligence (per art. 12–13) and reduced checks. Initially, Regulation 2023/1115 only explicitly mentions "low" and others, but "high risk" is used for enhanced scrutiny (see art. 20(4)).
5. *Ibid.*; see also European Commission Implementing Regulation (EU) 2025/1093 of 22 May 2025 (establishing benchmarking criteria and initial country classifications). Article 29(2) of the EUDR lists factors like rate of expansion of agriculture into forest, country's deforestation rate, agreements or enforcement efforts, etc., to guide classification.
6. Regulation 2023/1115, art. 20(4). The law sets differing minimum inspection rates: e.g., at least 9% of relevant imports (by operators and volume) from high-risk countries must be checked annually, 3% from standard-risk, and 1% from low-risk. The idea is to allocate enforcement resources in proportion to risk.
7. *Id.* art. 12 & 13. Even for low-risk origins, operators must still collect basic information and a simplified due diligence statement (focusing on showing products are deforestation-free); and competent authorities must still conduct some checks. Notably, the "deforestation-free" requirement (Article 3(a)) applies to all products, regardless of origin risk category (hence the Tulip analysis calling the "no risk" a much more permissive exemption than low-risk).
8. Commission Implementing Reg. 2025/1093, preamble & art. 1. The EP resolution being discussed (2025/2739(RSP)) expressly targeted this Implementing Regulation, asserting it exceeded the powers provided in the EUDR and calling for its repeal. The resolution's objection suggests the Parliament thought the Commission's listing approach was inadequate or improperly done.
9. See *European Commission Sets Country Risk Classifications for EU Deforestation Regulation*, Ropes & Gray Alert (July 2025) (noting that only a very limited number of countries were initially classified as low-risk, and none as high-risk, effectively leaving most as standard-risk). Brazil and others criticized the methodology as opaque and potentially biased.
10. European Parliament Draft Motion for Resolution 2025/2739, Recitals U–W. Multiple EU Member States reportedly found the EUDR's obligations "so complex" as to be disproportionate and sought "substantial simplification". An information note by some governments proposed ideas including negligible-risk country lists to remove geolocation requirements.

11. European Parliament, *Draft Motion for a Resolution on Commission Implementing Regulation (EU) 2025/1093...*, 17 June 2025, p. 5 (Recital W). Recital W explicitly floats "establishing a list of countries or regions with negligible deforestation risk" that would be exempt from certain requirements (geolocation) and only subject to limited checks. Operative para 3 then "calls on the Commission to establish an official list of countries and regions with negligible deforestation risk, thereby removing the geolocation requirement...".
12. See Colette van der Ven et al., *WTO Implications of the Proposed "No Risk" Amendment to the EUDR*, TULIP Consulting (Dec. 2024) at p. 1 (noting the EP introduced amendments aimed at reducing the EUDR's ambition, including a new "no risk" country category). This was in the context of proposed amendments during late 2024 when the Parliament was considering changes as part of the implementation delay negotiations.
13. Id. (Tulip Consulting study) at p. 1 ("This 'no risk' amendment would exempt countries that fall within its scope from two key EUDR requirements: that products placed on the EU market are deforestation-free; and the submission of a due diligence statement. These exemptions would make the 'no risk' category much less stringent than the existing benchmarking system..."). See also CocoaRadar, *"Negligible Risk" Loophole Could Undermine EU's Anti-Deforestation Law* (Oct. 23, 2024) (summarizing that under the proposal, commodities from negligible/"very low" risk countries would be exempt from plot-level GPS data, full traceability and risk assessment).
14. EP Draft Resolution 2025/2739, Recitals T–W. Recital T notes "forest area in Europe increased by 90,000 km² between 1990 and 2015" and Recital W suggests listing negligible-risk countries as a simplification measure. The implication is that European (and some other) countries with net reforestation or low deforestation would qualify.
15. Tulip Consulting study (Dec. 2024) at p. 1, citing the amendment authors' criteria. The three criteria: (i) stable or increasing forest since 1990; (ii) signatory of Paris Agreement and relevant human rights/anti-deforestation conventions; (iii) strict implementation/enforcement of forest protection domestically. These were referenced by MEPs backing the amendment to justify that only countries with exemplary records would get the "no risk" status, presumably including EU countries, some developed nations, etc.
