



EU - Biofuel Measures

EU - Palm Oil (Indonesia) [DS593]
EU and Certain Member States - Palm Oil (Malaysia)
[DS600]

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Dispute Timeline

Consultations Requested

DS 593: 09 Dec 2019

DS 600: 15 Jan 2021

Panel Established

DS 593: 29 July 2020

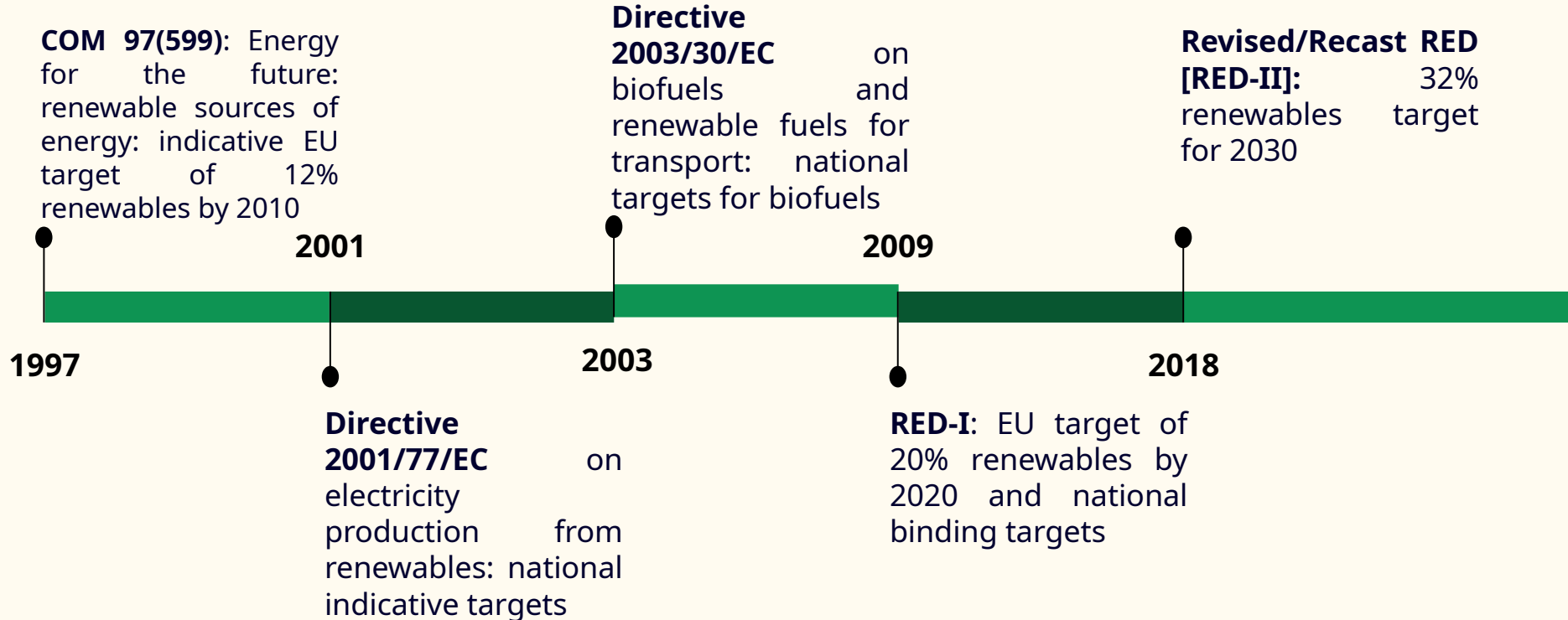
DS 600: 28 May 2021

Panel Report Circulated

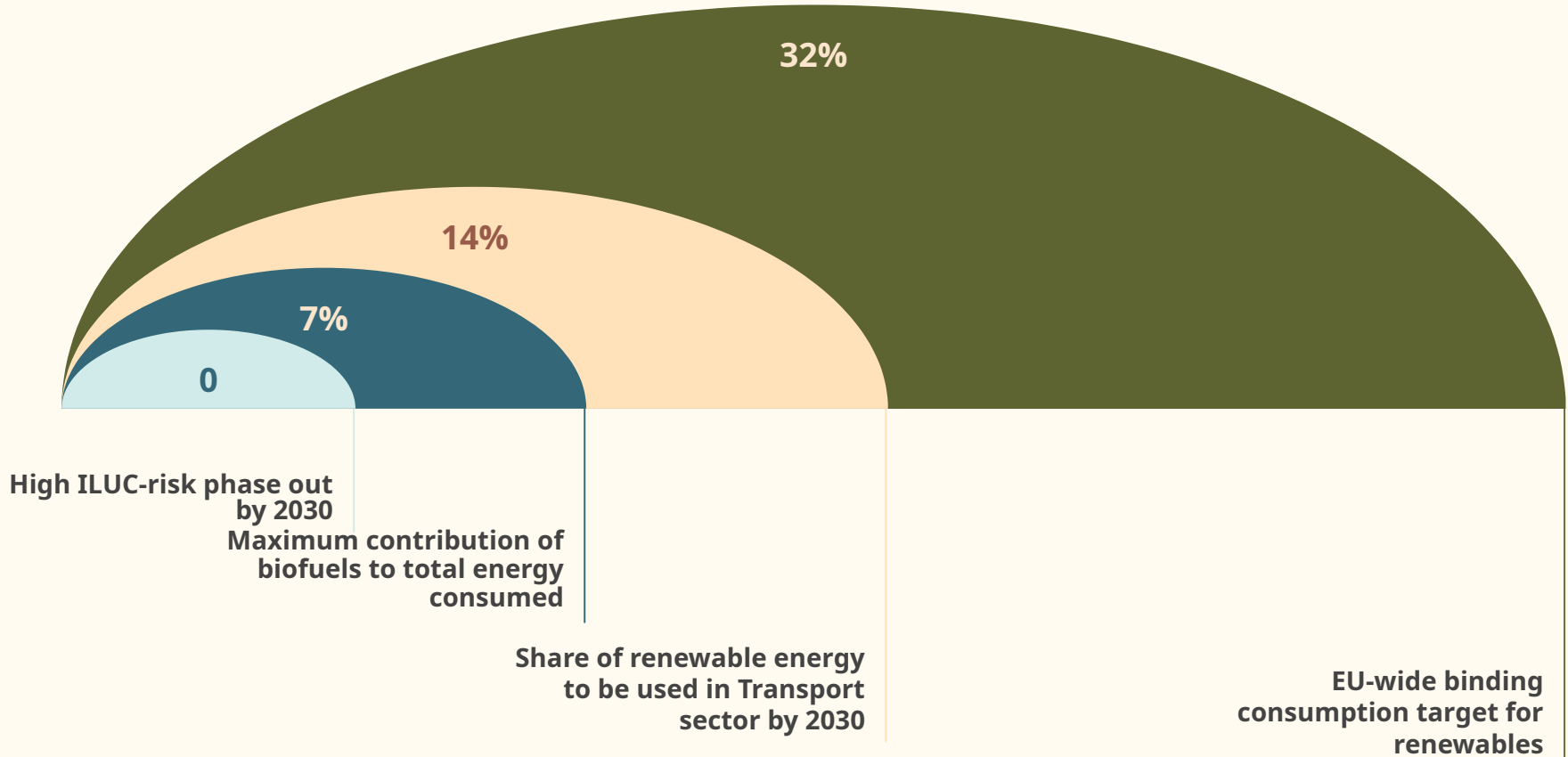
DS 593: 10 Jan 2025
(Adopted 24 Feb
2025)

DS 600: 05 March
2024
(Adopted 26 April
2024)

