

## MEMORANDUM

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**To:** European Federation for Transport and Environment AISBL

**From:** Myhre & Co Advokatfirma AS

Attorney: Robert Myhre

**Date:** 14th February 2019

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### PHASE OUT OF PALM OIL AND SOY OIL AS BIOFUEL FEEDSTOCKS – ANALYSIS UNDER THE WTO AGREEMENTS

#### 1. Conclusion

- (1) Based on the information available to us, our conclusion is that a phase out of palm oil and soy oil is compatible with the WTO agreements.

#### 2. Introduction

##### 2.1 Framework of the analysis

- (2) We have been asked to analyse whether the phase out palm oil and soy oil as biofuel feedstocks is compatible with the WTO agreements.
- (3) Fuel made of renewables (biofuel) is generally considered far more environmental friendly than fossil fuel. However, research shows that not every biofuel feedstock is environmental friendly in the sense that the total CO<sub>2</sub> emission is reduced. There is a variety of research related to this topic, and the general observation is that biofuel feedstock made of palm oil and soy oil does not lead to reduced CO<sub>2</sub> emissions.

- (4) The Renewable Energy Directive (RED)<sup>1</sup> establishes an overall policy for the production and promotion of energy from renewable sources in the EU. Furthermore, all EU countries must ensure that at least 10 % of their transport fuels come from renewable sources by 2020.<sup>2</sup>
- (5) The phase out of palm oil and soy oil as biofuel feedstocks means that biofuel made of palm oil or soy oil will not count as targets of renewables in the EU after 2020.

## 2.2 What is "biofuel"?

- (6) Biofuel is fuel that is derived from biomass such as plant or algae material or animal waste. Biofuel is divided into crop biofuel (first generation biofuel) such as sugar, starch or vegetable oil, and advanced biofuel (second generation biofuel) made from sustainable feedstock such as wastes and residues. Crop biofuel constitute the majority of biofuels currently in use.
- (7) Palm oil and soy oil are crop biofuel feedstocks. The use of crop biofuel feedstocks is not itself considered harmful to the environment. The negative environmental effects are related to the production of palm oil and soy oil. Production of palm oil and soy oil leads to deforestation of rainforest, either by growing palm trees in high carbon stock areas, or growing palm trees in areas previously used for other agriculture such as growing food or feed, forcing the agriculture production to expand and make use of high carbon stock areas. This concept is known as *ILUC* – indirect land-use change. Either way, the production leads directly or indirectly to deforestation of rainforest. As the rainforest produce O<sub>2</sub> and act as a carbon sink (soaking up CO<sub>2</sub>), deforestation leads to increased greenhouse gas emissions and increased atmospheric CO<sub>2</sub>-levels.<sup>3</sup>

## 2.3 Further analysis – the WTO

- (8) In the following, we will assess whether a phase out palm oil and soy oil as biofuel feedstocks is compatible with the WTO agreements. The WTO agreements were created to lower international trade barriers and promote international trading. One of the most important WTO agreements is the GATT (The General Agreement on Tariffs and Trade). The GATT aims to secure trade without discrimination and equal treatment of foreigners and locals.
- (9) However, the GATT also contains exceptions for e.g. measures implemented to protect the environment. The purpose of the GATT is not to prohibit measures which are implemented to increase sustainable consumption, sustainable trade and a sustainable way of living. These exceptions will be further explained in the following. In general, a measure implemented to protect the environment must be supported by scientific evidence that the measure is suitable for achieving the relevant goal.
- (10) First, we will present research findings relating to the environmental impact of biofuels feedstocks. Furthermore, we will assess the relevant WTO provisions which may impose

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<sup>1</sup> Directive 2009/28/EC <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0028> 25.01.2019.

<sup>2</sup> <https://ec.europa.eu/energy/en/topics/renewable-energy/renewable-energy-directive> 25.01.2019.