16. Tulip Consulting, *New Legal Analysis: WTO implications of "no risk" amendment* (Dec. 4, 2024). It notes that on 3 Dec 2024 EU lawmakers agreed to postpone EUDR by 12 months and that the "no risk" exemption was not included in the final text, with the Commission instead agreeing to provide clarifications and explore simplifications consistent with the Regulation's objectives. This indicates the exemption was dropped amid legislative compromise.
17. Id. The Commission's commitment was to clarify the Regulation and consider further simplifications "in full compliance with the objectives of the Regulation." This suggests any simplification would not undermine the core due diligence and deforestation-free requirements, unlike the broad "no risk" waiver which arguably would have.
18. General Agreement on Tariffs and Trade 1994, Art. I:1, 1867 U.N.T.S. 187 (requiring any advantage granted to any product from any country be accorded immediately and unconditionally to like products of all WTO Members). In *EC – Seal Products*, the Appellate Body affirmed that Article I:1 is a cornerstone against origin-based distinctions, and that a measure need not be a tariff to breach it – any rule or formality in connection with importation falls under Article I:1.

19. See GATT Art. I:1 (covering "customs duties and charges of any kind... and with respect to all rules and formalities in connection with importation and exportation"). The AB in *Canada – Autos* clarified that Article I:1 coverage is broad and not only tariff advantages (covering also internal taxes if they burden imports differently before importation is complete). In *EC – Seal*, the AB found the EU's indigenous and MRM exceptions constituted an "advantage" not accorded to all WTO members, violating Article I:1.
20. GATT 1994, Art. III:4, 1867 U.N.T.S. 190. Article III:4 provides that imported products "shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements" affecting their internal sale, offering for sale, purchase, transportation, etc. The Appellate Body has interpreted this to mean competitive conditions for imports must not be made less favourable than those for domestic products (AB Report, *Korea – Various Measures on Beef*, ¶¶133–134).
21. See Agreement on Technical Barriers to Trade, Annex 1.1 (defining "technical regulation" as a "document which lays down product characteristics or their related processes and production methods... with which compliance is mandatory."). A requirement that commodities be "deforestation-free" (a product characteristic related to its production) and that operators supply certain information/documentation as a condition of sale fits this definition. Indeed, several WTO Members have asserted the EUDR is a TBT measure, raising it in the TBT Committee as a specific trade concern.
22. TBT Agreement, Art. 2.1 (non-discrimination) and 2.2 (not more trade-restrictive than necessary). Article 2.2 lists "protection of human health or safety, animal or plant life or health, or the environment" as legitimate objectives. The core test is whether there is a reasonably available alternative that fulfills the objective equally well with less trade restriction (Appellate Body Report, *US – COOL*, ¶¶370–379).
23. Appellate Body Report, *US – Clove Cigarettes*, WT/DS406/AB/R (Apr. 2012) ¶¶87–97. The AB held that TBT 2.1, like GATT III:4, covers both de jure and de facto discrimination, and encompasses origin-based discrimination among foreign products (i.e. MFN) in addition to domestic vs imported. In *Clove*, the ban on flavoured cigarettes exempted menthol (largely US-made) but banned clove (Indonesian), found to violate 2.1 because both were like products and the difference in treatment did not stem exclusively from a legitimate regulatory distinction.
24. For instance, a 2024 study by Forest Trends notes that while countries like India, Colombia and Brazil raised WTO concerns about the EUDR as a "trade barrier," WTO rules give Members leeway on environmental measures, and none of the existing similar regulations have been challenged yet. The SPS Agreement wasn't the focus of those concerns – the debate has centered on GATT/TBT. See Duncan Brack, *Does the EU Deforestation Regulation Comply with WTO Requirements?*, Forest Trends Report (Sept. 2024).
25. Agreement on the Application of Sanitary and Phytosanitary Measures, Arts. 2.3, 5.1–5.3, 5.5, 5.6, Apr. 15, 1994, 1867 U.N.T.S. 493. Article 5.1: Members must ensure SPS measures are based on an assessment of risks to health. Article 5.5: avoid arbitrary or unjustifiable distinctions in levels of protection in different situations if resulting in discrimination or disguised restriction. Article 2.3: no arbitrary or unjustifiable discrimination where identical conditions prevail, and no disguised restriction on trade. These parallel the GATT XX chapeau language.
