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ANALYSIS OF DISCRIMINATORY MEASURES FROM EUROPEAN UNION RENEWABLE ENERGY DIRECTIVE II TO INDONESIA AS A PALM OIL PRODUCER COUNTRY

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Abstract

On 21 December 2018, the European Union (EU) issued a regulation titled Renewable Energy Directive II (RED II), where the RED II policy introduced the indirect land use change (ILUC) criteria for palm oil. RED II states that palm oil is classified as a commodity with a "high ILUC risk" type, and as such, the EU will gradually reduce palm oil consumption and no longer use palm oil by 2030. Indonesia brought this issue to WTO in 2020. Indonesia, through its consultation, argued that the RED II is inconsistent with the few provisions of the General Agreement on Tariffs and Trade (GATT) 1994, particularly under the National Treatment obligation. Indonesia argued that the measures derived from the RED II policy might cause discrimination against palm oil-based biofuel, considering RED II classifies palm oil as a high ILUC-risk commodity. Such discrimination occurs by gradually reducing the use of palm oil as a material for biofuels until it reaches zero percent by 2030. Further, Indonesia assumed that the RED II policy prioritizes other vegetarian oil produced in the EU countries, such as sunflower and rapeseed. This paper will analyze whether the RED II policy may be considered discriminative measures by the EU to palm oil producer countries under WTO regulations. Hence, such RED II policy is likely inconsistent with Article III:4 of the GATT 1994 regarding National Treatment.

Keywords: RED II, Discriminatory Measures, National Treatment, and Palm Oil.

Abstrak

Pada tanggal 21 Desember 2018, Uni Eropa (UE) menerbitkan peraturan berjudul Renewable Energy Directive II (RED II), dimana kebijakan dari RED II memperkenalkan kriteria perubahan penggunaan lahan secara tidak langsung atau ILUC. RED II menyebutkan bahwa kelapa sawit diklasifikasikan sebagai komoditas dengan jenis "risiko ILUC yang tinggi" dan oleh karena itu, Uni Eropa akan secara bertahap mengurangi konsumsi kelapa sawit secara bertahap dan tidak akan menggunakan kelapa sawit pada 2030. Indonesia membawa masalah ini kepada WTO di tahun 2020. Indonesia melalui konsultasinya, berpendapat bahwa RED II tidak konsisten dengan beberapa ketentuan pada General Agreement on Tariffs and Trade (GATT) 1994, khususnya berdasarkan kewajiban perlakuan National Treatment. Indonesia berpendapat bahwa kebijakan yang berdasarkan RED II dapat mengakibatkan diskriminasi pada kelapa sawit dan produk turunannya mengingat RED II mengklasifikasikan minyak sawit sebagai komoditas dengan risiko ILUC yang tinggi. Diskriminasi tersebut terjadi dalam bentuk pengurangan penggunaan minyak sawit sebagai bahan baku biofuel secara bertahap sampai mencapai presentase nol persen pada 2030. Selanjutnya, Indonesia berasumsi bahwa kebijakan RED II memprioritaskan minyak nabati lain yang diproduksi dalam negara-negara Uni Eropa, seperti bunga matahari dan rapeseed. Tulisan ini akan menganalisa apakah kebijakan RED II dapat dianggap sebagai tindakan diskriminatif oleh UE kepada negara yang memproduksi minyak sawit berdasarkan peraturan WTO. Oleh karena itu, kebijakan RED II menurut pendapat saya kemungkinan tidak sesuai dengan Pasal III:4 dari GATT 1994 mengenai National Treatment.

Kata kunci: RED II, Tindakan Diskriminatif, National Treatment, dan Minyak Sawit

I. INTRODUCTION

Indonesia is *arguably* the biggest producer of palm oil in the world.¹ However, there was growing concern related to the sustainability and environmental issue of palm oil. Thus, European Union (“EU”) adopted a certain measure that affected palm oil and its derivative products, such as palm oil-based biofuels.² On 21 December 2018, the European Union (EU) issued a regulation titled Renewable Energy Directive II (RED II). RED II introduced sustainability criteria for energy for transportation use, by assessing the impact of biofuel on the environment.³ In this regard, the RED II policy introduced the indirect land-use change (ILUC) criteria for palm oil.⁴ ILUC is the result of a land change that produces the release of carbon emissions, which are mostly produced from the conversion of land for food production into land for biofuel material production.⁵ RED II states that palm oil is classified as a commodity with a “high ILUC risk” type, and as such, the EU will reduce palm oil consumption gradually and will no longer use palm oil by 2030.⁶ This policy is regarded as the “freeze and phase-out” of biofuels.⁷ In this regard, palm oil is the only product considered by the EU as a high ILUC-risk product and only the low ILUC-risk product that will enjoy the benefit from the EU.⁸ As such, this measure taken by the EU will severely impact palm oil and its derivative product from Indonesia through import restrictions.⁹