<sup>3</sup> <https://ec.europa.eu/energy/en/topics/renewable-energy/biofuels/land-use-change> 25.01.2019.



restrictions on the phase out palm oil and soy oil as biofuel feedstocks. The overall question is whether such phase out is compatible with the WTO agreements.

### 3. Research findings – conclusions

- (11) The research is related to estimation of carbon emissions due to land use changes (ILUC risk) and deforestation.

*"Most of today's biofuels are produced from crops grown on agricultural land such as wheat and rapeseed. When agricultural or pasture land previously destined for the food, feed and fibre markets is diverted to the production of biofuels, the non-fuel demand will still need to be satisfied. Although this additional demand can be met through intensification of the original production, bringing non-agricultural land into production elsewhere is also possible. It is in the latter case that land-use change occurs indirectly, (hence the term indirect land-use change)".<sup>4</sup>*

- (12) Given the wide range of evidence available, and that this evidence is not always consistent, it is not trivial to pick the most appropriate way to assess overall ILUC risk for each biofuel feedstock. In the recast RED II, ranges of estimated ILUC values are provided for groups of crops based only on the results of MIRAGE modelling. Based on these values, one would conclude that oil crops for biodiesel have a higher expected ILUC emission than either sugary or starchy crops for ethanol production.

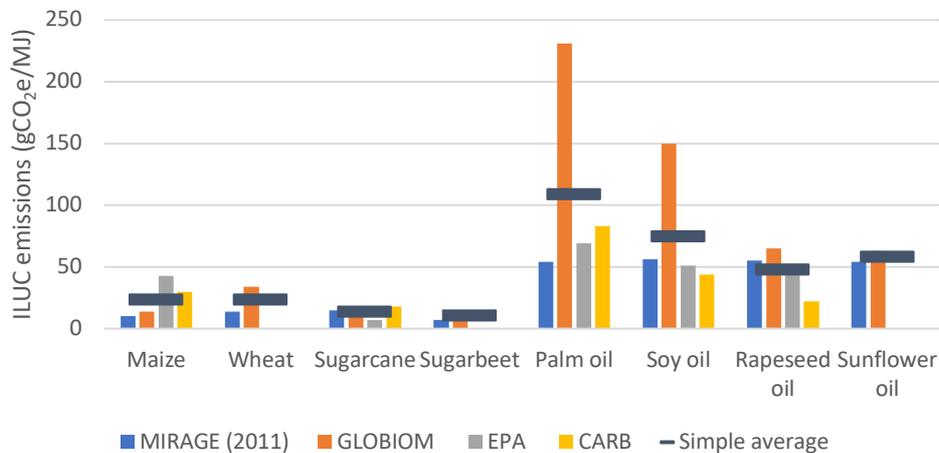


Figure 1 ILUC results from key regulatory ILUC studies\*

\*U.S. ILUC estimates adjusted to reflect the EU's convention of 20 year time accounting (multiplied by a factor of 1.5).

- (13) There are several approaches to consider likely ILUC emissions. The EU study GLOBIOM shows that palm oil and soy oil has substantially higher emission levels than the other

<sup>4</sup> Commission Staff Working Document – Impact Assessment p. 11, [https://ec.europa.eu/energy/sites/ener/files/swd\\_2012\\_0343\\_ia\\_en.pdf](https://ec.europa.eu/energy/sites/ener/files/swd_2012_0343_ia_en.pdf) 24.01.2019.



feedstocks. The US studies EPA and CARB also show that palm and soy are far above the other feedstocks with regards to emission levels.