26. GATT Art. XX(b) and (g). Forest conservation could be argued under XX(g) as "exhaustible natural resources" (forests are exhaustible; see *US – Gasoline*, WT/DS2/AB/R, at 15–16, recognizing clean air as exhaustible, and *US – Shrimp*,

- WT/DS58/AB/R, ¶128, recognizing living species as exhaustible). Under XX(b), measures for environmental health (e.g. preventing ecosystem collapse) have been considered (see *Brazil – Retreaded Tyres*, WT/DS332/AB/R, ¶144, where tire ban to prevent health risks was under XX(b)).
27. GATT Art. XX, chapeau (preamble). The chapeau text forbids measures applied in a manner that would result in arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on trade. This aims to prevent abuse of the exceptions. See Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R at 22 (Apr. 1996) (the chapeau is a balance between the right to invoke exceptions and the rights of other Members, to avoid abuse).
 28. These likeness criteria (physical characteristics, end-uses, consumer preferences, tariff classification) come from classic GATT jurisprudence (*Report of the Working Party, Border Tax Adjustments*, BISD 18S/97 (1970)). See also Appellate Body Report, *Philippines – Distilled Spirits*, WT/DS396/AB/R, ¶¶120–121 (likeness under Article III:2 involves analyzing competitiveness and substitutability). In the MFN context (Article I), the focus is similarly on whether products are in a competitive relationship such that an advantage to one would affect the other.
 29. Tulip Consulting study (Dec. 2024) p. 11 ("It seems highly likely that a WTO panel will find that all likeness criteria are present in the current case... physically, the alleged lower risk of being produced without deforestation in a 'no risk' country would not render the product 'non-like' to [one] produced in a country not covered by the 'no risk' exemption... it is a non-product related PPM that would not be physically visible in a product."). This aligns with past cases (e.g. *EC – Asbestos*, where health risk did lead to finding of unlike products, but that was a physical property difference – here, deforestation linkage is not detectable in the final product).
 30. The distinction is that in *Asbestos* the AB found carcinogenic asbestos fibers not "like" substitute fibers partly due to health risk differences manifesting in consumer preferences and regulation (AB Report, *EC – Asbestos*, WT/DS135/AB/R, ¶¶113–122). By contrast, here coffee or beef doesn't change in eyes of consumers based on deforestation history (absent labeling). See Tulip study, p. 12 (noting consumers wouldn't know, no label, so no difference in consumer taste or habits). So likeness stands.
 31. Appellate Body Report, *EC – Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (May 2014), ¶¶5.84–5.93 (MFN analysis), ¶¶5.287–5.303 (Article XX chapeau analysis). The AB found the EU Seal Reg violated MFN by according different treatment to Canadian/Norwegian products vs Greenlandic products under the Marine Management exception. Under Article XX, it assumed public morals applied but ruled the exceptions caused unjustifiable discrimination, partly as the EU did not negotiate with Canada/Norway for an equitable way to address animal welfare consistent with allowing Inuit hunts.
 32. Panel Report, *Indonesia – Autos*, WT/DS54/R (July 1998), ¶14.143 (finding violation of GATT Article I:1 where Indonesia's National Car program granted tax benefits to imports of parts from firms of a few countries with agreements, but not others, constituting an advantage to products of selected origins). This precedent underscores that conditional advantages tied to origin violate MFN.
 33. See Regulation 2023/1115, art. 1(2) ("This Regulation applies to relevant commodities and products... whether produced in the Union or imported."). Recital 13 emphasizes that to avoid discrimination, the same rules apply to domestic and imported products. Cf. EP Draft Res. 2025/2739, Recital X (noting Commission classification will be taken into account for operators' risk assessments under Art

10(2)(a) of EUDR). The law was crafted to cover domestic products to forestall a national treatment challenge.

34. Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 2000), ¶133 (setting out test for GATT III:4: (1) like products; (2) measure is law/regulation affecting internal sale, etc.; (3) imported products are treated less favorably than domestic products). The AB noted "no less favourable" means not modifying conditions of competition in favor of domestic products.
35. *Id.*, ¶137 (even-handedness in competitive conditions; focusing on whether measure "modifies the conditions of competition in the relevant market to the detriment of imported products"). The AB in *Korea – Beef* highlighted that a measure could be de facto discriminatory even if origin-neutral in law.
36. Indeed, the Forest Trends report by Duncan Brack (Sept. 2024) concluded that EUDR likely does not violate NT because products produced with deforestation (illegal vs legal) are arguably not "like" those without, and even if like, Article XX(g) could justify it, as long as applied evenly (p. 9–10 of report). However, that analysis did not account for a negligible-risk country exemption, which introduces an uneven application.
37. Appellate Body Report, *US – Tuna II (Mexico)*, WT/DS381/AB/R (May 2012), ¶215 (under TBT 2.1, once detrimental impact on imports is shown, the question is whether the measure is even-handed or whether the detrimental impact stems from a legitimate regulatory distinction). Also AB Report, *US – COOL*, WT/DS384/AB/R (Jul 2012), ¶¶268–273 (same framework).
38. *US – Clove Cigarettes*, WT/DS406/AB/R, ¶¶174–182; *US – Tuna II*, ¶¶230–234; *US – COOL*, ¶¶293–294. In *Clove*, the exemption of menthol (favored domestic product) vs ban of clove (imported product) was not a legitimate distinction – it was more political than health-based.
39. Panel Report, *US – Tuna II (Mexico)*, WT/DS381/R (Sept. 2011), ¶7.741; Appellate Body Report, *US – Tuna II*, WT/DS381/AB/R, ¶¶297–298. The panel found that the U.S. labelling scheme did discriminate against Mexican tuna; the AB upheld the result under TBT 2.1, focusing on lack of even-handedness. The criteria disqualified virtually all Mexican tuna because setting on dolphins (ETP method) was disallowed, whereas tuna from other regions faced lesser standards. The AB noted the measure wasn't calibrated to address mortality from other fishing methods outside the ETP.
40. Appellate Body Report, *US – Tuna II (Mexico) (Art. 21.5)*, WT/DS381/AB/RW (Dec. 2015), ¶¶7.276–7.282; Panel Report, *US – Tuna II (Mexico) (Art. 21.5 II)*, WT/DS381/RW/USA (Oct. 2017), ¶7.130–7.138. By the second compliance round (2018), the panel found the amended U.S. measure (which added requirements for other fisheries proportionate to their dolphin interaction rates) was now even-handed and no longer discriminatorily detrimental. The AB (2018) confirmed that calibrating requirements to actual risk in different regions resolved the 2.1 violation.
41. Appellate Body Report, *US – Tuna II (Art. 21.5)* (2015), ¶7.92 (the AB referenced its Shrimp/Turtle chapeau analysis, observing that if discrimination is arbitrary under XX chapeau, it likely indicates a lack of legitimate regulatory distinction under TBT 2.1). Tulip's analysis explicitly notes that given the "no risk" exemption is arbitrary/unjustifiable discrimination under XX chapeau, it similarly would not be a legitimate distinction under TBT 2.1.
42. *Id.*, citing AB Report, *US – Shrimp*, ¶¶164–165, and AB Report, *US – Gasoline*, p. 23. The AB in *Tuna II (21.5)* essentially said that the guidance from how to identify

arbitrary/unjustifiable discrimination in Article XX chapeau can inform the TBT 2.1 analysis of even-handedness.

43. Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R (Dec. 2007), ¶156 (considering alternatives under XX(b) necessity). The AB agreed the import ban was "necessary" in general, but took into account the significant volume of exempted imports from Mercosur in evaluating the measure's actual contribution to the objective. The Mercosur exemption reduced the measure's effectiveness, thus casting doubt on necessity and certainly on the chapeau consistency.
44. Appellate Body Report, *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 1998), ¶¶186–187. The AB reversed the panel's strict view of risk assessment but still found the EC ban not based on a risk assessment "appropriate to the circumstances," since the studies were general and did not specifically evaluate the health risk of consuming meat with residues of the hormones in question. The AB said a risk assessment could be quantitative or qualitative but had to rationally support the measure.
