

# ENVIRONMENTAL POLICIES MEET INTERNATIONAL TRADE LAW: USING WTO'S BIOFUELS DISPUTE TO FORECAST THE FATE OF EU'S DEFORESTATION ACT

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**Abstract:** This article examines the intersection between environmental policies and international trade law by analyzing the World Trade Organization (WTO) Panel Report on the European Union (EU) biofuel regulations and forecasting the implications for the EU's Deforestation Act. The EU's strict measures on biofuels, particularly those affecting palm oil-based products, were challenged by Malaysia within the WTO framework. The findings of the Dispute Resolution Panel, which scrutinized the application of the Technical Barriers to Trade (TBT) Agreement and the General Agreement on Tariffs and Trade (GATT), provide a precedent for understanding the compatibility of the EU's Deforestation Act with international trade law. Using a comparative methodology, the panel's interpretations and their implications for environmental and trade policies are assessed. The EU's Deforestation Act may face similar legal challenges. This analysis helps elucidate the complex balance between promoting trade liberalization and creating space for environmental measures. The study's findings highlight the potential for conflict and convergence between trade obligations and environmental objectives, suggesting a future trajectory for international trade disputes involving environmental legislation.

**Keywords:** International Trade Law. WTO's Dispute Settlement Body. Sustainability. European Union. Biofuel Regulations. Deforestation Act.

**Resumo:** Este artigo examina a interseção entre políticas ambientais e o direito do comércio internacional, analisando o Relatório do Painel da Organização Mundial do Comércio (OMC) sobre as regulamentações de biocombustíveis da União Europeia (UE) e prevendo as implicações para a Lei de Desmatamento da UE. As medidas rigorosas da UE sobre biocombustíveis, particularmente aquelas que afetam produtos à base

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de óleo de palma, foram contestadas pela Malásia no âmbito da OMC. As conclusões do Painel de resolução de disputas, que examinaram a aplicação do Acordo sobre Barreiras Técnicas ao Comércio (TBT) e o Acordo Geral sobre Tarifas e Comércio (GATT), fornecem um precedente para a compreensão da compatibilidade da Lei de Desmatamento da UE com o direito do comércio internacional. Usando uma metodologia comparativa, avalia-se interpretações do painel e suas implicações para políticas ambientais e comerciais. A Lei de Desmatamento da EU pode enfrentar desafios jurídicos semelhantes. Esta análise ajuda a elucidar o complexo equilíbrio entre a defesa da liberalização comercial e a criação de espaço para medidas ambientais. Os resultados do estudo destacam o potencial de conflito e convergência entre obrigações comerciais e objetivos ambientais, sugerindo uma trajetória futura para disputas comerciais internacionais envolvendo legislação ambiental.

**Palavras-Chave:** Direito do Comércio Internacional. Órgão de Solução de Controvérsias da OMC. Sustentabilidade. União Europeia. Regulamentos de Biocombustíveis. Lei Antidesmatamento.

## 1. Introduction

The European Union's (EU) evolving environmental regulations continue to stir significant discourse within international trade law, especially concerning their compliance with the World Trade Organization (WTO) regulations. Recent disputes, such as the case concerning EU regulations on biofuels, particularly those derived from palm oil, have spotlighted the complex interplay between environmental objectives and trade obligations.

This article explores the WTO panel report on EU biofuel regulations, which addressed controversial measures impacting palm oil-based biofuels, as a critical precedent for analyzing the EU's Deforestation Act. Its approach involves a review of the arguments of the parties, the Panel's reasoning, and the implications of specific articles under the Technical Barriers to Trade (TBT) Agreement and the General Agreement on Tariffs and Trade (GATT), to gauge how these considerations could similarly apply to the EU's Deforestation Act.

The paper begins by detailing the legislations and policies related to biofuels that were challenged in the WTO, summarizing the dispute's core issues. Following this, it delves into an analysis of the relevant WTO agreements, focusing on the Panel's interpretations and decisions. The final part of the paper focusses on the Deforestation Act, exploring its objectives and mechanisms, and speculates on how the biofuels

dispute might influence future legal challenges and trade relationships under this new legislative framework.

