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

REPORT OF THE PANEL

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China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
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China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
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Colombia – Textiles	Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
Colombia – Textiles	Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/R and Add.1, adopted 22 June 2016, as modified by Appellate Body Report WT/DS461/AB/R, DSR 2016:III, p. 1227
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EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
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EC – Bananas III (Guatemala and Honduras)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695
EC – Bananas III (US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 943
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EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
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EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
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Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, p. 5295
India – Agricultural Products	Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R, adopted 19 June 2015, DSR 2015:V, p. 2459
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Indonesia – Chicken	Panel Report, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*, WT/DS484/R and Add.1, adopted 22 November 2017, DSR 2017:VIII, p. 3769
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Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, p. 2749
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Korea – Radionuclides	Appellate Body Report, *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*, WT/DS495/AB/R and Add.1, adopted 26 April 2019, DSR 2019:VII, p. 3653
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Philippines – Distilled Spirits	Panel Reports, *Philippines – Taxes on Distilled Spirits*, WT/DS396/R / WT/DS403/R, adopted 20 January 2012, as modified by Appellate Body Reports WT/DS396/AB/R / WT/DS403/AB/R, DSR 2012:VIII, p. 4271
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US – Animals	Panel Report, *United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina*, WT/DS447/R and Add.1, adopted 31 August 2015, DSR 2015:VIII, p. 4085

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US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
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US – Clove Cigarettes	Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012:XI, p. 5865
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Continued Zeroing	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, as modified as Appellate Body Report WT/DS350/AB/R, DSR 2009:III, p. 1481
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US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – COOL (Article 21.5 – Canada and Mexico)	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015, DSR 2015:IV, p. 1725
US – COOL (Article 21.5 – Canada and Mexico)	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/RW and Add.1 / WT/DS386/RW and Add.1, adopted 29 May 2015, as modified by Appellate Body Reports WT/DS384/AB/RW / WT/DS386/AB/RW, DSR 2015:IV, p. 2019
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US – Countervailing and Anti-Dumping Measures (China)	Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/R and Add.1, adopted 22 July 2014, as modified by Appellate Body Report WT/DS449/AB/R, DSR 2014:VIII, p. 3175
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
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US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
US – FSC (Article 21.5 – EC)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, p. 119
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US – Gambling	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Gasoline	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769

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US – Lamb	Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R, DSR 2001:IX, p. 4107
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649
US – Origin Marking (Hong Kong, China)	Panel Report, *United States – Origin Marking Requirement*, WT/DS597/R and Add.1, circulated to WTO Members 21 December 2022, appealed 26 January 2023
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Ripe Olives from Spain	Panel Report, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WT/DS577/R and Add.1, adopted 20 December 2021
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007, DSR 2007:II, p. 425
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US – Tax Incentives	Panel Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/R and Add.1, adopted 22 September 2017, as modified by Appellate Body Report WT/DS487/AB/R, DSR 2017:V, p. 2305
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
US – Tuna II (Mexico)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/RW, Add.1 and Corr.1, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW, DSR 2015:X, p. 5409 and DSR 2015:XI, p. 5653
US – Tuna II (Mexico) (Article 21.5 – Mexico II)	Panel Reports, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States*, WT/DS381/RW/USA and Add.1 / *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/RW2 and Add.1, adopted 11 January 2019, as upheld by Appellate Body Report WT/DS381/AB/RW/USA / WT/DS381/AB/RW2, DSR 2019:III, p. 1315
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
US – Washing Machines	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R, DSR 2016:V, p. 2505
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

TABLE OF EXHIBITS REFERRED TO IN THIS REPORT

Panel Exhibit	Short Title (if applicable)	Title
EU-3, MYS-92	Status Report (2019)	Report From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the status of production expansion of relevant food and feed crops worldwide, COM/2019/142 final
EU-8	RED II Proposal	European Commission, Commission Staff Working Document, Impact Assessment accompanying the proposal for a directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast) (30 November 2016), SWD(2016) 418 final, Parts 1/4 to 4/4
EU-11		J. Miettinen, C. Shi, and S.C. Liew, "Land Cover Distribution in the Peatlands of Peninsular Malaysia, Sumatra, and Borneo in 2015 with Changes since 1990", Global Ecology and Conversation, Vol. 6 (2016), 67
EU-12		White Paper Nr. 17 by J. Miettinen et al., "Historical Analysis and Projection of Oil Palm Plantation Expansion on Peatland in Southeast Asia" (International Council on Clean Transportation, 2012)
EU-13		European Commission, Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast), COM(2016) 767 final (30 November 2016)
EU-17	Directive 2003/30/EC	Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport, OJ L 123, 17.5.2003, p. 42–46 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV) [consolidated version]
EU-18	European Parliament Report FINAL A5-0244/2002	Report of the Parliament on the proposal for a directive of the European Parliament and of the Council on the promotion of the use of biofuels for transport (COM(2001) 547 – C5-0684/2001 – 2001/0265(COD)), 20 June 2002, FINAL A5-0244/2002
EU-19	RED I	Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ 2009 L 140, p. 16
EU-25	Fuel Quality Directive	Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC [consolidated version]
EU-26	Impact Assessment (2012)	Working Document of the European Commission, "Impact Assessment – Accompanying the document: Proposal for a Directive of the European Parliament and of the Council amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources", SWD(2012) 343 final, 17 October 2012
EU-28	Study Report (2017)	Wageningen Economic Research, Netherlands Environmental Assessment Agency (PBL), Wageningen Environmental Research, and National Renewable Energy Centre (CENER), Study Report on Reporting Requirement on Biofuels and Bioliquids stemming from the Directive (EU) 2015/1513 (European Commission, 2017)
EU-32	ISO 14067:2018	ISO 14067:2018 (Greenhouse gases – Carbon footprint of products – Requirements and guidelines for quantification)
EU-121, MYS-212	UFOP Global Market Supply 2019/2020	UFOP, "Global Market Supply 2019/2020, European and world demand for biomass for the purpose of biofuel production in relation to supply in the food and feedstuff markets"
EU-123		J. Xu et al., "PEATMAP: Refining estimates of global peatland distribution based on a meta-analysis", Catena, Vol. 160 (2018), 134
EU-128		USDA FAS, "GAIN Biofuels Annual 2019: EU-28", 15 July 2019
EU-131		USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021

Panel Exhibit	Short Title (if applicable)	Title
EU-132		ETC/CME Eionet Report, Greenhouse gas intensities of road transport fuels in the EU in 2018 - monitoring under the Fuel Quality Directive, November 2020
EU-133		ETC/CME Eionet Report, Greenhouse gas intensities of transport fuels in the EU in 2019 - monitoring under the Fuel Quality Directive, October 2021
EU-134	Commission Regulation (EC) 193/2009	Commission Regulation (EC) No 193/2009 of 11 March 2009 imposing a provisional anti-dumping duty on imports of biodiesel originating in the United States of America, OJ 2009 L 67
EU-135		Commission Implementing Regulation (EU) 2019/244 of 11 February 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Argentina, OJ 2019 L 40, p. 1
EU-137		Biodiesel Standards in various EU member States (website accessed 25 April 2021)
EU-138	Moser, "Influence of Blending Canola, Palm, Soybean, and Sunflower Oil Methyl Esters on Fuel Properties of Biodiesel"	B.R. Moser, "Influence of Blending Canola, Palm, Soybean, and Sunflower Oil Methyl Esters on Fuel Properties of Biodiesel", Energy & Fuels, Vol. 22 (2008), 4301. See row 12 in Table 3: Canola (rapeseed) and palm oil biodiesel in a volume ratio of 3:1
EU-139		Commission Implementing Regulation (EU) 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia, OJ 2019 L 212, p. 1
EU-140		Arbeitsgemeinschaft Qualitätsmanagement Biodiesel e.V., "Cold Properties of Biodiesel"
EU-141		Austria's reporting under Article 7a of the Fuel Quality Directive for 2019
EU-142		Czech Republic's reporting under Article 7a of the Fuel Quality Directive for 2019
EU-143		Denmark's reporting under Article 7a of the Fuel Quality Directive for 2018
EU-144		Excerpt from the website of Preem, a Swedish fuel company
EU-145		Midttun, Knut Myrum Næss, and Proadpran Boonprasurd Piccini "Biofuel Policy and Industrial Transition—A Nordic Perspective" in Energies 2019, 12(14), 2740
EU-146		Eni press release of 15 April 2021: "Eni: New Systems Installed at the Venice Biorefinery to Eliminate Palm Oil Entirely"
EU-147		Press article from Argusmedia of 11 September 2020: "Spain's climate bill threatens biofuel projects: Repsol"
EU-148		Total's webpage (accessed on 22 April 2021): "GRANDPUITS: A ZERO-CRUDE PLATFORM BY 2024"
EU-149		Total's webpage (accessed on 22 April 2021): "LA MÈDE: A MULTIPURPOSE FACILITY FOR THE ENERGIES OF TOMORROW"
EU-150		Press article of 1 April 2021 from Le Monde « Total condamné à revoir son étude d'impact sur l'utilisation del'huile de palme dans une raffinerie »
EU-157		Gaveau D. &co., Slowing deforestation in Indonesia follows declining oil palm expansion and lower oil prices, Research Square, 15 January 2021
EU-161	Draft Commission Implementing Regulation	Draft Commission Implementing Regulation on rules to verify sustainability and greenhouse gas emissions saving criteria and low indirect land-use change-risk criteria, Brussels, internal document dated 29 June 2021
EU-164	ISO 13065:2015	ISO 13065:2015 (Sustainability criteria for bioenergy)
EU-165		Excerpt of ISO/IEC Directives, Part 2 – Principles and rules for the structure and drafting of ISO and IEC documents, ninth edition, 2021
EU-166	Finkbeiner Study	M. Finkbeiner, Indirect land use change (iLUC) within life cycle assessment (LCA) – scientific robustness and consistency with international standards (Association of the German Biofuel Industry, 2013)
EU-169		Excerpt from RSB website, "RSB Low ILUC Risk Biomass Module"
EU-170		Excerpt from UPM website, "All UPM BioVerno products are certified" (accessed on 26 November 2021)
EU-172		President Juncker's reply of 14 May 2019 to a letter from PM Mahathir to President Juncker on the RED II Delegated Act
EU-174		Letter of European Commissioner for Climate Action and Energy of 26 July 2018

Panel Exhibit	Short Title (if applicable)	Title
EU-190		French parliamentary report, Working Group on Biofuels, "Tax regime of biofuels" ("Fiscalité des biocarburants")
EU-191	DGEC, "Panorama 2019 - Biofuels incorporated in France"	DGEC, "Panorama 2019 - Biofuels incorporated in France" ("Panorama 2019 - Biocarburants incorporé en France"), 2019
EU-196		Article 9 of the French Finance Law 2020-935 of 30 July 2020
EU-197	French Government Circular of 18 August 2020	Circular by the French Government of 18 August 2020 on the incentive tax relating to the incorporation of biofuels (TIRIB), NOR: ECOD2020901C (Circulaire du 18 août 2020 Taxe incitative relative à l'incorporation de biocarburants (TIRIB), Articles 52 and 53
EU-198		Amendment nr. I-694 rect. bis. of 21 November 2020 to the French Finance Law for 2021 (Amendement N° I-694 rect. bis de 21 novembre 2020 de la loi de finances pour 2021)
EU-199		Article 266 quindecies - Code des douanes - Légifrance
EU-205	French Parliament Report n. 2609	Report of the French Parliament n. 2609 of 22 January 2020, p. 52.
EU-213		Webpage from the European Commission's (DG Energy) website: Voluntary schemes
EU-214		Commission decision C (2016) 5817 of 8 September 2016 in Case M.7963 - ADM/Wilmar/Olenex JV
EU-216		Veblen Institute, Amicus Curia submission
EU-219	Commission Implementing Decisions on Voluntary Schemes	Commission Implementing Decisions of 8 April 2022 recognising voluntary schemes covering low ILUC-risk certification set up by Bonsucro EU (2022/60), International Sustainability & Carbon Certification (ISCC) EU (2022/602) and the Roundtable on Sustainable Biomaterials (RSB) EU RED (2022/607)
EU-221		N. Khasanah et al., "Aboveground carbon stocks in oil palm plantations and the threshold for carbon-neutral vegetation conversion on mineral soils", Cogent Environmental Science, Vol. 1:1 (2015), 1
EU-222		Guillaume, T., Kotowska, M.M., Hertel, D. et al. Carbon costs and benefits of Indonesian rainforest conversion to plantations. Nat Commun 9, 2388 (2018)
EU-225, MYS-89	IPCC Report, "Climate Change and Land"	IPCC Report on "Climate Change and Land" (including the Summary for Policymakers)
EU-227		"Oilseeds and oilseed products" OECD-FAO Agricultural Outlook 2021-2030 (agri-outlook.org), p. 7.
EU-231		K.G. Austin et al., "Shifting patterns of palm oil driven deforestation in Indonesia and implications for zero-deforestation commitments", Land Use Policy, Vol. 69 (2017), 416
EU-232		Gaveau, D.L.A., Sheil, D., Husnayaen, Salim, M.A., Arjasakusuma, S., Ancrenaz, M., Pacheco, P., Meijaard, E., 2016. Rapid conversions and avoided deforestation: examining four decades of industrial plantation expansion in Borneo. Nature - Scientific Reports 6, 32017
EU-249		Page, S. E., Morrison, R., Malins, C., Hooijer, A., Rieley, J. O., and Jauhiainen, J.: Review of peat surface greenhouse gas emissions from oil palm plantations in Southeast Asia (ICCT White Paper 15), International Council on Clean Transportation, Washington, 2011
EU-250		Hooijer, A., Page, S., Jauhiainen, J., Lee, W. A., Lu, X. X., Idris, A., and Anshari, G.: Subsidence and carbon loss in drained tropical peatlands, Biogeosciences, 9, pp. 1053–1071.
EU-251		Jukka Miettinen et al, From carbon sink to carbon source: extensive peat oxidation in insular Southeast Asia since 1990, Environ. Res. Lett., 12 024014, 2017
EU-253		Couwenberg, J., Dommain, R. and Joosten, H., Global Change Biology (2009) Greenhouse gas fluxes from tropical peatlands in South East Asia. doi: 10.1111/j.1365-2486.2009.02016
EU-254		D.L.A. Gaveau et al., "Rise and fall of forest loss and industrial plantations in Borneo (2000–2017)", Conservation Letters, Vol. 12:3 (2018), 1
EU-259		DG Energy Voluntary schemes (accessed on 25 April 2022)
EU-261		T. Seljak, M. Buffi, A. Valera-Medina, C.T. Chong, D. Chiaramonti, T. Katrasnik, "Bioliquids and their use in power generation – A technology review", Renewable and Sustainable Energy Reviews 129 (2020) 109930