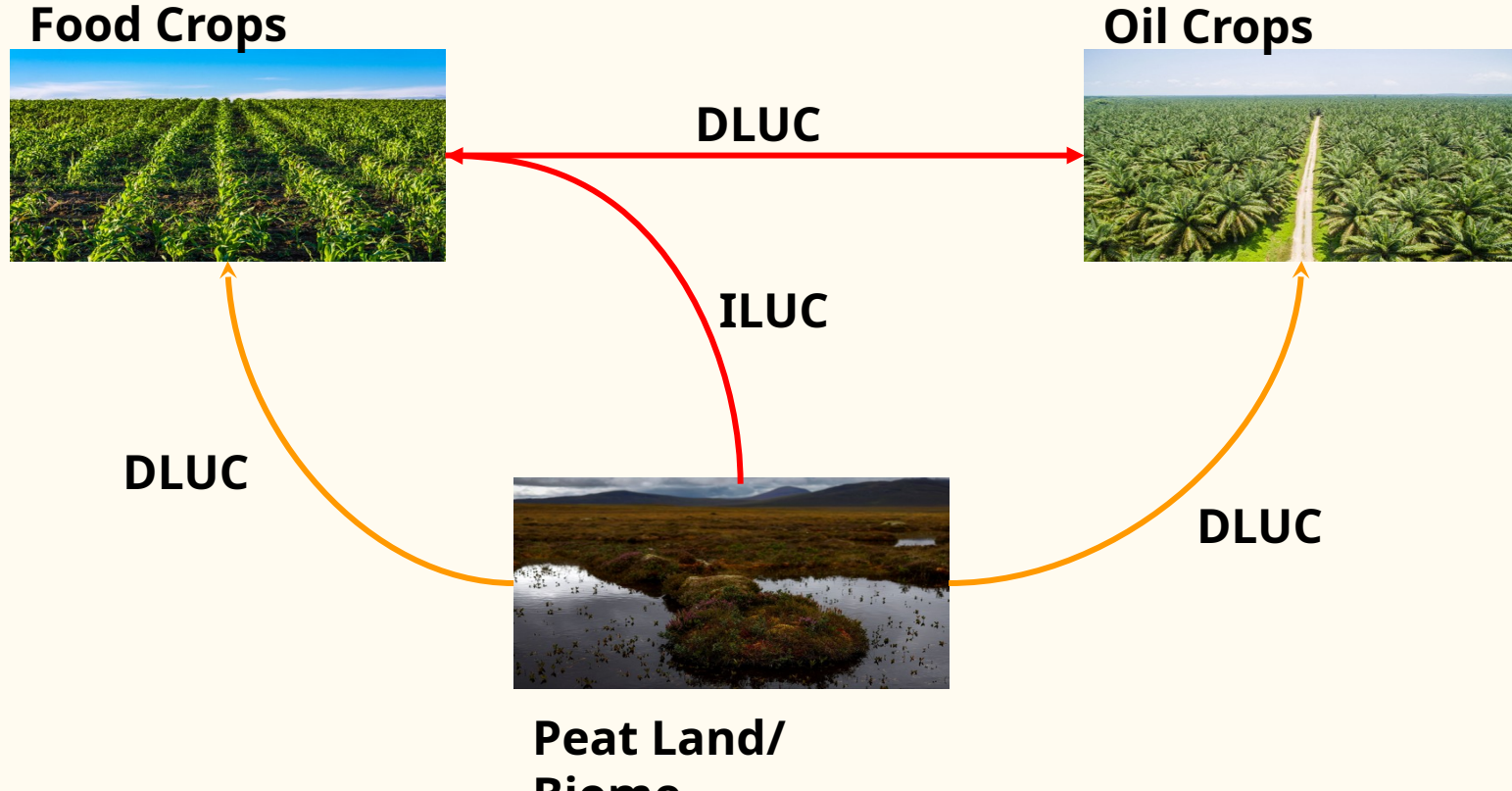
EU Renewable Energy Directives (RED) Timelines



EU RED-II Goals & Caps



Indirect Land Use Change (ILUC)



