



**EUROPEAN UNION – CERTAIN MEASURES CONCERNING  
PALM OIL AND OIL PALM CROP-BASED BIOFUELS**

**REQUEST FOR THE ESTABLISHMENT OF A PANEL BY INDONESIA**

The following communication, dated 18 March 2020, from the delegation of Indonesia to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 9 December 2019, Indonesia requested consultations with the European Union pursuant to Article 4 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 14 of the Agreement on Technical Barriers to Trade ("TBT Agreement") and Article 30 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") regarding certain measures imposed by the European Union and the EU Member States affecting palm oil and oil palm crop-based biofuels.

Consultations on those measures were held on 19 February 2020. Regrettably, those consultations have failed to settle the dispute.

Indonesia therefore requests that the Dispute Settlement Body establishes a panel to examine the matter identified in this request, pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, Article 14.1 of the TBT Agreement and Article 30 of the SCM Agreement.

**A. The measures at issue**

1. The measures at issue comprise measures adopted by the European Union and by certain EU Member States.

**a. EU measures**

2. The EU measures at issue are laid down in the following legal instruments:

- i. Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), OJ 2018 L 328, p. 80 ("RED II");
- ii. Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels, OJ 2019 L 133, p. 1 ("Delegated Regulation 2019/807");
- iii. Directive 2009/28/EC of 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, OJ 2009 L 140, p. 16 ("RED I"), as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion

of the use of energy from renewable sources, OJ 2015 L 239, p. 1 ("Directive 2015/1513");

- iv. Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, OJ 2018 L 328, p. 1 ("Regulation 2018/1999");
- v. Palm oil and deforestation of rainforests, European Parliament resolution of 4 April 2017 on palm oil and deforestation of rainforests (2016/2222(INI)), OJ 2018 C 298, p. 2 ("Resolution of 4 April 2017");
- vi. 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, COM(2019) 142 final (13 March 2019) ("Status Report"); and

any annexes thereto, amendments, supplements, replacements, renewals, extensions, implementing measures (including any implementing measures envisaged in the above-mentioned legal instruments) or any other related measures, and any exemptions applied.

3. RED II was adopted on 11 December 2018 and entered into force on 24 December 2018. It must be transposed by the EU Member States by 30 June 2021.<sup>1</sup> It is a recast version of RED I which was amended in 2015 by Directive 2015/1513.

4. RED II envisages the adoption by the Commission of notably delegated and implementing acts. Several provisions, such as Article 30(8) of EU RED II, refer to further action to be taken by the Commission. Those provisions apply together with Articles 32 ("Implementing acts") and 35 ("Exercise of the delegation"). Any such measures adopted or actions taken by the Commission, acting on the basis of EU RED II, are also covered by this panel request.

5. The Commission's initial proposal for RED II<sup>2</sup> laid down a new EU target of at least 27 % for the share of renewable energy consumption in the European Union in 2030. Article 7 of that proposal put forward, as part of the rules for calculating the share of energy from renewable sources, a model of a decreasing maximum share of biofuels and bioliquids produced from food or feed crops starting from 2021, allowing EU Member States to impose lower limits and to distinguish between different types of biofuel and bioliquid.

6. On 4 April 2017, the European Parliament adopted a resolution on palm oil and deforestation of rainforests. In that resolution, the European Parliament acknowledged that "the total GHG emissions from palm oil-related land use change is unknown" and that "it is necessary to improve scientific assessments in this regard".<sup>3</sup> It also referred to the fact that "there are no reliable data available in producer countries on the areas of land given over to the cultivation of oil palms".<sup>4</sup> As part of its general considerations, the European Parliament observed that "other plant-based oils produced from soybeans, rapeseed and other crops have a much higher environmental footprint and require much more extensive land use than palm oil" and noted that "other oil crops typically entail a more intensive use of pesticides and fertiliser".<sup>5</sup> Furthermore, it recognised the complexity of the oil palm issue and emphasised "the importance of developing a global solution based on the collectively responsibility of many actors".<sup>6</sup> The resolution nonetheless called for, *inter alia*, the introduction of minimum sustainability criteria for specifically palm oil and products containing palm

<sup>1</sup> Article 36(1) of RED II.