Panel Exhibit	Short Title (if applicable)	Title
EU-262		Nils Hinrichsen, Commercially available alternatives to palm oil in Lipid Technology, March–April 2016, Vol. 28, No. 3–4
EU-294		[Cuypers et al. 2013] Cuypers, D., Geerken, T., Gorissen, L., Peters, G., Karstensen, J., Prieler, S., … vVn Velthuizen, H. (2013). The impact of EU consumption on deforestation: Comprehensive analysis of the impact of EU consumption on deforestation
EU-324		THEN24, "TotalEnergies will no longer use palm oil from 2023"
EU-329	Commission Implementing Regulation (EU) 2022/996	Commission Implementing Regulation (EU) 2022/996 of 14 June 2022 on rules to verify sustainability and greenhouse gas emissions saving criteria and low indirect land-use change-risk criteria C/2022/3740
MYS-11	UFOP Global Market Supply 2020/2021	UFOP, Global Market Supply 2020/2021, European and world demand for biomass for the purpose of biofuel production in relation to supply in food and feedstuff markets
MYS-14		Greenea, "Is HVO the Holy Grail of the world biodiesel market?"
MYS-17		Oil World Annual 2021
MYS-19		T. Mielke, "World Markets for Vegetable Oils: Status and Prospects", in M. Kaltschmitt (ed.), Energy from Organic Minerals (Biomass), 2019
MYS-20		K. Azly Zahan and M. Kano, "Biodiesel Production from Palm Oil, Its By-Products, and Mill Effluent: A Review", Energies, Vol. 11 (2018), 2132
MYS-21		FAO/WHO, Codex Standard for Named Vegetable Oils (CODEX-STAN 210 - 1999), SECTION 2. Codex Standards for Fats and Oils from Vegetable Sources (fao.org) Section 2, Codex Alimentarius, Volume 8, Fats, oils and related products, Second Edition (2001)
MYS-36		Letter by the Director General of the Directorate-General Environment, Education, Transport and Energy of the Council of the European Union of 11 April 2018
MYS-40		Malaysian Palm Oil Council (MPOC), Comments on EC Commission Delegated Regulation (EU Ref Ares (2019)762855-08/02/2019)
MYS-42		HS Nomenclature, 2017, Chapter 38
MYS-43		Eurostat, Energy from renewable sources – SHARES
MYS-44	Letter of DG Trade to DG Energy	Letter dated 23 March 2018 from Jean-Luc Demarty, Director-General of DG TRADE to Dominique Ristori, Director-General of DG ENER, Ref. Ares (2018) 1615972 – 23/03/2018
MYS-45	Finkbeiner Expert Opinion	M. Finkbeiner, Report, Expert Opinion on Indonesia's WTO dispute – EU renewable energy targets, 15 December 2020
MYS-50	Draft Delegated Regulation	Draft of the Commission Delegated Regulation …/… supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels, C (2019) 2055 final (13 March 2019)
MYS-51		Contract notice by the European Commission, Belgium – Brussels: Support for the implementation of the Provisions on ILUC Set out in the Renewable Energy Directive, 2019/S 131-320816, OJ/S S131 and the Call for Tenders by the European Commission, Support for the Implementation of the Provisions on ILUC Set out in the Renewable Energy Directive, N° ENER/C2/2018-462
MYS-52	ISO/IEC 17007:2010	ISO/IEC 17007:2010 (Conformity assessment – Guidance for drafting normative documents suitable for use for conformity assessment)
MYS-53		United Nations, World Economic Situation and Prospects 2021, Statistical Annex, (United Nations, 2021), Table C "Developing economies by region"
MYS-54		UNCTADSTAT, Development status groups and composition: Developing economies
MYS-60		Deutsche Gesellschaft für Fettwissenschaft, "Physical properties of fats and oils"
MYS-62	Regulation (EU) 2018/1999	Regulation on the governance of the energy union and climate action (EU/2018/1999)
MYS-77		USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015
MYS-79		Transport and Environment, "The trend worsens: More palm oil for energy, less for food"

Panel Exhibit	Short Title (if applicable)	Title
MYS-90	RED II	Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L 328, 21.12.2018
MYS-91	Delegated Regulation	Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels, OJ L 133, 21.5.2019
MYS-102	European Parliament Resolution of 4 April 2017	European Parliament, Resolution on palm oil and deforestation of rainforests, 4 April 2017, (2016/2222(INI)), OJ 2018 C 298, p. 2
MYS-104		Vijay V., Pimm S.L., Jenkins C.N., Smith S.J., The Impacts of Oil Palm on Recent Deforestation and Biodiversity Loss, Plos One, 27 July 2016
MYS-113		European Technology and Innovation Platform, "Transesterification to biodiesel"
MYS-119	Moser, "Biodiesel Production, Properties, and Feedstocks"	B. R. Moser, "Biodiesel Production, Properties, and Feedstocks", in D. Tomes, P. Lakshmanan, D. Songstad (eds), Biofuels: Global Impact on Renewable Energy, Production Agriculture, and Technological Advancement (Springer, 2011)
MYS-123		Concawe, "Guidelines for handling and blending FAME"
MYS-126	SAE International, "HVO as a Renewable Diesel Fuel"	SAE International, "Hydrotreated Vegetable Oil (HVO) as a Renewable Diesel Fuel: Trade-off between NOx, Particulate Emission, and Fuel Consumption of a Heavy-Duty Engine"
MYS-127		L.P. Lindfors, "High Quality Transportation Fuels from Renewable Feedstock", Neste Oil Corporation Espoo, Finland, XXIst World Energy Congress Montreal, Canada September 12-16, 2010
MYS-131		ETIP Bioenergy, "Hydrogenated vegetable oil (HVO)"
MYS-139		USDA FAS, "GAIN Biofuels Annual: European Union", 22 June, 2021
MYS-140	Council Implementing Regulation (EU) 1194/2013	Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, OJ L 315, 26.11.2013, p. 2
MYS-141		Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia, OJ L 317, 9.12.2019
MYS-152		ISEAS Perspective, Serina Rahman, Malaysian Independent Oil Palm Smallholders and their Struggle to Survive 2020
MYS-163		Basiron, Y and Yew F.K., "Land use impacts of the livestock and oil palm industries", Journal of Oil Palm, Environment & Health 2015
MYS-168	ILUC Directive	Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources, OJ L 239, 15.9.2015
MYS-181	Article 266 quindecies of the French Customs Code	Article 266 quindecies of the French Customs Code (Code des douanes), as modified by Article 192 of Loi n° 2018-1317 du 28 décembre 2018 de finances pour 2019; Décret no 2019-570 du 7 juin 2019 portant sur la taxe incitative relative à l'incorporation de biocarburants, JORF no 0133 of 9 June 2019, no. 13; Ministère de l'Action et des Comptes publics, Circulaire du 12 juin 2019 – Taxe incitative relative à l'incorporation de biocarburants
MYS-229		RaboResearch, Global Canola Opportunities in the Sustainable-Fuel Future: Is Australia Fit and Ready?
MYS-233		Low ILUC-risk certification: Pilot report and recommendations Malaysia, Oil palm yield increase, February 2021
MYS-238		USDA FAS, "GAIN EU Oilseeds and Products Annual", 21 April 2022
MYS-241	ISO 14044:2017	ISO 14044:2017 (Environmental management – Life cycle assessment – Requirements and guidelines)
MYS-242	ISO 14040:2016	ISO 14040:2016 (Environmental management – Life cycle assessment – Principles and framework)
MYS-245	Press article, 11 October 2019	Reuters, In blow to Total, France upholds law banning palm oil from biofuel scheme, 11 October 2019

Panel Exhibit	Short Title (if applicable)	Title
COL-11		Kalsom et al (Malaysian Palm Oil Board), the Effect of Soyabean Oil Price Changes on Palm Oil Demand in China.
IDN-1		Examples of EU member States' measures restricting oil palm crop-based biofuel
IDN-2	Delzeit et al, Kiel Working Paper No. 2203	R. Delzeit, T. Heimann, F. Schünemann and M. Söder, "Who benefits really from phasing out palm oil-based biodiesel in the EU", Kiel Working Paper No. 2203, Kiel Institute for the World Economy, December 2021
IDN-13		Eurostat, Consumption of renewable energy in the transport sector in the EU-27 in 2011-2019
IDN-20		IPCC, Refinement to the 2006 IPCC Guidelines for National Greenhouse Gas Inventories (2019), Volume 1: General Guidance and Reporting, Chapter 8. Reporting Guidance and Tables, considered in May 2019 during the IPCC's 49th Session and adopted/accepted on 12 May 2019
IDN-25		M. Weisse & E. Goldman, "The World lost a Belgium-sized Area of Primary Rainforests Last Year"

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
BTL	biomass-to-liquids biofuels
CEPA	Indonesia-EFTA Comprehensive Economic Partnership Agreement
CFP	carbon footprint
CFPP	cold-filter plugging point
Delegated Regulation	Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high-carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels, OJ 2019 L 133, p. 1
DLUC	direct land use change
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ESO	European Standards Organisation
FAME	Fatty Acid Methyl Esters
FLEGT	European Union's Forest Law Enforcement, Governance and Trade
Fuel Quality Directive	Directive 2009/30/EC
GATT 1994	General Agreement on Tariffs and Trade 1994
GHG	greenhouse gas
HVO	Hydrotreated Vegetable Oil
ILUC	indirect land use change
ILUC Directive	Directive 2015/1513
IPCC	Intergovernmental Panel on Climate Change
ISCC	International Sustainability and Carbon Certification
ISO	International Organization for Standardisation
ISO 13065:2015	ISO standard 13065:2015 entitled "Sustainability criteria for bioenergy"
ISO 14040:2016	ISO standard 14040:2016 entitled "Environmental management — Life cycle assessment — Principles and framework"
ISO 14044:2017	ISO standard 14044:2017 entitled "Environmental management — Life cycle assessment — Requirements and guidelines"
ISO 14067:2018	ISO standard 14067:2018 "Greenhouse gases – Carbon footprint of products – Requirements and guidelines for quantification"
IUU	Illegal, Unreported and Unregulated
LCA	life cycle analysis
LUC	land use change
MFN	Most-Favoured Nation
OED	Oxford English Dictionary
PME	palm methyl ester
POIG	Palm Oil Innovation Group
PPM	processes and production methods
RED I	Directive 2009/28/EC on the promotion of the use of energy from renewable sources
RED II	Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), OJ 2018 L 328, p. 80
RME	rapeseed methyl ester
RSPO	Roundtable on Sustainable Palm Oil
RSPO IP	RSPO "Identity Preserved"
RSPO SG	RSPO "Segregated"
SBME	soybean methyl ester
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS Agreement	WTO Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TICPE	internal consumption tax on energy products
TIRIB	Taxe Incitative Relative à l'Incorporation de Biocarburant
UCO	used cooking oil
UNCTAD	United Nations Conference on Trade and Development
VAT	value added tax
VPAs	Voluntary Partnership Agreements
WESP	World Economic Situation and Prospects
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Malaysia

1.1. On 15 January 2021, Malaysia requested consultations with the European Union, France and Lithuania pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Article 14 of the Agreement on Technical Barriers to Trade (TBT Agreement) and Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) regarding the measures and claims set out below.[1]

1.2. Consultations were held on 17 March 2021 but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 15 April 2021, Malaysia requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, Article 14.1 of the TBT Agreement and Article 30 of the SCM Agreement.[2] At its meeting on 28 May 2021, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Malaysia in document WT/DS600/6, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Malaysia in document WT/DS600/6 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 19 July 2021, Malaysia requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 29 July 2021 the Director-General, composed the Panel as follows:

Chairperson:	Mr Manzoor AHMAD
Members:	Ms Sarah PATERSON
	Mr Arie REICH

1.6. Argentina, Australia, Brazil, Canada, China, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, India, Indonesia, Japan, the Republic of Korea, Norway, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, Thailand, Türkiye, Ukraine, the United Kingdom and the United States notified their interest in participating in the Panel proceedings as third parties.[5]

1.3 Panel proceedings

1.3.1 General

1.7. After consulting with the parties, the Panel adopted its Working Procedures and timetable on 13 September 2021.[6] Both were modified as needed in the course of the proceedings.

1.8. Following consultations with the parties, the Panel held a single substantive meeting with the parties on 10-13 May 2022. A session with the third parties took place on 11 May 2022. For reasons related to the COVID-19 pandemic, as elaborated further below, the substantive meeting of the

[1] Request for consultations by Malaysia, WT/DS600/1.
[2] Request for the establishment of a panel by Malaysia, WT/DS600/6 (Malaysia's panel request).
[3] DSB, Minutes of the meeting held on 28 May 2021, WT/DSB/M/452.
[4] Constitution note of the Panel, WT/DS600/7, para. 2.
[5] Constitution note of the Panel, WT/DS600/7, para. 5.
[6] See the Panel's Working Procedures in Annex A-1.

Panel with the parties and the third-party session was held in a hybrid format. On 22 March 2023, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 29 September 2023. The Panel issued its Final Report to the parties on 15 December 2023.

