



Volume 37 No 1, January 2022
DOI: 10.20473/ydk.v37i1.34596

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Yuridika (ISSN: 0215-840X | e-ISSN: 2528-3103)

FAKULTAS HUKUM UNIVERSITAS AIRLANGGA

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Article history: Submitted 5 August 2021; Accepted 1 October 2021; Available Online 14 January 2022.

Is the Measure to Phase Out Crude Palm Oil in RED II discriminatory based on the World Trade Organization Law?

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Abstract

The European Union enacted the Renewable Energy Directive 2018/2001 (RED II) policy under the pursuit of environmental protection. The authors will analyze how RED II is discriminative toward Indonesian trade of CPO, primarily within the concept of indirect land use change (ILUC), which restricts trade toward crude palm oil (CPO) whereas other domestic like products are exempted from such reduction. After the promulgation of this policy, Indonesia requested WTO to examine whether RED II follows the international obligations set forward in WTO. The author will analyze non-discrimination under WTO Law, specifically based on the provisions of Article 2.1, 2.2, and 5.1 Technical Barriers to Trade (TBT) Agreement as well as Article III:4, XX(b), and XX(g) of General Agreement on Tariffs and Trade (GATT) 1994, alongside with relevant jurisprudence of WTO case laws. This research is conducted through juridical-normative method, which utilizes library materials and secondary data. The outcome of this study shows that RED II does violate obligations of non-discrimination based on GATT and TBT due to differential treatment of like products that inflicts less favorable treatment and unequal opportunities of competition for CPO.

Keywords: International Trade Law; RED II; TBT; GATT; CPO.

Introduction

The rising concerns of global warming and climate change have pressured nations to include environmental concerns for the enactment of policies.¹ The polemic on the balance of environmental concerns and trade policy occurs within the international community. The former Executive-Director of the United Nations

¹ Among others, national environmental policies include the National Environmental Policy Act of the United States, Environmental Policy of United Kingdom, Environmental Protection Policy of Japan, National Environmental Policy of Sri Lanka, National Policy on Environment of Malaysia, and Law No.39 Year 2009 on Environmental Protection and Management of Indonesia.

Environment Program (UNEP) points out, '*We have failed to articulate clear, acceptable trade and environment policies because too much has been demanded of the WTO and too little has been done in other forms*'.² On this notion, there is a lack of a clear threshold prevalent between acceptable policies on limitations concerning environment and trade.

The Joint Working Party on Trade and Environment of the Organization for Economic Co-operation and Development (OECD) signified the positive impacts of integrating such concerns into national policies, especially in regard to the implication of international trade.³ In pertaining to this, OECD stated that trade will encourage countries to have better access and production of resource efficient and environmentally friendly products, whilst also expanding the market of such products.⁴ Subsequently, environmental regulations and standards are capable of stimulating innovation and exchange of technologies.⁵ Therefore, states are encouraged to integrate trade and environmental policies as an instrument for economic and political necessity.⁶

On the other hand, there are scholarly opinions that have signified the negative repercussions of integrating environmental concerns within trade policies. One of the concerns includes the risk of green protectionism, which occurs when the enactment of environmental policy consequently adds discriminatory non-environmental objectives or overly trade restrictive effects.⁷ Environmentalism may

² K Topfer, *Chapter 4 Trade, Development, and the Environment* (World Trade Organization Secretariat ed, 2000).[17-22].

³ Organisation for Economic Co-operation and Development, *Environmental Goods and Services: An Assessment of the Environmental, Economic and Development Benefits of Further Global Trade Liberalization COM/TD/ENV 86/FINAL* (OECD 2000).[70-92].

⁴ *ibid.*

⁵ A Carrapatoso, 'The Integration of Trade and Environmental Policies in Free Trade Agreements in Southeast-Asia' (2008) 1 *Südostasien Aktuell : Journal of Current Southeast Asian affairs* 105. [105].

⁶ DC Etsy , 'Bridging the Trade -Environment Divide' (2001) 15 *The Journal of Economic Perspectives* 130.[13-130].

⁷ F Erixon and R Abbott, 'Green Protectionism in the European Union: How Europe's Bio-fuels Policy and the Renewable Energy Directive Violate WTO Commitments' (2009) 1 *ECIPE Occasional Paper* 32.[32].

be used as a justification to shield domestic markets from international competition,⁸ which subsequently constitutes a disguised restriction on trade. In addition, the notion of green protectionism does not necessarily violate the obligations of the WTO but may harm the interests of trading partners.⁹

The notion of green protectionism appeared due to the occurrence of protectionist measures conducted for the attainment of environmental goals.¹⁰ In this regard, scholars have identified the emergence of environmental standards within trade and production, specifically within the sector of food and agriculture.¹¹ The policies vary from laws on packaging, eco-labelling, and production methods.¹² The implication is that there is a risk that the aforementioned policies seeks to safeguard the domestic industry.¹³

On this matter, scholars have also noted that green protectionism is often conducted by developed nations against the export of developing countries.¹⁴ This occurs due to the economic disparity between developed and developing countries. The study of the Committee on Trade and Environment underlined that *'Southern manufacturers have the capital and technological capabilities to adjust to higher environmental standards, whereas small and medium enterprises, who*

⁸ M Cole., 'Trade Liberalization, Economic Growth and the Environment' (2001) 1 Journal of Environmental Policy and Planning 144.[144].

⁹ Z Kutlina-Dimitrova and C Lakatos, 'The Global Cost of Protectionism' (2017) 8277 World Bank Policy Research Working Paper 5.[5].

¹⁰ WWF International, '5th WTO Ministerial Conference, Cancun WWF Briefing Series: Green Protectionism' (2019) <https://www.wto.org/english/forums_e/ngo_e/wwf_greenprotec_e.pdf> accessed 13 September 2019.

¹¹ S Jaffee and S Henson, 'Agro-Food Exports from Developing Countries: The Challenges Posed by Standards' (2004) 1 Global Agricultural Trade and Developing Countries, The World Bank 124.[124].

¹² B Mukherjee and N Rathi, 'Green Protectionism: Nuisance or Catalyst for Cross-Border Trade (With Reference to India)' (2017) 22 IOSR Journal of Humanities and Social Science (IOSR-JHSS) 6.[6].

¹³ *ibid.* The example of WTO case laws that constitutes as green protectionism includes the cases that were not justified under Article XX (b) and Article XX (g) of GATT 1994, which includes the case of *US-Gasoline, EC-Tariff Preferences, EC-Hormones, Indonesia-Chicken, China-Audio Visuals, Thai-Cigarettes, US-Gambling, EC-Seal, Brazil - Retreaded Tyres, Korea - Beef, and China - Raw Materials.*

¹⁴ *ibid.*[1-5].

have neither the cash nor the technological sophistication, will face difficulties'.¹⁵ Subsequently, conforming to the environmental standards imposed by developed countries may cause difficulties for the exporters of developed countries that are economically incapable.

In light of this matter, the pressure for nations to take into consideration environmental protection is reflected within other international agreements. One of the key instruments in combating climate change is the United Nations Framework Convention on Climate Change (UNFCCC), which has the objective to '*stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*'.¹⁶ Within the UNFCCC, the Paris Agreement was promulgated, which specifies in tackling greenhouse gas emissions. Article 2 (a) of the Paris Agreement held the objective of '*Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels*'.¹⁷ Hence, the Paris Agreement had formulated a global action plan to direct Member States in combating climate change.¹⁸

As part of the aforementioned strategy and package, the Renewable Energy Directive 2018/2001 (RED II) is the policy to promote and use energy from renewable sources in the EU. The Directive issued a sustainability criteria for bioenergy through measuring the impact of the biofuel to the environment. In this matter, the impact includes the production of such biofuels, which takes into consideration the process of indirect land use change (ILUC). ILUC is the result of land change that causes the release of carbon emissions, which occurs primarily from the conversion from land for food market that is transformed into land for

¹⁵ W Bello, 'The Threat of Green Protectionism' (1997) 1 International Centre for Trade and Development 1.[1-2].

¹⁶ UNFCCC, 'United Nations Framework Convention on Climate Change' (1992) 1771 United Nations Treaty Series.

¹⁷ UNFCCC, 'Paris Agreement' (2015) 2 United Nations Treaty Series.

¹⁸ The Global Action Plan is to undertake and communicate ambitious efforts in tackling climate change as prevalent in Article 3 of the Paris Agreement, which includes but not limited to enacting nationally determined contributions, adapting capacity to reduce the impact of climate change, and for developed countries to provide financial assistance for developing countries.

biofuel production.¹⁹ In the Directive, biofuels are categorized as high risk ILUC and low risk ILUC. The sustainability criteria of RED II consequently encourages members of the EU to phase out crude palm oil (CPO). In this regard, RED II placed CPO as an unsustainable biofuel due to being a high risk commodity for contributing to ILUC.²⁰ Subsequently, RED II directed EU countries to reduce the usage of CPO to 0% by 2030.²¹

The Directive may constitute as green protectionism due to the repercussions that the measure imposed to other countries. In pertaining to this, the production of CPO is dominated by Indonesia and Malaysia, which resulted in 85-90% of the total global CPO production.²² This issue was discussed in the 34th ASEAN Summit, in which leaders and government of ASEAN states acknowledged the discriminatory act against palm oil and its implication toward market access.²³ Furthering the response, Indonesia is preparing a litigation to the WTO, which may involve collaboration with Malaysia.²⁴

For Indonesia, the enactment of RED II is capable of inflicting severe economic consequences. The sector of crude palm oil serves as an integral source of foreign reserves, as well as an instrument of poverty alleviation and rural economic development.²⁵ In this matter, the CPO industry acts as a large contribution to the Indonesian economy through employing approximately 17 million workers, which

¹⁹ European Commission. "Sustainability Criteria for Biofuels Specified." European Commission - PRESS RELEASES - Press release - Sustainability criteria for biofuels specified. Available at https://europa.eu/rapid/press-release_MEMO-19-1656_en.htm.