HLUC Formula

(a) the average annual expansion of the global production area of the feedstock since 2008 is higher than 1 % and affects more than 100,000 hectares; and

(b) the share of such expansion into land with high-carbon stock is higher than 10%, in accordance with the following formula:

$$x_{hcs} = \frac{x_f + 2,6x_p}{PF}$$

where

x_{hcs} = share of expansion into land with high-carbon stock:

x_f = share of expansion into land referred to in Article 29(4)(b) and (c) of RED II:

x_p = share of expansion into land referred to in Article 29(4)(a) of RED II including peatland:

PF = productivity factor.

PF shall be 1,7 for maize, 2,5 for palm oil, 3,2 for sugar beet, 2,2 for sugar cane and 1 for all other crops.

Illustration of Calculations under the HLUC Formula

| | Article 3(a) | | Article 3(b) | | | |
|-------------|--|--|----------------|----------------|-----|--|
| | Average annual expansion of production area since 2008 (kha) | Average annual expansion of production area since 2008 (%) | X _r | X _p | PF | Formula applied to each feedstock |
| Cereals | | | | | | |
| Wheat | - 263.4 | - 0.1% | 1% | — | 1 | Average annual expansion of production area since 2008 <1% and 100 kha |
| Maize | 4 027.5 | 2.3% | 4% | — | 1.7 | $2.35 = \frac{4 + 2.6(0)}{1.7}$ |
| Sugar crops | | | | | | |
| Sugar cane | 299.8 | 1.2% | 5% | — | 2.2 | $2.27 = \frac{5 + 2.6(0)}{2.2}$ |
| Sugar beet | 39.1 | 0.9% | 0.1% | — | 3.2 | Average annual expansion of production area since 2008 <1% and 100 kha |
| Oil crops | | | | | | |
| Rapeseed | 301.9 | 1.0% | 1% | — | 1 | $1 = \frac{1 + 2.6(0)}{1}$ |
| Palm oil | 702.5 | 4.0% | 45% | 23% | 2.5 | $41.92 = \frac{45 + 2.6(23)}{2.5}$ |
| Soybean | 3 183.5 | 3.0% | 8% | — | 1 | $8 = \frac{8 + 2.6(0)}{1}$ |
| Sunflower | 127.3 | 0.5% | 1% | — | 1 | Average annual expansion of production area since 2008 <1% |

Palm Oil in Data

7.5%

Renewable
Energy in
Transport Sector
(EU)

90%

Crop Based
Biofuels share
in Renewable
Energy in
Transport
Sector (EU)

30%

Palm Oil-Based
Biofuels share
in Renewable
Energy in
Transport
Sector (EU)-
2018

7%

Palm Oil-Based
Biofuels share in
Renewable
Energy in
Transport Sector
(EU)- 2024

**USD 26.75
Billion**

EU's Crop Based
Biofuel Market
(2025) with CAGR of
5.73%

**USD 2.5
Billion**

Total EU Palm
Oil Imports
(2023)

**USD 446
Million**

Malaysia Palm Oil
Exports to EU (2023)