<sup>2</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast), COM(2016) 767 final (30 November 2016).

<sup>3</sup> Recital T in the preamble to Resolution of 4 April 2017.

<sup>4</sup> Recital U in the preamble to Resolution of 4 April 2017.

<sup>5</sup> Para. 6 of Resolution of 4 April 2017.

<sup>6</sup> Para. 18 of Resolution of 4 April 2017.

oil that enter the EU market,<sup>7</sup> introducing tariffs and non-tariff barriers based on the carbon footprint of palm oil;<sup>8</sup> and phasing out the use of vegetable oils that drive deforestation, including palm oil, as a component of biofuels, preferably by 2020.<sup>9</sup> The European Parliament further recommended promoting the production of EU oil crops, in particular "finding and promoting more sustainable alternatives for biofuel use, such as European oils produced from domestically cultivated rape and sunflower seeds".<sup>10</sup>

7. On 17 January 2018, the European Parliament called for the phasing out, by 2021, of palm oil crop-based biofuels for calculating EU renewable energy targets and adopted amendments that significantly altered the European Commission's initial proposal for RED II.<sup>11</sup> Apart from proposing a Union-wide binding target of at least a 35 % share of renewable energy to be accompanied by national targets and including a reference to its resolution of 4 April 2017, the European Parliament supported treating differently crop-based biofuels with high GHG efficiency and a low risk of indirect land use change ("ILUC"). It also instructed the Commission to develop a methodology for certifying low ILUC-risk biofuels and bioliquids. In any event, the European Parliament proposed that the contribution of biofuels and bioliquids produced from specifically palm oil be 0 % from 2021.

#### Binding EU renewable energy targets

8. RED II lays down two main types of binding renewable energy target.<sup>12</sup>

9. First, Article 3(1) of RED II imposes a new binding EU target of a share of at least 32 % of renewable energy in the EU gross final consumption of energy by 2030.<sup>13</sup> From 1 January 2021, the share of energy from renewable sources in each EU Member State's gross final consumption of energy may not be lower than the baseline share included in the third column of the table in Part A of Annex I to RED II.<sup>14</sup>

10. Second, Article 25(1) of RED II sets a distinct target for mainstreaming the use of renewable energy in the transport sector. Each EU Member State must require fuel suppliers to ensure that the share of renewable energy within the final consumption of energy in the transport sector is at least 14 % by 2030.<sup>15</sup> The calculation of that share is subject to the rules found in Articles 26 and 27 of RED II.

11. Articles 26 and 27 of RED II lay down, *inter alia*, specific limitations on the use of crop-based biofuels, bioliquids and biomass fuels for the purposes of meeting the EU renewable energy targets in the transport sector. These limitations are mostly linked to the notion of ILUC.

12. RED II applies together with Regulation 2018/1999 which further details the processes for, *inter alia*, monitoring and ensuring compliance with the binding EU renewable energy targets, including the mandatory base-line requirements.

#### The 7 % limitation

13. Article 26(1) of RED II states that, for the calculation of an EU Member State's gross final consumption of energy from renewable sources referred to in Article 7 and the minimum share referred to in the first subparagraph of Article 25(1), the share of biofuels, bioliquids and biomass fuels consumed in transport, where produced from food and feed crops, may not be more than one percentage point higher than the share of such fuels in the final consumption of energy in the road and rail transport sectors in 2020 in that Member State, with a maximum of 7 % of final consumption

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<sup>7</sup> Para. 43 of Resolution of 4 April 2017.

<sup>8</sup> Para. 47 of Resolution of 4 April 2017.

<sup>9</sup> Para. 82 of Resolution of 4 April 2017.

<sup>10</sup> Para. 83 of Resolution of 4 April 2017.