## 2. EU's Biofuel Regulations and WTO Dispute Overview

This section explores EU's biofuel regulations and policies that became the focus of the WTO dispute "EUROPEAN UNION AND CERTAIN MEMBER STATES – CERTAIN MEASURES CONCERNING PALM OIL AND OIL PALM CROP-BASED BIOFUELS" (WT/DS600/R)<sup>3</sup>, summarizing the main issues and challenges raised during the proceedings.

The EU has implemented a legislative framework to regulate the production and use of biofuels, addressing the environmental concerns associated with Indirect Land Use Change (ILUC). Key pieces of legislation include Directive 2003/30/EC and the Renewable Energy Directives (RED I and RED II)<sup>4</sup>. Initially, Directive 2003/30/EC and RED I aimed to encourage EU member States to substitute a portion of their transport energy consumption with biofuels, reducing reliance on fossil fuels and lowering greenhouse gas emissions<sup>5</sup>. Over time, these directives were amended to integrate concerns about the environmental impacts of biofuel production, particularly focusing on ILUC, which encompasses changes in land use patterns, such as deforestation, potentially spurred by increased biofuel production<sup>6</sup>.

RED II was introduced to further promote the use of renewable energy sources while addressing ILUC more directly. It established more

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<sup>3</sup> WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel**, 2024. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600R.pdf&Open=True>. Access on Mar. 30, 2024.

<sup>4</sup> EUROPEAN COMMISSION. **Renewable Energy Directive**. Available on: [https://energy.ec.europa.eu/topics/renewable-energy/renewable-energy-directive-targets-and-rules/renewable-energy-directive\\_en](https://energy.ec.europa.eu/topics/renewable-energy/renewable-energy-directive-targets-and-rules/renewable-energy-directive_en). Access on Apr. 18, 2024.

<sup>5</sup> WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel**, 2024. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600R.pdf&Open=True>. Access on Mar. 30, 2024. p. 30-31.

<sup>6</sup> WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel**, 2024. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600R.pdf&Open=True>. Access on Mar. 30, 2024. p. 32-33.

rigorous sustainability criteria for biofuels, including explicit limits on biofuels produced from food and feed crops and aims to boost the use of more sustainable biofuels that do not contribute to deforestation or ILUC<sup>7</sup>.

The directive relies on three specific measures: i) 7% cap on biofuels from food and feed crops, to prevent excessive use of agricultural land for biofuel production that might otherwise serve as food production; ii) high ILUC-risk cap and phase-out to set limits on biofuels considered to have a high ILUC risk; and iii) low ILUC-risk certification<sup>8</sup>.

The dispute began when Malaysia filed a complaint in the WTO, targeting EU's biofuel regulations that it claimed disproportionately impacted palm oil-based biofuels<sup>9</sup>. As per WTO dispute settlement procedures, the first step taken by Malaysia was to request formal consultations with the EU<sup>10</sup>, seeking to resolve the disagreement bilaterally<sup>11</sup>.

When the consultations did not lead to a resolution, Malaysia requested the establishment of a Panel to adjudicate the dispute. The Dispute Settlement Body (DSB) of the WTO responded by setting up the Panel, which was tasked with examining the measures in question under the relevant agreements, including the TBT and GATT<sup>12</sup>.

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<sup>7</sup> WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel**, 2024. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600R.pdf&Open=True>. Access on Mar. 30, 2024. p. 33-37.

<sup>8</sup> WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel**, 2024. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600R.pdf&Open=True>. Access on Mar. 30, 2024. p. 38-45.

<sup>9</sup> WTO. **Dispute settlement, DS600**. Available on: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds600\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds600_e.htm). Access on March 30, 2024.

<sup>10</sup> WTO. **European Union and certain member states – certain measures concerning palm oil and oil palm crop-based biofuels. Request for consultations by Malaysia**, 2021. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600-1.pdf&Open=True>. Access on Apr. 04, 2024.

<sup>11</sup> WTO. **Understanding on rules and procedures governing the settlement of disputes**, 1994. Arts. 3.7 and 4.3. Available on: [https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm#fntext3](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#fntext3). Access on Apr. 18, 2024.