1.3.2 Format of the substantive meeting of the Panel with the parties

1.9. In light of the prevailing sanitary conditions linked to the COVID-19 pandemic, the Panel provided in its initial Working Procedures for a possibility to hold substantive meetings with the parties and the third-party session through remote participation, on which it consulted with the parties.

1.10. In light of recent evolutions in the sanitary conditions and associated restrictions, the Panel proposed on 8 April 2022 to hold the substantive meeting of the Panel, including the third-party session, in person at the World Trade Organization (WTO) premises in Geneva.[7] Following consultations with the parties and third parties, the Panel confirmed that the substantive meeting would be held in a hybrid format, allowing for participation through remote means in addition to in-person presence.[8] To that end, the Panel shared with the parties and third parties a note on the modalities of remote participation in the substantive meeting.[9]

1.3.3 The ongoing separate panel proceedings in DS593

1.11. Following the decision to compose this Panel of the same panelists as the Panel in *EU – Palm Oil (Indonesia)* (DS593), Malaysia, acting as the complainant in this dispute and in its capacity as a third party in DS593, requested on 5 August 2021 harmonization of the two Panels' timetables.[10] Following that request, the Panels in both disputes invited the parties to participate in a joint organizational meeting in order to seek further views of the parties on the possible harmonization of the two proceedings and the possibility and extent of any exchange of information between the parties.[11] This joint organizational meeting with remote participation was held on 1 September 2021.

1.12. In its written communications and in the statement made at the joint organizational meeting, Malaysia submitted that the appointment by the Director-General of the same panelists to serve on the two Panels established to examine complaints relating to the same matter calls, by virtue of Article 9.3 of the DSU, for harmonization of these Panels' timetables.[12] In Malaysia's view, harmonization of the Panels' timetables would ensure, as far as possible, consistency between the Panel reports and that both complaints are "dispensed with by the Panels effectively and expediently".[13] In practical terms, Malaysia proposed postponing the second substantive meeting in DS593 until it could be held together with the second substantive meeting in DS600.[14] According to Malaysia, harmonizing the timeframes of the two proceedings would not cause undue delays to the proceedings in DS593 and would be fully in line with the letter and the spirit of Article 9.3 of the DSU.[15] Malaysia also considered that granting enhanced third-party rights to the parties to the two disputes would allow exchange of information between the two proceedings.[16]

1.13. The European Union, the respondent in both disputes, expressed support for the request by Malaysia to harmonize the panel proceedings in DS593 and DS600.[17] The European Union pointed out that such harmonization efforts would allow Malaysia and the European Union the time necessary to present and defend their positions and ensure consistency in the outcomes of the two disputes,

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[7] Panel communication to the parties and the third parties (8 April 2022).
[8] Panel communication to the parties and the third parties (15 April 2022).
[9] Note on the modalities of remote participation in the substantive meeting (24 April 2022).
[10] Malaysia's communication (5 August 2021), para. 7. The discussion that follows focuses on requests and communications that form part of the record in DS600.
[11] Panel communication to the parties regarding the joint virtual meeting in DS593 and DS600 (19 August 2021).
[12] Malaysia's communication (25 August 2021), para. 7; Malaysia's statement at the joint meeting with the Panel, paras. 4-5.
[13] Malaysia's communication (25 August 2021), para. 10; Malaysia's statement at the joint meeting with the Panel, para. 5; and Malaysia's communication (6 September 2021), para. 2.
[14] Malaysia's statement at the joint meeting with the Panel, para. 6.
[15] Malaysia's communication (6 September 2021).
[16] Malaysia's statement at the joint meeting with the Panel, para. 7.
[17] European Union's communications (5 August 2021 and 3 September 2021).

which relate to the same matter.[18] According to the European Union, the phrase "to the greatest extent possible" in Article 9.3 of the DSU expresses a preference for harmonizing the timetables of disputes that concern the same matter and where the same persons serve as panelists.[19] The European Union observed that "the fact that there might not be a situation in which harmonization was decided which is identical to the present situation" does not preclude harmonizing the proceedings in DS593 and DS600, especially given the disruptive impact of the COVID-19 pandemic on the work of the WTO and its Members.[20] In the European Union's view, "[i]t would be appropriate for the Panels in DS593 and DS600 to delay issuing their final Reports in either case until such time as they have sufficient knowledge of the arguments of the parties in both cases so as to ensure that no inconsistency arises between the two Reports and both proceedings are conducted effectively and in an efficient way."[21] Finally, the European Union reiterated its objection to granting enhanced third-party rights in DS593 to Malaysia, as this, in the European Union's view, would give Malaysia "an unfair advantage against the European Union in DS600".[22]

1.14. Indonesia objected to the request for harmonization of the two proceedings and to providing a possibility for an exchange of information between the parties to the two disputes. Indonesia recognized that panels enjoy a margin of discretion in deciding whether and how timetables should and can be harmonized.[23] Indonesia observed, however, that such a decision should balance various interests, including the need for the prompt settlement of disputes, protecting due process rights of the parties, ensuring an objective assessment of the matter, as well as the preference for efficiency and ensuring consistent rulings where separate panels are established to examine complaints related to the same matter.[24] Indonesia relied on the practice of previous panels and the fact that 10 months separate the establishment of the two Panels to argue that, on balance, harmonizing the two proceedings would unduly interfere with Indonesia's right to a prompt resolution of the dispute, as reflected in Articles 3.3, 12.8, and 12.9 of the DSU.[25] Indonesia also observed that ordering the exchange of information between the parties to both disputes, or holding a joint meeting would, in effect, result in granting enhanced third-party rights to Malaysia in DS593, to which both Indonesia and the European Union objected.[26] Indonesia argued in this regard that "Article 9.3 of the DSU does not envisage the exchange of information between parties in different disputes concerning a similar matter and being heard by more than one panel".[27]

1.15. Following a careful consideration of the parties' views and after weighing the relevant considerations relating to the possibility of harmonizing the timetables of the proceedings in DS593 and DS600, the Panel considered that under the circumstances, a degree of coordination could at that stage be assured by having the second substantive meeting in DS593 follow the filing of the first written submissions in DS600, without prejudice to any later decisions of the Panels in both disputes relating to further harmonization. In exercising its discretion in this respect, the Panel sought to balance the various objectives of the dispute settlement system, including all parties' due process rights, the objective of prompt settlement of disputes expressed in Article 3.3 of the DSU and the objective of promoting, as relevant, consistency in rulings relating to the same matter, consistent with the spirit of Article 9.3 of the DSU.[28] The Panel confirmed this approach in a further communication to the parties, explaining that the substantive meetings in both proceedings would be held separately, while accommodating in each proceeding the opportunities arising from the exercise of third-party participation rights accorded by the DSU.[29]

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[18] European Union's communication (3 September 2021).
[19] European Union's communication (6 September 2021), para. 1.
[20] European Union's communication (6 September 2021), para. 2.
[21] European Union's communication (6 September 2021), para. 6.
[22] European Union's communication (5 August 2021).
[23] Indonesia's communication (20 August 2021), paras. 8-9.
[24] Indonesia's communication (20 August 2021), paras. 8-9; Indonesia's statement at the joint meeting with the Panel, para. 17; and Indonesia's communication (2 September 2021), para. 3.
[25] Indonesia's communication (20 August 2021), paras. 11-14; Indonesia's statement at the joint meeting with the Panel, paras. 18-21.
[26] Indonesia's statement at the joint meeting with the Panel, para. 25.
[27] Indonesia's statement at the joint meeting with the Panel, para. 25.
[28] Panel communication to the parties regarding the possible harmonization of the panel proceedings in DS593 and DS600 (13 September 2021).
[29] Panel communication to the parties (6 December 2021). This communication addressed Malaysia's request of 11 November 2021 for an update on the potential harmonization of the proceedings in DS593 and DS600.

1.3.4 The holding of a single substantive meeting

1.16. At the joint organizational meeting held on 1 September 2021, the Panel explored with the parties the possibility of holding a single substantive meeting of the Panel with the parties, which would follow two rounds of written submissions. During the meeting, both Malaysia and the European Union stated that they would be in a better position to comment on this option after the first round of written submissions was completed.[30] In addition, Malaysia stated in writing that it remained open to any possible ways of expediting the proceedings, and that it would give due consideration to any such possible action while preserving its rights under the DSU and, in particular, under Article 12.4 thereof.[31]

1.17. In its communication of 6 December 2021 informing the parties that it would not be feasible to fully harmonize the timetables of the proceedings in DS593 and DS600, the Panel also explained that it remained mindful of the objective of promoting coherence in the conduct of the two proceedings, as well as the objective of prompt settlement of disputes as stated in Articles 3.3, 12.8 and 12.9 of the DSU.[32] In that connection, the Panel noted that at that point it had received the parties' first written submissions and invited the parties to clarify their positions on the possibility of holding a single substantive meeting preceded by a second round of written submissions.[33]

1.18. In its response to the Panel's communication, Malaysia expressed support for holding a single substantive meeting and requested that the proceedings in DS593 and DS600 be harmonized partially, notably with respect to the issuance of the interim and the final reports.[34] The European Union was also supportive of holding a single substantive meeting, on the condition that such meeting would be held in person.[35]

1.19. On 27 January 2022, the Panel shared with the parties a proposed revised timetable of the proceedings including a single substantive meeting preceded by the consecutive filing of the parties' second written submissions.[36] Malaysia objected to the proposed consecutive filing of the parties' second written submissions on the grounds that Article 12.6 of the DSU requires that "[a]ny subsequent written submissions shall be submitted simultaneously."[37] According to Malaysia, unlike the timelines indicated in Appendix 3 to the DSU, the Panel cannot deviate from the rules set out in the main body of the DSU, including those contained in the last sentence of Article 12.6.[38] Commenting on Malaysia's observations, the European Union noted that it is not uncommon to have staggered submissions in proceedings with only one panel hearing, including in compliance proceedings under Article 21.5 of the DSU.[39] The European Union argued that following Malaysia's suggestion would lead to a situation where the last document submitted prior to the second written submissions would be the European Union's first written submission. Therefore, without further reactions from Malaysia, there would be not much the European Union could add to the arguments it had already made in the first written submission to advance the debate at that stage of the proceedings.[40] Against this background, the European Union emphasized the importance of sending questions sufficiently in advance of the substantive meeting, if the Panel were to opt for a

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[30] See Panel communication to the parties (6 December 2021).

[31] Malaysia's comments on Indonesia's oral statement at the joint organizational meeting (6 September 2021).

[32] Panel communication to the parties (6 December 2021).

[33] Panel communication to the parties (6 December 2021).

[34] Malaysia's communication regarding the possibility of holding a single substantive meeting (17 December 2021). Malaysia's comments on the European Union's communication regarding the possibility of holding a single substantive meeting (10 January 2022).

[35] European Union's communication regarding the possibility of holding a single substantive meeting (17 December 2021); European Union's comments on Malaysia's communication regarding the possibility of holding a single substantive meeting (10 January 2022).

[36] Panel communication to the parties regarding the proposed revisions to the timetable (27 January 2022).

[37] Malaysia's comments on the Panel's communication regarding the proposed revisions to the timetable (31 January 2022).

[38] Malaysia's comments on the Panel's communication regarding the proposed revisions to the timetable (31 January 2022).

[39] The European Union's comments on Malaysia's comments on the Panel's communication regarding the proposed revisions to the timetable (3 February 2022).

[40] The European Union's comments on Malaysia's comments on the Panel's communication regarding the proposed revisions to the timetable (3 February 2022).

simultaneous filing of the second written submissions.[41] In response to the European Union's comments, Malaysia reiterated its strict opposition to a sequential filing of the second submissions, questioning the extent to which "staggering" of written submissions is common in panel proceedings and noting the clear language of Article 12.6 of the DSU, as well as the fact that the current proceedings are outside the context of Article 21.5 of the DSU.[42] Following this exchange of views, the Panel informed the parties that it would hold a single substantive meeting with the parties, preceded by a simultaneous filing of the second written submission and that any questions the Panel might ask at the substantive meeting, if any, would be sent to the parties sufficiently in advance.[43]

1.3.5 Unsolicited *amicus curiae* brief

1.20. On 25 April 2022, the Panel received from the Veblen Institute an unsolicited *amicus curiae* brief, which had been sent to the director of the Legal Affairs Division of the WTO and then transmitted to the Panel. On 28 April 2022, the Panel forwarded the document to the parties, inviting them to share any views they had in relation to the relevance and admissibility of the brief at the upcoming substantive meeting of the Panel with the parties.[44]

1.21. On 5 May 2022, Malaysia objected in writing to the *amicus curiae* brief and reserved the right to comment further on the matter orally during the substantive meeting or in writing.[45] Malaysia noted the Appellate Body's finding that a panel's discretionary power to seek information and technical advice under Article 13 of the DSU extends to unsolicited *amicus curiae* briefs. Malaysia submitted that such discretion is, however, predicated on due process considerations and that an *amicus curiae* brief can be filed as long as it does not come at the cost of unduly delaying the panel process.[46] Against this background, Malaysia objected to considering and accepting the *amicus curiae* brief submitted by the Veblen Institute, because, in Malaysia's view, it did not contain any new relevant information, it had been submitted at a late stage of the proceedings and admitting it would prejudice Malaysia's procedural rights and position in the proceedings, including as a developing-country Member.[47] Malaysia also expressed a concern that admitting the *amicus* brief would put the Panel at peril of being flooded with other unsolicited *amicus curiae* briefs at a later stage of the proceedings.[48]

1.22. The European Union, without providing written comments on the relevance and admissibility of the *amicus curiae* brief submitted by the Veblen Institute, subsequently included it as an exhibit to its opening statement at the substantive meeting of the Panel.[49] The parties made no further comments relating to its relevance or admissibility.