<sup>11</sup> See [http://www.europarl.europa.eu/doceo/document/TA-8-2018-0009\\_EN.html?redirect](http://www.europarl.europa.eu/doceo/document/TA-8-2018-0009_EN.html?redirect); An overview of the proposed amendments is available here: [http://www.europarl.europa.eu/doceo/document/A-8-2017-0392\\_EN.html?redirect#title1](http://www.europarl.europa.eu/doceo/document/A-8-2017-0392_EN.html?redirect#title1).

<sup>12</sup> The rules governing the calculation of the share of renewable energy are laid down, in particular, in Articles 7, 26 and 27 of RED II. Other targets apply in respect of, for example, the share of renewable energy in the heating and cooling sector (Article 23 of RED II).

<sup>13</sup> See also recital 8 in the preamble to RED II.

<sup>14</sup> Article 3(4) of RED II.

<sup>15</sup> Article 25(1) of RED II.

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of energy in the road and rail transport sectors in that Member State. The 7 % limitation applies solely to biofuels produced from food and feed crops. That limitation was first introduced in RED I, as amended by Directive 2015/1513.

14. Article 26(1) allows EU Member States to set limits that are lower than the 7 % limitation. In setting lower limits, Article 26(1) expressly recognises that EU Member States may differentiate between biofuels, bioliquids and biomass fuels produced from food and feed crops. Thus, Article 26(1) enables EU Member States to treat differently biofuels made from, for example, oil crops or specifically palm oil.

15. For the purposes of this panel request, the 7% limitation includes also more restrictive limits set by EU Member States.

16. The 7 % limitation including any measures further limiting the share of biofuels, bioliquids and biomass fuels consumed in transport, where produced from food and feed crops, restrict imports of palm oil and oil palm crop-based biofuels from Indonesia into the European Union. The design and operation of these measures mean that the quantity of imports of palm oil and oil palm crop-based biofuels into the EU market are severely restricted and result in unnecessary obstacles to trade in palm oil and oil palm crop-based biofuels.

17. Despite requests to that effect, the European Union has failed to adequately explain the justification of these measures.

The high ILUC-risk cap and phase-out, and the criteria for determining and certifying low ILUC-risk biofuels

*The high ILUC-risk cap and phase-out*

18. Article 26(2) of RED II addresses the alleged risk of ILUC. Recital 81 in the preamble to RED II states that ILUC "occurs when the cultivation of crops for biofuels, bioliquids and biomass fuels displaces traditional product of crops for food and feed purposes". The European Union takes the view, as recital 81 explains, that "[s]uch additional demand increases the pressure on land and can lead to the extension of agricultural land into areas with high-carbon stock, such as forests, wetland and peatland, causing additional greenhouse gas emissions". That recital also relies on Directive 2015/1513, in which the European Union previously recognised that "it is likely that greenhouse gas emissions linked to indirect land-use change are significant, and could negate some or all of the greenhouse gas emission savings of individual biofuels".<sup>16</sup> Furthermore, recital 82 in the preamble to RED II refers to the fact that, although the level of GHG emissions caused by ILUC "cannot be unequivocally determined", "the highest risk of indirect land-use change have been identified for biofuels ... produced from feedstock for which a significant expansion of the production area into land with high-carbon stock is observed".

19. Article 26(2) of RED II states that, for the calculation of an EU Member State's gross final consumption of energy from renewable sources referred to in Article 7 and the minimum share referred to in the first subparagraph of Article 25(1), the share of high ILUC-risk biofuels, bioliquids or biomass fuels produced from food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed shall not exceed the level of consumption of such fuels in that Member State in 2019. Furthermore, from 31 December 2023 until 31 December 2030, that limit is to decrease gradually to 0%. RED II, in particular when read together with Delegated Regulation 2019/807, gives effect to the European Parliament proposal of 17 January 2018, which proposed that the contribution of biofuels and bioliquids produced from specifically palm oil be 0 % from 2021, and the Resolution of 4 April 2017. The same rule is included in RED II even if the period for the phase-out is longer.