<sup>12</sup> WTO. **European Union and certain member states – certain measures concerning palm oil and oil palm crop-based biofuels. Request for the establish-**

Malaysia's primary claim was that the EU's biofuel regulations were discriminatory against palm oil-based biofuels and constituted unnecessary obstacles to international trade, thereby violating both the TBT and GATT agreements<sup>13</sup>. On the other hand, the EU defended its regulations as necessary to protect the environment from the adverse impacts associated with ILUC, asserting that the measures were justified under the exceptions provided for environmental protection in the WTO agreements<sup>14</sup>.

The final Panel Report included a detailed analysis of the claims, examining the necessity and proportionality of the EU's measures and whether they were unfairly discriminatory<sup>15</sup>. The Panel's findings were mixed, acknowledging some EU objectives as legitimate, but questioning the proportionality and discriminatory impact of the measures on Malaysian palm oil-based biofuels<sup>16</sup>.

The complexity of this case sets an important precedent for analyzing future disputes involving environmental regulations and trade, such as the EU's Deforestation Act. This analysis illustrates the intricate balance the WTO seeks to maintain between upholding free trade principles and allowing room for significant environmental protection measures.

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**ment of a panel by Malaysia.** Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600-6.pdf&Open=True>. Access on Apr. 18, 2024.

<sup>13</sup> WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel – Addendum 1**, 2024. Annex B-1. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600RA1.pdf&Open=True>. Access on Mar. 30, 2024.

<sup>14</sup> WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel – Addendum 1**, 2024. Annex B-2.

<sup>15</sup> WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel**, 2024. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600R.pdf&Open=True>. Access on Mar. 30, 2024. Findings. p. 76-344.

<sup>16</sup> WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel**, 2024. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600R.pdf&Open=True>. Access on Mar. 30, 2024. Findings. p. 76-344.

### 3. Panel Interpretations on TBT and GATT in the EU Biofuel Case

This section analyzes the main articles under which Malaysia has lodged its complaint against the EU's biofuel regulations, asserting violations of the TBT Agreement and the GATT to elucidate the legal grounds of the dispute and the rationale behind the Panel's conclusions.

#### 3.1. EU'S violations of the TBT

The Panel's decision was to first address claims under the TBT Agreement, before turning to claims under the GATT, as TBT provisions assesses the measures more specifically and in greater detail, therefore that is the order this article follows as well.<sup>17</sup>

##### 3.1.1. Arbitrary or unjustifiable discrimination under Art. 2.1 of the TBT

Initially, the Panel concluded that Malaysia has failed to establish that the 7% maximum share and the high ILUC-risk cap and phase-out are inconsistent with the obligation to ensure that technical regulations are not more trade-restrictive than necessary to fulfil a legitimate objective, under Art. 2.2 of the TBT.

The Panel also concluded that Malaysia has failed to establish that the high ILUC-risk cap and phase-out is inconsistent with the obligation in Art. 2.4 of the TBT to use relevant international standards as a basis for technical regulations.

Therefore, the Panel analyzed Art. 2.1 of the TBT Agreement in light of its findings under Articles 2.2 and 2.4, considering two relevant factors: a) the imported products are like domestic products and/or products originating in other countries; and b) the treatment accorded to imported products is less favorable than accorded to like products, that is, b.i) whether the technical regulation modifies the conditions of competition in the relevant market to the detriment of the group of

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<sup>17</sup> Also, Annex 1A establishes that TBT provisions prevail over those of GATT 1994 in case of conflict. This hierarchical relationship justifies the precedence of the TBT Agreement in the case analysis. WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel**, 2024. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600R.pdf&Open=True>. Access on Mar. 30, 2024. Findings, para. 7.65.

imported products and b.ii) whether such detriment stems exclusively from a legitimate regulatory distinction.

Turning to factor a), that is the similarity analysis, the Panel addressed characteristics and physical properties of the products, the extent to which the products can serve end-users, consumers' perception, and the tariff classification. It concluded that the domestic products stand in a sufficiently close competitive relationship with imported products.