2 FACTUAL ASPECTS

2.1. The products at issue in this dispute are certain *oil crop-based biofuels* (e.g. palm oil-based biofuels) produced from *oil crop feedstocks* (e.g. palm oil). Oil crop biofuel feedstocks can be used to produce ester biodiesel (Fatty Acid Methyl Esters, or "FAME") and hydrogenation-derived renewable diesel (Hydrotreated Vegetable Oil, or "HVO"). Both FAME and HVO are admissible as renewable content that can be used to meet the requirements of RED II (which are elaborated further below).

2.2. The measures at issue comprise measures adopted by the European Union, France and Lithuania. The EU measures challenged by Malaysia[50] are part of the European Union's renewable energy policy, and, in particular what the European Union refers to as its "Biofuels regime" (EU

[41] The European Union's comments on Malaysia's comments on the Panel's communication regarding the proposed revisions to the timetable (3 February 2022).
[42] Malaysia's response to the European Union's comments on Malaysia's comments on the Panel's communication regarding the proposed revisions to the timetable (10 February 2022).
[43] Panel communication to the parties regarding the revised timetable (14 February 2022).
[44] Panel communication to the parties regarding the *amicus curiae* brief (28 April 2022).
[45] Malaysia's objection to the *amicus curiae* brief submitted by the Veblen Institute (5 May 2022).
[46] Malaysia's objection to the *amicus curiae* brief submitted by the Veblen Institute (5 May 2022) (referring to Appellate Body Reports, *US – Shrimp*, para. 107; *EC – Seal Products*, para. 1.15).
[47] Malaysia's objection to the *amicus curiae* brief submitted by the Veblen Institute (5 May 2022).
[48] Malaysia's objection to the *amicus curiae* brief submitted by the Veblen Institute (5 May 2022).
[49] European Union's opening statement at the meeting of the Panel, fn 1; Veblen Institute, Amicus Curia submission, (Exhibit EU-216).
[50] See Malaysia's panel request, paras. 10, 12 and 17.

Biofuels regime).[51] The Panel therefore first describes below this regulatory context in which these measures were adopted, before turning to a description of the specific aspects challenged by Malaysia.[52] Finally, the Panel briefly describes some of the key concepts relevant to an understanding of these measures.

2.3. This section focuses on the measures at issue in this dispute. Measures and initiatives taken by Malaysia to regulate land use, land use change, deforestation, and related factual aspects regarding the cultivation of oil crops are addressed insofar as necessary in the context of the Panel's assessment in section 7 of this Report.

2.1 Overall EU-wide regulatory context

2.4. The European Union identifies several legal instruments as comprising the EU Biofuels regime, including[53]:

a. Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), OJ 2018 L 328, p. 80 (RED II)[54];

b. Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, OJ 2018 L 328, p. 1 (Regulation (EU) 2018/1999)[55]; and

c. Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high-carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels, OJ 2019 L 133, p. 1 (Delegated Regulation).[56]

2.5. The Panel will first describe below some of the EU legal instruments that preceded the adoption of RED II and the Delegated Regulation and provide relevant background to their adoption.

2.2 Background to the specific measures at issue

2.2.1 Directive 2003/30/EC, RED I and relevant amendments concerning indirect land-use change (ILUC)

2.6. The European Parliament and the Council adopted Directive 2003/30/EC "on the promotion of the use of biofuels or other renewable fuels for transport" on 8 May 2003.[57] Directive 2003/30/EC established the legal framework in relation to biofuels and other renewable fuels in the transport sector.[58]

2.7. Directive 2003/30/EC stated that there is a link between energy consumption in the transport sector and greenhouse gas (GHG) emissions and that increased use of biofuels is a means to address

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[51] European Union's first written submission, para. 14.

[52] The descriptions contained in this section are without prejudice to any of the Panel's subsequent determinations with respect to the identification or contents of the specific measures at issue in this dispute.

[53] European Union's first written submission, paras. 15-19.

[54] RED II, (Exhibit MYS-90).

[55] Regulation (EU) 2018/1999, (Exhibit MYS-62).

[56] Delegated Regulation, (Exhibit MYS-91).

[57] Directive 2003/30/EC, (Exhibit EU-17).

[58] European Union's first written submission, para. 196. The European Union refers to it as the "first 'biofuels' directive".

those concerns.[59] Moreover, it contained indicative targets for EU member States as regards the quantities of biofuels that should be placed on their energy markets[60] and established that mandatory targets would be considered if the national indicative targets were not achieved.[61]

2.8. Directive 2003/30/EC was replaced by Directive 2009/28/EC on the promotion of the use of energy from renewable sources (RED I).[62] RED I was adopted by the European Parliament and the European Council on the basis of a proposal submitted by the European Commission.[63]

2.9. RED I introduced overall binding targets for the share of energy from renewable sources in the gross final consumption of energy in EU member States, including in the transport sector.[64]

2.10. In RED I, "biofuel" is defined as "liquid or gaseous fuel for transport produced from biomass" and "energy from renewable sources" is defined as "energy from renewable non-fossil sources".[65] RED I introduces a 20% mandatory target for the overall share of energy from renewable sources in the European Union's gross final consumption of energy by 2020[66], and a 10% mandatory target for energy from renewable sources in the final consumption of energy in all forms of transport in an EU member State by the same date.[67]

2.11. RED I also established, in respect of each EU member State, a national overall target for the share of energy from renewable sources in 2020.[68] RED I prescribed that EU member States adopt national renewable energy action plans for the purpose of meeting those targets.[69]

2.12. Under RED I, biofuels were only eligible to be taken into account in achieving these targets if they met certain sustainability criteria and GHG emissions savings levels.[70] The introduction of the sustainability criteria is explained in Recital 69 of RED I, partially reproduced below:

> The increasing worldwide demand for biofuels and bioliquids, and the incentives for their use provided for in this Directive, should not have the effect of encouraging the destruction of biodiverse lands. Those finite resources, recognised in various international instruments to be of value to all mankind, should be preserved. Consumers in the Community would, in addition, find it morally unacceptable that their increased use of biofuels and bioliquids could have the effect of destroying biodiverse lands. For these reasons, it is necessary to provide sustainability criteria ensuring that biofuels and bioliquids can qualify for the incentives only when it can be guaranteed that they do not originate in biodiverse areas or, in the case of areas designated for nature protection purposes or for the protection of rare, threatened or endangered ecosystems or species, the relevant competent authority demonstrates that the production of the raw material does not interfere with those purposes. […]

2.13. Article 17 of RED I set out the sustainability criteria for biofuels and bioliquids. In order to meet the sustainability criteria, biofuels were required to represent a 35% reduction in GHG emissions as compared with fossil fuels.[71] In addition, raw material obtained from land with high biodiversity value could not be taken into account for the purposes of meeting the targets.[72] Article 17(3) stated that land with "high biodiversity value" is land with the status of either forest or other wooded land, areas designated by law for nature protection purposes and highly biodiverse

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[59] Directive 2003/30/EC, (Exhibit EU-17), Recitals (3) to (6), and (22).

[60] European Union's first written submission, para. 199; Directive 2003/30/EC, (Exhibit EU-17), Article 3(1).

[61] Directive 2003/30/EC, (Exhibit EU-17), Article 4(2); European Union's first written submission, para. 199.

[62] RED I, (Exhibit EU-19).

[63] European Union's first written submission, para. 206; European Parliament Report, FINAL A5-0244/2002, (Exhibit EU-18).

[64] Articles 3(1) and 3(4), Annex I, RED I.

[65] Article 2(i) and (a) of RED I.

[66] Article 3(1) of RED I.

[67] Article 3(4) of RED I.

[68] Article 3(1) of and Annex I to RED I.

[69] Article 4(1) of RED I.

[70] Article 17(2) of RED I.

[71] Article 17(2) of RED I.

[72] Article 17(3) of RED I.

grassland meeting certain criteria. Pursuant to Article 17(4) of RED I, biofuels may not be counted towards the targets if produced from raw materials from land with high-carbon stock. Lastly, Article 17(5) provided that biofuels would not be counted if made from raw material obtained from land that was peatland.

2.14. In 2009, the European Council and the Parliament adopted Directive 2009/30/EC (Fuel Quality Directive). The Fuel Quality Directive aimed at addressing the GHG intensity of different fuels by obliging EU member States to require suppliers to reduce life cycle GHG emissions per unit of energy from fuel and energy supplied by up to 10% by 31 December 2020.[73] Furthermore, the biofuels covered by the Fuel Quality Directive are subject to the same sustainability criteria as under RED I. Similarly, compliance with the criteria was a precondition for biofuels to count towards the GHG emissions reductions targets.[74]

2.15. In 2015, RED I and the Fuel Quality Directive were amended by Directive 2015/1513 (ILUC Directive).[75] One of the stated purposes of the ILUC Directive was to "address the impact of indirect land use change given that current biofuels are mainly produced from crops grown on existing agricultural land".[76] The ILUC Directive also implemented the outcomes of a review of ILUC risk contemplated by Article 19 of RED I.[77] The preamble of the ILUC Directive stated that when indirect land use change involves the conversion of land with high-carbon stock, it can lead to significant GHG emissions and as such it could negate some or all of the GHG emission savings of individual biofuels.[78]

2.16. In addition, RED I contemplated addressing GHG emissions relating to ILUC at a later stage, following a review of the impact of ILUC on GHG emissions.[79] A review was conducted in 2012, which included an impact assessment for different policy options to address ILUC in the context of the European Union's policy promoting renewable energy sources and limiting GHG emissions.[80] This was the main objective of the ILUC Directive, which amended RED I and defined ILUC for the purposes of the EU Biofuels Regime.[81] ILUC was described as follows in the ILUC Directive:

> Where pasture or agricultural land previously destined for food and feed markets is diverted to biofuel production, the non-fuel demand will still need to be satisfied either through intensification of current production or by bringing non-agricultural land into production elsewhere. The latter case constitutes [ILUC] and when it involves the conversion of land with high carbon stock it can lead to significant greenhouse gas emissions. […][82]

2.17. The ILUC Directive introduced a limitation on the share of biofuels *produced from food or feed crops* that could be counted towards meeting renewable energy targets. The preamble of the ILUC Directive explains this limitation as follows:

> To *prepare for the transition towards advanced biofuels and minimise the overall indirect land-use change impacts*, it is appropriate to limit the amount of biofuels and bioliquids produced from cereal and other starch-rich crops, sugars and oil crops and from crops

[73] Fuel Quality Directive, (Exhibit EU-25), Article 1(5), p. 12.

[74] European Union's first written submission, para. 228; Fuel Quality Directive, (Exhibit EU-25), Article 1(6), p. 18.

[75] ILUC Directive, (Exhibit MYS-168).

[76] ILUC Directive, (Exhibit MYS-168), Recital (4), p. 2.

[77] European Union's first written submission, para. 228; see also ILUC Directive, (Exhibit MYS-168), Recitals (16) and (28), pp. 4 and 6.

[78] ILUC Directive, (Exhibit MYS-168), Recitals (4) and (5), p. 2.

[79] Malaysia's first written submission, para. 323; European Union's first written submission, para. 222. See also RED I, (Exhibit EU-19), Article 19(6), p. 41, which states in relevant part as follows:

> The Commission shall, by 31 December 2010, submit a report to the European Parliament and to the Council reviewing the impact of indirect land-use change on greenhouse gas emissions and addressing ways to minimise that impact. The report shall, if appropriate, be accompanied, by a proposal, based on the best available scientific evidence, containing a concrete methodology for emissions from carbon stock changes caused by indirect land-use changes, ensuring compliance with this Directive, in particular Article 17(2).

[80] European Union's first written submission, para. 230.

[81] Malaysia's first written submission, para. 333; European Union's first written submission, para. 230.

[82] Malaysia's first written submission, para. 325 (referring to ILUC Directive (Exhibit MYS-168), recital (4), p. 2).

> grown as main crops primarily for energy purposes on agricultural land that can be counted towards targets set out in this Directive, without restricting the overall use of such biofuels and bioliquids. […][83]

2.18. The ILUC Directive also envisaged that "provisional mean values of estimated ILUC emissions" should be included in the reporting of GHG emissions from biofuels and bioliquids under RED I[84] and that the European Commission should review the effectiveness of the measures introduced by the ILUC Directive "based on the best and latest available scientific evidence, in limiting the impact of indirect land-use change greenhouse gas emissions and addressing ways to further minimize that impact".[85]

2.19. The ILUC Directive introduced an amendment to RED I to require EU member States to limit the amount of biofuels and bioliquids produced from cereal and other starch-rich crops, sugars and oil crops and from crops grown as main crops primarily for energy purposes on agricultural land to 7% of the final consumption of energy in transport in the EU member State in 2020.[86] Furthermore, additional definitions were established, including for "low indirect land-use change-risk biofuels".[87]

2.20. In November 2016, the European Commission presented a proposal for a "recast" Directive. This proposal includes an impact assessment, in which various policy options are envisaged, "to promote the decarbonisation and energy diversification of transport fuels, while addressing Indirect Land Use Change (ILUC) associated to food-based biofuels".[88]

2.21. In 2017, a study report (Study Report (2017)) was submitted by the European Commission pursuant to RED I as amended by the ILUC Directive, "to gather comprehensive information on, and to provide systematic analysis of the latest available scientific research and the latest available scientific evidence on indirect land use change (ILUC) greenhouse gas emissions associated with production of biofuels and bioliquids".[89]

2.2.2 RED II

2.22. RED II is a "recast" of RED I.[90] As RED I did, RED II establishes a common framework for the promotion of renewable energy in the European Union.[91]

2.23. The subject-matter of RED II is described in Article 1, which reads as follows:

> This Directive establishes a common framework for the promotion of energy from renewable sources. It sets a binding Union target for the overall share of energy from renewable sources in the Union's gross final consumption of energy in 2030. It also lays down rules on financial support for electricity from renewable sources, on self-consumption of such electricity, on the use of energy from renewable sources in the heating and cooling sector and in the transport sector, on regional cooperation between Member States, and between Member States and third countries, on guarantees of origin, on administrative procedures and on information and training. It also establishes sustainability and greenhouse gas emissions saving criteria for biofuels, bioliquids and biomass fuels.