20. On 13 March 2019, the European Commission adopted Delegated Regulation 2019/807 supplementing RED II, as envisaged by Article 26(2) of RED II. That regulation entered into force on 10 June 2019. The European Commission adopted Delegated Regulation 2019/807 without having carried out any impact assessment. This was done "despite the political importance of the file" and

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<sup>16</sup> Recital 5 in the preamble to Directive 2015/1513.

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in light of the short time frame between the entry into force of RED II and the deadline set in Article 26(2) of RED II.<sup>17</sup>

21. Similar to RED II, Delegated Regulation 2019/807 states that ILUC "can occur when land previously devoted to food or feed production is converted to produce biofuels, bioliquids and biomass fuels" but, taking into account that food and feed demands still need to be satisfied, "may lead to the extension of agricultural land into areas with high carbons stock such as forests, wetlands and peatland, causing additional greenhouse gas emissions".<sup>18</sup>

22. Delegated Regulation 2019/807 establishes criteria for determining what are high ILUC-risk feedstock and low ILUC-risk biofuels, bioliquids or biomass fuels.

23. Article 3 identifies the cumulative criteria that apply for determining what is high ILUC-risk feedstock for which a significant expansion of the production area into land with high-carbon stock is observed. In particular, high ILUC-risk feedstock is identified by reference to the average annual expansion of the production area since 2008 and a formula expressing the share of that expansion into land with high-carbon stock.

24. Article 3 must be read together with the Annex to Delegated Regulation 2019/807. That annex, organised according to three categories of food or feedstock (cereals, sugar crops and oil crops) and individual types of oil crops (such as rapeseed, palm oil, soybean and sunflower oil crops), lists fixed values for: (i) the first criterion in Article 3(a) expressed in kilo hectare (kha) and percentage points and (ii) the shares operating as constants in the formula. Article 3 sets the fixed value of the productivity factor for each individual type of feedstock. When the fixed values and constants are used for, for example, the various oil crops, the criteria set out in Article 3 mean that only palm oil is considered to be a high ILUC-risk feedstock.

25. As a result, in accordance with Article 26(2) of RED II read together with Delegated Regulation 2019/807, palm oil is the only feedstock that is high ILUC-risk and of which the share in the target of renewable energy must be gradually reduced and, ultimately, fully eliminated by 2030. For other feedstock, the same limitation and phase-out requirements do not apply.

26. Although the European Union has produced a report on the status of production expansion of relevant food and feed crops worldwide, that Status Report offers no adequate (scientific) basis for the criteria defined in Article 3 of Delegated Regulation 2019/807 and the fixed values and constants used in that provision and in the Annex to Delegated Regulation 2019/807.

27. These measures are concerned with regulating trade in biofuels without finding a basis in the performance of such biofuels.

28. They discriminate against palm oil and oil palm crop-based biofuels which are primarily imported into the European Union, in favour of like products that are either of EU origin or imported. They also discourage imports of palm oil and oil palm crop-based biofuels into the European Union and eventually will result in excluding palm oil and oil palm crop-based biofuels from the EU market. Given that Indonesia is the largest exporter of palm oil to the European Union, these measures affect particularly Indonesia. The European Union relies on the concept of ILUC but it accepts that there is no sound scientific basis for this concept because "ILUC cannot be observed or measured".<sup>19</sup> The European Union has also acknowledged that "ILUC emissions cannot be measured with the level of precision required to be included in the EU GHG emission calculation methodology".<sup>20</sup>

29. By relying on ILUC, the European Union has also departed from relevant standards adopted by, *inter alia*, the International Organization for Standardization ("ISO"). The European Union has done so without providing the required publication and notification of these measures and organising an adequate process for commenting. The European Union has also prepared and adopted these measures without taking into account circumstances specific to the developing countries where palm

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<sup>17</sup> European Commission, Explanatory Memorandum to the Commission's proposal for Delegated Regulation 2019/807, C(2019) 2055 final (13 March 2019), p. 1.

<sup>18</sup> Recital 2 in the preamble to the Delegated Regulation.

<sup>19</sup> Status Report, p. 4.

<sup>20</sup> Status Report, p. 4. See also recital 81 in the preamble to RED II.

oil and oil palm crop-based biofuels are produced. These measures lack also transparency and an objective basis.