Considering that the scope of the obligation in Art. 2.1 of the TBT overlaps with the non-discrimination obligation in Art. III:4 of the GATT, Art. III:4 has been used to interpret Art. 2.1. Establishing less favorable treatment under Art. 2.1 involves assessing whether a technical regulation “modifies the conditions of competition to the detriment of imported products compared to domestic products”.<sup>18</sup>

The Panel found that demand for biofuels in the EU is “almost exclusively”<sup>19</sup> driven by its renewable energy policies and, that in its absence, there is little demand for biofuel. Additionally, the only biofuel deemed to be high ILUC-risk is the one made from palm oil. Therefore, by limiting and eventually excluding palm oil-based biofuel from eligibility towards renewable energy targets, the high ILUC-risk cap and phase-out modifies the conditions of competition to the detriment of this type of biofuel.

On the other hand, the high ILUC-risk cap and phase-out also affects some of the EU domestic production. The Panel, however, considered the measure disproportionately affects products imported from Malaysia, determining a *de facto* discrimination.<sup>20</sup>

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<sup>18</sup> WTO. **Appellate Body Reports, United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (II) (Mexico)**, 2012. Available on: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds381\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm) Access in July 2024. Findings, para. 215; and WTO. **US – Measures Affecting the Production and Sale of Clove Cigarettes**. Available on: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds406\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm) Access in July, 2024. Findings, para. 180.

<sup>19</sup> WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel**, 2024. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600R.pdf&Open=True>. Access on Mar. 30, 2024. Findings, para. 7.476.

<sup>20</sup> WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel**, 2024. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600R.pdf&Open=True>. Access on Mar. 30, 2024. Findings, para. 7.488.

On the matter of attribution of the detrimental impact to the high ILUC-risk cap and phase out, the Panel found that, while EU member States may enjoy some margin of discretion to regulate, they cannot count palm oil-based biofuel towards the renewable energy targets to the same extent as rapeseed oil- and soybean oil-based biofuel. In this sense, it was found that the measures clearly limit market opportunities for palm oil-based biofuel.

The Panel further analyzed whether the detrimental impact “stems exclusively from a legitimate regulatory distinction”.<sup>21</sup> The classification of palm oil as a high ILUC-risk feedstock reflects the degree of the risk of ILUC and GHG emissions associated with the feedstock’s production, based on which the measure draws a regulatory distinction between different types of biofuels.

In this context, the measure does not attempt to attribute to biofuel feedstocks specific levels of ILUC-related GHG emissions, but to estimate the pressure that demand for a particular biofuel feedstock exerts on existing agricultural production. That is, estimating a degree of risk does not require land use change. On a conceptual level, the regulatory distinction is *a priori* legitimate.<sup>22</sup>

It is important to highlight that the Panel found that the EU has applied the high ILUC-risk cap and phase-out inconsistently with Art. 2.1 of the TBT because it failed to conduct a timely review of the data used to classify biofuels as high ILUC-risk, leading to arbitrary or unjustifiable discrimination between countries with similar conditions. Moreover, the additionality criterion, the financial additionality and the abandoned or severely degraded land pathways are formulated in overly vague and ambiguous terms, preventing effective certification of palm oil-based biofuels as low ILUC-risk.

Finally, the Panel found that, while the low ILUC-risk criteria’s conceptual design does not constitute arbitrary or unjustifiable discrimination, the 10-year limit on eligibility grants disadvantages to perennial crops, resulting in arbitrary and unjustifiable discrimination. Therefore, the EU’s regulatory distinction does not stem solely from

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<sup>21</sup> WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel**, 2024. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600R.pdf&Open=True>. Access on Mar. 30, 2024. Findings, para. 7.495.

<sup>22</sup> WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel**, 2024. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600R.pdf&Open=True>. Access on Mar. 30, 2024. Findings, para. 7.545.



a legitimate regulatory distinction, and its administration of the high ILUC-risk cap and phase-out is inconsistent with Art. 2.1 of the TBT Agreement.