Historically, the EU has never made liberal trade its top priority, therefore, it is not a surprise that the EU’s external trade policy is commonly associated not with neutrality but with discrimination among its various trading counterparts.¹⁰ Such measures by the EU cause negative impacts on palm oil producer countries such as Indonesia and Malaysia, as both countries contributed to 85%-90% of the total global CPO production.¹¹ The EU measure was discussed at the 34th ASEAN summit in 2019, in which the government and leaders of ASEAN members acknowledged such discriminatory measures by the EU against palm oil products and their bad implications for open market access.¹² For Indonesia, the palm oil sector plays a crucial role in the Indonesian economy including employing approximately 4,5 million workers.¹³ Further, the palm oil industry contributed to approximately 4.5% of

¹ “World Trade Organization, European Union – Certain Measures Concerning Palm Oil and Oil Palm Crop Based Biofuels, Request for Consultations from Indonesia (2019)”, accessed on 26 April 2022, <https://docs.wto.org/dol2fe/Pages/SS/direct doc.aspx?filename=q:/WT/DS/593-1.pdf&Open=True>.

² “World Trade Organization”.

³ 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?”, *Yuridika* Volume 37 No 1, (2022): 214

⁴ Michelle Limenta, “Palm Oil for Fuels: WTO Rules and Environmental Protection”, *Global Trade and Customs Journal*, Vol. 15 Issue 7 (2020): 321 <https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/15.7/GTCJ2 020073>.

⁵ Limenta, “Palm Oil for Fuels”.

⁶ Stephen Mayr, Birgit Hollaus, and Madner, “Palm Oil, the RED II and WTO Law: EU Sustainable Biofuel Policy Tangled Up in Green”, *Review of European, Comparative & International Environmental Law*, Volume 30, Issue 2 (2020): 233.

⁷ Mayr, “Palm Oil, the RED II”

⁸ Mayr, “Palm Oil, the RED II”

⁹ Mayr, “Palm Oil, the RED II”

¹⁰ Marise Cremona, “Neutrality of Discrimination? The WTO, the EU, and External Trade” in Grainne De Burca & Joanne Scott (eds), *The EU and The WTO: Legal and Constitutional Issues* (London: Hart Publishing, 2001).

¹¹ De Burca, “The EU and The WTO”.

¹² De Burca, “The EU and The WTO”.

¹³ De Burca, “The EU and The WTO”.

Indonesia's Gross Domestic Product in 2019.¹⁴ Based on that fact, it is understood that the palm oil sector is important for Indonesia given its contribution to providing job opportunities and export income. However, palm oil also has a negative reputation. Although palm oil is one of the most effective materials for biofuel production, however palm oil is associated with deforestation and biodiversity loss.¹⁵ Considering that palm oil is not produced within the EU but imported, the measure from RED II may likely have a huge impact on the trade.¹⁶

Indonesia brought this issue to WTO, and in 2020, such a request from Indonesia is approved by WTO members to establish a panel to hear the dispute process.¹⁷ Indonesia argued that the action is a response to the EU arguments that the palm oil industry is responsible for deforestation, bushfire, and violation of human rights such as slavery, gender discrimination, and exploitation of labor.¹⁸ Indonesia argues that such a measure taken by the EU to phase out palm oil-based biofuels through RED II is inconsistent in nature and inconsistent with various WTO agreements such as GATT 1994.¹⁹ The articles under GATT 1994 that Indonesia argued that RED II inconsistent with several provisions are among others, Article I:1 regarding Most-Favored Nation and Article III:4 regarding National Treatment.²⁰ Both provisions are the obligations under WTO laws to prohibit discrimination among WTO members concerning trade activity.²¹ The MFN obligations under Article I:1 will focus on whether the advantage provided to certain products originating from the territory of any WTO member is not extended unconditionally and immediately to like products from another territory of all WTO members.²² On the other hand, National Treatment under Article III:4 prohibits discrimination against imported products in comparison to like domestic products.²³ However, this paper will focus on the GATT 1994 provisions only, in particular Article III:4 of the GATT 1994. The reason is, based on an analysis by the author, the RED II directive does not provide discrimination against palm oil imported from Indonesia and palm oil imported from other countries such as Malaysia and Thailand. However, the RED II may likely discriminate the palm oil-based biofuel, which originates outside the EU, and provide better treatments to non-palm oil-based biofuel sourced from like domestic products such as rapeseed and soybean. Those non-palm oil products are produced within the EU. Thus, such policy may not be inconsistent with the National Treatment principle under Article III:4 of the GATT 1994