30. Despite requests to that effect, the European Union has failed to adequately explain the justification of these measures.

*The criteria for determining and certifying low ILUC-risk biofuels*

31. Under RED II, an exemption to the high ILUC-risk cap and phase-out applies for biofuels, bioliquids or biomass fuels certified as "low ILUC-risk". Low ILUC-risk biofuels, bioliquids and biomass are defined as "biofuels, bioliquids and biomass fuels, the feedstock of which was produced within schemes which avoid displacement effects of food and feed-crop based biofuels, bioliquids and biomass fuels through improved agricultural practices as well as through the cultivation of crops on areas which were previously not used for cultivation of crops, and which were produced in accordance with the sustainability criteria for biofuels, bioliquids and biomass fuels laid down in Article 29".<sup>21</sup>

32. Article 4, read together with Article 5, of Delegated Regulation 2019/807 identifies the cumulative criteria that must be met in order to classify biofuels, bioliquids and biomass fuels as low ILUC-risk. These criteria include the sustainability and GHG emission savings criteria and the need to comply with additionality requirements. Because of the criteria set out in Article 3, all of the conditions laid down in Articles 4 and 5 of Delegated Regulation 2019/807 apply solely to biofuels made from oil palm crops. It follows that only oil palm crop-based biofuels must be classified, and certified, as low ILUC-risk in order to count towards the EU renewable energy targets or benefit from Member States' support schemes. In any event, the conditions set out in Articles 4 and 5 of Delegated Regulation 2019/807 are designed in a manner so as to preclude any oil palm crop-based biofuels from meeting them.

33. In order to establish conformity with the low ILUC-risk criteria, and obtain certification, Article 6 refers to the need to submit reliable information, to arrange for an adequate standard of independent auditing and proof of auditing and to comply with Article 30 of RED II. Additional rules governing certification of biofuels, bioliquids and biomass fuels as low ILUC-risk will be adopted by the Commission. Those additional rules to be adopted are also covered by this panel request.

34. These procedures are discriminatory in respect of suppliers of oil palm crop-based biofuels from Indonesia and restrict imports of Indonesian palm oil and oil palm crop-based biofuels.

35. While it appears that the criteria for low ILUC-risk biofuels exclude the possibility of oil palm crop-based biofuels meeting those criteria, adequate certification procedures, in any event, appear to be lacking. In laying down the conditions for assessing conformity with the low ILUC-risk criteria, and obtain certification, the European Union has not respected relevant international standards.

36. The European Union has done so without providing the required publication and notification of these measures and organising an adequate process for commenting. The European Union has also prepared and adopted these measures without taking into account circumstances specific to the developing countries where palm oil and oil palm crop-based biofuels are produced.

37. Despite requests to that effect, the European Union has failed to adequately explain the justification of these measures.

The sustainability and GHG emission savings criteria

38. Biofuels, bioliquids and biomass fuels must fulfil, *inter alia*, the sustainability and GHG emission savings criteria in RED II, which expand on the criteria found in RED I. The sustainability criteria are laid down in Article 29(2)-(7); the GHG emission savings criteria are found in Article 29(10). Those criteria apply to biofuels, bioliquids and biomass used for meeting the EU renewable energy targets, measuring compliance with renewable energy obligations or being eligible

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<sup>21</sup> Article 2(37) of RED II.

for financial support under the support schemes for the consumption of biofuels, bioliquids and biomass fuels.<sup>22</sup>

39. Compliance with the sustainability and GHG emission savings criteria is to be verified. Voluntary national or international standard setting schemes may be used subject to the Commission's approval.<sup>23</sup>

40. Those measures, including through (but not limited to) the use of default values in calculating GHG emission savings, discriminate against palm oil and oil palm crop-based biofuels which are primarily imported into the European Union, in favour of like products that are either of EU origin or imported. They also discourage imports of palm oil and oil palm crop-based biofuels into the European Union and eventually will exclude palm oil and oil palm crop-based biofuels from the EU market. Given that Indonesia is the largest exporter of palm oil to the European Union, these measures affect particularly Indonesia.