[83] Recital 17 to the ILUC Directive. (emphasis added) The same text is also found in Recital 80 to RED II, with the addition of a reference to "direct and indirect" land-use change impacts. (See also Malaysia's first written submission, para. 324.)
[84] Recital 21 to the ILUC Directive.
[85] Recital 34 to the ILUC Directive.
[86] Article 2(2)(b)(iv) of the ILUC Directive.
[87] Article 2(1)(w) of the ILUC Directive.
[88] RED II Proposal, (Exhibit EU-8), pp. 16-17.
[89] Study Report (2017), (Exhibit EU-28).
[90] European Union first written submission, para. 249.
[91] RED II, (Exhibit MYS-90).

2.2.2.1 General requirements

2.24. The terms "energy from renewable sources" or "renewable energy" are defined in Article 2(1) of RED II as:

> energy from renewable non-fossil sources, namely wind, solar (solar thermal and solar photovoltaic) and geothermal energy, ambient energy, tide, wave and other ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogas.

2.25. RED II requires EU member States to ensure that at least 32% of the energy consumed in the European Union by 2030 is energy from renewable sources.[92] EU member States are to achieve this target collectively through national contributions set out in integrated national energy and climate plans.[93] Article 3(1) of RED II provides that:

> Member States shall collectively ensure that the share of energy from renewable sources in the Union's gross final consumption of energy in 2030 is at least 32%. The Commission shall assess that target with a view to submitting a legislative proposal by 2023 to increase it where there are further substantial costs reductions in the production of renewable energy, where needed to meet the Union's international commitments for decarbonisation, or where a significant decrease in energy consumption in the Union justifies such an increase.

2.26. Article 7 of RED II lays down general rules for the calculation of the share of energy "from renewable sources" for the purposes of EU member States' national contributions. Pursuant to the first subparagraph of Article 7(1) of RED II, the gross final consumption of energy from renewable sources in each member State shall be calculated as the sum of:

> (a) gross final consumption of electricity from renewable sources;
>
> (b) gross final consumption of energy from renewable sources in the heating and cooling sector; and
>
> (c) final consumption of energy from renewable sources in the transport sector.

2.27. With regard to (a), (b) and (c) above, gas, electricity and hydrogen from renewable sources shall be considered only once for the purposes of calculating the share of gross final consumption of energy from renewable sources.[94]

2.2.2.2 Requirements relating to the use of renewable energy in the transport sector

2.28. Pursuant to Article 25(1) of RED II:

> In order to mainstream the use of renewable energy in the transport sector, each Member State shall set an obligation on fuel suppliers to ensure that the share of renewable energy within the final consumption of energy in the transport sector is at least 14 % by 2030 (minimum share) in accordance with an indicative trajectory set by the Member State and calculated in accordance with the methodology set out in this Article and in Articles 26 and 27. The Commission shall assess that obligation, with a view to submitting, by 2023, a legislative proposal to increase it in the event of further substantial costs reductions in the production of renewable energy, where necessary to meet the Union's international commitments for decarbonisation, or where justified on the grounds of a significant decrease in energy consumption in the Union.

2.29. Pursuant to Article 7(4) of RED II, for the purposes of point (c) of the first subparagraph of paragraph 1 (i.e. the transport sector), the following requirements shall apply:

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[92] Article 3(1) of RED II.
[93] Article 3(2) of RED II.
[94] Article 7(1) of RED II.

(a) Final consumption of energy from renewable sources in the transport sector shall be calculated as the sum of all biofuels, biomass fuels and renewable liquid and gaseous transport fuels of non-biological origin consumed in the transport sector. However, renewable liquid and gaseous transport fuels of non-biological origin that are produced from renewable electricity shall be considered to be part of the calculation pursuant to point (a) of the first subparagraph of paragraph 1 only when calculating the quantity of electricity produced in a Member State from renewable sources.

(b) For the calculation of final consumption of energy in the transport sector, the values regarding the energy content of transport fuels, as set out in Annex III, shall be used. For the determination of the energy content of transport fuels not included in Annex III, Member States shall use the relevant European Standards Organisation (ESO) standards in order to determine the calorific values of fuels. Where no ESO standard has been adopted for that purpose, Member States shall use the relevant International Organization for Standardisation (ISO) standards.

2.30. Biofuels are defined as "liquid fuel for transport produced from biomass".[95] Bioliquids are defined as "liquid fuel for energy purposes other than for transport, including electricity and heating and cooling, produced from biomass".[96] Biomass fuels are defined as "gaseous and solid fuels produced from biomass".[97]

2.31. Article 25(1) of RED II further provides that EU member States may set such obligation by means of, *inter alia*, measures targeting volumes, energy content or GHG emissions, provided that it is demonstrated that the minimum shares are achieved.

2.32. Article 27 of RED II contains calculation rules with respect to the minimum shares of renewable energy in the transport sector referred to in the first and fourth subparagraphs of Article 25(1).

2.2.2.3 Requirements applicable to biofuels, bioliquids and biomass fuels

2.33. The final paragraph of Article 7(1) of RED II provides that biofuels, bioliquids and biomass fuels can only be taken into account in this calculation if they fulfil certain sustainability and greenhouse gas (GHG) emission savings criteria.

2.34. The <u>sustainability criteria</u> are laid out in Article 29 of RED II. Pursuant to Article 29 biofuels, bioliquids and biomass fuels produced from agricultural biomass:

a. shall not be made from raw material obtained from land with a high biodiversity value, namely land that has the status of either a primary forest and other wooded land, highly biodiverse forest and other wooded land which is species-rich and not degraded and areas designated for nature protection purposes; or for the protection of rare, threatened or endangered ecosystems or species recognised by international agreements unless evidence is provided that the production of that raw material did not interfere with those nature protection purposes.[98]

b. shall not be made from raw material obtained from land with high-carbon stock, namely land that had one of the following statuses in January 2008 and no longer has that status[99]:

   i. wetlands, namely land that is covered with or saturated by water permanently or for a significant part of the year;

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[95] Article 2(33) of RED II.
[96] Article 2(32) of RED II.
[97] Article 2(27) of RED II. Biomass is in turn defined as "the biodegradable fraction of products, waste and residues from biological origin from agriculture, including vegetal and animal substances, from forestry and related industries, including fisheries and aquaculture, as well as the biodegradable fraction of waste, including industrial and municipal waste of biological origin" (Article 2(24) of RED II).
[98] Article 29(3) of RED II.
[99] Article 29(4) of RED II.

ii. continuously forested areas, namely land spanning more than one hectare with trees higher than five metres and a canopy cover of more than 30 %, or trees able to reach those thresholds *in situ*;

iii. land spanning more than one hectare with trees higher than five metres and a canopy cover of between 10 % and 30 %, or trees able to reach those thresholds *in situ*, unless evidence is provided that the carbon stock of the area before and after conversion is such that, when the methodology laid down in Part C of Annex V is applied, the conditions laid down in paragraph 10 of this Article would be fulfilled.

c. shall not be made from raw material obtained from land that was peatland in January 2008, unless evidence is provided that the cultivation and harvesting of that raw material does not involve drainage of previously undrained soil.[100]

2.35. Article 29(10) of RED II also sets out the following GHG emission savings criteria:

10. The greenhouse gas emission savings from the use of biofuels, bioliquids and biomass fuels taken into account for the purposes referred to in paragraph 1 shall be:

(a) at least 50 % for biofuels, biogas consumed in the transport sector, and bioliquids produced in installations in operation on or before 5 October 2015;

(b) at least 60 % for biofuels, biogas consumed in the transport sector, and bioliquids produced in installations starting operation from 6 October 2015 until 31 December 2020;

(c) at least 65 % for biofuels, biogas consumed in the transport sector, and bioliquids produced in installations starting operation from 1 January 2021;

(d) at least 70 % for electricity, heating and cooling production from biomass fuels used in installations starting operation from 1 January 2021 until 31 December 2025, and 80 % for installations starting operation from 1 January 2026.

An installation shall be considered to be in operation once the physical production of biofuels, biogas consumed in the transport sector and bioliquids, and the physical production of heating and cooling and electricity from biomass fuels has started.

The greenhouse gas emission savings from the use of biofuels, biogas consumed in the transport sector, bioliquids and biomass fuels used in installations producing heating, cooling and electricity shall be calculated in accordance with Article 31(1).

2.36. To determine the GHG emission savings of biofuels, the European Union applies a life cycle analysis (LCA). Annex V of RED II details the LCA methodology for calculating GHG emissions from the production and use of biofuels.[101] This methodology includes consideration of the GHG emissions from carbon stock changes caused by land use change (LUC).[102] These LUC-related emissions are calculated by considering: (1) the carbon stock per unit area associated with the reference land use (prior to the land use change); (2) the carbon stock per unit area associated with the actual land

[100] Article 29(5) of RED II.

[101] Annex V of RED II also sets out typical and default values for calculating the GHG emission savings of biofuels, bioliquids and biomass fuels. For instance, the default value of GHG emission savings of palm oil biodiesel is 19% if processed with open effluent pond, and 45% if processed with methane capture at oil mill. RED II also stipulates that "[t]he Commission shall review, by 31 December 2020, guidelines for the calculation of land carbon stocks drawing on the 2006 IPCC Guidelines for National Greenhouse Gas Inventories – volume 4 and in accordance with Regulation (EU) No 525/2013 and Regulation (EU) 2018/841 of the European Parliament and of the Council. The Commission guidelines shall serve as the basis for the calculation of land carbon stocks for the purposes of this Directive". See Annex V(C)(10) to RED II (fns omitted).

[102] See Annex V of RED II.

use; (3) the productivity of the crop (measured as biofuel energy per unit area); and (4) whether biomass is obtained from restored degraded land.[103]

2.37. Article 30 of RED II further provides for "Verification of compliance with the sustainability and greenhouse gas emissions saving criteria". Article 30(1) provides, in part, that:

> Where biofuels, bioliquids and biomass fuels, or other fuels that are eligible for counting towards the numerator referred to in point (b) of Article 27(1), are to be taken into account for the purposes referred to in Articles 23 and 25 and in points (a), (b) and (c) of the first subparagraph of Article 29(1), Member States shall require economic operators to show that the sustainability and greenhouse gas emissions saving criteria laid down in Article 29(2) to (7) and (10) have been fulfilled. […]

and that:

> For those purposes, they shall require economic operators to use a mass balance system […][104] The mass balance system shall ensure that each consignment is counted only once in point (a), (b) or (c) of the first subparagraph of Article 7(1) for the purposes of calculating the gross final consumption of energy from renewable sources and shall include information on whether support has been provided for the production of that consignment, and if so, on the type of support scheme.

2.38. RED II further distinguishes between "advanced biofuels", defined as biofuels that are produced from the feedstock listed in Part A of Annex IX of RED II[105], and those biofuels not produced from feedstock listed in Part A of Annex IX of RED II. Biofuels made from food and feed crops are not listed in Part A of Annex IX. These are so-called "conventional" biofuels.

2.39. The calculation rules for biofuels include:

a. a minimum target share of advanced biofuel set at 0.2% of the final consumption of energy in the transport sector in 2022, 1% by 2025 and 3.5% by 2030[106]; and

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[103] See Annex V(C)(7) of RED II. See also section 2.7 below on Conventional biofuel production and land use change.

[104] Pursuant to Article 30(1) of RED II, the mass balance system is one which:
(a) allows consignments of raw material or fuels with differing sustainability and greenhouse gas emissions saving characteristics to be mixed for instance in a container, processing or logistical facility, transmission and distribution infrastructure or site; (b) allows consignments of raw material with differing energy content to be mixed for the purposes of further processing, provided that the size of consignments is adjusted according to their energy content; (c) requires information about the sustainability and greenhouse gas emissions saving characteristics and sizes of the consignments referred to in point (a) to remain assigned to the mixture; and (d) provides for the sum of all consignments withdrawn from the mixture to be described as having the same sustainability characteristics, in the same quantities, as the sum of all consignments added to the mixture and requires that this balance be achieved over an appropriate period of time.

[105] Article 2(34) of RED II; Part A of Annex IX of RED II lists down the following:
(a) Algae if cultivated on land in ponds or photobioreactors; (b) Biomass fraction of mixed municipal waste, but not separated household waste subject to recycling targets under point (a) of Article 11(2) of Directive 2008/98/EC; (c) Biowaste as defined in point (4) of Article 3 of Directive 2008/98/EC from private households subject to separate collection as defined in point (11) of Article 3 of that Directive; (d) Biomass fraction of industrial waste not fit for use in the food or feed chain, including material from retail and wholesale and the agro-food and fish and aquaculture industry, and excluding feedstocks listed in part B of this Annex; (e) Straw; (f) Animal manure and sewage sludge; (g) Palm oil mill effluent and empty palm fruit bunches; (h) Tall oil pitch; (i) Crude glycerine; (j) Bagasse; (k) Grape marcs and wine lees; (l) Nut shells; (m) Husks; (n) Cobs cleaned of kernels of corn; (o) Biomass fraction of wastes and residues from forestry and forest-based industries, namely, bark, branches, pre-commercial thinnings, leaves, needles, tree tops, saw dust, cutter shavings, black liquor, brown liquor, fibre sludge, lignin and tall oil; (p) Other non-food cellulosic material; (q) Other ligno-cellulosic material except saw logs and veneer logs.

[106] Article 25(1) of RED II.

b. a maximum share for biofuels made from food and feed crops.[107]

2.40. The detail of the calculation rules in respect of biofuels made from food and feed crops is described below, when setting out the measures at issue that are challenged by Malaysia in these proceedings.

2.3 The specific EU measures at issue

2.41. Article 26 of RED II contains specific rules for the calculation of EU member State's final consumption of energy from renewable sources in respect of biofuels from food and feed crops.