This paper will analyze whether the issuance of RED II by the EU is inconsistent with the Article III:4 of the GATT 1994 and also whether RED II policy may be considered

¹⁴ "Indonesia At-A-Glance Country Guide", United Nations Development Programme, Published 8 May 2019) <https://www.undp.org/facs/publications/indonesia-glance-country-guide#:~:text=Indonesia%20is%20the%20world's%20largest,employment%20to%203%20million%20people>.

¹⁵ "United Nations Development Programme".

¹⁶ "United Nations Development Programme".

¹⁷ Andrew D. Mitchell and Dean Merriman, "Indonesia's WTO Challenge to the European Union's Renewable Energy Directive: Palm Oil & Indirect Land-Use Change" *Trade L. & Dev.* Vol. 548 (2020):551.

¹⁸ K.D.Raju, "Yearbook of International Environmental Law" *World Trade Organization (WTO) Disputes Journal*, Volume 30, Issue 1, (2019): 478.

¹⁹ Raju, "Yearbook of International".

²⁰ "DS593: European Union: Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels" (Dispute Settlement, 10 June 2021), World Trade Organization, accessed 25 November 2022, https://www.wto.org/english/tratop_e/dispute/cases_e/ds593_e.htm.

²¹ Peter Van den Bossche and Denise Prevost, *Essentials of WTO Law* 2nd ed., (Cambridge: Cambridge University Press: 2021), p.54

²² Van den Bossche, "Essentials of WTO".

²³ Van den Bossche, "Essentials of WTO".

as discriminative measures by the EU to palm oil producer countries under Article III:4 of the GATT 1994. This dispute has not been decided by WTO as the latest status of this dispute is waiting for the report from the Dispute Settlement Board expected to be issued before the end of the second quarter of 2022.²⁴

II. LEGAL INTERPRETATION OF ARTICLE III:4 OF THE GATT 1994

Article III:4 of the GATT 1994 is concerning non-discrimination rules in WTO rules. This article provides obligations to the member of WTO to implement the national treatment obligation for trade in goods. The basic purpose of the national treatment obligation under this Article is to ensure that all WTO members have the same and equal opportunity to export to or import from other WTO members compare to the like domestic products.²⁵ Based on the observation by Appellate Body in the EC-Seal Products case (2014), it is understood that Article III:4 promotes the equality of opportunities for imported products and domestic products and therefore, it does not require evidence of actual trade effects from a specific measure.²⁶

The primary purpose of the national treatment obligation is to ensure that the internal policy is not applied to domestic products or imported products in a way that such policy provides protection for domestic products.²⁷ Thus, Article III of the GATT 1994 requires WTO members to provide equality of competitive level for imported products against domestic products.²⁸

Further, based on WTO case law, the prohibition on discrimination measures as stipulated under Article III of the GATT 1994 covers discrimination in law and discrimination in fact.²⁹ In the case of Japan – Alcoholic Beverages II (1996), the measure at issue was tax regulation that imposed a higher tax on alcoholic beverages such as brandy, whisky, and vodka (either domestic or imported) than on *shochu* (either domestic or imported).³⁰ Even though the tax regulation was neutral-origin on its surface, however, in fact, it discriminated against imported alcoholic beverages and favored traditional domestic alcoholic beverages.

It is worth noting, however, that the national treatment obligation under Article III of the GATT 1994 does not apply to government procurement, for instance: regulations, laws, or requirements regulating the purchase by government agencies of products for governmental purposes and not with the purpose for commercial resale or for the purpose of production of goods for commercial sale.³¹ However, the national treatment obligation under Article III applies to the parties bound by the multilateral government on government procurement.³²

In order to determine whether a measure imposed by a WTO member is inconsistent or not with Article III:4 of the GATT 1994 regarding national treatment obligation, there are three questions that must be answered:³³

²⁴ Van den Bossche, "Essentials of WTO".

²⁵ Van den Bossche, "Essentials of WTO".

²⁶ Van den Bossche, "Essentials of WTO".

²⁷ Van den Bossche, "Essentials of WTO".

²⁸ Van den Bossche, "Essentials of WTO".

²⁹ Van den Bossche, "Essentials of WTO".