45. *US – Shrimp*, WT/DS58/AB/R, ¶128 (sea turtles are exhaustible natural resources); *US – Gasoline*, WT/DS2/AB/R, p. 15–16 (clean air is an exhaustible natural resource). By analogy, forests (being depletable through deforestation) qualify. The EUDR applies alongside EU domestic forest protections (e.g. EU forestry laws), satisfying the requirement of domestic measures in conjunction.
46. GATT XX(g) second requirement: The measure must be made effective in conjunction with restrictions on domestic production or consumption. The EUDR applies equally to domestic products placed on the EU market (they must be deforestation-free and comply with due diligence). This parallel internal applicability helps fulfill XX(g) – similar to how in *US – Shrimp* the U.S. also restricted its own shrimpers.
47. *Brazil – Retreaded Tyres*, WT/DS332/AB/R, ¶144 (AB accepted Brazil's objective of reducing waste tires to prevent spread of mosquito-borne diseases, etc., as falling under XX(b) to protect life/health). The measure was considered "necessary" after weighing factors, but ultimately failed the chapeau due to the Mercosur exemption (¶225).
48. See Appellate Body Report, *Korea – Various Measures on Beef*, ¶¶161–164 (describing necessity test under XX(b)); AB Report, *Brazil – Tyres*, ¶¶178–182 (weighing importance of objective, contribution of measure, and trade impact, as well as alternatives). If an alternative (like an international cooperative approach) is reasonably available and equally effective, a unilateral strict measure may not be "necessary." Some commentators argue partnerships could achieve EUDR goals with less trade friction.
49. Appellate Body Report, *US – Gasoline*, p. 18 (interpreting "relating to" in XX(g) as "primarily aimed at" conservation). *US – Shrimp*, ¶141 (measure must be "reasonably related" to the conservation goal). The EUDR's core requirement clearly targets conservation (no deforestation in supply chain), so it meets this test more straightforwardly than, say, a ban on a product indirectly related.
50. *US – Shrimp*, WT/DS58/AB/R, ¶¶158–160, 161–164 (chapeau analysis). The AB noted that the U.S. applied its ban in a rigid manner that did not allow other exporting nations to demonstrate they had a different but comparable regulatory program, and that the U.S. negotiated seriously with some countries but not others, which amounted to unjustifiable discrimination. The lack of flexibility and unequal negotiating effort were key reasons it failed the chapeau.

51. *EC – Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, ¶5.300 (finding the EU did not adequately justify why the discriminatory aspects of the Indigenous Communities exception – which mostly benefitted Greenland (Denmark) – were necessary, making it unjustifiable discrimination). Also ¶5.318 (faulting inconsistent application and lack of even-handedness). The AB also flagged that less trade-restrictive alternatives (such as a labeling scheme) weren't sufficiently considered by the EU, and procedural fairness issues, but the discrimination point was central.
52. *US – Shrimp*, WT/DS58/AB/RW (adoption Nov 2001), ¶¶144–147. After the U.S. implemented a more flexible process (including negotiating bilateral turtle agreements and instituting a transparent certification process open to all exporting nations), the compliance AB found the measure met the chapeau. The discrimination was no longer arbitrary because countries were given a fair opportunity and assistance to reach compliance.
53. *Brazil – Retreaded Tyres*, WT/DS332/AB/R, ¶¶225–234. The AB held Brazil's ban failed the chapeau due to the exemption for Mercosur imports, which caused arbitrary discrimination: Brazil was allowing the very risk (waste tyres) from some countries that it banned from others. It termed this "a form of discrimination that would undermine the objective of the measure at issue" and thus could not be justified.
54. *Id.*, ¶228 (the discrimination was considered unjustifiable even though it resulted from Brazil's WTO-consistent regional trade obligations – the AB still put the onus on Brazil to minimize the discriminatory effect or otherwise adjust policy). Brazil's predicament shows WTO will not excuse discrimination just because it arises from conflicting international commitments; similarly, the EU cannot justify negligible-risk discrimination by pointing to, e.g., special relationships or administrative convenience.