- (14) Taking a simple average<sup>5</sup> of the four results it is apparent that palm oil has generally been modelled with higher expected ILUC emissions than any other feedstocks (109 gCO<sub>2e</sub>/MJ), with soy oil the second highest (75 gCO<sub>2e</sub>/MJ) followed then by rapeseed and sunflower oil, then by starchy crops, then by sugary crops with consistently low ILUC estimates.
- (15) Even though the different models give slightly different results in the estimated CO<sub>2</sub> emission levels, there are clear indications that palm oil and soy oil as biofuel feedstocks will lead to increased CO<sub>2</sub> emissions due to ILUC.
- (16) The RED II classifies high ILUC-risk biofuel feedstocks as feedstocks for which a "*significant expansion of the production area into land with high-carbon stock is observed*".<sup>6</sup> This definition raises two questions; (i) what is land with high-carbon stock areas, and (ii) what is "significant expansion" into such areas.
- (17) In summary, the RED II defines high carbon stock land as wetlands, continuously forested areas, and land spanning more than one hectare with trees higher than five metres. High - carbon stock therefore not only covers areas that would be universally recognised as forests, but also some woody savannahs and shrubland, and any wetlands including peatland.
- (18) It is difficult to determine how "significant expansion" should be interpreted. Furthermore, there is no single global dataset that would allow the exact identification of the fraction of expansion of each biofuel feedstock that has been directly associated with incursion onto high carbon-stock lands in any given time period. Rather, the available evidence consists of a combination of agricultural statistics, econometric analyses and remote sensing studies, with a wide variation in the level of detail available for different crops, different regions and different time periods.
- (19) Research evidence shows that there is a strong link between oil palm expansion and deforestation and peat drainage in Southeast Asia. Palm oil is mainly produced in regions where there is a high risk of agricultural expansion driving land use change in high carbon stock areas. Research (eg. Barthel et al., 2018) finds that, "*there is a high degree of confidence that the expansion of oil palm cultivation has resulted in significant deforestation in Indonesia and Malaysia in particular.*" Thus, it is clear that there is a strong link between palm oil production and expansion into high-carbon stock areas. Whether the expansion is "significant" will depend on what threshold is applied. However, the research evidence provided shows that the numbers are quite high, which means that the expansion is likely to be considered "significant" in accordance with the wording of the RED II.
- (20) As regards to soy oil, the major soy producing nations are Brazil, Argentina, and the United States. The carbon stock expansion in the US is quite low, but in Latin America, the numbers are high and in 2016, 47% of global soy production was by Brazil and Argentina. In the period 2012-2015, 62 % of the soybean harvested area expansion was in Latin America.
- (21) South America and Southeast Asia are identified by (Curtis, Slay, Harris, Tyukavina, & Hansen, 2018) as the regions where there is by far the strongest link between expansion of

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<sup>5</sup> A simple average may not always be the most appropriate way to weight results of different studies, but provides a first indication of how results compare across the literature considered.

<sup>6</sup> Article 26 of the RED II.



commodity agriculture and deforestation. The strength of the association between forest loss and soy expansion in Latin America is therefore central in understanding whether soy should be considered high ILUC-risk. Thus, the research evidence provided shows that there is a strong link between soy oil production and expansion into high-carbon stock areas. There are strong arguments that the expansion should be considered "significant".

- (22) For the purpose of this analysis, it is not necessary (or possible) to establish the exact scientific consequences of the use of palm oil and soy oil as biofuel feedstocks, but it is sufficient to provide research showing that there is a strong connection between the use of palm oil and soy oil and increased CO<sub>2</sub> emissions, and expansion into high-carbon stock areas. In our opinion, the evidence provided is sufficient to establish such a connection.

## 4. Applicable WTO Provisions

### 4.1 General

- (23) As mentioned in the introduction, the GATT sets out requirements to secure international trade without discrimination, and equal treatment of foreigners and locals. The agreement prevents the contracting parties to implement measures which are discriminatory.
- (24) Furthermore, the WTO Agreement on Technical Barriers to Trade (TBT) seeks to ensure that technical negotiations and standards do not create unnecessary obstacles to trade.
- (25) The measure in question is a phase out of palm oil and soy oil as biofuel feedstocks, and the goal is to reduce and prevent deforestation of rainforest and thereby reducing CO<sub>2</sub>-emission. In the following, we will analyze the compatibility of such measure under the GATT and the TBT Agreement.
- (26) It is our opinion that the legitimacy of a phase out must be assessed in relation to each biofuel feedstock. This means that palm oil and soy oil must be assessed independently, as there are different scientific results related to each feedstock. However, for the purpose of this analysis, the two feedstocks will be considered jointly, as the analysis is the same for both palm oil and soy oil.