2.42. Food and feed crops are defined as "starch-rich crops, sugar crops or oil crops produced on agricultural land as a main crop excluding residues, waste or ligno-cellulosic material and intermediate crops, such as catch crops and cover crops, provided that the use of such intermediate crops does not trigger demand for additional land".[108]

2.43. These rules set limits on the contribution that such biofuels can make to the consumption targets described above.[109] The rules described below are the main subject-matter of this dispute.

2.3.1 7% maximum share of biofuels made from food and feed crops

2.44. The limit on the contribution that biofuels made from food or feed crops may be counted as making to meeting EU renewable energy targets was first introduced in the ILUC Directive[110] and was maintained in RED II.

2.45. Article 26(1) of RED II reads as follows:

> 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 the first subparagraph of Article 25(1), the share of biofuels and bioliquids, as well as of biomass fuels consumed in transport, where produced from food and feed crops, shall be no more than one percentage point higher than the share of such fuels in the final consumption of energy in the road and rail transport sectors in 2020 in that Member State, with a maximum of 7% of final consumption of energy in the road and rail transport sectors in that Member State.
>
> Where that share is below 1 % in a Member State, it may be increased to a maximum of 2 % of the final consumption of energy in the road and rail transport sectors.
>
> Member States may set a lower limit and may distinguish, for the purposes of Article 29(1), between different biofuels, bioliquids and biomass fuels produced from food and feed crops, taking into account best available evidence on indirect land-use change impact. Member States may, for example, set a lower limit for the share of biofuels, bioliquids and biomass fuels produced from oil crops.
>
> Where the share of biofuels and bioliquids, as well as of biomass fuels consumed in transport, produced from food and feed crops in a Member State is limited to a share lower than 7 % or a Member State decides to limit the share further, that Member State may reduce the minimum share referred to in the first subparagraph of Article 25(1) accordingly, by a maximum of 7 percentage points.

[107] Article 26(1) of RED II.

[108] Article 2(40) of RED II. Starch-rich crops are defined as "crops comprising mainly cereals, regardless of whether the grains alone or the whole plant, such as in the case of green maize, are used; tubers and root crops, such as potatoes, Jerusalem artichokes, sweet potatoes, cassava and yams; and corm crops, such as taro and cocoyam". (Article 2(39) of RED II.)

[109] See para. 2.28 above.

[110] See para. 2.16 above.

2.46. These rules are referred to by Malaysia as "the 7% limit"[111] and by the European Union as a "7% maximum share".[112]

2.3.2 The "high ILUC-risk cap" and the "high ILUC-risk phase-out"

2.47. RED II also caps the contribution that "high ILUC-risk" biofuels may make to meeting the EU gross final consumption of energy from renewable sources target in the transport sector. This is described by the parties as "the high ILUC-risk cap", or "cap".

2.48. RED II also gradually decreases the contribution that "high ILUC-risk" biofuels may be counted as making to renewable energy targets. This is described by the parties as the "high ILUC-risk phase-out", or "the phase-out".

2.49. Malaysia refers to these two rules as distinct measures, i.e. "the high ILUC-risk cap" and the "high ILUC-risk phase-out".[113]

2.50. Article 26(2) of RED II provides as follows:

> 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 the first subparagraph of 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 shall not exceed the level of consumption of such fuels in that Member State in 2019, unless they are certified to be low indirect land-use change-risk biofuels, bioliquids or biomass fuels pursuant to this paragraph.
>
> From 31 December 2023 until 31 December 2030 at the latest, that limit shall gradually decrease to 0%.
>
> By 1 February 2019, the Commission shall submit to the European Parliament and to the Council a report on the status of worldwide production expansion of the relevant food and feed crops.
>
> By 1 February 2019, the Commission shall adopt a delegated act in accordance with Article 35 to supplement this Directive by setting out the criteria for certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels and for determining the high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high-carbon stock is observed. The report and the accompanying delegated act shall be based on the best available scientific data.
>
> By 1 September 2023, the Commission shall review the criteria laid down in the delegated act referred to in the fourth subparagraph based on the best available scientific data and shall adopt delegated acts in accordance with Article 35 to amend such criteria, where appropriate, and to include a trajectory to gradually decrease the contribution to the Union target set in Article 3(1) and to the minimum share referred to in the first subparagraph of Article 25(1), of high indirect land-use change-risk biofuels, bioliquids and biomass fuels produced from feedstock for which a significant expansion of the production into land with high-carbon stock is observed.

2.51. The Delegated Regulation, which was adopted on 13 March 2019 to implement Article 26(2) of RED II, contains the criteria to determine which crops are "high ILUC risk". Article 3 of the Delegated Regulation, which sets forth the cumulative criteria that apply, and which refers to the Annex and the review mechanism in Article 7 of the Delegated Regulation, reads as follows:

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[111] Malaysia's first written submission, para. 385.
[112] European Union's first written submission, para. 541.
[113] Malaysia's first written submission, para. 387.

Article 3

Criteria for determining the high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed

For the purpose of determining the high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high-carbon stock is observed, the following cumulative criteria shall apply:

(a) the average annual expansion of the global production area of the feedstock since 2008 is higher than 1 % and affects more than 100,000 hectares; and

(b) the share of such expansion into land with high-carbon stock is higher than 10%, in accordance with the following formula:

$$x_{hcs} = \frac{x_f + 2{,}6x_p}{PF}$$

where

x_{hcs} = share of expansion into land with high-carbon stock:

x_f = share of expansion into land referred to in Article 29(4)(b) and (c) of RED II:

x_p = share of expansion into land referred to in Article 29(4)(a) of RED II including peatland:

PF = productivity factor.

PF shall be 1,7 for maize, 2,5 for palm oil, 3,2 for sugar beet, 2,2 for sugar cane and 1 for all other crops.

The application of the criteria in points (a) and (b) above shall be based on the information included in the Annex, as revised in accordance with Article 7.

2.52. This criterion is to be taken together with the values contained in the Annex to the Delegated Regulation, as reproduced below in Table 1.

Table 1: Values contained in the Annex to the Delegated Regulation

	Average annual expansion of production area since 2008 (kha)	Average annual expansion of production area since 2008 (%)	Share of expansion into land referred to in Article 29(4)(b) and (c) of Directive (EU) 2018/2001	Share of expansion into land referred to in Article 29(4)(a) of Directive (EU) 2018/2001
Cereals				
Wheat	– 263.4	– 0.1%	1%	—
Maize	4 027.5	2.3%	4%	—
Sugar crops				
Sugar cane	299.8	1.2%	5%	—
Sugar beet	39.1	0.9%	0.1%	—
Oil crops				
Rapeseed	301.9	1.0%	1%	—
Palm oil	702.5	4.0%	45%	23%
Soybean	3 183.5	3.0%	8%	—
Sunflower	127.3	0.5%	1%	—

Source: The Delegated Regulation.

2.53. A Status Report presented together with the Delegated Regulation provides information linked to the criteria set out in the Delegated Regulation.[114] In particular, the Status Report explains the data on feedstock expansion and the sources of this data, contained in the Annex of the Delegated Regulation, and elaborates upon the methodology used and the design of the formula.[115]

2.54. Palm oil-based biofuel is currently the only conventional biofuel that, on the application of the formula, qualifies as "high-ILUC-risk".[116] This result was obtained by considering the double threshold of the average annual expansion of the global production area as per Article 3(a) of the Delegated Regulation, and by applying the formula as per Article 3(b) of the Delegated Regulation.[117] The data on feedstock expansion can be found in the Annex of the Delegated Regulation. Table 2, prepared by the Panel based on information contained in the Delegated Regulation, illustrates these calculations by applying the formula to each feedstock.

[114] Status Report (2019), (Exhibit MYS-92).
[115] The parties disagree on the scientific basis on which the Status Report relies.
[116] European Union's first written submission, para. 733; Malaysia's first written submission, para. 939.
[117] When the formula is applied, the data on feedstock expansion, reported in the Status Report, are considered as variables that are combined with the fixed values and constants (the productivity factor and the 2.6 peat multiplier).

Table 2: Illustration of calculations under the Delegated Regulation

	Article 3(a)		Article 3(b)			
	Average annual expansion of production area since 2008 (kha)	Average annual expansion of production area since 2008 (%)	X_f	X_p	PF	Formula applied to each feedstock
Cereals						
Wheat	– 263.4	– 0.1%	1%	—	1	Average annual expansion of production area since 2008 <1% and 100 kha
Maize	4 027.5	2.3%	4%	—	1.7	$2.35 = \frac{4 + 2.6(0)}{1.7}$
Sugar crops						
Sugar cane	299.8	1.2%	5%	—	2.2	$2.27 = \frac{5 + 2.6(0)}{2.2}$
Sugar beet	39.1	0.9%	0.1%	—	3.2	Average annual expansion of production area since 2008 <1% and 100 kha
Oil crops						
Rapeseed	301.9	1.0%	1%	—	1	$1 = \frac{1 + 2.6(0)}{1}$
Palm oil	702.5	4.0%	45%	23%	2.5	$41.92 = \frac{45 + 2.6(23)}{2.5}$
Soybean	3 183.5	3.0%	8%	—	1	$8 = \frac{8 + 2.6(0)}{1}$
Sunflower	127.3	0.5%	1%	—	1	Average annual expansion of production area since 2008 <1%

Source: The Delegated Regulation

2.55. Article 7 of the Delegated Regulation sets forth a review clause that is also a relevant part of the legislative framework. It provides:

Article 7

Monitoring and Review

> The Commission shall, by 30 June 2021, review all relevant aspects of the report on feedstock expansion, in particular the data on feedstock expansion, as well as the evidence on the factors justifying the small holders provision in Article 5(1), and, if appropriate, amend this Regulation. This revised report shall be submitted to the European Parliament and the Council and become the basis for the application of the criteria set out in Article 3.
>
> The Commission shall review thereafter the data included in the report in light of evolving circumstances and latest available scientific evidence.

2.56. Article 7 of the Delegated Regulation thus provides that the list of crops that are considered as "high ILUC-risk" is reviewed based on newly collected scientific data to be included in a revised and updated report. The monitoring and review mechanism establishes the commitment to collect

and use the latest available scientific data[118], and to update the variables in the calculation of the formula in Article 3 and the criteria for low ILUC-risk certification under Article 5(1). In other words, Article 7 establishes the commitment to collect the newest available scientific data, based on which the list of crops that are qualified as "high ILUC-risk" following the application of the formula may be updated, as well as the criteria for low ILUC-risk certification for smallholders.

2.3.3 Low ILUC-risk certification

2.57. RED II also introduces the concept of "low ILUC-risk biofuels", which is defined as follows in its Article 2(37):

> 'low indirect land-use change-risk biofuels, bioliquids and biomass fuels' means biofuels, bioliquids and biomass fuels, the feedstock of which was produced within schemes which avoid displacement effects of food and feed-crop based biofuels, bioliquids and biomass fuels through improved agricultural practices as well as through the cultivation of crops on areas which were previously not used for cultivation of crops, and which were produced in accordance with the sustainability criteria for biofuels, bioliquids and biomass fuels laid down in Article 29;

2.58. Article 26(2) of RED II provides that biofuels made from "high ILUC-risk" feedstock are not included in the cap and/or phase-out if they are certified to be "low ILUC-risk" biofuels, bioliquids or biomass fuels pursuant to this paragraph. Such biofuels remain however still subject to the 7% limit/ maximum share.

2.59. The Delegated Regulation implements Article 26(2) of RED II by laying down the criteria for certifying low ILUC-risk biofuels, bioliquids and biomass fuels. Article 4 of the Delegated Regulation introduces general criteria for the certification of "low ILUC-risk":

> Article 4
>
> General criteria for certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels
>
> 1. Biofuels, bioliquids and biomass fuels may only be certified as low indirect land-use change-risk fuels if all the following criteria are met:
>
> (a) the biofuels, bioliquids and biomass fuels comply with the sustainability and greenhouse gas emissions saving criteria set out in Article 29 of Directive (EU) 2018/2001;
>
> (b) the biofuels, bioliquids and biomass fuels have been produced from additional feedstock obtained through additionality measures that meet the specific criteria set out in Article 5;
>
> (c) the evidence needed to identify the additional feedstock and substantiate claims regarding the production of additional feedstock is duly collected and thoroughly documented by the relevant economic operators.
>
> 2. The evidence in point (c) of paragraph 1 shall at least include information on the additionality measures taken to produce additional feedstock, the delineated areas on which these measures have been applied and the average yield achieved from the land where these measures have been applied over the 3-year period immediately preceding the year when the additionality measure was applied.

2.60. Article 2(5) of the Delegated Regulation defines *additionality measure*, one of the low ILUC-risk certification criteria listed in Article 4, as "any improvement of agricultural practices leading, in a sustainable manner, to an increase in yields of food and feed crops on land that is already used for the cultivation of food and feed crops; and any action that enables the cultivation of food and

[118] Concerning in particular the data on feedstock expansion, as well as the evidence on the factors justifying the smallholders provision in Article 5(1) of the Delegated Regulation.

feed crops on unused land, including abandoned land, for the production of biofuels, bioliquids and biomass fuels".

2.61. Article 5 of the Delegated Regulation sets out the conditions that *additionality measures* must meet in order to satisfy the requirements for certification under Article 4(b) of the Delegated Regulation. This provision provides as follows:

Article 5

Additionality measures

> 1. Biofuels, bioliquids and biomass fuels may only be certified as low indirect land-use change-risk fuels if:
>
> (a) the additionality measures to produce the additional feedstock meet at least one of the following conditions:
>
> (i) they become financially attractive or face no barrier preventing their implementation only because the biofuels, bioliquids and biomass fuels produced from the additional feedstock can be counted towards the targets for renewable energy under Directive 2009/28/EC or Directive (EU) 2018/2001;
>
> (ii) they allow for cultivation of food and feed crops on abandoned land or severely degraded land;
>
> (iii) they are applied by small holders;
>
> (b) the additionality measures are taken no longer than 10 years before the certification of the biofuels, bioliquids and biomass fuels as low indirect land-use change-risk fuels.