²⁰ Directive (EU) 2018/2001, 'The European Parliament and of the Council of 11 December 2018 on the Promotion of the Use of Energy from Renewable Sources. PE/48/2018/REV/1'.

²¹ *ibid.* Article 26.

²² Indonesia Investments, 'Minyak Kelapa Sawit Indonesia: Produksi & Ekspor CPO' (2017) <<https://www.indonesia-investments.com/id/bisnis/komoditas/minyak-sawit/item166>> accessed 25 September 2019.

²³ Elvia Muthiariny Dewi, 'ASEAN Summit Highlights Palm Oil Discrimination Issue' (*Tempo*, 2019) <<https://en.tempo.co/read/1217646/asean-summit-highlights-palm-oil-discrimination-issue>> accessed 25 September 2019.

²⁴ The Jakarta Post, 'Indonesia, Malaysia Prepare to Contest EU's RED II CPO Policy' (2019) <<https://www.thejakartapost.com/news/2019/03/25/indonesia-malaysia-prepare-to-contest-eu-red-ii-cpo-policy.html>> accessed 30 September 2019.

²⁵ L Rist, L Feintrenie and P Levang, 'The Livelihood Impacts of Oil Palm: Smallholders in Indonesia, Biodiversity and Conservation' (2010) 19 *Biodivers Conserv* 1024.[1009-1024].

includes more than four million farmers.²⁶ The condition is further exacerbated by the global distribution of CPO. The export of Indonesian export of CPO amounts to a total of 34.71 million tonnes, variously distributed to India (6.71 tonne), China (4.41 tonne), Pakistan (2.48 tonne), Africa (2.58 tonne), and the European Union (4.78 tonne).²⁷ On 9 December, 2019, Indonesia issued a request for consultations to the WTO upon certain measures concerning palm oil and oil palm crop-based biofuels that was issued by the European Union. On this matter, Indonesia issued RED II, Delegated Regulation 2019/807, and relevant measures and claimed that the aforementioned measures are in violation of the GATT, TBT Agreement, and the SCM Agreement.²⁸

The threat of green protectionism can influence local and international trade. Scholars have observed that green protectionism is an occurrence that may occur between developed and developing nations – this research offers to review whether green protectionism is evident in the trade of CPO, specifically whether RED II is discriminatory based on the grounds of World Trade Organization Law. Hence, this paper offers to answer the research question of '*What are the grounds that Indonesia can use to claim that the Renewable Energy Directive is discriminatory in accordance with World Trade Organization Law?*'. In pertaining to this, the focus of this research will be limited to the analysis of Article 2.1, 2.2, and 5.1.1 of the TBT Agreement as well as Article III:4, XX(b), and XX(g) of GATT 1994.

To address the research question, this paper will explore the polemic against RED II by reviewing the content of the Directive (Chapter 1), followed by reviewing the issuance of violation complaint by Indonesia (Chapter 2), and

²⁶ The Insider Stories, 'Indonesia: Europe Do Outright Discrimination Against CPO' (*The Insiders Stories*, 2019) <<https://theinsiderstories.com/indonesia-europe-do-outright-discrimination-against-cpo/>> accessed 21 September 2019.

²⁷ Databoks, 'Inilah 10 Negara Tujuan Utama Ekspor CPO Pada 2019' (*Databoks*, 2019) <<https://databoks.katadata.co.id/datapublish/2019/08/08/inilah-10-negara-tujuan-utama-ekspor-cpo-pada-2019>> accessed 20 September 2019.

²⁸ Indonesia issued the indication on the violation of WTO obligations, specifically within Article 2.2, 2.1, 2.4, 2.5, 2.8, 2.9, 5.1.1, 5.1.2, 5.2, 5.6, 5.8, 12.1, and 12.3 TBT Agreement, Article XI:1, I:1, III:4, X:3(a), and III:2 GATT 1994, as well as Article 3.1 (b) and 5 SCM Agreement. See Request for Consultations by Indonesia for *European Union-Certain Measures Concerning Palm Oil and Oil Palm Crop Based Biofuels*.

further analyzed through reviewing non-discrimination law in WTO, specifically through comparing precedence in WTO law in application to the CPO case in reviewing non-discrimination in WTO law (Chapter 4) and valid exception to environmental protection (Chapter 5). This research found that RED II may constitute as green protectionism and Indonesia's grounds to prepare litigation based on WTO law may prevail by arguing that (i) CPO, rapeseed oil, sunflower seed oil, and soybean oil are grouped as like product; (ii) the ILUC calculation methodology gives rise to the less favorable treatment of CPO as an imported product in comparison to the domestic product; (iii) RED II does not pursue a legitimate objective because the measure does not necessarily contribute to the fulfilment of such objective in relation with the uncertainties imposed by the ILUC calculation methodology; (iv) RED II and all relevant supplementing regulation constitute as internal measure and technical regulation; as well as (v) the certification scheme within RED II constitutes as a CAPs.

The Polemic Against The Renewable Energy Directive

RED II is the framework that sets a binding target for renewable sources in 2030, which established '*sustainability and greenhouse gas emissions saving criteria for biofuels, bioliquids, and biomass fuels*'.²⁹ RED II serves to realize Article 194 (1) of the Treaty on the Functioning of the European Union (TFEU), which articulates the goal of the Union energy policy to promote renewable forms of energy.³⁰ RED II serves as the amended version of Directive 2009/28/EC. In this regard, Directive 2009/28/EC comprised of sustainability criteria, which includes the protection of land with high biodiversity value.³¹ The improvement that RED II offered is the enactment of Indirect Land Use Change (ILUC). In this matter, ILUC

²⁹ Directive (EU) 2018/2001 (n 20). above.

³⁰ European Union, 'Treaty on the Functioning of the European Union' (*eur-lex.europa.eu*, 2007) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3AC2008%2F115%2F01>> accessed 17 September 2019.

³¹ Directive 2009/28/EC, *The European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC*.

introduced the concept that the change of land use from agriculture to biofuel is capable of increasing greenhouse gas emissions. The severity of such occurrence may vary depending on several factors, namely (i) type of feedstock used for fuel production, (ii) level of additional demand for feedstock triggered by the use of biofuels, bioliquids, or biomass fuels, and (iii) the extent to which land with high carbon stock is protected worldwide.³²

From the aforementioned concept of ILUC, RED II further classified the criteria for low ILUC-risk and high ILUC-risk biofuels. The objective is to avoid high ILUC-risk biofuels through accepting only the certified low ILUC-risk biofuels. RED II articulated high ILUC-risk biofuels as biofuels that requires the process involving '*significant expansion of the production area into land with high-carbon stock is observed*'.³³ In this regard, Article 29 (4) stated that land with high-carbon stock constitutes of wetlands, continuously forested areas, and land spanning more than one hectare with trees higher than five meters.³⁴

The specifications for the criteria of high ILUC risk feedstock are articulated in the Explanatory Memorandum to the RED II. In this matter, Article 3 of the Explanatory Memorandum stated that the cumulative criteria includes '*(a) The average annual expansion of 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%*'.³⁵ Based upon Article 3 of the Explanatory Memorandum, palm oil is the only feedstock that is categorized as high ILUC risk. In this matter, the average annual expansion of production area since 2008 for palm oil is 4%, which, therefore, fulfils the criteria of Article 3(a) of the Explanatory Memorandum.³⁶ Aside from that, the share of expansion into land with high-carbon stock is higher than 10% as it amounts to 45%

³² *ibid.*

³³ Directive (EU) 2018/2001 (n 20). above, Article 26 (2).

³⁴ *ibid.*, above, Article 29 (4).

³⁵ Eur-Lex Europa, 'Explanatory Memorandum on the Directive (EU) 2018/2001 of the European Parliament. , Accessed On' (*Eur-Lex Europa*, 2019) <[https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=PI_COM:C\(2019\)2055&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=PI_COM:C(2019)2055&from=EN)> accessed 13 November 2019.

³⁶ *ibid.* Annex.

in accordance with Article 29 (4)(b) and (c) of RED II and 23% in accordance with Article 29(4)(a) of RED II.³⁷

On the other hand, RED II categorized low ILUC biofuels as biofuels that are created whilst avoiding displacement of the current function for the land and feedstock. The determination of low ILUC biofuels is conducted through the criteria of Article 3 of the Explanatory Memorandum. Hence, wheat, maize, sugar cane, sugar beet, rapeseed, soybean, and sunflower constitute as a low ILUC risk feedstock as pursuant to the analysis conducted by the European Commission.³⁸ In this regard, Paragraph 91 of RED II stated that *'feedstock which has low indirect land-use change impacts when used for biofuels, should be promoted for its contribution to the decarbonisation of the economy'*.³⁹ Therefore, to ensure the usage of low ILUC biofuels, RED II enacts the criteria to identify and certify low ILUC-risk biofuels. Subsequently, the certified low ILUC-risk biofuels are exempted from the gradual reduction that is set for the high ILUC risk biofuels. In this matter, the limit that is imposed by RED II exempts low ILUC-risk biofuels, as long as the requirements are in accordance with the criteria as articulated in Article 29 of RED II.