#### **b. EU Member States' measures**

41. The EU Member States' measures are laid down in the following legal instruments:

- i. Article 266 *quindecies* of the French Customs Code, as modified by Article 192 of the Law no 2018-1317 on 28 December 2018 for 2019 finances;<sup>24</sup>
- ii. Article L. 661-2 of the French Energy Code;<sup>25</sup>
- iii. French Decree no 2019-570 of 7 June 2019 on the incentive tax relating to the incorporation of biofuels, JORF no 0133 of 9 June 2019, no. 13;<sup>26</sup>
- iv. French Decision of 23 November 2011 modified taking into account the application of the order n° 2011-1105 of 14 September 2011 and Decree no 2011-1468 of 9 November 2011, relating to the sustainability of biofuels and bioliquids;<sup>27</sup>
- v. French Decision of 2 May 2012 relating to the energy content of biofuels and fuels.<sup>28</sup>
- vi. French Circulaire of 12 June 2019 – Tax relating to the incorporation of biofuels ("TRIB"), NOR: CPAD1917078C;<sup>29</sup> and

any annexes thereto, amendments, supplements, replacements, renewals, extensions, implementing (including any implementing measures envisaged in the above-mentioned legal instruments) measures or any other related measures, and any exemptions applied.

42. Since the entry into force of RED I and its recast version, RED II, Member States have adopted and are likely to adopt legislation excluding palm oil and/or oil palm crop-based biofuels from measures taken to meet the renewable energy targets.

43. These measures include, but are not limited to, tax measures adopted by France that incentivise the consumption of biofuels in order to meet the targets imposed by EU law. In particular, France has introduced an annual tax on the making available of fuel for consumption ("the French

<sup>22</sup> Articles 7(1) and 29 of RED II. See also recital 94 in the preamble to RED II.

<sup>23</sup> Article 30(4)-(7) of RED II.

<sup>24</sup> Available at:

<https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000037993315&cidTexte=LEGITEXT00006071570&dateTexte=20190101>.

<sup>25</sup> Available at

<https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000028418337&cidTexte=LEGITEXT00023983208&dateTexte=20160101>.

<sup>26</sup> Available, at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000038566562&categorieLien=id>.

<sup>27</sup> Available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024851601>.

<sup>28</sup> Available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000025838709&categorieLien=id>.

<sup>29</sup> Available at: [http://circulaires.legifrance.gouv.fr/pdf/2019/06/cir\\_44749.pdf](http://circulaires.legifrance.gouv.fr/pdf/2019/06/cir_44749.pdf).

fuel tax"). The French fuel tax applies when the designated products are released for fuel consumption within the territory of France.

44. The French fuel tax is designed and structured in such a manner that the rate of that tax decreases as the share of renewable energy sources in the fuel increases. For the purpose of that legislation, biofuel is sustainable if it satisfies the sustainability criteria in RED I (which are now included and expanded upon in RED II). However, the benefit that would accrue as a result of those tax measures is, starting from 1 January 2020, not available in respect of palm oil because French law expressly excludes from the definition of biofuels oil palm crop-based biofuels, regardless of whether they are sustainable or not. The introduction of that exclusion is linked to RED II and Delegated Regulation 2019/807. As a result, for the purpose of the French fuel tax, oil palm crop-based biofuels are excluded from the concept of biofuels. The Circulaire of 12 June 2019 further confirms the intention of the French legislator to exclude products based on palm oil from the definition of biofuels and the concept of renewable energy.

45. By not making the reductions to the fuel tax available for oil palm crop-based biofuels, the French measures discriminate against oil palm crop-based biofuels, which are primarily imported into the European Union, in favour of other crop-based biofuels that are either produced in the European Union or imported.

46. By providing for reductions to the fuel tax for biofuels from specific feedstock, France in effect foregoes government revenue that is otherwise due and thereby confers a benefit to the producers of those biofuels. By excluding oil palm crop-based biofuels from those tax reductions, the French fuel tax is designed and operates in such a manner so as to impede and displace imports of oil palm crop-based biofuels from Indonesia into the French market. The French fuel tax also results in lost sales of oil palm crop-based biofuels from Indonesia in the French market.