### 4.2 The GATT art. III – discriminatory measures

- (27) Article III:4 of the GATT prohibits measures which discriminate "like products" based on the country of exportation:

*"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."*

- (28) The proposed measure will not lead to import restrictions on biofuel made of palm oil or soy oil. Furthermore, the measure will not limit the possibility to sell and purchase palm oil and soy oil, or biofuel made from these feedstocks, in the EU. However, the measure will limit the demand for palm oil and soy oil in the EU, compared with the situation today. As biofuel made high ILUC risk feedstocks no longer will count in the EU renewables target, the EU market demand of such biofuel is likely to decrease. However, regulations leading to a demand decrease is not itself considered a trade restriction under the WTO agreements.



- (29) The EU renewables requirement will therefore lead to an increase in the demand for other renewable energy sources for use in the transport sector. As new research is developed, the exact content in the EU renewables requirement may be adjusted and developed to ensure that the regulations in fact to promote environmentally friendly solutions. Thus, biofuel feedstock producers are not in any way guaranteed that their goods will be demanded in the EU, as the markets needs to be developed according to the developed research findings.
- (30) For the purpose of this analysis, it is not necessary to finally conclude on whether or not the measure will be deemed as discriminatory under the WTO GATT art. III:4, as the measure falls under the exception in the GATT art. XX paragraph g, and therefore is compatible with the GATT. This will be elaborated in the following.

#### 4.3 The GATT art. XX - exceptions for environmental protection

##### 4.3.1 General

- (31) Discriminating measures relating to environmental protection may be justified under GATT art. XX. There are mainly two exceptions relating to environmental protection in art. XX – namely paragraph b and g. Paragraph b relates to measures which are *necessary to protect human, animal or plant life or health*. Paragraph g relates to measures *relating to the conservation of exhaustible natural resources*.
- (32) Both paragraphs may be applicable for preventing deforestation of rainforest, and thereby reducing CO<sub>2</sub>-emissions. Paragraph b contains a necessity-requirement, and thus has a somewhat higher threshold. In comparison, paragraph g requires that the measure must be "relating to" the conservation of exhaustible natural resources.
- (33) It follows from WTO case law that article XX analysis is two-tiered.<sup>7</sup> First, the measure must fall under one of the categories in the paragraphs a to j. Second, the measure must be justified under the *chapeau* in article XX first paragraph. Furthermore, the chapeau sets out two requirements for measures which fall under one of the categories in paragraphs a to j. The measure must not constitute a means of *arbitrary or unjustifiable discrimination*. In addition, the measure must not constitute a *disguised restriction on international trade*. If the measure falls under one of the paragraphs a to j, and fulfils the two requirements under the chapeau, the measure is considered compatible with the GATT.
- (34) In the following, we will apply GATT art. XX paragraph g on the proposed measure (phase out of palm oil and soy oil as biofuel feedstocks) and examine whether the measure will be compatible with the GATT.

##### 4.3.2 Measures relating to the conservation of exhaustible natural resources

The purpose of art. XX paragraph g is to "*ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources*".<sup>8</sup>

- (35) This exception contains three separate requirements. First, the measure must concern "exhaustible natural resources". Second, the measure must relate to the "conservation" of such resources. Third, the measure must be made effective in conjunction with restrictions on domestic production or consumption.

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<sup>7</sup> E.g. DS58 US – Shrimp - Article 21.5 Panel Report.