2.62. Article 6 of the Delegated Regulation introduces auditing and verification requirements for certification of low ILUC-risk biofuels. This provision provides as follows:

Article 6

Auditing and verification requirements for certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels

> 1. For the purpose of certifying low indirect land-use change-risk biofuels, bioliquids and biomass fuels, economic operators shall:
>
> (a) submit reliable information substantiating their claims ensuring that all requirements set out in Articles 4 and 5 have been duly fulfilled;
>
> (b) arrange for an adequate standard of independent auditing of the information submitted and an adequate level of transparency reflecting the need for public scrutiny of the auditing approach; and
>
> (c) provide evidence that audits are conducted.
>
> 2. The auditing shall verify that information submitted by economic operators is accurate, reliable and protected against fraud.
>
> 3. In order to demonstrate that a consignment is to be considered as a low indirect land-use change-risk biofuel, bioliquid or biomass fuel, economic operators shall use the mass balance system set out in Article 30(1) of Directive (EU) 2018/2001. Voluntary schemes may be used to demonstrate compliance with the criteria set out in Articles 4 to 6 in accordance with Article 30 of Directive (EU) 2018/2001.

2.63. On 14 June 2022, the European Commission, in accordance with Article 30(8) of RED II, adopted Implementing Regulation (EU) 2022/996 on rules to verify sustainability and GHG emissions saving criteria and low ILUC-risk criteria.[119] The absence of an implementing regulation on low ILUC-risk certification (or other specific implementing rules necessary to make low ILUC-risk certification operational) up until this date is one ground on which Malaysia challenges low-ILUC-risk certification.

2.64. A further issue of contention between the parties is the role of voluntary certification schemes and to what extent they have been recognized by the European Commission. Voluntary schemes require approval by the European Commission pursuant to Article 30(6) of RED II. Three such decisions were pending during part of these proceedings, eventually receiving final approval on 8 April 2022.[120] The content of these decisions is debated amongst the parties.

2.4 Summary of main relevant rules in RED II

2.65. In summary, RED II includes the following rules relevant to calculating the targets for the consumption of renewable energy sources, including the rules relevant to the contribution of biofuels:

a. an EU-wide binding consumption target of at least 32% renewable energy by 2030, to be achieved collectively by EU member States[121];

b. an overall target for the share of renewable energy to be used in the transport sector is set at 10% by 2020 and 14% by 2030[122];

c. biofuels, bioliquids and biomass fuels can only be taken into account in the calculation of this target if they fulfil certain sustainability and GHG emission savings criteria[123];

d. the contribution of biofuels made from food and feed crops (i.e. "crop-based" or "conventional" biofuels) to meeting these targets shall not exceed 1 percentage point more than the share of such fuels in the final consumption of energy in the transport sector in the relevant EU member State in 2020, up to a maximum contribution of 7% of the total energy consumed in the transport sector ("7% limit" or "7% maximum share")[124];

e. where the share of biofuels, bioliquids, and biomass fuels produced from food and feed crops consumed in transport in a member State is limited to less than 7% or a member State decides to limit it further, that member State may reduce the overall target described at b. above accordingly, by a maximum of 7%[125];

f. a minimum target share of "advanced" biofuel as a percentage of the total energy consumed in the transport sector is also established, which is set at 0.2% in 2020, 1% by 2025 and 3.5% by 2030[126];

g. the contribution to the targets of biofuels made from food or feed crops for which a significant expansion of the production area into land with high carbon stock is observed ("high ILUC-risk biofuels") shall not exceed the level of consumption of such fuels in that member State in 2019 (the high ILUC-risk cap); as of 31 December 2023, this contribution will have to be gradually reduced to 0% by 2030 at the latest (the high ILUC-risk phase-out)[127];

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[119] C/2022/3740, OJ L 168, 27.6.2022, p. 1–62. Commission Implementing Regulation (EU) 2022/996, (Exhibit EU-329). See European Union's response to Panel question No. 61, para. 394.

[120] The European Union provided this information in its comments on the descriptive part of the Report but did not submit the documents themselves.

[121] Article 3(1) of RED II; European Union's first written submission, para. 21.

[122] Article 25(1) of RED II.

[123] Article 7(1) of RED II.

[124] Article 26(1) of RED II.

[125] Article 26(1) of RED II.

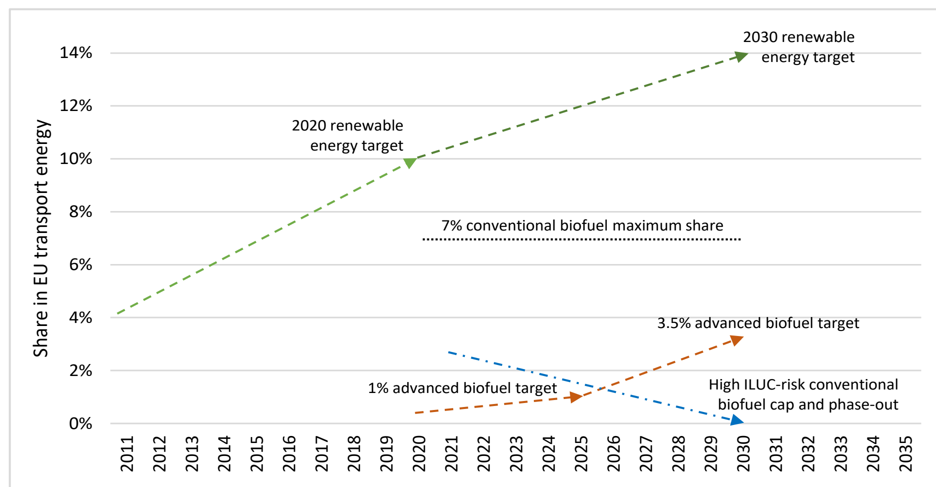
[126] Article 25(1) of RED II.

[127] Article 26(2) of RED II; Status Report (2019), (Exhibit MYS-92), p.5.

h. high ILUC-risk biofuels meeting certain requirements may be certified as low ILUC-risk ("low ILUC-risk certification") are not subject to the cap and/or phase-out otherwise applicable to biofuels produced from high ILUC-risk crops.[128]

2.66. Figure 1 below, prepared by the Panel based on the provisions of RED II, summarizes the combined operation of these requirements.

Figure 1: Overview of EU renewable energy targets and requirements in the transport sector under RED II



Source: Based on the provisions of RED II

2.5 French TIRIB measure

2.67. The specific French measure challenged by Malaysia concerns an annual tax payable by entities that release fuel for consumption within the territory of France.[129] The tax is known as the TIRIB (*Taxe Incitative Relative à l'Incorporation de Biocarburant,* meaning: incentive tax concerning the incorporation of biofuels).[130]

2.68. As described by the parties, the TIRIB is set out in the following legal instruments:[131]

a. Article 266 *quindecies* of the French Customs Code, as modified by Law No. 2018-1317 on 28 December 2018, Law No. 2019-1479 on 28 December 2019, and Law No. 2020-1721 on 29 December 2020;

b. Article 6 of Law No. 220-935 of 30 July 2020 on amending finances for 2020;

c. Article L. 661-1 to 661-9 of the Energy Code;

d. Decree No. 2019-570 of 7 June 2019 regarding the incentive tax relating to the incorporation of biofuel;

e. Decision of 23 November 2011 modified, in respect of the application of Order No. 2011-1105 of 14 September 2011 and Decree No. 2011-1468 of 9 November 2011, relating to the sustainability of biofuel and bioliquid;

f. Decision of 2 May 2012 relating to the energy content of biofuels and bioliquids;

[128] Status Report (2019), (Exhibit MYS-92), p.5.
[129] Malaysia's panel request, paras. 25-28.
[130] Malaysia's first written submission, para. 375; European Union's first written submission, para. 1422.
[131] Malaysia's first written submission, para. 402 and fn 312 to para. 400 (including hyperlinks to instruments, and submitted as Exhibit MYS-181).

g. Circular of 18 August 2020 – The incentive tax relating to the incorporation of biofuels (TIRIB).

2.69. Entities that release fuel for consumption within the territory of France are liable to pay the TIRIB as an additional tax that varies in relation to the extent to which the energy content of the fuel released achieves established incorporation targets for qualifying energy sources, as detailed below.[132] The TIRIB is applied in addition to the value added tax (VAT) and the internal consumption tax on energy products (TICPE).[133] Unlike the TIRIB, which taxes fuel released for consumption at a variable rate according to the fuel energy source content, the TICPE is directly proportional to the volume of taxed fuel regardless of content and the VAT is directly proportional to the total value of the fuel released for consumption.[134]

2.70. The amount of the TIRIB depends on the amount and composition of the fuel released by the entity and is determined according to the following formula[135]:

X hL * rate € / hL * (IT% - AI%) = Y €

Where: ***X*** is the amount of fuel released measured in hectolitres

rate is a periodically adjustable amount of euros per hectolitre

IT% is a periodically adjustable target for the incorporation of a certain percentage of energy in the fuel mix from qualifying sources of energy

AI% is the actual percentage of energy in the fuel mix from the qualifying sources of energy

Y is the amount, expressed in euro, of tax owed by the entity releasing the fuel for consumption in the territory of France

2.71. The rate and the incorporation target percentages are specified in Part IV of Article 266 *quindecies* of the Customs Code.[136] In 2020, the applicable rate was EUR 101 per hectolitre, and this was increased to EUR 104 per hectolitre in 2021.[137] In 2020, the incorporation target was 8% for diesel and 8.2% for petrol, and the petrol incorporation target was increased to 8.6% in 2021.[138]

2.72. The application of the above formula results in a tax rate that varies in direct proportion to the factor (IT% - AI%), which is the difference between the targeted energy incorporation of qualifying fuel and the actual incorporation of qualifying fuel. This aspect of the TIRIB is illustrated in the following examples using the 2020 incorporation target for diesel (8%) and the established 2020 rate (EUR 101 per hectolitre):

a. If the incorporation target is achieved, then the factor (IT% - AI%) will be zero and the amount of the TIRIB will be EUR zero per hectolitre. (This is true regardless of the particular target percentage or rate used.)

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[132] Malaysia's first written submission, paras. 375-377; European Union's first written submission, paras. 1437-1441.

[133] European Union's first written submission, paras. 1432-1435. Prior to releasing fuel for consumption in France, and entity may purchase and store fuels from various sources to be blended into a fuel mix to be released for consumption without incurring these fuel taxes under a regime in which fuel in designated warehouses is suspended from tax prior to release for consumption. Malaysia's first written submission, para. 377, fn 292.

[134] European Union's first written submission, para. 1434.

[135] Malaysia's first written submission, paras. 376, 1034-1038; European Union's first written submission, para. 1440.

[136] Malaysia's first written submission, paras. 375-376, 1034-1038; Article 266 quindecies of the French Customs Code (Code des douanes), (Exhibit MYS-181).

[137] Malaysia's first written submission, paras. 375-376, 1034-1038; Malaysia's response to Question No. 193.

[138] Ibid.

b. In contrast, if no qualifying fuel is incorporated, then the factor (IT%-AI%) will be equal to the incorporation target, which in 2020 was 8% for diesel, resulting in a TIRIB of EUR 8.08 per hectolitre (101 * (8% - 0%) = EUR 8.08 per hectolitre).

c. If the qualifying fuel content accounts for 2% of the energy in the fuel, then the factor (IT% - AI%) will be 6%, resulting in a TIRIB of EUR 6.06 per hectolitre (101 * (8% - 2%) = EUR 6.06 per hectolitre).

d. If the qualifying fuel content accounts for 6% of the energy in the fuel, then the factor (IT% - AI%) will be 2%, resulting in a TIRIB of EUR 2.02 per hectolitre (101 * (8% - 6%) = EUR 2.02 per hectolitre).

2.73. Article 266 *quindecies* of the French Customs Code provides that, for the purposes of the TIRIB, qualifying sources of energy in the fuel mix for achieving the incorporation target are renewable energy sources and that energy from biofuels is renewable if it meets the sustainability and GHG emission savings criteria that are in line with RED II and the Delegated Regulation.[139]

2.74. Article 266 *quindecies* of the French Customs Code, provides that "palm oil-based products are not considered to be biofuels" starting from 1 January 2020.[140] The Circular of 18 August 2020 states that palm oil-based products are excluded, from 2020, from the full benefit of the tax advantage regardless of their mode of production.[141] The Circular of 12 June 2019, which preceded and was replaced by the Circular of 18 August 2020, stated that this was to exclude products based on palm oil not only from the scope of biofuels but also from that of renewable energy.[142] The exclusion of palm oil-based biofuel from qualifying sources of energy for TIRIB purposes was presented as a measure taken for environmental purposes.[143]

2.75. Additionally, Law No. 2020-935 of 30 July 2020 on amending finances for 2020 provided that the energy derived from certain biofuel (FAME with a cold-filter plugging point (CFPP) of at most -10°C) would be counted at 120% of its actual value for the purposes of contributing to the incorporation target with respect to the calculation of the TIRIB payable between 1 August 2020 and 31 December 2020.[144] The Circular of 18 August 2020 states that to qualify for the 120% of actual value treatment the certificates of incorporation "must indicate that the biofuels received are not produced from palm oil or meet a CFPP of not more than -10°C for FAME".[145]

2.6 Lithuania's measures

2.76. In addition to the EU-wide measures and the French measure, Malaysia challenges a Lithuanian law "transposing EU rules on ILUC".[146] The relevant paragraphs of Malaysia's panel request are presented under a sub-heading entitled "*Lithuania's Law No XI-1375 on renewable energy*", and state:

> 29. In view of the provisions of the RED II and the Delegated Regulation, Lithuania has amended its law on renewable energy to reflect the revised EU rules on ILUC.

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[139] Article 266 quindecies of the French Customs Code, (Exhibit MYS-181); Article 266 quindecies - Code des douanes – Légifrance, (Exhibit EU-199).

[140] Malaysia's first written submission, para. 378 fn 293; see also Article 266 quindecies of the French Customs Code, (Exhibit MYS-181), p.19.