RED II initiated binding mechanisms with the incorporation of ILUC. In this regard, the directive issued a national limit for fuels that presented risks of high ILUC. This limit is articulated within Article 26 of RED II, in which Member States should limit the share of biofuels, bioliquids, and biomass fuels that are categorized as high ILUC. The specificity of the limit includes that Member States should not exceed the consumption of such fuels with the levels in 2019, with the exception that the biofuels are certified into low ILUC. In addition, the national limit is enacted from 31 December, 2023, in which Member States are expected to gradually decrease the usage of high-ILUC risk biofuels to 0% by December 2030.⁴⁰

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ Directive (EU) 2018/2001 (n 20). above, Paragraph 81.

⁴⁰ *ibid.* above, Article 26 (2).

Issuance of Violation Complaint By Indonesia

Indonesia issued a complaint to the WTO through arguing that the actions of the EU to phase out CPO is not in accordance with the obligations of WTO agreements. Among others, Indonesia argues that the RED II policy constitutes a violation of Articles III:4 GATT, Article 2.1 TBT, Article 2.2 TBT, and Article 5.1.1 TBT Agreement.⁴¹ The violation complaint will prevail when the respondent is proven to carry out obligations of WTO agreements, which subsequently constitute as a direct nullification or impairment of benefits of the complainant within the WTO agreements.⁴²

The nullification or impairment of benefits refers to the '*damage of a country's benefits and expectations through another country's change in its trade regime or failure to carry out its WTO obligations*'.⁴³ In pertaining to this, the benefit that is referred to includes Indonesia's assurance of CPO market access, which is hampered through provisions of RED II. Specifically, Article 26 of RED II determines the phase out of CPO as part of high ILUC risk biofuel that shall gradually decrease to 0% by 2030.⁴⁴ Therefore, this constitutes as a direct nullification of benefits as RED II specifically states to phase out crude palm oil by 2030.

Additionally, Indonesia also faced various adverse effects from the implication of the Renewable Energy Directive. The obstacles of market access subsequently impacted the scheme of employment and smallholder plantation, which, in turn, affected the economy of Indonesia. The adverse effects are aggravated from the weight of CPO export that Indonesia enacted to the European Union, as Indonesia is the largest producer of CPO.

⁴¹ European Union, 'Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels, DS593' (*World Trade Organization*, 2020) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds593_e.htm> accessed 20 January 2020.

⁴² World Trade Organization, *A Handbook on the WTO Dispute Settlement System* (Cambridge University Press 2004).[191].

⁴³ WTO, 'Nullification and Impairment' (2019) <https://www.wto.org/english/thewto_e/glossary_e/nullification_and_impairment_e.htm> accessed 7 September 2019.

⁴⁴ Directive (EU) 2018/2001 (n 20). above, Article 26.

WTO has the jurisdiction to handle this dispute in accordance to Article 1.1 of the DSU. In this matter, GATT and TBT contain provisions that prohibit certain actions, such as the prohibition to conduct restriction. In pertaining to this, only positive action can constitute as a violation of such provisions.⁴⁵ The example of positive action includes a law, regulation, or decision that creates a restriction.⁴⁶ Hence, Member States can only issue a complaint on the prevalence of positive action. Subsequently, the breach of such obligation cannot be a result of inaction of Member States. Regarding this issue, the positive action that was enacted by the European Union was RED II, which constitutes as a directive that creates a restriction to the export of CPO. Therefore, the positive action provides a basis to a valid complaint for Indonesia to issue this dispute in the WTO.

Aside from this, one of the issues that may occur is that the actions of RED II may include provision that is enacted in the future. In this matter, the phasing out of the crude palm oil is scheduled to occur in the year of 2030. This issue was previously discussed in *US - Superfund*, which stated the following: '*Even though the legal effect of such a measure will only occur in the future, the measure already had an impact on the market participants engaging in international trade prior to its coming into force because these market participants typically plan their transactions ahead of time*'.⁴⁷ Regarding this, *US-Superfund* stated that complaints are capable of being issued to measures that resulted in future impact. The case interpreted that the provisions of GATT are also applicable through the predictability of future trade.

Non-Discrimination in WTO Law

The principle of non-discrimination is prevalent within the WTO as articulated within GATT and the TBT Agreement. On this matter, the notion of discrimination occurs as crude palm oil and like products are treated differently through the

⁴⁵ WTO (n 43).[41].

⁴⁶ *ibid.*

⁴⁷ GATT Panel Report, 'United States - Taxes on Petroleum and Certain Imported Substances (US-Superfund), BISD 345/136' (1987) <https://www.wto.org/english/tratop_e/dispu_e/gatt_e/87superf.pdf> accessed 28 August 2019.

enactment of ILUC. In pertaining to this, the measure to phase out CPO is not in accordance with the provisions of Article 2.1, 2.2, and 5.1.1 TBT Agreement as well as Article III:4, XX (b), and XX (g) GATT.

1 Crude Palm Oil are Like Products with Domestic Products

The analysis on non-discrimination within the provisions of GATT and the TBT Agreement are based upon the premise that crude palm oil are like products with other vegetable oils, namely rapeseed oil, sunflower seed oil, and soybean oil. In determining the likeness of a product, jurisprudence from WTO case law applied a four-tier criteria, namely (i) end-uses of product, (ii) tastes and habits of consumers, (iii) the nature, properties, and quality of product, and (iv) the tariff classification of the product.⁴⁸ Jurisprudence also signified that the risks of the product are not considered in determining the likeness of the product.⁴⁹

In pertaining to this, it is necessary to understand the characteristics of CPO. The fruit of oil palm trees is capable of producing two types of oil, namely crude palm oil (CPO) and crude palm kernel oil (CPKO).⁵⁰ In this regard, CPO is derived from the pulp of the fruit, whereas CKPO derives from the kernels of the fruit.⁵¹ The sustenance is capable of producing several products. In this regard, CPO is mostly used in foods, while CPKO is used in non-edible products including detergents, cosmetics, and plastics.

On this notion, CPO are like products to rapeseed oil, sunflower oil, and soybean oil as the four products incorporate the similar end-uses of the product. In this matter, the four products are used as biofuels which are used for the transport

⁴⁸ World Trade Organization, 'EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS' (2001) <https://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf> accessed 9 September 2019. [130-2]

⁴⁹ *ibid.*[130-2].

⁵⁰ AN Alkabbashi, 'Biodiesel Production from Crude Palm Oil by Transesterification Process' (2009) 3166 Journal of Applied Sciences.[70].

⁵¹ K Poku, 'Origin of Oil Palm: Small Scale Palm Oil Processing in Afric' (2002) 148 FAO Agricultural Science Bulletin.[3].

sector and which are produced from biomass.⁵² Biomass itself is created through various sources, namely plant roots, seeds, forest residues and wastes from cattle and humans.⁵³ The biofuels are further categorized into several generations in accordance with the mechanism of creating such biofuels. The first generation biofuel processes sugar, starch, animal fat, or vegetable oil through conventional technology, the second generation uses wood and agricultural waste through advanced technical processes, whereas the third generation converts biodiesel through the usage of algae.⁵⁴

The next indicator includes the tastes and habits of consumers. The case of *EC-Asbestos* signified that the tastes and habits of consumer implies the relationship of products as substitutes. This relates to the third criteria, namely the nature, properties, and quality of product. On this notion, CPO have similar nature and property as oil palm is regarded as crop biofuel feedstock, similar to rapeseed oil, sunflower seed oil, and soybean oil. As such, oil palm is considered effective as the product with the highest yield of oil per unit in contrast to other crop.⁵⁵ Oil yield refers to the amount of oil that can be extracted from an oilseed.⁵⁶ In addition, a research conducted by the International Union for Conservation of Nature (IUCN) signified that oil palm is the most efficient oil-producing plant as it requires less land than other plants.⁵⁷ The study showed that oil palm requires 0.26 hectares of land to produce 1 ton of palm oil, whereas the production of 1 ton of rapeseed oil required 1.25 hectares, 1 ton of sunflower oil required 1.43 hectares, and 1 ton of

⁵² A Demirbas, 'Progress and Recent Trends in Biofuels' (2007) 33 *Progress in Energy and Combustion Science*. [18].

⁵³ M Verma, 'Biofuels Production from Biomass by Thermochemical Conversion Technologies' (2012) 1 *International Journal of Chemical Engineering*. [1-2].

⁵⁴ V Dossche and S Ozinga, *When the Solution Is the Problem: The EU and Its Policies on Agrofuels* (FERN Bioenergy and Forests Briefing Note 2008). [2].

⁵⁵ Food and Agriculture Organization, 'Oil Palm' (*Food and Agriculture Organization*, 2002) <<http://www.fao.org/3/y4355e/y4355e03.htm>> accessed 1 September 2019.

⁵⁶ Oilgae, 'Oil Yield - Definition, Glossary, Details' <http://www.oilgae.com/ref/glos/oil_yield.html> accessed 2 September 2019.

⁵⁷ Riska Rahman, 'Government Pins Hope on International Study Favoring Palm Oil' (*The Jakarta Post*, 2019) <<https://www.thejakartapost.com/news/2019/02/08/government-pins-hope-on-international-study-favoring-palm-oil.html>> accessed 1 September 2019.

soybean oil required 2 hectares.⁵⁸ Hence, the products are similar due to the contents of oil yield that is prevalent within all of the products. Because of such similarities, the products are capable of acting as substitute products for crop biofuel feedstock.

The fourth indicator of like product includes the tariff classification of the product. Jurisprudence signified that tariff classification implies the classification as prevalent within Harmonized System Codes. In pertaining to this, CPO, soybean oil, sunflower seed oil, and rapeseed oil are all categorized within Chapter 15 of the Harmonized System Codes (HS Code), which classifies vegetable oils. On this matter, CPO is classified under the HS Code of 15111010,⁵⁹ rapeseed oil is under the HS Code of 1515910,⁶⁰ soybean oil is under the HS Code of 15079010,⁶¹ and sunflower seed oil is under 15121920.⁶² Consequently, similar HS code classification signifies the fulfilment of the fourth element in determining that the four products are like products.

