



# ***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

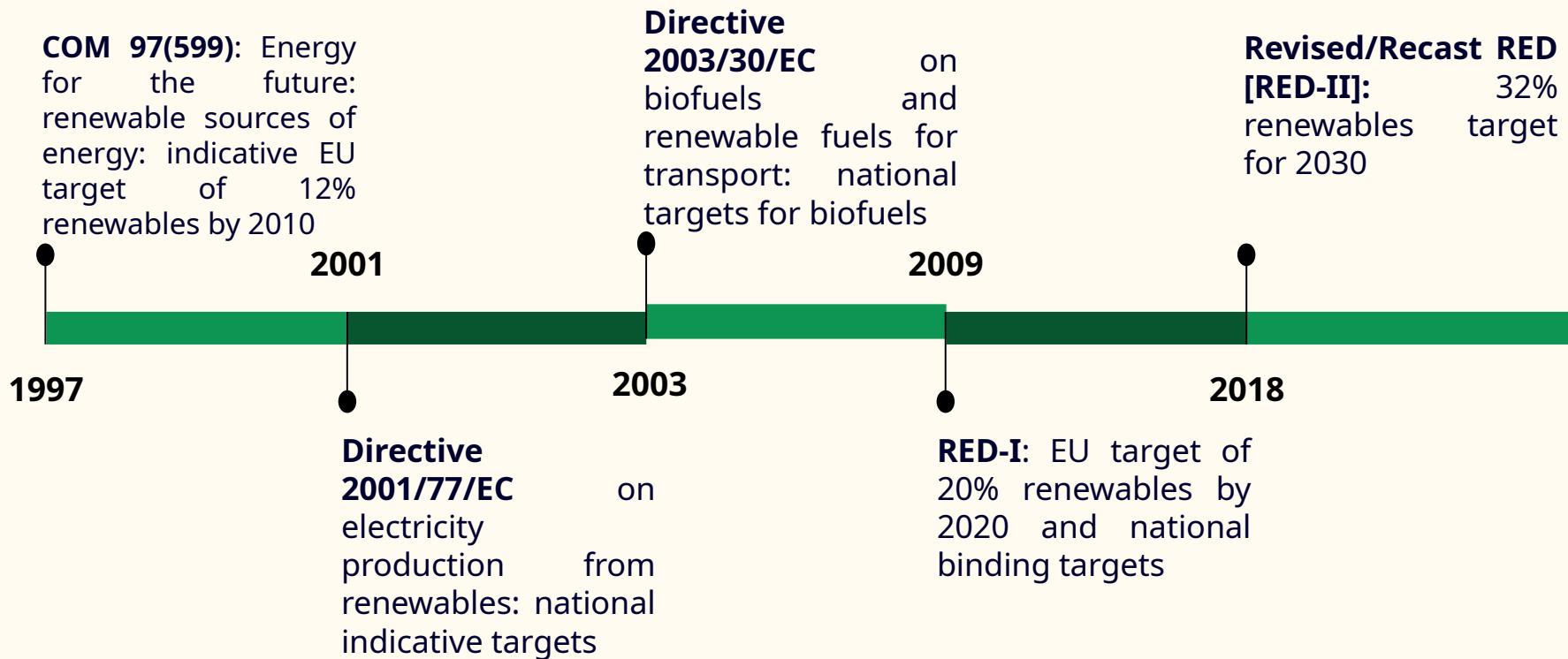