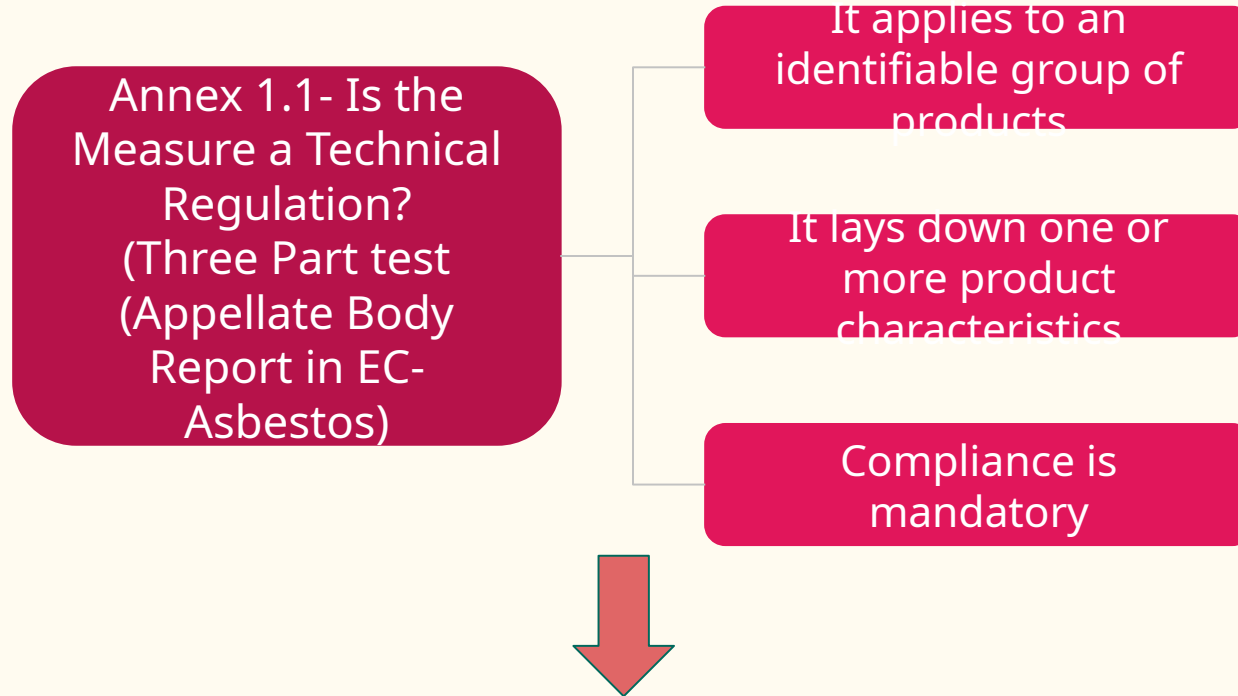
**USD 416
Million**

Indonesia Palm Oil
Exports to EU (2023)

Measure at Issue

| | | |
|----|--|---|
| 01 | 7% Share of biofuels from food/feed crops | <ul style="list-style-type: none">● Maximum 7% share for food/feed crop-based biofuels in renewable energy targets |
| 02 | High ILUC-Risk Classification, Cap & Phase out | <ul style="list-style-type: none">● Palm oil classification as high ILUC-risk with phase out from 2023-2030 |
| 03 | Low ILUC-Risk Certification | <ul style="list-style-type: none">● Certification procedure for demonstrating low ILUC-risk production |
| 04 | French TIRIB | <ul style="list-style-type: none">● <i>Taxe Incitative Relative à l'Incorporation de Biocarburant</i>, meaning: incentive tax concerning the incorporation of biofuels - Tax reduction system excluding high ILUC-risk biofuels |

TBT Agreement Issues



Inconsistent with procedural guidelines for Publication to WTO TBT Committee and Public Comment (Article 2.9.2 and 2.9.4)

TBT Agreement Issues (cont.)



01

Does the measure treat like products, regardless of origin, equally?

- Likeness (Degree of Similarity)
- De Facto Discrimination
- Lack of Justification under TBT 2.1

02

Is the measure scientifically justified and necessary to achieve a legitimate objective?

- EU's Objective to reduce GHG emissions from ILUC was legitimate
- Measure based on scientific evidence (2019 report)
- Not more trade restrictive than necessary
- Not merely descriptive, is performance based

03

Is the measure in adherence with International Standards?

- MSPO, RSPO, ISCC and ISO standards
- "Relevant" standards
- Even if, standards are ineffective/ non-applicable

TBT Agreement Issues (cont.)