2 Non-Discrimination Principle in Article 2.1 TBT Agreement

WTO law signifies that a measure constitutes as a violation of Article 2 (1) TBT Agreement if it can be proven that the measure is a technical regulation concerning like products that implies treatment no less favorable, which subsequently is not in accordance with the non-discrimination principle. The jurisprudence of *EC - Asbestos* signifies that a measure constitutes as a technical regulation under the fulfilment of the following elements: (i) the regulation applies to an identifiable product or group of products; (ii) the regulation must lay down one or more product

⁵⁸ The International Council on Clean Transportation, 'How Rapeseed and Biodiesel Drive Oil Palm Expansion' (2017) <https://theicct.org/sites/default/files/publications/Oil-palm-expansion_ICCT-Briefing_27072017_vF.pdf> accessed 1 September 2019.

⁵⁹ European Custom Portal, 'HS Code 15111010 - Crude, Palm, Oil' (2019) <<https://www.tariffnumber.com/2019/15111010>> accessed 16 December 2019.

⁶⁰ Cibex, 'HS Codes 15149190: HS Classifications of Rapeseed Oil' (2019) <www.cybex.in/HS-Codes/Rapeseed-Oil-Hs-Codes-15149190.aspx> accessed 16 December 2019.

⁶¹ European Custom Portal, 'HS Code 15079010 - Soya, Bean, Oil. HS Code, Customs Tariff Number, Taric Guide - European Database' (2019) <<https://www.tariffnumber.com/2019/15079010>> accessed 16 December 2019.

⁶² Cibex, 'HS Codes 15121920 : HS Classifications of Sunflower Oil, Non-Edible Grade (Other than Crude Oil). EXPORT IMPORT DATA' (2019) <<http://www.cybex.in/HS-Codes/Sunflower-Oil-Non-Edible-Grade-Hs-Codes-15121920.aspx>> accessed 16 December 2019.

characteristics; and (iii) compliance with such characteristics must be mandatory.⁶³ The Renewable Directive applies to an identifiable product or group of products as well as having laid down one or more product characteristics. This is prevalent in the Delegated Regulation 2019/807, which distinguishes the criteria for determining high ILUC-risk feedstock and low ILUC-risk biofuels, bioliquids, or biomass fuels. Subsequently, the identifiable products or group of products are implied as biofuels, bioliquids, or biomass fuels, whereas the product characteristic is referred within specification of the ILUC-risk feedstock. In addition, compliance with the technical regulation can be deemed as mandatory. In pertaining to this, the Renewable Energy Directive includes a mandatory nature of a negative form, in which the products that is accepted by the EU consists of biofuels that do not contain high ILUC risk. Regarding this, non-compliance will lead to the inability of the product to enter the EU market.

RED II constitutes as a measure that conducts less favorable treatment toward the imported and domestic products as in accordance with the case of *US-Clove Cigarettes*. Regarding this, the assessment includes (i) whether the technical regulation modifies detrimental competition of imported products and (ii) whether such detrimental impact ‘*stems exclusively from a legitimate regulatory distinction*’. To which end, the ILUC calculation method within RED II modifies the competition of CPO in the EU sector as the measure governs the gradual phasing out of the product. Regarding this, the detrimental impact is derived exclusively from the ILUC calculation method in RED II. Because of this, RED II implies treatment no less favorable.

3 Trade Restrictiveness in Article 2.2 TBT Agreement

WTO law signifies that the violation of Article 2.2 is prevalent in the event that the measure is a technical regulation that does not pursue a legitimate

⁶³ World Trade Organization, ‘Appellate Body Report European Communities - Trade Description of Sardines (EC-Sardines) WT/DS231/AB/R’ (2002) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds231_e.htm> accessed 16 December 2019.[189-195].

objective or if the measure is more trade-restrictive than necessary in fulfilling such legitimate objective. The measure of RED II constitutes as a technical regulation in accordance with the arguments elaborated in Article 2.1 of the TBT Agreement as RED II applies to an identifiable product or group of products, contains product characteristics, and compliance with such characteristics must be mandatory.

Firstly, the Renewable Energy Directive does not pursue a legitimate objective. Legitimate objective is defined by jurisprudence as the genuine nature of the objective, which should be justifiable by public policies and social norms, and complemented with a legitimate measure to fulfil the objective.⁶⁴ In this regard, the objective of environmental protection of reducing greenhouse gas emissions is justifiable by public policies and social norms, such as the commitments of the Paris Agreement.⁶⁵ However, the measure is not complemented with a legitimate measure to fulfil the objective as the ILUC calculation methodology has various measures. On this notion, the European Union stated that '*ILUC cannot be observed or measured*', whilst stating that the modelling of ILUC may be conducted but through a variety of limitations.⁶⁶ In addition, the European Union also stated that '*ILUC emissions cannot be measured with the level of precision required to be included in the EU GHG emission calculation methodology*'.⁶⁷ Hence, the aforementioned acknowledgement of the EU concludes that the ILUC calculation methodology is not a legitimate measure to fulfil the objective as it lacks precision and certainty to the fulfilment of such objectives. Second, RED II is more trade restrictive than necessary to fulfil the legitimate objective. In determining the trade-restrictiveness

⁶⁴ World Trade Organization, 'UNITED STATES – MEASURES AFFECTING THE PRODUCTION AND SALE OF CLOVE CIGARETTES' (2011) <[https://www.worldtradelaw.net/document.php?id=reports/wtopanelsfull/us-clovecigarettes\(panel\)\(full\).pdf&mode=download](https://www.worldtradelaw.net/document.php?id=reports/wtopanelsfull/us-clovecigarettes(panel)(full).pdf&mode=download)> accessed 16 December 2019.

⁶⁵ UNFCCC (n 17).

⁶⁶ European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Status of Production Expansion of Relevant Food and Feed Crops Worldwide' (2019) <[https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2019\)142&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2019)142&lang=en)> accessed 16 December 2019.[4].

⁶⁷ World Trade Organization, 'UNITED STATES – MEASURES AFFECTING THE PRODUCTION AND SALE OF CLOVE CIGARETTES' (n 64).[81].

of a measure, the case of *US-Clove Cigarettes* incorporated the assessment of disguised restriction, the material contribution of the measure in the fulfilment of the objective, as well as the alternative measures that are less restrictive but create an equivalent contribution.⁶⁸

The assessment of disguised restrictions derived from the case of *EC-Asbestos* through (i) the publicity test, (ii) whether the measure amounts to arbitrary or unjustifiable discrimination, and (iii) the measure's design, architecture, and revealing structure. On this notion, the measure 2018/2001 is publicly available. However, the mechanism of the ILUC calculation methodology fails the publicity. As previously mentioned, the European Union stated that '*ILUC cannot be observed or measured*' and that the modelling of ILUC may receive a variety of limitations.⁶⁹ Next, the measure amounts to unjustifiable discrimination because, in accordance with the jurisprudence of *US-Shrimp*, RED II was enacted with minimum negotiation efforts and does not enact the flexibility of such measures for exporting countries.⁷⁰

In addition, the measure does not provide certainty within the provision of material contribution in the fulfilment of the objective. Regarding this, there should be a relationship between the objective and the measure,⁷¹ which considers the risk and the protectionist implication.⁷² Therefore, the relationship between the objective and the measure should also be examined in accordance with the risk and of the objective and the restrictions imposed within the measure.

Lastly, there are less restrictive measures that are capable of contributing to the same objective. If the objective is to reduce greenhouse gas emissions, then

⁶⁸ *ibid.*

⁶⁹ European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Status of Production Expansion of Relevant Food and Feed Crops Worldwide' (n 66).[4].

⁷⁰ World Trade Organization, 'UNITED STATES - IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS' (1998) <https://www.wto.org/english/tratop_e/dispu_e/58abr.pdf> accessed 16 December 2019.

⁷¹ World Trade Organization, 'Brazil — Measures Affecting Imports of Retreaded Tyres' (2009) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm> accessed 16 December 2019.[145].

⁷² *ibid.*

there are alternative measures that are more consistent with the TBT Agreement by preventing the protectionist notion. In this regard, the measure could have reduced the trade of all like products due to the adverse impact that rapeseed oil, sunflower seed oil, and soybean oil may also impose on the environment. Therefore, the measure is more trade restrictive than necessary in the fulfilment of the objectives.

4 Certification Scheme is not in Compliance with Article 5.1.1 TBT Agreement on Conformity Assessment Procedure

To assess whether a measure violates Article 5.1.1 of the TBT Agreement, it should be proven that the measure constitutes as CAPs and that the measure causes less favorable access between like products. In pertaining to this, the certification scheme of RED II constitutes as CAPs that cause less favorable access to the suppliers of CPO in comparison to other vegetable oil products.