**DS 600:** 28 May 2021

Panel Report Circulated

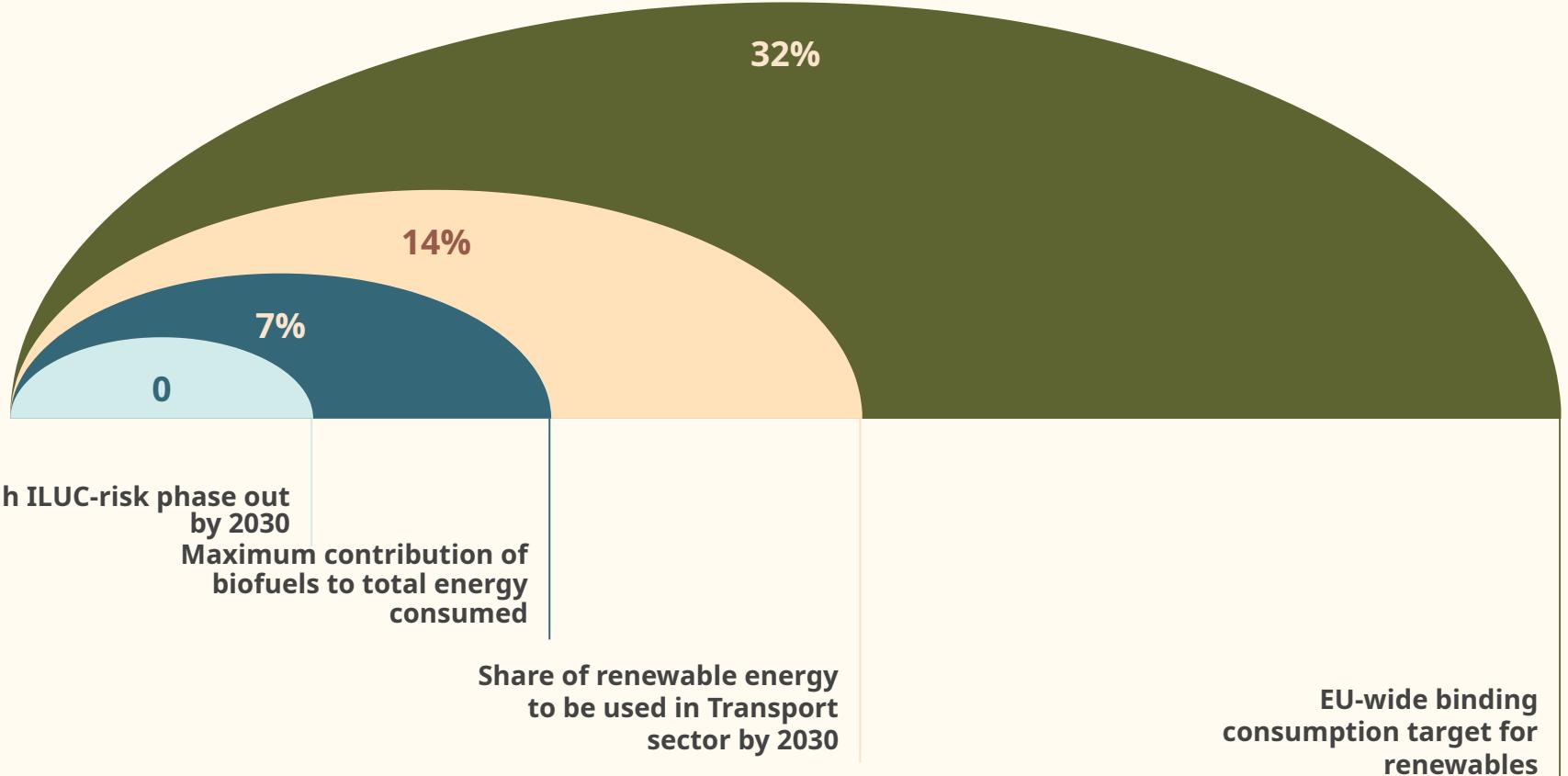
**DS 593:** 10 Jan 2025  
(Adopted 24 Feb  
2025)