Article 5: Conformity Assessment Procedure

Low-risk ILUC
Certification procedure

- Non-discriminatory CAP towards Malaysian & Indonesian suppliers
- Created unnecessary obstacles to trade due to complex design
- Lack of Notification and consultation in the WTO TBT Committee

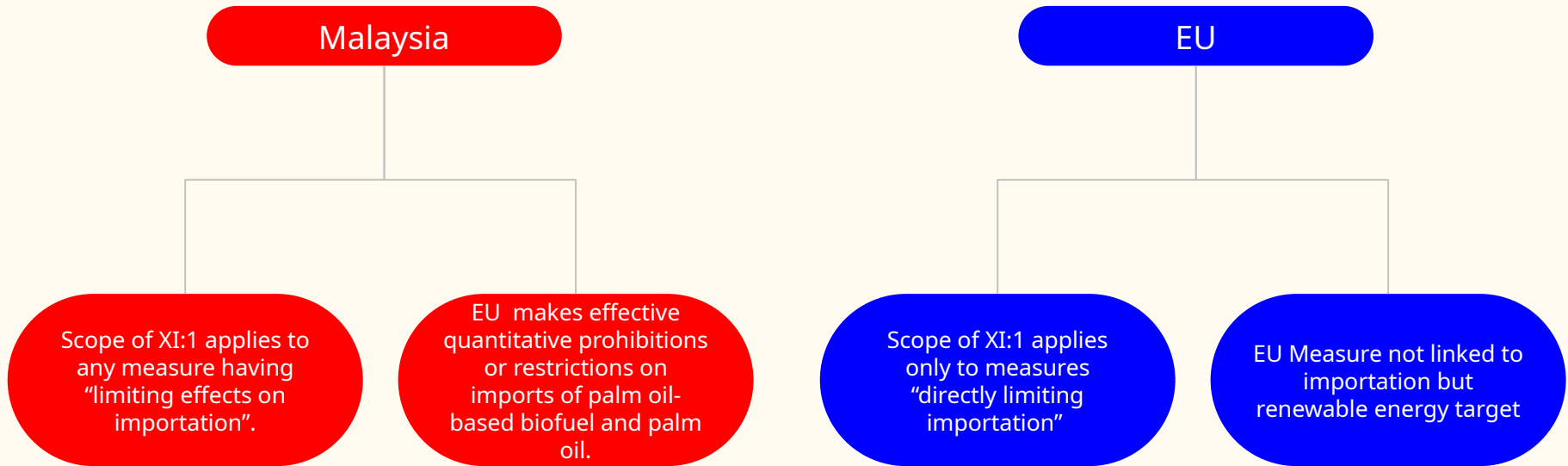
Article 12: Special and Differential Treatment

Flexibility to Developing countries by Developed Countries

- EU considered Malaysia and Indonesia's development into account (consultations, dialogue and engagement)
- No exemption from regulatory measures, only consideration of needs

GATT Article XI:1 [General Elimination of Quantitative Restrictions]

Article XI:1 requires that Members do not institute or maintain "prohibitions or restrictions ... on the importation" of any product in their territory.



PANEL: Malaysia has ***not established*** that the high ILUC-risk cap and phase-out or the low ILUC-risk certification procedure is inconsistent with the obligation in Article XI:1

GATT Article III:4 [National Treatment]

Imported Products and Domestic Products are “like”

- ☐ Similar physical characteristics
- ☐ Similar primary end-use
- ☐ Similar consumer preferences
- ☐ Identical 6 digit tariff heading (3826.00)



Within Scope of Article III:4

- ☐ Article 26(2), RED II is a “law/regulation”
- ☐ Does not mandate exact fuel mix
- ☐ Limits consideration of high ILUC-risk feedstocks
- ☐ Affects sale/purchase/use of imported products



Less favourable treatment

- ☐ Palm-oil biofuels phased out
- ☐ EU-origin rapeseed & soybean oil unaffected
- ☐ Results in competitive disadvantage to imports

Inconsistent with GATT Article III:4

Article I:1 [General Most-Favoured Nation Treatment]



Measures qualify under Article I:1

Scope

Both - High ILUC Cap and Phase Out, and Low ILUC Certification procedures - fall under Article I:1

Are "like" products

Oil palm based biofuel "like" biofuel produced from soybean oil, rapeseed oil, etc.