<sup>8</sup> The Analytical Index of the GATT p. 584 [https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art20\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf)



- (36) The first question is whether the measure is relating to "exhaustible natural resources". WTO case law shows that the interpretation of "exhaustible natural resources" is expansive and previous examples of what has been considered exhaustible natural resources are dolphins, sea turtles, and clean air.<sup>9</sup> There is no requirement that the resource is rare or endangered to be considered exhaustible.<sup>10</sup> It is undisputed that the rainforest is considered a natural resource, and "*tropical rain forests, which are important for biodiversity, are most appropriately managed as exhaustible resources due to their slow growth*".<sup>11</sup> The rainforest cannot regenerate under the current land-use practices.

*"Rainforest ecosystems are vulnerable to disruption because of their internal complexity and interdependence. Because there are few individuals of any one species, removal of even small numbers of them has a substantial effect on species composition and interrelationships in the forest by depressing reproduction, and long periods of time will be required to reconstruct viable populations. Forests are also dependent upon their closed nutrient cycles; disruption of these cycles by exposure and extraction of trees can cause their destruction."*

*"It may take one thousand years for a rainforest to recover its original level of biomass after clearing and burning, since few seeds and seedlings of rainforest plants can survive burning."<sup>12</sup>*

- (37) Deforestation of the tropical rainforest also leads to extermination of several species, which itself can be considered an exhaustible natural resource. Thus, based on WTO case law and legal theory, the rainforest must be considered an exhaustible natural resource in relation to the GATT art. XX paragraph g.
- (38) The next question is whether the measure is relating to the "conservation" of the rainforest. As the measure aims to prevent and reduce deforestation of the rainforest, it is undisputed that the measure is relating to the conservation of the rainforest. Thus, this requirement is fulfilled.
- (39) Furthermore, the measure must be "relating to" the conservation of the rainforest. This requirement has been interpreted in WTO case law, e.g. US – Tuna I and II, and "*while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as 'relating to' conservation within the meaning of Article XX(g)*".<sup>13</sup>
- (40) The next question is whether the phase out of palm oil and soy oil as biofuel feedstocks is "primarily aimed at" the conservation of the rainforest. There must be a connection between the stated environmental policy goal and the measure at issue. In DS58 US – Shrimp the Appellate Body concluded that the US import ban on shrimp was "reasonably related" to the turtle conservation measures sought to be achieved.
- (41) A phase-out of palm oil and soy oil as biofuel feedstock in the in the RED will reduce the EU market for such biofuel feedstocks by 2030. The EU market for biofuels, and thereby biofuel

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<sup>9</sup> E.g. DS58 US - Shrimp, DS2 US - Gasoline, DS 381 US - Tuna II.

<sup>10</sup> International Law & the Environment, Patricia Birnie, Alan Boyle, Catherine Redgwell, 3. edition, 2009, p. 772.

<sup>11</sup> Environmental and Natural Resource Economics, Timothy C. Haab Ph.D., John C. Whitehead (2014) p. xxii.

<sup>12</sup> <http://www.rainforestconservation.org/rainforest-primer/3-rainforests-in-peril-deforestation/f-consequences-of-deforestation/9-difficulty-of-reforestation/> 25.01.2019.

<sup>13</sup> The Analytical Index of the GATT p. 584 [https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art20\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf)



made from palm oil, was largely expanded when the EU implemented the RED and the 10 % renewables target. A phase out of palm oil and soy oil as permitted feedstocks is likely to cause a reduction of the EU market for palm oil and soy oil. Furthermore, a reduction of the EU market is likely to lead to less production of palm oil and soy oil, and thereby less deforestation of the rainforest.