### *3.1.2. Unnecessary obstacles to trade under Art. 5.1.2 of the TBT*

For a period, the low ILUC-risk certification procedure was non-operational. Later, a limited number of certification schemes have been approved, whereas only a small number concerned low ILUC-risk certification. Certification of palm oil-based biofuel was not possible prior to April 2022, and afterwards, it was only possible on a provisional basis.

The EU requires certification for low ILUC-risk exception but lacks detailed rules to obtain it. Therefore, the certification procedure in Art. 6 of the Delegated Regulation is inconsistent with Art. 5.1.2 of the TBT, creating unnecessary obstacles to international trade.

## *3.2. EU's violations of the GATT*

This section brings to attention the main arguments from Malaysia regarding the EU's alleged violations of the GATT, specifically concerning the less favorable treatment, the most favored nation and the general exceptions related to the protection of the environment.

### *3.2.1. Less Favorable Treatment, under Art. III:4, and Most Favored Nation, under Art. I:1 of the GATT*

The Panel recalled that the scope of the non-discrimination obligation in Art. III:4 and in Art. 2.1 of the TBT Agreement, previously analyzed, is different. However, given the overlap in the parties' arguments, the Panel reached a similar conclusion.

Turning to the obligation of treatment no less favorable than that accorded to the like domestic products, similarly to the decision on "detrimental impact" under Art. 2.1 of the TBT, the Panel found the measures accords less favorable treatment to imported products, and, therefore, are inconsistent with Art. III:4 of the GATT. Furthermore, considering the Panel's findings on the link between the eligibility for the EU renewable energy targets and the opportunities on the EU biofuel market, the low ILUC-risk certification procedure affects the internal market.

Concerning Art. I:1 of the GATT, additional advantage<sup>23</sup> was not conferred to the biofuels that do not have to undergo the low ILUC-risk certification procedure. However, the Panel found that (i) the high ILUC-risk cap and phase-out limits and eliminates the eligibility of palm oil-based biofuel to count towards the renewable energy consumption targets; (ii) there is little demand for biofuels that are not eligible towards these targets; (iii) which affects the competitive opportunities for palm oil-based biofuel on the EU market, (iv) concluding that biofuel imported from Malaysia cannot enjoy the same market opportunities from other countries.

The Panel concluded, thus, that the high ILUC-risk cap and phase-out is inconsistent with Art. I:1 of the GATT.

### *3.2.2. Arbitrary or unjustifiable discrimination, under Art. XX of the GATT*

Having found the high ILUC-risk cap and phase-out inconsistent with Art. III:4 and Art. I:1, the Panel addressed the EU's invocation of the general exceptions in Art. XX of the GATT.

The measures at issue are aimed at limiting the risk of ILUC-related GHG emissions that arise when the cultivation of crops for biofuels displaces traditional production of crops for food and feed purposes, and its objective relates to the conservation of high-carbon stock land.

In assessing Art. XX(g), the terms 'exhaustible natural resources' must be read "in light of contemporary concerns of the community of nations about the protection and conservation of the environment".<sup>24</sup> The Panel considered that the high ILUC-risk cap and phase-out is

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<sup>23</sup> "[T]he term "advantage" is interpreted broadly and covers situations creating more favorable competitive opportunities or affecting the commercial relationship between products originating in different countries."

WTO. **Panel Report, European Communities — Regime for the Importation, Sale and Distribution of Bananas (III) (Guatemala and Honduras)**, 1997. Available on: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds27\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm) Access in July 2024. Findings, para. 7.239.

<sup>24</sup> WTO. **Appellate Body Report, United States — Import Prohibition of Certain Shrimp and Shrimp Products**, 1998. Available on: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds58\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm) Access in July 2024. Findings, para. 129

“made effective in conjunction with restrictions on domestic production or consumption”<sup>25</sup>, within the meaning of Art. XX(g).

So as to public health or environmental problems, under the necessity test in Art. XX(b), “measures adopted in order to attenuate global warming and climate change”<sup>26</sup> and “the reduction of CO2 emissions is one of the policies covered by subparagraph (b) of Art. XX”<sup>27</sup>, and fall within the range of policies to protect human life or health.