Confer "advantage, favour, privilege, or immunity"

Measures virtually eliminates demand for oil palm based biofuel in the EU market. Exemption from certification not an advantage *per se*, rather due to low ILUC classification

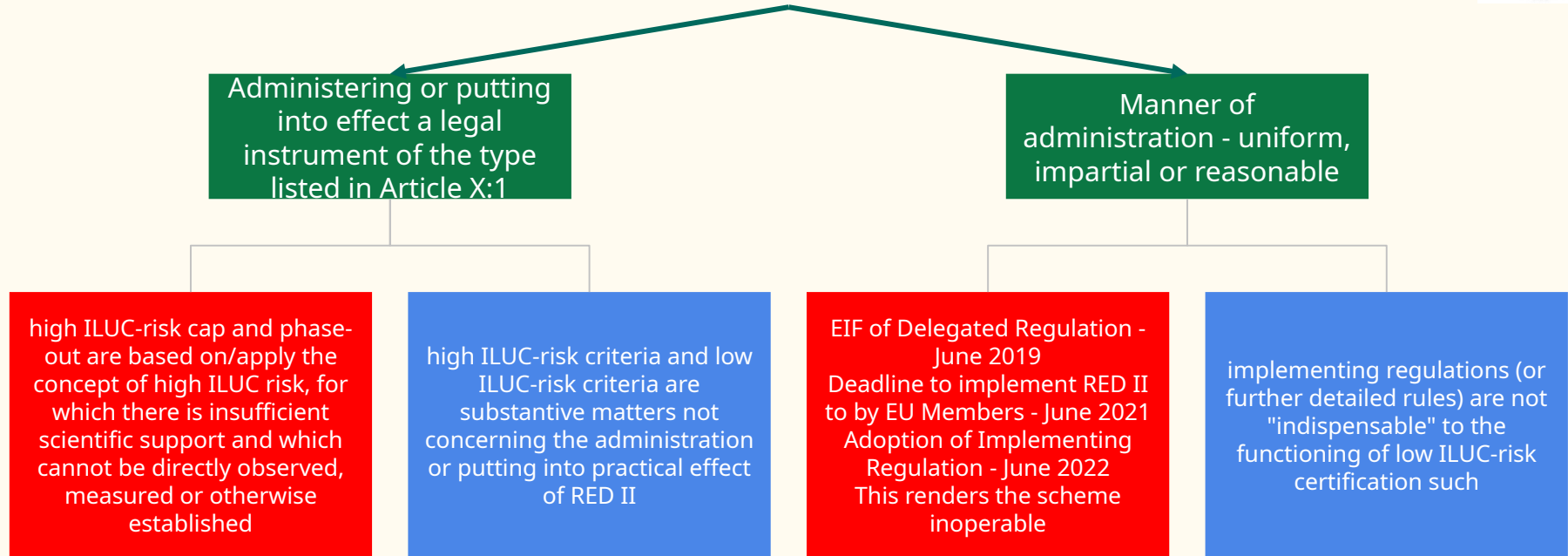
advantage not extended "immediately" and "unconditionally"

Oil palm oil-based biofuel imported from Malaysia cannot enjoy the same market opportunities as rapeseed oil and soybean oil-based biofuels imported from other countries.

Inconsistent with GATT Article I:1




"With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."*

***GATT Article X:3(a)* [Reasonable & impartial administration]**



Finding: *Implementing Regulation administrative in nature and administered in a manner that is not reasonable - Inconsistent with Article X:3(a)*

GATT Article XX [General Exceptions]

| | |
|---|---|
| <i>Chapeau - measures are not applied in an arbitrary or discriminatory manner, or as a disguised restriction on international trade</i> |  |
| <i>XX(a) - necessary to protect public morals</i> | Not Addressed |
| <i>XX(b) - necessary to protect human, animal or plant life or health</i> |  |
| <i>XX(g) - relating to the conservation of exhaustible natural resources</i> |  |

SCM Issues



Article 1.1(a)(1)(ii)



Malaysia's
Claim:
Lower tax for
biofuels =
revenue
foregone



EU's Defense:
Benchmark =
TIRIB formula
→ no revenue
foregone.