The Certification Scheme within the Renewable Energy Directive constitutes as a Conformity Assessment Procedure. In accordance with Annex 1.3 TBT Agreement, CAPs constitute as any procedure that determines the requirements in the technical regulation. In correspondence, the certification scheme of the Renewable Energy Directive determines whether or not a product is in accordance with the technical regulation, namely RED II, as proven with the arguments for Article 2.1 and 2.2 of the TBT Agreement. In light of ensuring the sustainability of palm oil production as in accordance with the requirements of RED II, several international standards of sustainability have been developed. These standards are promulgated to address concerns over plantation practices, which vary from environmental losses to risks of social outcomes.⁷³ There are 15 voluntary schemes of certification accepted by the European Commission in compliance with the EU sustainability criteria, which include the Principles and Criteria for Sustainable Palm Oil Production that was issued by the Roundtable on Sustainable Palm Oil (RSPO) in 2004. RSPO is declared as a certification in compliance with the standards of the

⁷³ C Morgans, 'Evaluating the Effectiveness of Palm Oil Certification in Delivering Multiple Sustainability Objectives' (2018) 13 Environmental Research Letters 1. [1]

EU through Commission Implementing Decision (EU) 2019/1175 of 9 July, 2019, on recognition of the ‘Roundtable on Sustainable Palm Oil RED’ voluntary scheme for demonstrating compliance with the sustainability criteria under Directives 98/70/EC and 2009/28/EC of the European Parliament and of the Council.⁷⁴ Aside from that, another key instrument includes the International Sustainability and Carbon Certification (ISCC), which was created in 2010. ISCC was recognized by the EU through Commission Implementing Decision (EU) 2016/1361 of 9 August, 2016, on recognition of the ‘International Sustainability and Carbon Certification system’ for demonstrating compliance with the sustainability criteria under Directives 98/70/EC and 2009/28/EC of the European Parliament and of the Council.⁷⁵

In correlation with RED II, both RSPO and ISCC are voluntary in nature, but constitute as a preliminary requirement for the product to enter the European Union. This was articulated in Article 30 (4) of RED II, which states that ‘*The Commission may decide that voluntary national or international schemes setting standards for the production of biofuels, bioliquids or biomass fuels, or other fuels that are eligible.*’ Consequently, products that do not receive certification from RSPO and ISCC will not be accepted in the European Union as pursuant to RED II.

On this notion, the Certification Scheme causes less favorable access to suppliers of like products. Article 5.1.1 of the TBT Agreement prohibits discrimination, which is implied within the obligation for CAPs to cause no less favorable outcome to suppliers of like products. In pertaining to this, the certification scheme of RED II conducts discrimination because it causes less favorable conditions to the access of smallholders who act as the suppliers of CPO. This notion constitutes as discrimination as producers deriving from the EU will not receive similar difficulties due to the differing economic conditions.

⁷⁴ Eur-Lex Europa, ‘Lex Access to European Union Law’ (2019) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016D1361&from=EN&lang3=choose&lang2=choose&lang1=EN>> accessed 22 November 2019.

⁷⁵ Commission Implementing Decision (EU) 2016/1361 of 9 August 2016 on Recognition of the ‘International Sustainability and Carbon Certification system’.

In pertaining to this, smallholders from Indonesia and Malaysia receive difficulties to comply with the scheme of oil palm certification as initiated by RSPO. One of the main concerns includes that the certification of RSPO is costly, hence it does not accommodate the economic status of several CPO producers, especially smallholders.⁷⁶ Consequently, the palm oil producing countries took the initiative to develop national standards, namely the Malaysian Sustainable Palm Oil (MSPO) and the Indonesian Sustainable Palm Oil (ISPO).

In this matter, ISPO is a mandatory standard of sustainable palm oil that is articulated within Ministry of Agriculture Regulation No.11/Permentan/OT.140/3/2015 on Indonesian Sustainable Palm Oil (MoA Regulation 11/2015). Similar to the RSPO, the scheme initiated by ISPO seeks to evaluate the production process of CPO, which includes the legality, management system, corporate social responsibility, and environmental protection.⁷⁷ In pertaining to this, ISPO seeks to adhere to the Indonesian commitment to address climate change as one of the parties to have ratified the Paris Agreement, whilst also serving as a signatory to the Forest for Climate Declaration.⁷⁸

In Indonesia, oil palm producers are primarily divided into three categories, namely smallholders, state-owned companies, and private sectors.⁷⁹ Although the DJP does not clarify the specificity and scope upon such categorization, there are several scholarly opinions that define such category. In this regard, the term smallholders in practice tend to refer 'to differences in size and level of reliance

⁷⁶ Gora Kunjana, 'Indonesia Akan Berlakukan ISPO Dalam Perdagangan CPO' (*Investor.id*, 2010) <<https://investor.id/agribusiness/indonesia-akan-berlakukan-ispo-dalam-perdagangan-cpo>> accessed 7 November 2019.

⁷⁷ Indonesia, Ministry of Agriculture Regulation No.11/Permentan/OT.140/3/2015 on Indonesian Sustainable Palm Oil (*Peraturan Menteri Pertanian Republik Indonesia Nomor 11/Permentan/OT.140/3/2015 tentang Sistem Sertifikasi Kelapa Sawit Berkelanjutan Indonesia (Indonesian Sustainable Palm Oil Certification System / ISPO)*).

⁷⁸ Embassy of the Republic of Indonesia in Warsaw the Republic of Poland, 'Indonesian Sustainable Palm Oil (ISPO) Contributes To Promote And Realize SDGS 2030' (2019) <<https://kemlu.go.id/warsaw/en/news/1050/indonesian-sustainable-palm-oil-ispo-contributes-to-promote-and-realize-sdgs-2030>> accessed 7 November 2019.

⁷⁹ Badan Pusat Statistik, *Statistik Perkebunan Indonesia; Kelapa Sawit 2014-2016* (Badan Pusat Statistik 2015).[2].

on family labour'.⁸⁰ The aforementioned understanding is similar to the definition of the RSPO, which states that smallholders include '*farmers who grow oil palm, alongside with subsistence crops, where the family provides the majority of labour and the farm provides the principal source of income, and the oil palm area is less than 50 ha*'.⁸¹ Therefore, smallholders can be categorized as farmers that own a small oil palm area.

On the other hand, MSPO is the Malaysian national scheme for sustainable palm oil production, which governs the conduct of oil palm plantation to palm oil processing. The objective of the MSPO, among others, includes '*to create, maintain and administer a fund to be used for the purposes of establishing and operating a sustainable palm oil certification scheme in Malaysia*'.⁸² The MSPO recognizes three standards, which are differentiated in accordance with the actors. In pertaining to this, the scheme includes requirements for independent smallholders, oil palm plantations and organized smallholders, as well as palm oil mill.⁸³ Currently, the MSPO is serving as a voluntary scheme, but is mandatory as of the end of 2019.⁸⁴

Similar to Indonesia, Malaysia is home to many smallholders that act as palm oil producers. In this matter, the Malaysian Palm Oil Board (MPOB) stated that the standard was enacted to assist small and medium range producers that are incapable of affording RSPO certification.⁸⁵ Through the enactment of MSPO, the Malaysian government is also issuing financial aid to incentivize the smallholders to conduct

⁸⁰ Rob Cramb and John F. McCarthy, *The Oil Palm Complex: Smallholders, Agribusiness and the State in Indonesia and Malaysia* (NUS Press - National University of Singapore 2016).[27-77].

⁸¹ RSPO, 'RSPO Smallholders' (2019) <<https://rspo.org/smallholders>> accessed 23 November 2019.

⁸² MPOCC, 'Malaysian Palm Oil Certification Council' (2018) <<https://www.mpocc.org.my/about-mpocc>> accessed 23 November 2019.

⁸³ Intertek, 'Malaysian Sustainable Palm Oil (MSPO)' (2018) <<https://www.intertek.com/food/traceability/malaysian-sustainable-palm-oil-mspo/>> accessed 11 November 2019.

⁸⁴ Controlunion, 'Malaysia Sustainable Palm Oil' (2019) <<https://certifications.controlunion.com/en/certification-programs/certification-programs/mspo-malaysia-sustainable-palm-oil>> accessed 11 November 2019.

⁸⁵ EFCEA Economics Climate Environment, 'Comparison of the ISPO, RSPO, and MSPO Standards' (2016) <https://www.sustainablepalmoil.org/wp-content/uploads/sites/2/2015/09/Efeca_PO-Standards-Comparison.pdf> accessed 23 November 2019.

MSPO certification.⁸⁶

MSPO and ISPO are national certification schemes created by each nation in order to accommodate the necessity for smallholders to conduct certification. The cost of the certification is capable of impacting the selling of CPO itself. In this matter, the certification of RSPO requires approximately USD 25 to USD 50 per hectare, whereas obtaining a certificate through ISPO costs USD 25 per hectare.⁸⁷ The implication is that the costs of the palm oil impact the price of CPO to the consumers, which subsequently allows the CPO to be less competitive as a product.

In correlation with RED II, the directive acknowledges RSPO and ISCC as the preferred standard of palm oil certification. Although the RSPO and ISCC are voluntary in nature, the two certifications guarantee for allowing the palm oil to enter the EU market. In this matter, CPO suppliers in Malaysia and Indonesia may have the potential to create sustainable CPO that is in accordance with the ILUC calculation methodology, but may not be able to afford such certification due to their economic background.

Hence, the certification scheme within RED II creates less favorable access for smallholder suppliers of CPO. The occurrence of such notion constitutes as a form of *de facto* discrimination, because the CAPs do not explicitly state the discrimination within the legal texts, but rather that gives rise to the discriminative condition in practice. The inability for the EU to accept certification schemes applicable for Indonesian and Malaysian smallholders, namely ISPO and MSPO, hampers the possibility for smallholder suppliers to access the EU market as exacerbated with the financial inability of such smallholders to comply with the approved CAPs.

⁸⁶ Ooi Tee Ching, 'Gov't Assures Implementation of MSPO Certification Practical, Financial Aid for Smallholders' (*NST Online*, 2017) <<https://www.nst.com.my/news/2017/02/215108/govt-assures-implementation-mspo-certification-practical-financial-aid>> accessed 23 November 2019.

⁸⁷ Irna Nurhayati, *Implikasi Kebijakan Standarisasi Produk Crude Palm Oil (CPO) Melalui Indonesian Sustainable Palm Oil (ISPO) Terhadap Perdagangan Ekspor Produk CPO Indonesia* (Center for World Trade Studies Universitas Gadjah Mada 2011).[4].