- (42) Consequently, the phase out of palm oil and soy oil as biofuel feedstocks is "primarily aimed" at the conservation of the rainforest and reduction of CO<sub>2</sub> emission. Thus, this requirement is fulfilled.
- (43) Lastly, the measure must be "made effective in conjunction with restrictions on domestic production or consumption". The Appellate Body interpreted this requirement in the DS2 US – Gasoline case: *"we believe that the clause "if such measures are made effective in conjunction with restrictions on domestic product or consumption" is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline"*.
- (44) The phase out of palm oil and soy oil as biofuel feedstocks means that these biofuel feedstocks will not count in any RED targets, irrespective of production country. Palm oil is currently not grown in the EU, and soy oil is grown in the EU to some extent. For both palm oil and soy oil, there will be no differentiation based on where the biofuel is produced. For soy oil, the measure will affect producers both in the EU and the rest of the world. As palm oil is currently not grown in the EU, the measure will in practice only affect producers outside of EU. However, this does not imply that the measure is discriminating on international trade. The measure will affect all palm oil producers worldwide. Hence, this requirement is fulfilled.
- (45) Based on the above, it is our opinion that the requirements in the GATT art. XX paragraph g is fulfilled. However, the requirements in the introductory clause of art. XX, the chapeau, must also be fulfilled.

#### 4.3.3 Application methods – the chapeau of art. XX

- (46) If a measure falls under one of the exceptions listed in art. XX paragraphs a to j, it must be assessed whether the application method is justifiable under the chapeau in the introductory clause of art. XX. First, the measure must not be applied in a manner which leads to arbitrary or unjustifiable discrimination. This means that the measure must not be applied differently to countries where the same conditions prevail, but also that the measure must not be applied uniformly to countries where the same conditions do not prevail.
- (47) The proposed measure in question will be applied uniformly in the EU, and towards all palm oil and soy oil producing countries. The measure will not differentiate between different countries, as the measure consists of biofuels made from palm oil and soy oil feedstocks being phased out as acceptable biofuels in the renewables target. Consequently, the measure will not be applied in an arbitrary or unjustifiable manner.
- (48) Second, the measure must not be applied as a disguised restriction on international trade. It is the application of the measure and not the measure itself that shall be examined in this regard. The measure in question will be applied through standard EU regulations with the standard decisional processes. There are no indications that such a measure will be applied in a manner that constitutes a disguised restriction of international trade. Therefore, it is our opinion that the chapeau of art. XX is fulfilled in the present case.



#### 4.3.4 Conclusion

(49) The requirements in the GATT art. XX paragraph g are fulfilled, and the measure must be deemed justifiable under GATT art. XX and therefore consistent with the GATT,

#### 4.4 The TBT art. 2.1 and 2.2

(50) The TBT art. 2 regards technical regulations of products. The provision aims to ensure equal treatment of "like products" from national origin and products originating from other member countries.

(51) Art. 2.1 has the following wording:

*"Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country."*

(52) Furthermore, it is stated in art. 2.2 that:

*"Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products."*

(53) If a phase out of palm oil and soy oil as acceptable biofuel feedstock under the renewable energy targets in the EU is considered a discriminating technical regulation, the question is whether the regulation fulfils a "legitimate objective", and therefore compatible under the TBT art. 2.2.

(54) Protection of the environment is listed as a legitimate objective, although the list is non-exhaustive. A technical regulation applied to protect the environment shall not be more trade-restrictive than necessary to ensure the relevant environmental protection, taken into account the risk of non-fulfillment. In the assessment of the consequences of non-fulfillment, the available scientific and technical information must be reviewed.

(55) The Appellate Body interpreted the TBT art. 2.2 in US – Tuna II:

*"In sum, we consider that an assessment of whether a technical regulation is 'more trade-restrictive than necessary' within the meaning of Article 2.2 of the TBT Agreement involves an evaluation of a number of factors. A panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure."*