Guided by its previous decisions, the Panel found that the high ILUC-risk cap and phase-out was considered as a measure necessary to protect human, animal or plant life or health within the meaning of Art. XX(b).

Having concluded that the high ILUC-risk cap and phase-out is provisionally justified under Art. XX(g) and Art. XX(b), the Panel analyzed the chapeau of Art. XX.

The terms “arbitrary or unjustifiable discrimination” and “disguised restriction on trade” are found both in the chapeau of Art. XX of the GATT 1994 and in the sixth Recital of the Preamble of the TBT Agreement, which provides relevant context for Art. 2.1.<sup>28</sup>

The Panel concluded that the measures at issue constitute arbitrary or unjustifiable discrimination, because the EU failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk, and because there are deficiencies in the design and implementation of the low ILUC-risk criteria and certification procedure.

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<sup>25</sup> Art. XX(g) of the GATT

<sup>26</sup> WTO. **Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres**, 2007 Available on: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds332\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm) Access in July, 2024. Findings, para. 151.

<sup>27</sup> WTO. **Panel Report, Brazil – Certain Measures Concerning Taxation and Charges**, 2017. Available on: <https://www.wto-ilibrary.org/content/reports/25189832/202> Access in July 2024. Findings, para. 7.880.

<sup>28</sup> WTO. **Appellate Body Reports, US – Measures Affecting the Production and Sale of Clove Cigarettes**. Available on: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds406\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm) Access in July 2024. Findings, para. 173; and WTO. **US – Appellate Body Reports, United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (II) (Mexico)**, 2012. Available on: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds381\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm) Access in July 2024. Findings, para. 213.

We further highlight that, a separate opinion has suggested there is “a lack of sound scientific evidence”<sup>29</sup> warranting differential treatment, which “does not seem to be justifiable under the GATT general exceptions”<sup>30</sup>.

#### 4. EU Deforestation Act under the lens of WTO Biofuel Findings

This section explores the implications of the WTO’s rulings on EU biofuel regulations for the recently enacted EU Deforestation Act. Given the Panel’s interpretations and decisions it is considered how such precedent might influence potential future disputes related to environmental regulations. This analysis seeks to identify how the lessons learned from the biofuel case could be applied to the EU’s Deforestation Act, particularly in whether it might withstand international scrutiny under the WTO.

##### 4.1. *The new EU Deforestation Act*

Deforestation and forest degradation represent critical challenges to global environmental sustainability, impacting biodiversity, climate change, and the livelihoods of many. To combat these issues, the EU adopted Regulation (EU) 2023/1115, which aims to reduce its contribution to deforestation related to the consumption of specific commodities<sup>31</sup>.

This regulation mandates strict due diligence and traceability requirements for products such as cattle, cocoa, coffee, oil palm, soya, and wood entering the EU<sup>32</sup>. Its measures include monitoring systems,

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<sup>29</sup> WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel**, 2024. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600R.pdf&Open=True>. Access on Mar. 30, 2024. Findings, para. 7.1454.

<sup>30</sup> WTO. **European Union and certain Member states – certain measures concerning palm oil and oil palm crop-based biofuels. Report of the Panel**, 2024. Available on: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/600R.pdf&Open=True>. Access on Mar. 30, 2024. Findings, para. 7.1453

<sup>31</sup> EUROPEAN COMMISSION. **Deforestation**, 2024. Available on: [https://environment.ec.europa.eu/topics/forests/deforestation\\_en](https://environment.ec.europa.eu/topics/forests/deforestation_en). Access on April 19, 2024.

<sup>32</sup> EUROPEAN UNION. **Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023**. Art. 1.1. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R1115&q>

certification requirements and the establishment of a “deforestation-free” standard that demand verification that commodities have not contributed to deforestation post-2020<sup>33</sup>. The legislation also introduces penalties and enforcement mechanisms to ensure compliance across supply chains that extend into non-EU nations<sup>34</sup>.

Developing countries have criticized the EU’s regulation as a form of green protectionism. In an official letter to the main EU authorities, it was argued that the standards and compliance costs disproportionately affect their economies and impede their development.