³⁰ Van den Bossche, "Essentials of WTO".

³¹ Van den Bossche, "Essentials of WTO".

³² Van den Bossche, "Essentials of WTO".

³³ Van den Bossche, "Essentials of WTO".

- A. Whether the measure at issues such as law, regulation, or requirement is covered by Article III:4;
- B. Whether the imported and domestic products are 'like products';
- C. Whether the imported products are provided with less favorable treatment.

The three questions above are called the three-steps test.³⁴

A. Measures covered under Article III: 4 of the GATT 1994

The first question that must be asked when testing whether such a measure is inconsistent with Article III:4 is: Does the measure that becomes an issue fall under Article III:4? The measure at issue is covered under Article III:4 when there is a regulation, law, or requirement that influences the internal sale, offering for sale, purchase, distribution, transportation, or use of products.³⁵ Thus, the scope of application of Article III:4 in relation to national treatment obligation is quite extended considering according to the established WTO case law, Article III:4 does not only cover measures that regulate but also measures that have an impact on the sale, purchase, distribution, transportation, and use of the products.³⁶ In order to be subject within the scope of application of Article III:4, it is satisfactory that a measure may change the conditions of competition level between imported and like domestic products.³⁷

The example of measures included under the scope of the national treatment obligation of Article III:4 such as minimum price requirement for domestic and imported alcoholic beverages, the limitation of the points of sale for imported alcoholic beverages, regulations that create higher transportation costs for imported wheat, and a ban on alcohol advertising.

B. 'Like Products'

The third question is related to 'like products'. A non-compliant with the national treatment obligation arises when the products at issue are 'like' products. The GATT 1994 does not define 'like products'. However, several WTO case law has provided few clarifications and established the concept of 'like products' subject to the context used.³⁸ Based on the case of EC – Asbestos (2001), the Appellate Body established a concept of 'like products' as products that share several identical or similar characteristics.³⁹

Further, to determine whether products at issue are 'like products', we can use these four criteria based on a case-by-case basis in WTO.

The criteria are as follows:⁴⁰

1. The products' properties, characteristics, and quality (e.g. their physical characteristics);
2. The products' end use (e.g. the extent to which products are capable of exercising

³⁴ Van den Bossche, "Essentials of WTO".

³⁵ Van den Bossche, "Essentials of WTO".

³⁶ Van den Bossche, "Essentials of WTO", p.74.

³⁷ Van den Bossche, "Essentials of WTO".

³⁸ Van den Bossche, "Essentials of WTO", p.58.

³⁹ Van den Bossche, "Essentials of WTO", (n 9) 316.

⁴⁰ Van den Bossche, "Essentials of WTO". 318.

similar or the same purposes)

3. The consumers' tastes and habits, which also referred to consumers' behavior and perceptions)
4. The products' tariff classification.

In all cases in WTO, the assessment of whether the products are 'like products' is an assessment of the nature of such products and the competitive relationship between and among those products in a particular market.⁴¹ The fourth criteria abovementioned are the factors used to establish such a competitive relationship.⁴²

Based on the established case law, when the only element differentiating the products at issue is their origin, therefore it can be assumed that the products are 'like'.⁴³ To conclude, in order to determine the 'like' products, we should assess the nature and the competitive relationship between the products at issue, such as the physical characteristics of the products, the end use, consumer habits, tastes, and tariff classification.

C. Treatment No Less Favourable

Providing 'treatment no less favorable to imported products means providing those products with conditions of competition no less favorable than the treatment provided to the 'like' domestic products.⁴⁴ A treatment provided is considered inconsistent with Article III:4 when the treatment changes the conditions of competition level in the relevant market which result in a bad impact on imported products.⁴⁵ There is no requirement to demonstrate the 'actual effects' from such less favorable treatment in the market, however, the potential effects of the measure may serve as a basis for a discovery that shows that a measure at issue provides 'less favorable treatment'.⁴⁶

In order to support the discovery of a treatment that provides 'less favorable' under Article III:4, there should be a demonstration of a genuine relationship between the measure at issue and its negative impact on the competitive level for imported products vis-à-vis like domestic products.⁴⁷

All in all, the national treatment obligation is designed to prohibit 'hidden protectionism' with the purpose to create equal competitive conditions.⁴⁸

III. CASE SUMMARY

Based on the latest status, below are the case summary from the beginning until the newest update:⁴⁹

- A. On 21 December 2018, The European Union issued RED II which sets a general

⁴¹ Van den Bossche, "Essentials of WTO".(n 12) 58

⁴² Van den Bossche, "Essentials of WTO".