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

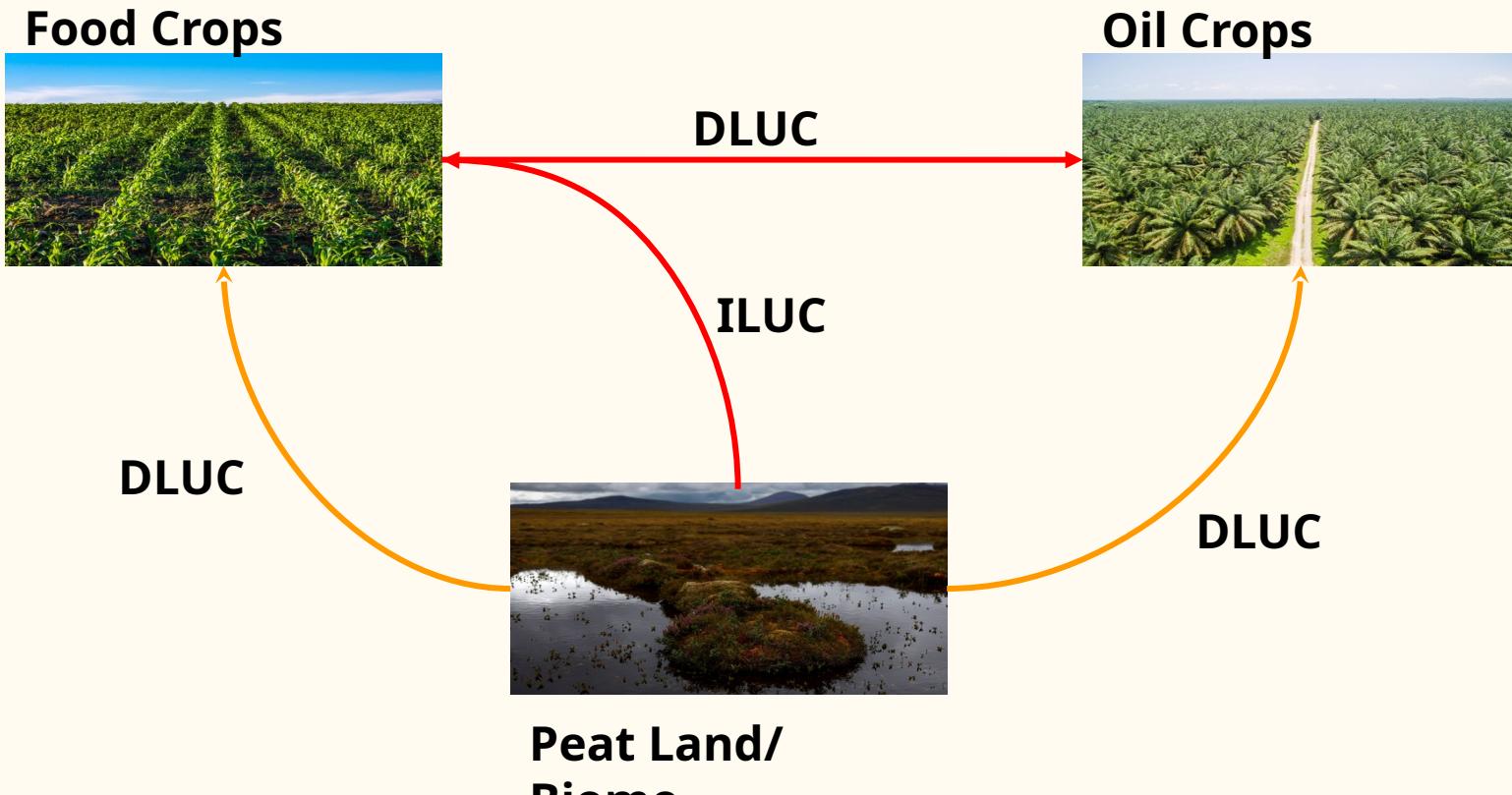
# EU Renewable Energy Directives (RED) Timelines



# 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 <sub>f</sub>	X <sub>p</sub>	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**

- Maximum 7% share for food/feed crop-based biofuels in renewable energy targets

02

**High ILUC-Risk Classification, Cap & Phase out**

- Palm oil classification as high ILUC-risk with phase out from 2023-2030

03

**Low ILUC-Risk Certification**

- Certification procedure for demonstrating low ILUC-risk production

04

**French TIRIB**

- *Taxe Incitative Relative à l'Incorporation de Biocarburant*, meaning: incentive tax concerning the incorporation of biofuels - Tax reduction system excluding high ILUC-risk biofuels

# *TBT Agreement Issues*

Annex 1.1- Is the Measure a Technical Regulation?  
(Three Part test  
(Appellate Body Report in EC-Asbestos)

It applies to an identifiable group of products

It lays down one or more product characteristics

Compliance is mandatory



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

03

Is the measure in adherence with International Standards?

- Not merely descriptive, is performance based
- 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

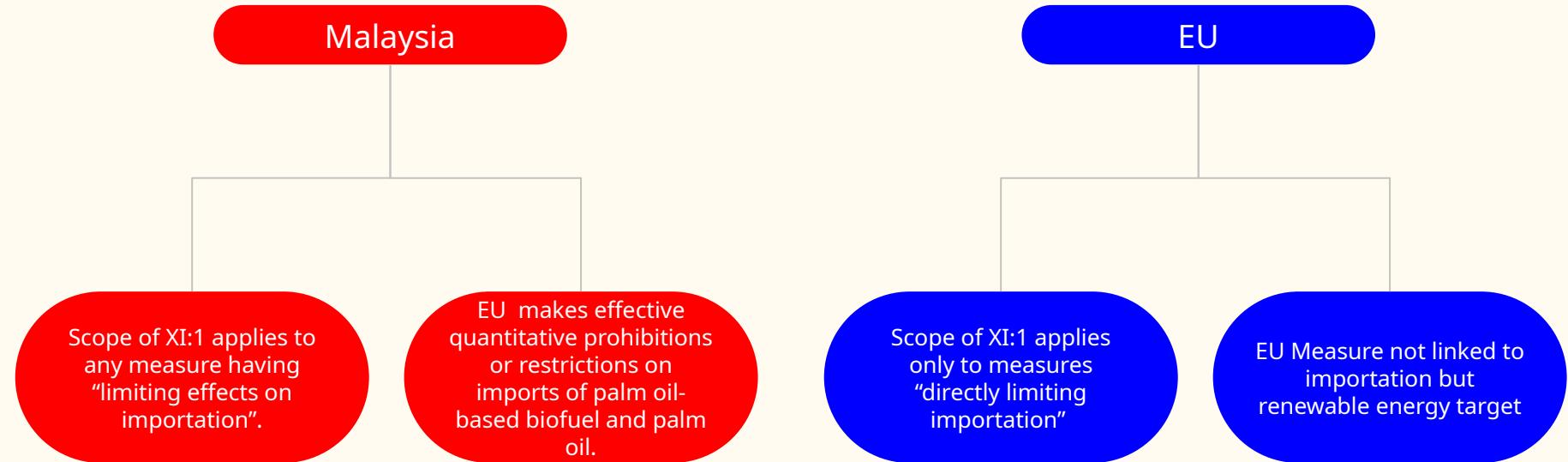
## Article 12: Special and Differential Treatment