By setting high standards, the EU influences the regulatory landscape beyond its borders, encouraging other countries to align with its environmental objectives<sup>35</sup>. However, there is concern that the unilateral imposition of these standards infringes on the sovereignty of developing nations to regulate their own environmental and economic policies, hence the critics that such measures should be negotiated multilaterally to ensure fairness and equity<sup>36</sup>.

The compliance costs associated with the EU’s deforestation regulation can be substantial for producers in developing countries, including investments in traceability systems, certification, and sustainable farming practices, that fear losing access to the EU market if they cannot meet such requirements, which would negatively impact their export revenues and economic stability<sup>37</sup>.

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[id=1687867231461](#). Access on May 6, 2024.

<sup>33</sup> EUROPEAN UNION. **Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023**. Chapter 2.

<sup>34</sup> EUROPEAN UNION. **Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023**. Art. 24 and 25.

<sup>35</sup> TREVIZAN, Ana Flávia. Exploring the Brussels Effect: The European Union’s Impact on Brazilian Forestry Policies. **Revista de Direito**, Viçosa, Brasil, v. 16, n. 01, 2024. Available on: <http://www.revistadir.ufv.br>. Access on May 19, 2024.

<sup>36</sup> JOAQUIM, Gabriel. Protecionismo verde: o caso do regulamento anti-desmatamento da União Europeia. *In*: ATHAYDE, Amanda *et al.* **Comércio Internacional e Concorrência: desafios e perspectivas atuais – Volume VI**. Brasília: Faculdade de Direito da UnB, 2024. p. 56-75.

<sup>37</sup> MINISTÉRIO DAS RELAÇÕES EXTERIORES. **Carta de países em desenvolvimento a autoridades europeias sobre a entrada em vigor da chamada “lei antidesmatamento” da União Europeia**, 2023. Available on: [https://www.gov.br/mre/pt-br/canais\\_atendimento/imprensa/notas-a-imprensa/carta-de-paises-em-desenvolvimento-a-autoridades-europeias-sobre-a-entrada-em-vigor-da-chamada-201clei-antidesmatamento201d-da-uniao-europeia](https://www.gov.br/mre/pt-br/canais_atendimento/imprensa/notas-a-imprensa/carta-de-paises-em-desenvolvimento-a-autoridades-europeias-sobre-a-entrada-em-vigor-da-chamada-201clei-antidesmatamento201d-da-uniao-europeia). Access on May

Like the challenges faced by the EU's biofuel regulations under the WTO, developing countries might contest the deforestation regulation as discriminatory and a barrier to free trade, arguing that it violates WTO agreements as provided by in the next section.

#### 4.2. *Insights from the Biofuels case to the EU Deforestation Act*

As seen, the WTO Panel Report on EU and Certain Member States - Palm Oil (Malaysia) may reflect on the EU's Deforestation Act. For the purpose of this research, the EU's Deforestation Act will be considered as a technical regulation, in which articles 2 and 3 of the TBT are applicable, in order to advance on more significative provisions.

The analysis of the EU Deforestation Act gives rise to questions concerning possible violations of the Most-Favored Nation principle, upon the Act's differentiation between high-risk and low-risk countries<sup>38</sup> and potentially violating the principle of national treatment, by treating imported products less favorably than domestic products. It is important to note that the products' similarity would require a deeper analysis when compared to the EU and Certain Member States - Palm Oil (Malaysia) case, as the EU Deforestation Act comprehends a broader product scope.

Moreover, the detrimental impact assessment would require a demonstration of the link between the Deforestation Act and EU market conditions. Given the above-mentioned conditions, as well as the Panel Report on EU and Certain Member States - Palm Oil (Malaysia), it is likely that a hypothetical request before the WTO would claim violations to articles I and III of GATT, and 2.1 of TBT.

Also, Art. 3 of the Act prohibits placing non-compliant products on the market, which might be seen as a disguised restriction on international trade, in violation of Art. 5.1.2 of the TBT. In the same manner, it could be argued that the Act is not the least trade-restrictive measure available to achieve its environmental objectives, under Art. 2.2 of the TBT.