⁴³ Van den Bossche, "Essentials of WTO". 59

⁴⁴ Van den Bossche, "Essentials of WTO". 75

⁴⁵ Van den Bossche, "Essentials of WTO".

⁴⁶ Van den Bossche, "Essentials of WTO". 76.

⁴⁷ Van den Bossche, "Essentials of WTO".

⁴⁸ Peter M Gerhart and Michael S Baron, "Understanding National Treatment: The Participatory Vision Of The WTO", *Indiana International & Comparative Law Review*, Vol. 14 No. 3 (2004), <https://doi.org/10.18060/17819>.

⁴⁹ Gerhart, "Understanding National Treatment".

renewable energy policy framework in the EU. RED II sets a target for EU members to gradually reduce the use of biofuel from 2023 to 2030 when the use will decrease to 0%.

- B. Under RED II, biofuel and palm oil, along with its derivative product, are classified as high ILUC risk due to environmental concerns and land use issues. The EU member who eliminates the use of high ILUC-risk biofuel and palm oil products and instead uses the low ILUC-risk products that meet the sustainability criteria will get incentive support for such use.
- C. By limiting and eliminating the use of only palm oil-based biofuels for the purpose of meeting EU renewable energy targets and imposing a further requirement for the biofuel to obtain a certificate, Indonesia argued that the measures at issue discriminate against palm oil and its derivative product, including palm oil-based biofuels, which are mainly imported to EU, and such measures at points are in favor of like products that are either of EU origin or imported.
- D. Further, Indonesia argued that such measures by the EU mean that there will be restrictions on importing palm oil and its derivative product.
- E. In December 2019, Indonesia requested consultations with the EU regarding the RED II-related measures that affected palm oil products trading. In January 2020, Argentina, Columbia, Malaysia, Costa Rica, Guatemala, and Thailand joined as third parties in the dispute.⁵⁰ On March 2020, Indonesia requested the establishment of a panel and on July 2020, the Dispute Settlement Body established a panel. Lastly, on June 2021, the chair of the panel informed Dispute Settlement Body that after consultations with the parties, the panel will issue its final report to the parties estimated before the second quarter of 2022.

Therefore the latest update of this case is still ongoing in the WTO and waiting for the final report and decision.

IV. LEGAL ANALYSIS

Before this article discuss whether the RED II measure is consistent with Article III:4 of the GATT 1994, it is important to check what provision under RED II may be considered to be inconsistent with Article III:4 of the GATT 1994. The relevant provision that we can consider is Article 26 paragraph 2 RED II of the GATT 1994. The article states as follows:

For the calculation of a Member State's final consumption of energy from renewable sources, the share of high indirect land use change-risk biofuels produced from food and feed crops which has a significant expansion of the production area into land with high-carbon stocks shall not exceed the level of consumption of such fuels. From the 31st of December 2023 until the 31st of December 2030, the limit shall gradually reduce to 0%.⁵¹

Further, Article 3 of the delegated act of RED II states that the product is categorized as high ILUC risk if the product is produced on land that has expanded into land with high-carbon stock higher than 10%.⁵² Based on the annex of the delegated act, palm oil has a share of expansion in the amount of 45%⁵³ and palm oil is the only product that

⁵⁰ Gerhart, "Understanding National Treatment", 478.

⁵¹ Renewable Energy Directive, Directive (EU) 2018/2001.

⁵² Commission Delegated Regulation 2019/807 (EU) dated 13 March 2019.

⁵³ Commission Delegated Regulation 2019/807 (EU) dated 13 March 2019.

has a share of expansion amount higher than 10%.

For the calculation of a Member State's gross final consumption of energy from renewable sources referred to in Article 7 and the minimum share referred to in Article 25(1), the share of high indirect land use change-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 may not exceed the level of consumption of such fuels. From the 31st of December 2023 until the 31st of December 2030, this restriction shall be gradually reduced to 0%.

To check whether the RED II measures are consistent with Article III:4 of the GATT 1994 regarding national treatment obligation, we need to check by using the test that consists of 3 questions already explained above. Based on Indonesia's request for consultations, Indonesia argued that there are two reasons why RED II measures are inconsistent with Article III:4 of the GATT 1994 or not:

- A. Restricting and eliminating the use of palm oil and its derivative products, including palm oil-based biofuels, to meet EU renewable energy targets; and
- B. Requiring the ILUC criteria for the biofuels

Therefore, Indonesia needs to show whether RED II measures issued by the EU are inconsistent with the following three elements. This paper will assess the three aspects of national treatment obligations as explained in the previous chapter.