- (56) As briefly explained in section 3 of this analysis, there is solid evidence that the use of palm oil and soy oil as biofuel feedstocks leads to deforestation of the rainforest and thereby increased CO<sub>2</sub> emission. Due to the application of different models, the exact emission levels are not established. However, it is not necessary to establish the exact consequence of the production of palm oil and soy oil, as there is a strong causal connection between deforestation and use of palm and soy oil as biofuel feedstocks. Both soy oil and palm oil are considered forest risk commodities, and the phase out of palm oil and soy oil as biofuel feedstocks will constitute a large contribution in the pursuit of preventing deforestation and increased CO<sub>2</sub> levels.
- (57) Furthermore, there is a strong connection between the production of palm oil and soy oil for biofuels and the renewables target in the EU. However, the phase out will not be trade restrictive, as there will be no restrictions relating to the import, export, sale, or use of palm oil and soy oil, or biofuel made from these feedstocks. Therefore, the legitimate objective environmental protection outweighs the potential trade-restricting effects in the balancing of interests as set out in the TBT art. 2.2.
- (58) Consequently, our opinion is that a phase out of palm oil and soy oil as biofuel feedstocks under the EU renewable targets is compatible with the TBT art. 2.1 and 2.2.

#### 4.5 Conclusion

- (59) Based on the information available to us, it is our opinion that a measure implemented by the EU, consisting of a phase out of biofuels made from palm oil and soy oil feedstocks as acceptable feedstocks under the renewables target in the EU, will be consistent with the WTO agreements. Even though the measure may affect the trade of palm oil and soy oil into the EU, the measure is not trade restricting, and it is justifiable under the environmental protection provisions in the WTO agreements.

#### 4.6 Differentiation between oil crop feedstocks

- (60) This analysis has primarily concerned palm oil and soy oil. The research evidence, as illustrated in section 3 above, shows that palm oil and soy oil have the highest CO<sub>2</sub> emissions compared to other crop biofuel feedstocks. However, also rapeseed oil and sunflower oil production leads to high CO<sub>2</sub> emissions. For the purpose of analyzing measures under the WTO agreements, each oil crop feedstock must be assessed independently, as there is different research related to each feedstock.

### 5. ILUC-risk categories – challenges

- (61) The EU is discussing to implement two different categories of ILUC-risk; low indirect land-use change risk and high indirect land-use change risk.
- (62) Low indirect land-use change risk (low ILUC-risk) biofuels means biofuels the feedstocks of which were produced within schemes which reduce the displacement of production for purposes other than for making biofuels and which were produced in accordance with the sustainability criteria for biofuels set out in Article 17 of Directive (EU) 2015/1513.
- (63) High indirect land-use change risk (high ILUC-risk) feedstocks are food or feed crops for which a significant expansion of the production area into land with high carbon stock is observed.



- (64) High indirect land-use change risk feedstocks will not count towards the EU renewables target. Having two categories of ILUC risk (high and low) means that feedstocks classified as low ILUC risk will be counted towards the renewables target. For palm oil or soy oil producers it will be of major importance to get classified as low ILUC risk to be attractive on the EU market.
- (65) A low ILUC risk category will give palm oil producers and soy oil producers who can document a sustainable production (with low ILUC emissions) an advantage as their biofuel will be counted in the EU renewables target.
- (66) However, there significant concerns related to operating with two such categories. There are several practical implications with having two categories, and especially with regards to the monitoring of the different categories.
- (67) Because the monitoring of the different categories will be impractical, there is a great chance that the two categories will be illusory, and that high ILUC-risk feedstocks potentially will be classified as low ILUC-risk feedstocks in the absence of necessary monitoring. An implementation of two risk categories is likely to counteract the progress of phasing out biofuel feedstocks leading to increased CO<sub>2</sub> emissions.
- (68) A differentiation based on production method is therefore impractical to implement, and the differentiation is likely to be illusory.
- (69) It is our opinion that two ILUC risk categories are unnecessary for the measure to be compatible with the WTO agreements. The evidence for the strong connection of palm oil to conversion of high carbon stock land is very clear, and a phase-out of palm oil in general will be justified under the exceptions for environmental protection in the WTO agreements. Thus, it is not necessary to implement two categories of ILUC risk to justify a phase out of palm oil, and most likely also soy oil.
- (70) Palm oil would be likely to be assessed as high ILUC-risk on any characterization of significance, but for soy the deforestation link is somewhat weaker and thus the threshold set may well determine whether there will be a longer term market for soy biodiesel in the EU.