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

## Confer "advantage, favour, privilege, or immunity"

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

## Are "like" products

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

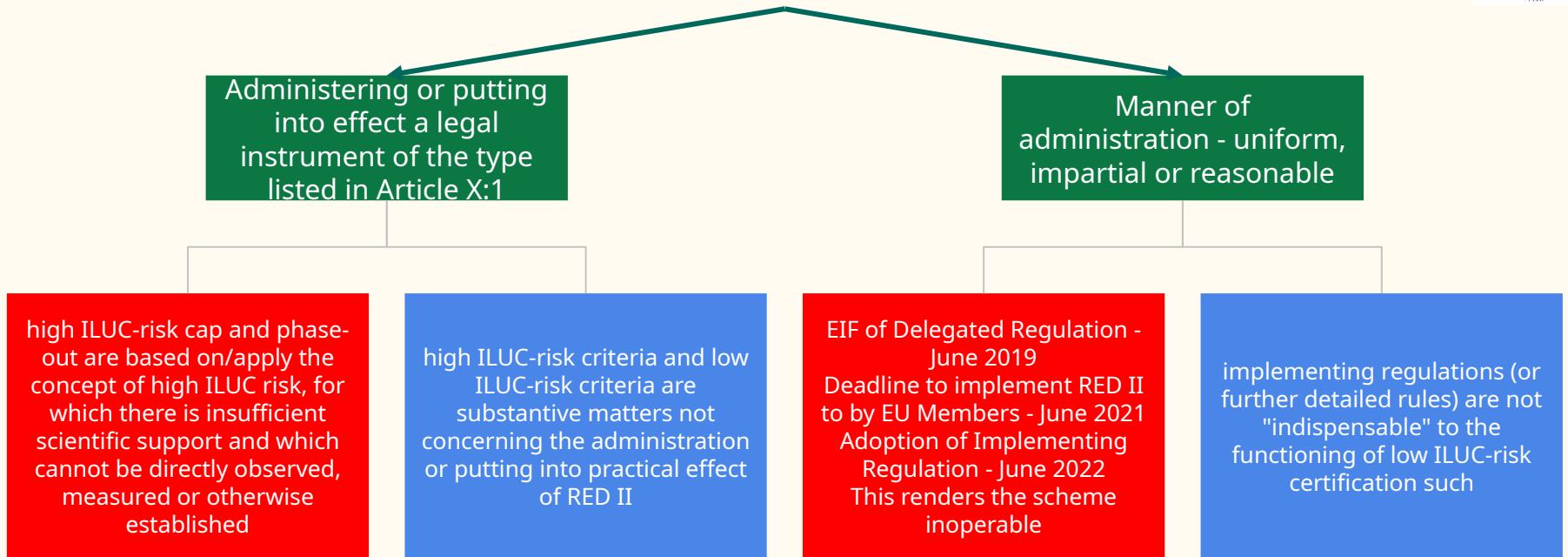


advantage not extended "immediately" and "unconditionally" oil-based biofuel imported from Malaysia cannot enjoy the same market opportunities as rapeseed oil- and soybean oil-based biofuels imported from other countries.

## 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]

**Chapeau** - measures are not applied in an arbitrary or discriminatory manner, or as a disguised restriction on international trade



**XX(a)** - necessary to protect public morals

Not Addressed

**XX(b)** - necessary to protect human, animal or plant life or health



**XX(g)** - relating to the conservation of exhaustible natural resources



# 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

### Financial Contribution



1. Government Revenue Foregone
2. Income Support

### Subsidy

### 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

Arguendo  
Analysis

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.

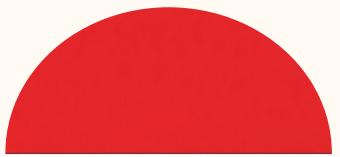


Panel Ruling:  
No causation proven.  
Multiple market factors at  
play → no serious  
prejudice.

# 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