A. Whether RED II Measures are Covered under The Scope of Article III:4 of the GATT 1994

The scope of Article I:1 can be interpreted broadly. The measures that fall under the scope of article I:1 consists of law, regulation, and requirement affecting the internal sale, purchase, distribution, and transportation. One of the measures is internal measures that can be in the form of internal regulations. In the context of RED II measures, it will bind all members of the EU in which the member shall comply with RED II policy as their internal regulations to meet the renewable target as stipulated under RED II measures. The EU member state shall use low ILUC risk-based biofuel in order to meet the renewable target set by the EU commission. Therefore, the RED II measures are likely to be covered under Article III: of the GATT 1994.

B. Whether the imported and domestic products at issue are "like products."

There are four criteria, as explained in the previous chapter, that can be used to determine whether the products at issue are 'like' products: 1) the characteristic, property, and nature of the goods; 2) the product's end-use, 3) consumer's perception and behavior, and 4) the tariff classification. Principally, to determine the product's likeness, we have to check the nature and the level of relationship competitiveness between the products.⁵⁴The factors abovementioned are the principal basis to determine the likeness of the products.

Concerning this element, Indonesia must analyze and demonstrate whether High ILUC risk products (palm oil and its derivatives) are 'like' low ILUC-risk products (non-palm oil products).⁵⁵ This comparison arises because the RED II policy explains

⁵⁴ Commission Delegated Regulation 2019/807 (EU) dated 13 March 2019, 563.

⁵⁵ Commission Delegated Regulation 2019/807 (EU) dated 13 March 2019, 564.

that the only product that is categorized as high ILUC risk is palm oil.⁵⁶ This paper will not discuss scientific evidence to demonstrate palm oil and other 'like' products, although the WTO panel shall use various proof and data to assess the likeness of these products.

The other materials (except palm oil) that can be used as the ingredient of biofuels are rapeseed, sunflower, and soybean.⁵⁷ The first element that needs to be assessed is the characteristics, property, and nature of the goods. The material and physical characteristics between the high ILUC risk biofuel (sourced from palm oil) and low ILUC risk biofuel (sourced from non-palm oil products such as soybean and rapeseed) may demonstrate differences in terms of physical, chemical, and other characteristics. However, the end use of high ILUC risk and low ILUC risk biofuel can show no significant differences. The end use of both high ILUC risk and low ILUC risk biofuel is the same in that both types of biofuel can be used as fuel for transportation and engine combustion purposes.

With respect to the Consumer's taste and perception, their preference may be influenced by the characteristics of the material of the biofuel. For example, if palm oil-based biofuel is not suitable for cold climates, therefore, the customer in a cold climate will not be persuaded to use palm oil-based biofuel.⁵⁸ However, if we use the interpretation used in US – Clove Cigarettes, the Appellate Body argued that the likeness of the products should be based on the level of competitiveness of the product. Therefore, it can be argued that the high ILUC risk biofuel and low ILUC risk biofuel will compete with each other in the biofuel market for the transportation and engine combustion process. Thus, both high ILUC risk and low ILUC risk biofuel are 'like products'.

Lastly, with respect to the tariff classification of imported biofuels, this will be subject to the composition of the biofuels imported. For example, pure unmixed biodiesel (B100) will be classified under code number 3826.00 while the blended mixture such as B5 or B20 will be classified under code number 2710.20.⁵⁹

Irrespective of that, there is no basis that can be used to classify biofuels differently based on classification number to check whether the products are high ILUC risk or low ILUC risk.⁶⁰

Therefore, while the RED II policy is origin-neutral on its surface, however, in reality, the RED II policy has a negative impact on the competitive opportunities of high ILUC risk biofuel (which is sourced mainly from palm oil imported from outside the EU) against low ILUC-risk biofuel (which sourced mainly from soybean, rapeseed, and other non-palm oil commodities that produced domestically within the EU).

C. Whether the imported products are provided with less favorable treatment

According to the data from the United States Department of Agriculture, in 2019 the list of countries that produced palm oil along with its percentage is as follows:⁶¹ 1)

⁵⁶ Commission Delegated Regulation 2019/807 (EU) dated 13 March 2019.

⁵⁷ Commission Delegated Regulation 2019/807 (EU) dated 13 March 2019, 565.

⁵⁸ Commission Delegated Regulation 2019/807 (EU) dated 13 March 2019.

⁵⁹ Commission Delegated Regulation 2019/807 (EU) dated 13 March 2019.

⁶⁰ Commission Delegated Regulation 2019/807 (EU) dated 13 March 2019.