## **B. Legal basis for the complaint in respect of the EU measures**

47. The EU measures appear to be inconsistent with the following obligations under the TBT Agreement and the GATT 1994, in particular:

### *TBT Agreement*

- i. by limiting and phasing out the use of oil palm crop-based biofuels for meeting EU renewable energy targets, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for classifying and certifying low ILUC-risk biofuels, and by imposing the 7 % limitation, the measures at issue appear to create unnecessary obstacles to international trade in palm oil and oil palm crop-based biofuels going beyond what is required for achieving a legitimate objective, in violation of Article 2.2 of the TBT Agreement;
- ii. by limiting and phasing out the use of oil palm crop-based biofuels for meeting EU renewable energy targets, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for classifying and certifying low ILUC-risk biofuels, without defining other crops as high ILUC-risk and subjecting other like biofuels to the low ILUC-risk criteria, the measures at issue appear to discriminate among like biofuels of different origins, in violation of Article 2.1 of the TBT Agreement;
- iii. by limiting and phasing out the use of oil palm crop-based biofuels for meeting EU renewable energy targets, taking into account also the criteria for determining high ILUC-risk feedstock and the criteria for classifying and certifying low ILUC-risk biofuels, without defining other crops as high ILUC-risk and subjecting other like biofuels to the low ILUC-risk criteria, the measures at issue appear to discriminate between imported oil palm crop-based biofuels and like biofuels of EU origin, in violation of Article 2.1 of the TBT Agreement;
- iv. by limiting and phasing out the use of oil palm crop-based biofuels for meeting EU renewable energy targets, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for classifying and certifying low ILUC-risk biofuels, and by imposing the 7 % limitation, without using relevant international standards,



the European Union appears to have failed to use relevant international standards as a basis for its technical regulations, in violation of Article 2.4 of the TBT Agreement;

- v. by preparing, adopting or applying the limitation and phasing out requirements for oil palm crop-based biofuels, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for classifying and certifying low ILUC-risk biofuels, the European Union appears to have failed, upon the request of Indonesia, to explain the justification for those measures in terms of Articles 2.2 to 2.4 of the TBT Agreement, in violation of Article 2.5 of the TBT Agreement;
  - vi. by regulating trade in biofuels based on a description of an abstract and unsubstantiated high-ILUC risk concept instead of the performance of such biofuels, the European Union appears to have failed to act in accordance with Article 2.8 of the TBT Agreement;
  - vii. by adopting a technical regulation that has a significant effect on trade of other Members in circumstances where either a relevant international standard does not exist or the content of the technical regulation does not accord with a relevant international standard without the required publication and notification of that regulation and organising an adequate process for commenting, the European Union appears to have failed to act in accordance with Article 2.9 of the TBT Agreement;
  - viii. by preparing, adopting or applying conformity assessment procedures for certifying only oil palm crop-based biofuels as low ILUC-risk, the European Union appears to treat suppliers of oil palm crop-based biofuels from Indonesia less favourably than suppliers of like biofuels from other countries, in a comparable situation, in violation of Article 5.1.1 of the TBT Agreement;
  - ix. by preparing, adopting or applying conformity assessment procedures for certifying oil palm crop-based biofuels as low ILUC-risk, the European Union appears to create unnecessary obstacles to international trade, in violation of Article 5.1.2 of the TBT Agreement;
  - x. by failing to make available conformity assessment procedures for certifying oil palm crop-based biofuels as low ILUC-risk, the European Union appears to have failed to comply with the obligations under Article 5.2 of the TBT Agreement;
  - xi. by requiring certification that has a significant effect on trade of other Members in circumstances where either a relevant international standard does not exist or the content of the conformity assessment procedures does not accord with a relevant international standard without the required publication and notification of that certification procedure and organising an adequate process for commenting, the European Union appears to have failed to act in accordance with Article 5.6 of the TBT Agreement;
  - xii. by failing to publish promptly or otherwise make available the conformity assessment procedures for low ILUC-risk certification, the European Union appears to have acted contrary to Article 5.8 of the TBT Agreement.
  - xiii. by failing to take into account, in the preparation and application of the technical regulations and conformity assessment procedures at issue, circumstances specific to the developing countries where palm oil and oil palm crop-based biofuel are produced, the European Union appears to have failed to ensure that those measures do not create unnecessary obstacles to exports from developing country Members, in violation of Articles 12.1 and 12.3 of the TBT Agreement;
- GATT 1994*
- xiv. by limiting and phasing out the use of oil palm crop-based biofuels for meeting EU renewable energy targets, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for classifying and certifying low ILUC-risk biofuels,