Given its restrictive character, the Act could be viewed as disguised restriction on international trade and, eventually, considered arbitrary or unjustifiable discrimination under the chapeau of Art. XX of the GATT. Thus, even if the Act was capable of justification under

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17, 2024.

<sup>38</sup> EUROPEAN UNION. **Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023**. Art. 10, 11, 13, 16 and 27.

articles XX(g) and XX(b) of the GATT, the invocation of general exceptions would be prevented.

As described on the Panel Report on EU and Certain Member States - Palm Oil (Malaysia), a complainant must demonstrate that relevant international standards exist, but were not used as a basis for the regulation. Additionally, it must demonstrate that these standards are not ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued to establish that a technical regulation is inconsistent with the obligation on Art. 2.4 of the TBT.

In this sense, considering the very broad definitions of “deforestation” and “forest degradation” established by Art. 2 of the Deforestation Act, the regulation might be contested because, while relevant international standards were arguably used as a basis for such definitions<sup>39</sup> such broad definitions might not be justified as necessary for fulfilling the regulation’s legitimate objectives.

Art. 9 of the EU Deforestation Regulation requires operators and traders to establish due diligence systems that include the provision of geolocation data for plots of land where commodities are produced to ensure that commodities are deforestation-free. Such necessity may be questioned before the WTO, based on whether they are more stringent than necessary to achieve the EU’s objectives. As seen in the Panel Report on EU and Certain Member States - Palm Oil (Malaysia), strict requirements might exceed what is necessary to provide adequate confidence in product conformity and might consist in a violation of Art. 5.1.2 of the TBT Agreement.

These requirements could be viewed as creating unnecessary obstacles to trade, particularly for smallholders and producers in developing countries, as such countries might lack the resources and technological capabilities to comply with the detailed due diligence and geolocation requisites, limiting their ability to compete in the EU market.

As was the case in the Panel Report on EU and Certain Member States - Palm Oil (Malaysia), the EU Deforestation Act could be challenged on the grounds that it disproportionately impacts developing countries, which may not have the same capacity to comply with the new requirements. This could act as a barrier to market access for these producers and is inconsistent with the TBT Agreement’s provisions

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<sup>39</sup> EUROPEAN UNION. **Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023**. Para. 43. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R1115&qid=1687867231461>. Access on May 6, 2024.

for special and differential treatment, which aim to facilitate trade for developing countries and support their integration into the global trading system.

Additionally, while the Deforestation Act establishes that it should take into account the principle of “policy coherence for development” and serve to “promote and facilitate cooperation with developing countries” through the provision of technical and financial assistance, it does not provide specific measures on such support or flexibility mechanisms to assist producers in developing countries to comply with the new requirements, placing them at an unfair disadvantage compared to producers in developed countries.

## **5. Concluding remarks**

This article provides a comprehensive analysis of the interplay between environmental policies and international trade law through the lens of the WTO Panel Report on EU and Certain Member States - Palm Oil (Malaysia), and its implications for the EU’s Deforestation Act. The examination of Malaysia’s claim against the EU’s biofuel measures affecting palm oil underlines the balance between enforcing environmental standards and adhering to international trade obligations.

The WTO Panel findings on the application of the TBT and GATT offer crucial insights into how environmental regulations can be aligned with trade law. This case serves as a valuable reference for future legal interpretations and dispute resolutions involving environmental measures.

The EU’s Deforestation Act, with its strict due diligence and traceability requirements, aims to significantly reduce deforestation linked to EU consumption. However, the Act may face similar legal challenges as the biofuel regulations, particularly regarding accusations of discrimination and unnecessary trade barriers. Developing countries have already voiced concerns about the economic and developmental impacts of such regulations, emphasizing the need for multilateral coordination and support mechanisms to ensure fair implementation.

This study highlights the need for coherent and well-integrated policies that address both environmental and trade objectives. The future of international trade disputes involving environmental legislation will likely continue to evolve, reflecting the ongoing tension between environmental protection and trade liberalization. The lessons learned from the WTO’s Panel Report on EU and Certain Member States - Palm Oil (Malaysia) provide a valuable framework for anticipating and addressing the challenges that lie ahead, ultimately promoting a more sustainable and equitable global trading system.



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