5 National Treatment Principle of Article III:4 GATT

Jurisprudence signifies that Article III:4 of the GATT 1994 is determined through the fulfillment of three elements, namely (i) the measure is an internal measure affecting the internal sale, offering for sale, purchasing, transporting, distribution, or usage; (ii) imported products and domestic products are like products; and (iii) less favorable treatment.⁸⁸ In this regard, RED II constitutes as an internal measure. Article III:4 recognized internal measure to either be laws, regulations, or requirements. In pertaining to this, RED II constitutes as a directive that regulated the phase out of CPO. Specifically, RED II issued a requirement to decrease the usage of high ILUC risk biofuels to 0% by 2030. Therefore, RED II constitutes as an internal measure. The nature of directives is that the legislative act allows EU countries to illustrate the goal that should be achieved, but the mechanism of achieving such goals is solely reliant upon the individual countries.⁸⁹ Therefore, RED II allows the freedom of EU countries to develop national legislation and policies that are in accordance with the purpose of the directive. One of the countries that have enacted action in accordance with RED II is France. In this matter, the constitutional court of France excluded palm oil from the national biofuel scheme.⁹⁰

For the second element, RED II as an internal measure has affected the internal sale, offering for sale, purchasing, transportation, and distribution. In this regard, jurisprudence signified that ‘affecting’ refers to the modification on the conditions of competition within the internal market. In pertaining to this, because RED II had only targeted the phasing out of CPO, subsequently the producers of CPO will receive obstacles in competing within the EU market. Consequently, the conditions of competition for the CPO are modified. For the third element, the measure of RED

⁸⁸ World Trade Organization, ‘Korea – Measures Affecting Imports of Fresh, Chilled And Frozen Beef’ (2000) <https://www.wto.org/english/tratop_e/dispu_e/161-169abr_e.pdf> accessed 23 November 2019.

⁸⁹ European Union, ‘Regulations, Directives and Other Acts’ (*European Union*, 2019) <https://europa.eu/european-union/eu-law/legal-acts_en> accessed 20 November 2019.

⁹⁰ Thomson Reuters, ‘In Blow to Total, France Upholds Law Banning Palm Oil from Biofuel Scheme’ (2019) <<https://www.reuters.com/article/us-total-biofuels-palmoil/french-court-rules-against-tax-breaks-for-palm-oil-biofuel-idUSKBN1WQ0ZG>> accessed 20 November 2019.

II encompasses imported and domestic products that are like products in accordance with the arguments elaborated in Article 2.1 TBT Agreement. The determination of like products is based on the case of *EC-Asbestos*, which concludes that CPO serves as the imported products that are like products to the domestic product of rapeseed oil, sunflower seed oil, and soybean oil.

The last element stipulates that the measure should enact less favorable treatment for the fulfilment of Article 2.1 TBT Agreement. Jurisprudence signified that less favorable treatment attributes to whether or not the measure alters the condition of competition in the market, which subsequently impacts the imported products differently than the domestic products.⁹¹ This notion is proven as RED II hampers the competition of CPO in the EU market, which constitutes as a less favorable treatment in comparison to other domestic products, namely rapeseed oil, sunflower seed oil, and soybean oil, which are still capable of issuing their products within the EU market. In accordance with the case of *Korea-Beef*, the notion of less favorable treatment is prevalent in the inability for consumers to compare product, which consequently hampers the competition. By enacting RED II that seeks to phase out crude palm oil, the consumers' decision will be limited with the other domestic products that are available in the EU market. Hence, RED II excludes CPO in the market.

The notion of less favorable treatment is further exacerbated through the inconsistency of the objectives as RED II seems to only target CPO. In this matter, the element of non-sustainability within RED II included environmental and social repercussions caused by the production of CPO. This is further explained in the Palm Oil Study of the EU Commission, which stated that the basis of non-sustainability includes that CPO contributes to deforestation, biodiversity loss, peat land conversion, greenhouse gas emissions, use of fire and impact, air pollution, water pollution, impact in commodities, land use rights, smallholders,

⁹¹ World Trade Organization, 'Korea – Measures Affecting Imports of Fresh, Chilled And Frozen Beef' (n 88).[137].

and the occurrence of forced and child labor.⁹² In pertaining to this, the calculation methodology of ILUC low risk biofuels incorporates factors that are in favor of other vegetable oils except for CPO. The ILUC criteria consequently allow the projection on consumption of vegetable oil in 2030 as illustrated in Attachment 5.⁹³ Regarding this, the ILUC criteria targets only the environmental impact of CPO, whilst neglecting the adverse effect that the other like products may impose.

Soybean oil is a like product of the CPO that the ILUC calculation methodology of RED II claimed as sustainable. However, there are studies that indicate non-sustainability in the production of soybean oil. In pertaining to this, 70% of soy that is sold in international trade is derived from tropical forested countries.⁹⁴ In correlation with deforestation, a study estimates at least 7% global soy expansion had a direct link to deforestation in 2012 to 2015.⁹⁵ One of the examples is prevalent in Latin America, in which from 2000 to 2006 there was approximately 30% soy expansion that was directly linked to deforestation.⁹⁶ The significance of soy in contributing to deforestation was acknowledged in the Amsterdam Declaration Towards Eliminating Deforestation from Agricultural Commodity Chains with European Countries. In this regard, Article 1 of the Amsterdam Declaration states the commitment to '*eliminate deforestation from the production of agricultural commodities such as beef and leather, palm oil, paper and pulp, soy and other*

⁹² Mark Barthel, 'Study on the Environmental Impact of Palm Oil Consumption and on Existing Sustainability Standards: For European Commission, DG Environment. Study Contract No : 07.0201/2016/743217/ETU/ENV.F3' (2018) <https://ec.europa.eu/environment/forests/pdf/palm_oil_study_kh0218208enn_new.pdf> accessed 23 November 2019.[15-21].

⁹³ Indonesian Palm Oil Association, 'Dampak Perang Minyak Nabati Dunia Terhadap Industri CPO Indonesia Dalam Jangka Panjang' (2019) <<https://gapki.id/news/3096/dampak-perang-minyak-nabati-dunia-terhadap-industri-cpo-indonesia-dalam-jangka-panjang>> accessed 23 November 2019.

⁹⁴ Sam Lawson, *Consumer Goods and Deforestation: An Analysis of the Extent and Nature of Illegality in Forest Conversion for Agriculture and Timber Plantations* (Forest Trends Report Series: Forest Trade and Finance 2014).[2].

⁹⁵ Transport and Environment, 'High & Low ILUC Risk Biofuels: Policy Recommendations for the EU Delegated Act' (2018) <https://www.transportenvironment.org/sites/te/files/publications/2019_01_High_low_ILUC_TE_briefing_final.pdf> accessed 23 November 2019.

⁹⁶ Yan Gao, *A Global Analysis of Deforestation Due to Biofuel Development* (Center for International Forestry Research (CIFOR) 2011).[20-32].

commodities such as cocoa and rubber by no later than 2020'.⁹⁷ The aforementioned declaration was signed in 2015 by Denmark, France, Germany, Norway, and the United Kingdom.

As another form of like products, the notion that rapeseed oil is sustainable is also currently challenged by several scientists. The criticism is prevalent toward the non-sustainability of the process to grow rapeseed oil. In pertaining to this, farmers may use the application of nitrogen to maximize yields, which consequently may be washed into rivers and ground waters through heavy rain.⁹⁸ Hence, there are also aspects of rapeseed oil that are regarded as non-sustainable due to the negative impact of the environment that it imposes.

Similar criticism is imposed to the sustainability of soybean oil. A study enacted by Globium for the European Commission exhibited that '*biodiesel from palm oil is three times worse for the climate than regular diesel while soy oil diesel is two times worse*'.⁹⁹ Therefore, soybean oil should also be categorized as high ILUC risk biofuel, especially due to the similarity with palm oil in terms of its implication to the environment. Soybean oil is a negative concern for the climate as it constitutes as a major contributor to deforestation, inflicts large negative impact on biodiversity, and results to expansion of high-carbon land.

Valid Exception to Environmental Protection

One of the defenses that can be issued by the EU is that the measure of RED II constitutes the general exceptions of Article XX GATT 1994. In this regard, Article XX (b) GATT 1994 justifies measures necessary to protect plant life, whereas Article XX (g) GATT 1994 justifies measures necessary to conserve exhaustible natural resources. On this notion, RED II pursued a valid objective

⁹⁷ Amsterdam Declaration, *Towards Eliminating Deforestation from Agricultural Commodity Chains with European Countries* (undersigned European countries 2015).

⁹⁸ Sustainable Food Trust, 'The Supply Chain of Fats: Rapeseed Oil' (2018) <<https://sustainablefoodtrust.org/articles/the-supply-chain-of-fats-rapeseed-oil/>> accessed 23 November 2019.

⁹⁹ European Commission, 'High and Low Indirect Land-Use Change (ILUC) - Risks Biofuels, Bioliquids and Biomass Fuels?' (2019) <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2019-762855/feedback/F78614_en?p_id=525646> accessed 23 November 2019.

of protecting plant life and conserving exhaustible natural resources, but failed to prove the element of necessity through the attainment of such measures. In addition, the measure is not justified under the Chapeau of Article XX GATT 1994 as the measure constitutes as arbitrary or unjustifiable discrimination and disguised restriction on international trade.