by imposing the 7 % limitation, and by imposing the sustainability criteria and the GHG emission savings criteria, the measures at issue appear to restrict importation of palm oil and oil palm crop-based biofuels, in violation of Article XI:1 of the GATT 1994;

- xv. by limiting and phasing out the use of oil palm crop-based biofuels for meeting EU renewable energy targets, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for classifying and certifying low ILUC-risk biofuels, without defining other crops as high ILUC-risk and subjecting other biofuels to the low ILUC-risk criteria, and by imposing the sustainability criteria and the GHG emission savings criteria, the measures at issue appear to discriminate among like crops and biofuels originating in third countries, in violation of Article I:1 of the GATT 1994;
- xvi. by limiting and phasing out the use of oil palm crop-based biofuels for meeting EU renewable energy targets, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for classifying and certifying low ILUC-risk biofuels, without defining other feedstock as high ILUC-risk and subjecting other like biofuels to the low ILUC-risk criteria, and by imposing the sustainability criteria and the GHG emission savings criteria, the measures at issue appear to discriminate between imported palm oil and oil palm crop-based biofuels and like products of EU origin, in violation of Article III:4 of the GATT 1994; and
- xvii. by adopting the criteria laid down in Articles 3 to 5 of Delegated Regulation 2019/807, the European Union appears to have failed to administer RED II in a reasonable, impartial and uniform manner, in violation of Article X:3(a) of the GATT 1994.

### **C. Legal basis for the complaint in respect of the EU Member States' measures**

48. The EU Member States' measures appear to be inconsistent with the following obligations under the GATT 1994 and the SCM Agreement:

- i. by making reductions to the fuel tax available for oil crop-based biofuels but excluding oil palm crop-based biofuels from those reductions, such measures appear to discriminate among like biofuels originating in third countries, in violation of Article I:1 of the GATT 1994;
- ii. by making reductions to the fuel tax available for oil crop-based biofuels but excluding oil palm crop-based biofuels from those reductions, such measures appear to discriminate between imported oil palm crop-based biofuels and other biofuels of domestic origin, in violation of Article III:2 of the GATT 1994; and
- iii. by making reductions to the fuel tax available for crop-based biofuels but excluding oil palm crop-based biofuels from those reductions, such measures appear to amount to a subsidy within the meaning of Article 1.1(a)(ii) of the SCM Agreement, that confers a benefit on producers of biofuels other than palm oil-based biofuels and is specific within the meaning of Article 2 of the SCM Agreement, that has an adverse effect on the interests of Indonesia and, in particular, constitutes serious prejudice to the interests of Indonesia pursuant to Article 5(c) of the SCM Agreement, apparently contrary to Articles 3.1(b) and 5 of the SCM Agreement.

### **D. Conclusion**

49. Accordingly, Indonesia respectfully requests that the Dispute Settlement Body establishes a panel to examine this matter, with standard terms of reference as set out in Article 7.1 of the DSU.

In light of your communication dated 17 March 2020 regarding the postponement of Dispute Settlement Body meeting scheduled for 30 March 2020, we respectfully ask that this request of panel establishment could be inscribed in the agenda of the earliest Dispute Settlement Body meeting held after the date of this request.

Please accept, Mr. Chairperson, the assurances of my highest consideration.

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