⁶¹ Niall McCarthy, "Which Countries Produces The Most Palm Oil", (*Forbes*, 2 October 2020), accessed 21 November 2022, <https://www.forbes.com/sites/niallmccarthy/2020/10/02/which-countries-produce-the-most-palm-oil-infographic/?sh=45de34171e42>.

Indonesia (contributed to 58% of global palm oil production), 2) Malaysia (contributed to 26% of global palm oil production), 3) Thailand (contributed to 4% of global palm oil production), 4) Colombia (contributed to 2% of global palm oil production), 5) Nigeria (contributed to 1% of global palm oil production), 6) Guatemala (contributed to 1% of global palm oil production), 7) Honduras (contributed to 1% of global palm oil production), and 8) Papua New Guinea (contributed to 1% of global palm oil production). Based on the list of countries already mentioned, we can see that there are no EU member states that are included in the list. Therefore, we could argue that no EU member states produce palm oil and the EU member states have to import palm oil from the countries included in the list above.

In the context of the RED II directive, the measure is origin-neutral on the surface. The “freeze and phase-out” policy is addressed to the biofuel sourced from High ILUC products, which is from palm oil. However, when we analyze the regulation deeper, there are different treatments between the biofuels that can be counted as sustainable (high ILUC risk) and the biofuels which do not meet the sustainable and GHG criteria (low ILUC risk).⁶² The advantage of using biofuels that meet the requirements is that the EU member will enjoy the support scheme in the form of investment aid, tax exemptions, tax refunds, and price support schemes.⁶³ Thus, the implication of this policy is that the EU member who does not use such low ILUC risk will not enjoy such a support scheme. Further, by including only certain oilseed crops such as rapeseed and sunflower in the calculation of the minimum renewable energy target that must be fulfilled by the EU members in the transport sector⁶⁴, and impose an elimination policy to palm oil-based biofuel to 0% by 2030, such an approach can be likely to be considered as an advantage. Such different treatments of palm oil-based biofuel may indicate that there are “hidden” barriers to palm oil-based biofuel and create an unequal competitive level to non-palm oil-based biofuel.

Therefore, RED II arguably provides an advantage to the EU member states that use biofuels product derived from materials other than palm oil, categorized as high ILUC risk. Such an advantage will be in the form of a support scheme for that EU member. On top of the advantage mentioned above, the fact that palm oil is not produced within the EU demonstrates that the RED II directive arguably provides better treatment than non-palm oil products produced outside the EU. Therefore, better treatments are arguably provided for the domestic product produced by the EU.

The EU may argue that the decision to categorize palm oil-based biofuel as a high ILUC risk is based on the severe environmental concerns against palm oil. Such reason may become a basis the EU uses to justify their different treatment against palm oil-based biofuel. However, the EU should be able to demonstrate during the hearing process in WTO that there are severe damages and real threats to the environment, particularly to the EU. This is because palm oil is arguably not produced and grown within the EU. Therefore, it may be difficult to conclude that there is severe damage to the EU, considering there is no land conversion for palm oil production in the EU. Even if it is true that the environmental concerns are valid and exist in the general system of palm oil production, however, a country should not make a policy that discriminates against certain products based on environmental reasons that are still disputable among the nations. A government should comply with the obligations under WTO regulations and consider environmental protection. Thus, a policy that

⁶² Van den Bossche, “Essentials of WTO”, 562.

⁶³ Van den Bossche, “Essentials of WTO”.

⁶⁴ Amandari, “Is the Measure to Phase”, 242

considers environmental protection should also not discriminate against products from other states.

In summary, the measure derived from RED II by eliminating the use of palm oil for biofuel material to 0% by 2030 and providing incentives for the benefit of non-palm oil-based biofuel is likely to have a negative impact on the competitive opportunities for palm oil exporting countries such as Indonesia and other WTO members. Moreover, the fact that palm oil is not produced within the EU may give the argument that the level of treatment between non-palm oil-based biofuel (domestic product) and palm oil-based biofuel (imported product) is not equal.

V. CONCLUSION

As the non-discrimination principle is a bedrock of WTO law, all WTO members should demonstrate the non-discriminative principle, in particular to the national treatment obligation. This is because the national treatment obligation guarantees equal opportunity for WTO members between domestic and imported products.