1 Protection of Plant Life in Article XX (b) GATT 1994

The elements of Article XX (b) GATT 1994 constitute of (i) the objective of the measure and (ii) the necessity to fulfil the objectives. Jurisprudence of WTO case laws noted that the justification should be based upon a specific risk that must be established.¹⁰⁰ In this regard, the measure to phase out CPO is incorporated as the protection of plant life as the objective of RED II constitutes as preventing deforestation and reducing greenhouse gas emissions. Aside from that, the second element of Article XX (b) GATT 1994 incorporated a necessity test to signify whether or not the measure is necessary to fulfil the element. Regarding this, jurisprudence signified that necessity is prevalent if there are no alternative measures that are more consistent with the GATT 1994. Upon this matter, the alternative measures that are consistent with GATT 1994 are prevalent through the notion that the measure could have conducted a reduction on the production of all the like products, and not just the CPO, seeing that the other like products are also capable of contributing to deforestation and greenhouse gas emissions. Therefore, the measure is not necessary to fulfil the objectives of environmental protection.

In addition, the ILUC calculation methodology does not acknowledge the different processing mechanism of palm oil. In this matter, there are still possibilities that the processing of palm oil constitutes as low-risk ILUC. Hence, sustainable processing practices should be taken into consideration, such as *‘replanting versus expansion, zero burning policies, no peatland development, use of high carbon stock approach and high carbon value to set aside carbon-rich areas, and development*

¹⁰⁰ World Trade Organization, ‘Brazil — Measures Affecting Imports of Retreaded Tyres’ (n 71).[7.349].

of high-yield palm trees',¹⁰¹ as well as other measures which ensure that sustainable palm oil is low ILUC risk.

In this matter, the Indonesian government enacted efforts in preventing the expansion of new land for palm oil production as well as ensuring sustainable practices in the processing of palm oil. One of the prevalent efforts was promulgated within Presidential Instruction No. 8 Year 2018 on the Moratorium and Evaluation of Licensing for Oil Palm Plantations and Increasing Productivity of Oil Palm Plantations (Inpres 8/2018). The aforementioned regulation was created to increase the governance of sustainable palm oil and to ensure environmental protection, which includes the effort to reduce greenhouse gas emissions.¹⁰² Inpres 8/2018 was the presidential order for the relevant government institution to enact a moratorium of three years for the expansion of land in the production of CPO. In this matter, Inpres 8/2018 instructed the Coordinating Ministry of Economic Affairs to coordinate the moratorium, evaluate the licensing of palm oil production, and increase the productivity of palm oil production.

In November 2019, another effort of the Indonesian government was also realized through the Presidential Instruction No. 6 Year 2019 on the National Action Plan of Sustainable Palm Oil Plantation (Inpres 6/2019). The objective of Inpres 6/2019 includes to increase accelerating the capacity and capability of plantations, settling land status and legalization, as well as increasing the diplomacy of utilizing palm oil as sustainable renewable energy.¹⁰³ In this regard, Inpres 6/2016 is the roadmap for the collective effort of Ministries in improving the sustainability of CPO, which includes but is not limited to efforts

¹⁰¹ Golden Agri Resources (GAR), 'ILUC, Palm Oil and Biofuels' (2018) <<https://goldenagri.com.sg/wp-content/uploads/2018/11/GAR-ILUC-Position-Paper-Final-Version-November.pdf>> accessed 20 November 2019.

¹⁰² Instruksi Presiden Republik Indonesia Nomor 8 Tahun 2018, *Penundaan Dan Evaluasi Perizinan Perkebunan Kelapa Sawit Serta Peningkatan Produktivitas Perkebunan (Presidential Instruction No. 8 Year 2018 on the Moratorium and Evaluation of Licensing for Oil Palm Plantations and Increasing Productivity of Oil Palm Pl* (Inpres 2018).

¹⁰³ Instruksi Presiden No.6 Tahun 2019, *Rencana Aksi Nasional Perkebunan Kelapa Sawit Berkelanjutan Tahun 2019-2014 (Presidential Instruction No. 6 Year 2019 on the National Action Plan of Sustainable Palm Oil Plantation)* (Inpres 2019).

of socialization of ISPO in both domestic and international markets as well as increasing measurement, reporting, and verification process as an effort to reduce greenhouse gases in palm oil plantations.¹⁰⁴

From the aforementioned elaboration, it can be seen that the government of Indonesia enacted various efforts to adhere with the concerns of ILUC. In this matter, the ILUC calculation methodology should acknowledge the efforts of Indonesia in incorporating elements of sustainability within the production of CPO. The implication to the efforts of Indonesia is that the producers are capable of processing CPO that does not contribute to the environmental negative repercussions that are claimed by the ILUC calculation method.

In summation, the measure of RED II attributes to inflicting less favorable treatment due to causing unequal opportunities of competition as it excluded CPO from the EU market. In this regard, RED II had the environmental objective of preventing deforestation and reducing greenhouse emissions. Within this matter, it should be considered that other domestic biofuels also caused pervasive effects to the environment as well as that Indonesia had enacted various efforts to prevent the concerns set forth in ILUC. On this notion, the nature of phasing out only CPO causes obstacles for the CPO producers to enter the EU market, whereas other domestic products are not limited by RED II.

2 Exhaustible Natural Resources in Article XX (g) GATT 1994

Next, there are three elements prevalent within Article XX (g), namely (i) the measure must concern 'exhaustible natural resources', (ii) the measure must relate to the 'conservation' of such resources, and that (iii) the measure must be made effective in conjunction with restrictions on domestic production or consumption. In this matter, the first element is fulfilled as the measure does concern exhaustible natural resources. Regarding this, exhaustible natural resource includes both living

¹⁰⁴ *ibid.*

and non-living resources.¹⁰⁵ Hence, the exhaustible natural resource within this dispute is the clean air, because the measure focused upon the emissions caused by land use. On this notion, clean air was previously considered as a form of exhaustible natural resources in the case of *US-Gasoline*.¹⁰⁶ Subsequently, the WTO panel declared that clean air is an exhaustible resource because it could be depleted.¹⁰⁷ The second element states that the measure should relate to the conservation of such resources. Upon this notion, RED II is not proven to have been related with the conservation of clean air as an exhaustible resource because of the uncertainty implied in the ILUC calculation methodology. In this regard, ILUC is a new concept that emerged within RED II. As such, Paragraph 112 of RED/2018/2001 stated that '*It is necessary to lay down clear rules based on objective and non-discriminatory criteria, for the calculation of greenhouse gas emissions savings*'.¹⁰⁸ However, the calculation methodology of ILUC is discriminatory due to various reasons, namely that it imposes differential treatment to other like-products of CPO, ILUC neglects the different processing mechanism of CPO, and disregards the inability of smallholders to comply with the accepted forms of certification.

The European Commission claims that the ILUC calculation methodology derived from the '*best available scientific data*' as pursuant to Article 26 paragraph 2 RED II. The European Commission held that such data were discovered by leading experts, namely through seventeen studies which applied Partial Equilibrium (PE), Computable General Equilibrium (CGE) or Integrated Assessment Models (IAM), six studies which used hybrid life cycle analysis (LCA) techniques, five studies based on empirical approaches analysis, one study which used a causal descriptive

¹⁰⁵ World Trade Organization, 'UNITED STATES - IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS' (n 70). [128]

¹⁰⁶ World Trade Organization, 'STANDARDS FOR REFORMULATED AND CONVENTIONAL GASOLINE' (1996) <https://www.wto.org/english/tratop_e/dispu_e/2-9.pdf> accessed 20 November 2019.

¹⁰⁷ V Imperiale, *Chapter 8. Characterizing Air As An Exhaustible Natural Resource. In Reconciling Environment and Trade* (Brill 2008).[247].

¹⁰⁸ Directive (EU) 2018/2001 (n 20).[112].

model, and one study based on expert opinion.¹⁰⁹ However, the ILUC calculation methodology received several criticisms from other experts.

In this matter, the Cerology for Transport and Environment (CTE) conducted a study that showed the lack of evidence in having clear criteria to certify low ILUC risk crops.¹¹⁰ CTE criticized the lack of transparency within the reasoning behind the assumptions that are used in the calculations. In addition, another study conducted by Finkbeiner concluded that there is no scientific consensus on ILUC factors, hence imposing various uncertainties to the calculation.¹¹¹

In pertaining to this, there is an element within Paragraph 81 of RED II that is challenged by experts, which stipulated:

*'While the level of greenhouse gas emissions caused by indirect land-use change cannot be unequivocally determined with the level of precision required to be included in the greenhouse gas emission calculation methodology, the highest risks of indirect land-use change have been identified for biofuels, bioliquids and biomass fuels produced from feedstock for which a significant expansion of the production area into land with high-carbon stock is observed'.*¹¹²

The aforementioned article shows that the ILUC model targets land with historical deforestation. Consequently, areas that experienced land use change in the past will result in crops considered as high ILUC risk, which may not occur due to the actions of the present feedstock producers.¹¹³ Hence, the ILUC model is capable of creating unfair conditions for the present feedstock producers.

Aside from that, a study enacted by Copenhagen Economics resulted in different models of calculating ILUC through including different factors. The study of found that the usage of different factors may cause different calculations, which

¹⁰⁹ European Commission, *Study Report on Reporting Requirements on Biofuels and Bioliquids Stemming from the Directive (EU) 2015/1513*. Contract Number ENER/CI/SER/2015-438/4/SI2.735083. (European Commission 2017).

¹¹⁰ C Malins, 'Risk Management: Identifying High and Low ILUC-Risk Biofuels under the Recast Renewable Energy Directive' (2019) 1 Cerology: Report commissioned by Transport and Environment.[3-6].

¹¹¹ M Finkbeiner, *Indirect Land Use Change (ILUC) within Life Cycle Assessment (LCA) – Scientific Robustness and Consistency with International Standards* (erband Der Olsaaten - Verarbeitenden Industrie in Deutschland 2013).[28].

¹¹² Directive (EU) 2018/2001 (n 20).[81].