Panel Ruling:
No SCM
violation;
TIRIB formula
is normative.

**FINANCIAL
CONTRIBUTION**

Subsidy

**Financial
Contribution**



1. Government Revenue Foregone
2. Income Support

Benefit

SCM Issues (cont..)

Article 1.1(a)(2)

FINANCIAL CONTRIBUTION



Malaysia's
Claim:
Lower tax →
higher profits =
income support



EU's Defense:
TIRIB
encourages
blending; no
income
guarantee



Panel Ruling:
No income
support under
SCM. TIRIB
affects tax
burden, not
income directly.



SCM Issues (cont..)

Article 1.1(b)

BENEFIT



Malaysia's
Claim:
Reduced tax
for biofuels
= selective
benefit.



EU's
Defense:
Uniform
rules +
compliance
costs → No
benefit



Panel
Ruling:
Lower Tax
Payment =
Benefit to
Suppliers



Assuming arguendo a
subsidy exists, the Panel
assessed potential
violations under SCM
Articles 1-2.

SCM Issues (cont..)

SPECIFICITY



Article 2



Malaysia's
Claim:
Subsidy
benefits
non-palm
operators →
specific.



EU's
Defense:
Rules apply
equally to
all
operators.



Panel
Ruling:
Subsidy is
specific if it
exists.

SCM Issues (cont..)

ADVERSE EFFECTS

Articles 5(c), 6.3(a), 6.3(c)



Malaysia's Claim:
Discriminatory tax caused
palm oil export decline →
serious prejudice.



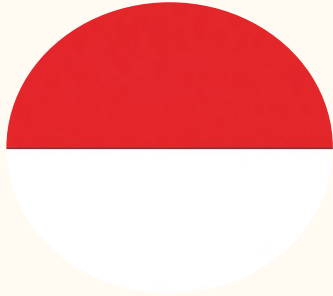
EU's Defense:
Export drop due to market
factors (e.g.,
environmental trends,
consumer preferences); no
direct link to tax.



Panel Ruling:
No causation proven.
Multiple market factors at
play → no serious
prejudice.

SCM Issues (cont..) Article 3.1(b)

Import Substitution Subsidy



Indonesia's Claim:
TIRIB excludes palm oil (imported) but allows rapeseed (domestic) → de facto import substitution subsidy.



EU's Defense:

- TIRIB tax incentive is not tied to domestic vs. imported biofuels.
- Subsidy applies to any "qualifying" biofuel meeting criteria
 - Eg: Soybean-based biofuels (US/Argentina).



Panel Ruling:

- No strict requirement to use domestic goods.
- Eligible biofuels include imported alternatives (e.g., soybean).
- Subsidy contingent on sustainability, not origin.

Dissenting Opinion

01

PROTECTIONIST INTENT

- Not Just Environmental
- Evidence: Favored EU crops (e.g., rapeseed) over imported palm oil.
- Outcome: Domestic industry protection under guise of sustainability

02

ARBITRARY TREATMENT

- Singling Out Palm Oil
- Double Standard: Ignored higher ILUC risks from soybean.
- Flawed Science: Used "generous" GHG formula favoring soybean

03

DISSENT'S LEGAL CONCLUSION

- TBT Agreement Violation: Failed "legitimate objective" test (mixed environmental/protectionist aims).
- GATT Violation: Art. XX Exception Failed- "Arbitrary discrimination" (palm vs. soybean). "Disguised trade restriction" (protecting EU farmers).



THANK YOU