To conclude, the RED II measures from the EU arguably did not demonstrate the national treatment obligation considering the advantages provided to the EU member states that use the low ILUC-risk product in the form of a support scheme. Such an advantage will not be provided to the EU member who imports and uses biofuels derived from palm oil. On the other hand, as the exporter of palm oil products, Indonesia will be impacted by RED II measures considering there will be restrictions on palm oil import and the elimination of the use of palm oil until it reaches 0% by 2030. Further, the EU member who uses palm oil as a material for biofuel will not enjoy the benefit of the support scheme and will not satisfy the requirement to meet the minimum renewable energy target set by the EU. Thus, RED II creates an advantage to oilseed crops other than palm oil for biofuel material sources. Palm oil is not produced within the EU compared to other oilseed crops such as rapeseed and sunflower. Therefore, the different treatments for palm oil-based biofuel and non-palm oil-based biofuel may likely violate the national treatment obligation. Environmental concerns should not be used to justify the discriminative treatment accorded to domestic products. The EU should also comply with WTO regulations; therefore, the RED II directive should not be biased against imported products while also upholding environmental standards.

Based on the preceding, the Government of Indonesia should be able to establish an argument to demonstrate to the DSB panel that RED II measures are inconsistent with Article III: 4 of the GATT 1994. We could argue that the DSB panel of WTO will likely issue a decision concluding that RED II policy is inconsistent with Article III of the GATT 1994 regarding national treatment obligation. As we are currently waiting for the decision from the DSB panel in WTO regarding this matter, the Government of Indonesia should anticipate and prepare if the panel decision is not in favor of Indonesia's interest. Therefore, if such an event occurs, the Government of Indonesia should review the panel report and establish the argument to file an appeal against the DSB panel report to Appellate Body in WTO based on the initial ideas.

BIBLIOGRAPHY

Books

Burca Grainne De. Joanne Scott (eds). *The EU and The WTO: Legal and Constitutional Issues* (London: Hart Publishing, 2001).

Bossche Peter Van den. Denise Prevost. *Essentials of WTO Law* 2nd ed. (Cambridge: Cambridge University Press: 2021).

Journals

Amandari Laras Thyrsa. Yetty Komalasari Dewi. "Is the Measure to Phase Out Crude Palm Oil in RED II discriminatory based on the World Trade Organization Law?". *Yuridika* Volume 37 No 1 (2022).

Limenta, Michelle. "Palm Oil for Fuels: WTO Rules and Environmental Protection". *Global Trade and Customs Journal*. Vol. 15 Issue 7 (2020). <https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/15.7/GTCJ2.020073>.

Mayr, Stephen. Birgit Hollaus. Madner. "Palm Oil, the RED II and WTO Law: EU Sustainable Biofuel Policy Tangled Up in Green". *Review of European, Comparative & International Environmental Law*. Volume 30, Issue 2 (2020).

Mitchell Andrew D. Dean Merriman. "Indonesia's WTO Challenge to the European Union's Renewable Energy Directive: Palm Oil & Indirect Land-Use Change". *Trade L. & Dev*. Vol. 548 (2020).

Raju, K.D. "Yearbook of International Environmental Law". *World Trade Organization (WTO) Disputes Journal*. Volume 30, Issue 1, (2019).

Gerhart Peter M. Michael S Baron. "Understanding National Treatment: The Participatory Vision Of The WTO". *Indiana International & Comparative Law Review* Vol. 14 No. 3 (2004). <https://doi.org/10.18060/17819>.

Websites

"World Trade Organization, European Union – Certain Measures Concerning Palm Oil and Oil Palm Crop Based Biofuels, Request for Consultations from Indonesia (2019)". accessed on 26 April 2022. https://docs.wto.org/dol2fe/Pages/SS/direct_doc.aspx?filename=q:/WT/DS/593-1.pdf&Open=True.

"Indonesia At-A-Glance Country Guide". United Nations Development Programme. Published 8 May 2019) <https://www.undp.org/facs/publications/indonesia-glance-country-guide#:~:text=Indonesia%20is%20the%20world's%20largest,employment%20to%203%20million%20people>.

"DS593: European Union: Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels" (Dispute Settlement, 10 June 2021). World Trade Organization. accessed 25 November 2022. https://www.wto.org/english/tratop_e/dispute/cases_e/ds593_e.htm.

Niall McCarthy. "Which Countries Produces The Most Palm Oil", (*Forbes*, 2 October 2020). accessed 21 November 2022. <https://www.forbes.com/sites/niallmcCarthy/2020/10/02/which-countries-produce-the-most-palm-oil-infographic/?sh=45de34171e42>.

Regulations

Renewable Energy Directive, Directive (EU) 2018/2001.

Commission Delegated Regulation 2019/807 (EU) dated 13 March 2019.