¹¹³ Golden Agri Resources (GAR) (n 101).

showed that rapeseed and sugarbeet are capable of resulting to ILUC levels that are almost equal to palm oil.¹¹⁴ The study was also supported by the Netherlands Environmental Assessment that concluded the same patterns.¹¹⁵

The controversy of ILUC received commentaries from the German-based certification scheme of International Sustainability and Carbon Certification (ISCC). In this matter, the ISCC stated that it is impossible to determine the actors that cause ILUC and to separate it from Direct Land Use Change (DLUC) due to factors that complicate the calculation, such as '*variation in supply, increasing demand due to population and income growth, productivity increases*' and other factors which may occur simultaneously.¹¹⁶

In response to the differing results of expert studies, the representative of the European Commission stated the following:¹¹⁷ '*Different studies can come to different results, depending on the assumptions used. The figures used as default values by the Commission are the result of a comprehensive process including input from world leading experts, where all input data and assumptions are freely available*'. Regarding this, the EU acknowledged that differing results may occur due to the factors that are initially used. However, the '*best available scientific data*' imposed by the European Commission are not open to being challenged by other experts.

In addition, the third element of Article XX (g) GATT 1994 is also not fulfilled, which is the requirement of even-handedness, namely that the measure must be made in conjunction with restrictions on domestic production or consumption. However, the measure is not made in conjunction with such matter as the ILUC

¹¹⁴ Copenhagen Economics, *The Missing Indirect Land-Use Change Factors: How to Make Decisions When Science Is Incomplete?* (European Forum for Sustainable Development 2011).

¹¹⁵ F Erixon, *Biofuels Reform in the European Union: Why New ILUC Rules Will Reinforce the WTO Inconsistency of EU Biofuels Policy* (European Centre for International Political Economy 2013).

¹¹⁶ ISCC System, 'How to Deal with Indirect Land Use Change?' (*ISCC System*, 2019) <<https://www.iscc-system.org/how-to-deal-with-indirect-land-use-change/>> accessed 23 November 2019.

¹¹⁷ Nature Publishing Group, 'Rapeseed Biodiesel Fails Sustainability Test' (2012) <<https://www.nature.com/news/rapeseed-biodiesel-fails-sustainability-test-1.11145>> accessed 23 November 2019.

calculation method does not restrict domestic productions, but rather only restricts the imported CPO.

3 Chapeau of Article XX GATT 1994

RED II does not fulfil the Chapeau of Article XX GATT 1994 as the measure constitutes as arbitrary or unjustifiable discrimination and disguised restriction on international trade. In this regard, jurisprudence defined disguised restriction as a hidden agenda on the domestic products. As previously mentioned, the EU is the largest producer of rapeseed.¹¹⁸ In 2015 to 2016, the EU was capable of producing 22.3 million tonnes of rapeseed from 6.5 million hectares of land.¹¹⁹ In addition, sunflower seed oil is produced from the EU, with productions deriving from the Netherlands (5.1%) and France (5.2%). Soybean oil is also produced from EU, as noted in the production of Netherlands (14.2%), Portugal (5.1%), and Germany (4.2%). Subsequently, as CPO is an imported product, then the measure constitutes as a disguised restriction due to the concern of a hidden agenda to promote the domestic products of the EU.

Conclusion

RED II was promulgated under the pursuit to protect the environment, yet this study concludes that the policies governing ILUC do discriminates the trade of CPO in the EU. RED II issued a requirement to decrease the usage of high ILUC risk biofuels to 0% by 2030,¹²⁰ which categorizes CPO as a biofuel with high ILUC risk. Discrimination against the trade of CPO is evident in RED II as CPOs are treated differently than other like-products, hence the measure to phase out CPO is not aligned with Article 2.1, 2.2, and 5.1.1 TBT Agreement as well as Article III:4, XX(b), and XX(g) GATT.

¹¹⁸ Nazlin Ismail. Kamar Nor Aini. Kamarul Zaman and Balu, *Competitiveness of the Rapeseed Industry in the European Union* (Malaysian Palm Oil Board 2017).[33].

¹¹⁹ *ibid.*

¹²⁰ Directive (EU) 2018/2001 (n 20). (2).

CPOs are like products with domestic products, namely rapeseed oil, soybean oil, and sunflower oil. Jurisprudence in *EC-Asbestos* suggests that the indicators of like-products include similar end-use, products are treated similarly by the tastes and habits of consumers, the nature, properties, and quality of the product, and the tariff classification of the product.¹²¹ Based on such indicators, CPOs are categorized as like-products with other vegetable oil products. Next, RED II conducts less favorable treatment toward the imported products of CPO. The ILUC calculation method in RED II modifies the competition of CPO by gradually phasing out the product. Similar to the case of *US-Clove Cigarettes*, RED II implies treatment that is less favorable to CPO than its domestic like-products.¹²²

Following this, RED II contains elements of trade restrictiveness regulated in Article 2.2 TBT Agreement. In accordance with the case law of *US-Clove Cigarettes*, RED II does not pursue a legitimate objective as it should be complemented with legitimate measures to fulfil the measure,¹²³ and the methodology in ILUC contains limitations that are unable to be observed or measured, whilst also limitations on the publicity of the research.¹²⁴ Additionally, jurisprudence of *US-Shrimp* suggests negotiation should occur in RED II to accommodate for exporting countries.¹²⁵ Hence, the measure is more trade restrictive than necessary in the fulfilment of the objective.

Next, the certification scheme for CPO is not in compliance with Article 5.1.1 TBT Agreement on Conformity Assessment Procedure (CAPs) as it causes less favorable access to the suppliers of CPO in comparison to other vegetable oil products. The RSPO and ISCC are voluntary certification schemes, but serve

¹²¹ World Trade Organization, 'EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS' (n 48).

¹²² World Trade Organization, 'UNITED STATES – MEASURES AFFECTING THE PRODUCTION AND SALE OF CLOVE CIGARETTES' (n 64).

¹²³ *ibid.*

¹²⁴ European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Status of Production Expansion of Relevant Food and Feed Crops Worldwide' (n 66).

¹²⁵ World Trade Organization, 'UNITED STATES - IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS' (n 70).[172].

as a preliminary requirement to export to the EU. The certification efforts would adversely impact smallholders that act as palm oil producers as there is a cost to applying the certification. This would also impact the price of the product, which makes the cost less competitive as a product. Hence, the certification scheme in RED II causes less favorable access for smallholder suppliers of CPO.

RED II also violates the national treatment principle of Article III:4 GATT. RED II is an internal measure created to phase out CPO. The policy affected the conditions of the competition within the market of biofuel, yet the policy only targets CPO. Hence, RED II modified the competition of CPO in the EU market in comparison to other domestic products. The jurisprudence of *Korea-Beef* and *Japan-Alcoholic Beverages* confirms that less favorable treatment includes the inability for consumers to compare product.¹²⁶ Hence, RED II does enact less favorable treatment for CPO in comparison to the domestic products.

Additionally, RED does not constitute as a valid exception of environmental protection as per Article XX (b) GATT 1994. RED II fails to fulfil the element of necessity in Article XX (b) GATT 1994, as the measure will only be considered as necessary if there are no other alternative measures that are more consistent with GATT 1994. In this regard, the Indonesian government enacted various regulations such as Inpres 8/2018 and Inpres 6/2019, which see to adhere with the concerns of ILUC. It should also be considered that other domestic biofuels also contain negative effects to the environment that are not equally regulated in RED II. Hence, RED II inflicts less favorable treatment and causes unequal opportunities of competition for CPO.

RED II also does not constitute as a valid exception of environmental protection under Article XX (g) GATT 1994. In accordance with the jurisprudence of *US-Gasoline*, RED is not proven to have been related with the conservation of clean air due to the uncertainty implied in the ILUC calculation methodology. The study by Cerology for Transport and Environment (CTE) confirmed the lack of

¹²⁶ World Trade Organization, 'KOREA – MEASURES AFFECTING IMPORTS OF FRESH, CHILLED AND FROZEN BEEF' (n 88).[137].

evidence in having clear criteria to certify low ILUC risk crops.¹²⁷ The Directive also specifies that ILUC targets land with historical deforestation.¹²⁸ ISCC had also challenged the concept as it was impossible to determine actors that caused ILUC in separation with Direct Land Use Change (DLUC).¹²⁹

Lastly, RED II violates the Chapeau of Article XX GATT 1994 as the Directive is a disguised restriction in international trade due to the hidden agenda on the domestic product. This can be seen as the EU is the largest producer of rapeseed, hence it gives rise to question whether THE EU has a hidden agenda to promote the domestic product of rapeseed.

In the event that Indonesia decides to continue the dispute settlement mechanism on the case of *European Union - Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels*, then it is suggested that Indonesia incorporate the findings of the WTO law that have been elaborated in this study. However, the legal arguments surrounding the TBT Agreement and GATT 1994 can only be supported through technical and scientific evidence, which should be further researched in order for the grounds to prevail. The repercussion of Indonesia in losing this dispute is detrimental to the development of the nation's economy. Hence, although the dispute has been processed in the WTO, the Indonesian government should still conduct other mechanisms in avoidance of the dispute through negotiations and consultations with the relevant party. To this end, the Indonesian government should increase efforts in socializing the progress of Indonesia in achieving sustainable CPO, namely the certification of ISPO and the recent enactment of Inpres 6/2019.

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¹²⁷ Malins (n 110).

¹²⁸ Directive (EU) 2018/2001 (n 20).[81].

¹²⁹ ISCC System (n 116).

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HOW TO CITE: Laras Thyrsa Amandari and Yetty Komalasari Dewi, 'Is the Measure to Phase Out Crude Palm Oil in RED II discriminatory based on the World Trade Organization Law?' (2022) 37 *Yuridika*.