[141] Circular by the French Government of 18 August 2020 on the incentive tax relating to the incorporation of biofuels (TIRIB), NOR: ECOD2020901C (Circulaire du 18 août 2020 Taxe incitative relative à l'incorporation de biocarburants (TIRIB), Articles 52 and 53, (Exhibit EU-197).

[142] Article 266 quindecies of the French Customs Code, (Exhibit MYS-181).

[143] European Union's first written submission, para. 1436 (referring to Exhibit EU-190).

[144] Malaysia's first written submission, para. 1046; European Union's first written submission, paras. 1526-1528 (referring to Exhibits EU-196, EU-197, EU-198).

[145] Malaysia's first written submission, para. 1046; European Union's first written submission, paras. 1526-1528 (referring to Exhibits EU-196, EU-197, EU-198). In addition, Amendment nr. I-694 rect. bis. of 21 November 2020 to the French Finance Law for 2021 (Amendement N° I-694 rect. bis de 21 novembre 2020 de la loi de finances pour 2021), (Exhibit EU-198) by which the described treatment was extended to March 2021, states this would extend a support measure for the biodiesel sector.

[146] Malaysia's first written submission, paras. 380-381.

30. Lithuania, like any other EU member State, will still theoretically allow the importation of high ILUC-risk feedstocks or biofuels, bioliquids, and biomass fuels produced therewith. By 2030, however, the share of fuels produced from feedstocks considered by the EU as high ILUC-risk feedstocks are to gradually decrease to 0% for the calculation of Lithuania's gross final consumption of energy from renewable sources referred to in Article 7 of the RED II and the minimum share referred to in the first subparagraph of Article 25(1) of the RED II.

31. Malaysia understands that Lithuania's measure is set up and implemented through the following legal instruments:

    i. Lithuania's Law No XI-1375 on renewable energy, as amended by Law No XIII-2869 amending Articles 1, 2, 3, 4, 5, 6, 11, 13, 14, 16, 17, 20, 20(1), 22, 25, 28, 29, 35, 37, 38, 39, 46, 48, 49, 55, 58, 59, 60, 61, 62, 63, 63, 64 and the Annex of Law No XI-1375 on renewable energy, repealing Article 11(1) and adding Article 20(2) of 28 April 2020.

    ii. Any annexes thereto, amendments, supplements, replacements, renewals, extensions, implementing measures or any other related measures, and any exemptions applied.

2.77. A footnote to the above-quoted subparagraph (i) of the panel request contains a hyperlink to the text of the Lithuanian law at issue in the original language.

2.7 Conventional biofuel production and land use change

2.78. A key concept underlying the definitions of "high ILUC-risk" and "low ILUC-risk" used in the EU measures described above is land use change (LUC). Land use change can be *direct* (DLUC) or *indirect* (ILUC).[147]

2.7.1 Land use change (LUC)

2.79. According to a Report on "Climate Change and Land" by the Intergovernmental Panel on Climate Change (IPCC) the term "land use" refers to "[t]he total of arrangements, activities and inputs applied to a parcel of land."[148] This IPCC report, furthermore, describes the term "land use change" as "[t]he change from one land use category to another".[149]

2.80. In ISO standard 14067:2018 "Greenhouse gases – Carbon footprint of products – Requirements and guidelines for quantification" (hereinafter "ISO 14067:2018"), "land use" is defined as:

> human use or management of land within the relevant boundary.
>
> Note 1 to entry: In this document, the relevant boundary is the boundary of the system under study.
>
> Note 2 to entry: Land use is often referred to as 'land occupation' in life cycle assessment (LCA).[150]

2.7.2 Direct land use change (DLUC)

2.81. ISO 14067:2018 defines Direct Land Use Change (DLUC) as: a "change in the human use of land within the relevant boundary" where "the relevant boundary is the boundary of the system

[147] Malaysia's first written submission, paras. 3 and 412; European Union's first written submission, paras. 32-35.
[148] IPCC Report, "Climate Change and Land", (Exhibit MYS-89), p.817.
[149] IPCC Report, "Climate Change and Land", (Exhibit MYS-89), p.817.
[150] ISO 14067:2018, (Exhibit EU-32), Clause 3.1.7.4.

under study". It also notes that "land use change happens when there is a change in the land-use category as defined by the IPCC (e.g. from forest land to cropland)."[151]

2.7.3 Indirect land use change (ILUC)

2.82. As described above, the concept of ILUC is relied upon in RED II and the Delegated Regulation in the context of placing a general limit on the share of biofuels produced from feed and food crop that may contribute to EU renewable energy targets (the "7% limit"), first introduced in the ILUC Directive, and also through the concepts of "high ILUC-risk" and "low ILUC-risk" feedstock that underpin the "cap and phase-out" and related requirements.

2.83. ILUC is described as follows in Recital 81 of RED II: "Indirect land-use change occurs when the cultivation of crops for biofuels, bioliquids and biomass fuels displaces traditional production of crops for food and feed purposes. Such additional demand increases the pressure on land and can lead to the extension of agricultural land into areas with high-carbon stock, such as forests, wetlands and peatland, causing additional greenhouse gas emissions."

2.84. ISO 14067:2018 defines "indirect land use change" as:

> change in the use of land which is a consequence of direct land use change (3.1.7.5), but which occurs outside the relevant boundary.
>
> Note 1 to entry: In this document, the relevant boundary is the boundary of the system under study.
>
> Note 2 to entry: Land use change happens when there is a change in the 'land-use category' as defined by the IPCC (e.g. from forest land to cropland).
>
> EXAMPLE If land use on a particular parcel of land changes from food production to biofuel production, land use change might occur elsewhere to meet the demand for food. This land use change elsewhere is indirect land use change.[152]

2.85. The IPCC Report on "Climate Change and Land" defines ILUC as "Land use change outside the area of focus, that occurs as a consequence of change in use or management of land within the area of focus, such as through market or policy drivers. For example, if agricultural land is diverted to biofuel production, forest clearance may occur elsewhere to replace the former agricultural production."[153]

2.86. Malaysia challenges the way in which the European Union, in the measures at issue, has made use of the concept of ILUC and addressed ILUC impacts potentially resulting from conventional biofuel production.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. With regard to the EU measures at issue, Malaysia requests[154] the Panel to find that the European Union:

a. violates the national treatment and the Most-Favoured Nation (MFN) obligations under Article 2.1 of the TBT Agreement because the high ILUC-risk cap and the high ILUC-risk phase-out discriminate between like oil crop-based biofuel of different foreign origin and between oil palm crop-based biofuel from Malaysia and like oil crop-based biofuel of EU origin;

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[151] ISO 14067:2018, (Exhibit EU-32), Clause 3.1.7.5.
[152] ISO 14067:2018, (Exhibit EU-32), Section 3.1.7.6.
[153] IPCC Report, "Climate Change and Land", (Exhibit MYS-89), p. 817.
[154] Malaysia's first written submission, para. 1216.

b. violates Article 2.2 of the TBT Agreement by imposing the 7 % limit and the high ILUC-risk cap and the high ILUC-risk phase-out with a view to or with the effect of creating unnecessary obstacles to international trade;

c. violates Article 2.4 of the TBT Agreement by imposing the high ILUC-risk cap and the high ILUC-risk phase-out without using relevant international standards as a basis;

d. violates Article 2.5 of the TBT Agreement by failing to explain the justification for preparing, adopting or applying the 7 % limit and the high ILUC-risk cap and the high ILUC-risk phase-out in terms of Articles 2.2 to 2.4 of the TBT Agreement;

e. violates Article 2.8 of the TBT Agreement because the high ILUC-risk cap and the high ILUC-risk phase-out regulate trade in biofuel based on descriptive characteristics of product requirements instead of its performance;

f. violates Articles 2.9.2 and 2.9.4 of the TBT Agreement by failing to notify proposals of RED II and the Delegated Regulation and by having failed to organize a meaningful commenting process in respect of the proposal for RED II and that for the Delegated Regulation.

g. violates Article 5.1.1 of the TBT Agreement because the conformity assessment procedure for certifying biofuel as biofuel made from oil palm that is low ILUC-risk discriminates against Malaysian suppliers of oil palm crop-based biofuel;

h. violates Article 5.1.2 of the TBT Agreement by imposing a conformity assessment procedure for certifying oil palm crop-based biofuel as low ILUC-risk which creates unnecessary obstacles to international trade;

i. violates Article 5.2.1 of the TBT Agreement by failing to ensure, when implementing Article 5.1 of the TBT Agreement, that the conformity assessment procedure for certifying oil palm crop-based biofuel as low ILUC-risk is undertaken and completed as expeditiously as possible;

j. violates (i) Article 5.6.1 of the TBT Agreement by failing to publish a notice at an early appropriate stage that it proposes to introduce a particular conformity assessment procedure, in such a manner as to enable interested parties in Malaysia and other WTO Members to become acquainted with it; (ii) Article 5.6.2 of the TBT Agreement by failing to notify proposals of RED II and the Delegated Regulation; and (iii) Article 5.6.4 of the TBT Agreement by having failed to organize a meaningful commenting process in respect of the proposal for RED II and that for the Delegated Regulation;

k. violates Article 5.8 of the TBT Agreement by failing to promptly publish or otherwise make available the conformity assessment procedure for certifying oil palm crop-based biofuel as low ILUC-risk;

l. violates Articles 12.1 and 12.3 of the TBT Agreement by failing to take into account the circumstances specific to developing countries, in preparing and applying the technical regulations and the conformity assessment procedure at issue;

m. violates Article I:1 of the GATT 1994 because the high ILUC-risk cap, the high ILUC-risk phase-out and low ILUC-risk certification discriminate among palm oil and oil palm crop-based biofuel and like products originating in third countries;

n. violates Article III:4 of the GATT 1994 because the 7% limit[155], the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification discriminate between palm oil and oil palm crop-based biofuel originating in Malaysia and like products of EU origin;

[155] In the course of the proceedings, Malaysia confirmed that it does not intend to pursue its claim of discrimination under Article III:4 of the GATT 1994 with respect to the 7% limit/maximum share. (Malaysia's response to Panel question Nos. 73 and 76.)

o. violates Article X:3(a) of the GATT 1994 because the high ILUC-risk cap and the high ILUC-risk phase out are based on/apply the concept of high ILUC risk, for which there is insufficient scientific support and which cannot be directly observed, measured or otherwise established[156], and because, as regards low ILUC-risk certification, the European Union has, to date, failed to adopt implementing legislation, providing for detailed rules that would allow for products to be certified as having low ILUC-risk[157]; and

p. violates Article XI:1 of the GATT 1994 because the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification make effective quantitative prohibitions or restrictions on imports of oil palm crop-based biofuel and palm oil.

3.2. With regard to the French measures, Malaysia requests[158] the Panel to find that the European Union:

a. violates Article I:1 of the GATT 1994 because the exclusion of petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel, from the French biofuel tax reduction discriminates among like biofuels and their feedstocks originating in different third countries;

b. violates the first sentence of Article III:2 of the GATT 1994 because the exclusion of petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel, from the French biofuel tax reduction while making it available to other like oil crop-based biofuel of EU origin, discriminates between imported oil palm crop-based biofuel and other like biofuel of EU origin, by subjecting imported oil palm crop-based biofuel to internal taxes in excess of those applied to like domestic products;

c. violates, in the alternative to Malaysia's claim under the first sentence of Article III:2 of the GATT 1994, the second sentence of Article III:2 of the GATT 1994 because the exclusion of petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel, from the French biofuel tax reduction, while making it available to other like oil crop-based biofuel of EU origin, results in oil palm crop-based biofuel being taxed not similarly to other directly competitive or substitutable oil crop-based biofuel of EU origin, so as to afford protection to domestic production; and

d. violates Article 5(c) of the SCM Agreement because the exclusion of petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel, from the French biofuel tax reduction is an actionable subsidy which causes adverse effects to the interests of Malaysia, in the form of serious prejudice to its interests within the meaning of Articles 6.3(a) and 6.3(c) of the SCM Agreement.

3.3. With regard to Lithuania's measures, Malaysia contends that the measures set out particularly, but not exclusively, in Article 26 of the RED II and the Delegated Regulation are inconsistent with the EU's obligations under the TBT Agreement and the GATT 1994. Hence, any implementation by Lithuania of these measures in its domestic law would also be inconsistent with the same obligations under the TBT Agreement and the GATT 1994.[159]

3.4. The European Union requests the Panel to reject all the claims brought by Malaysia against the EU measures, the French TIRIB reduction and the Lithuanian measures.[160]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries provided to the Panel in accordance with paragraph 25 of the Working Procedures adopted by the Panel.[161]

[156] See Malaysia's first written submission, paras. 969 and 1216.
[157] See Malaysia's first written submission, paras. 970 and 1216.
[158] Malaysia's first written submission, para. 1217.
[159] Malaysia's first written submission, para. 1218.
[160] European Union's first written submission, para. 1834.
[161] See Annexes B-1 and B-2.

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Brazil, Canada, Colombia, Costa Rica, Ecuador, Indonesia, Japan, the Republic of Korea, the Russian Federation, the United Kingdom, Ukraine and the United States are reflected in their executive summaries, provided in accordance with paragraph 27 of the Working Procedures adopted by the Panel (see Annexes C-1 through C-13). Argentina, China, El Salvador, Guatemala, Honduras, India, Norway, the Kingdom of Saudi Arabia, Singapore, Thailand and Türkiye reserved their rights to participate in these proceedings as a third party, and did not make a written submission or present oral arguments to the Panel.

6 INTERIM REVIEW

6.1 Introduction

6.1. On 29 September 2023, the Panel issued its Interim Report to the parties. On 31 October 2023, Malaysia and the European Union each submitted written requests for the Panel to review aspects of the Interim Report. On 21 November 2023, Malaysia and the European Union submitted comments on each other's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests made at the interim review stage.

6.3. Insofar as the paragraph numbering in the Final Report has changed from the Interim Report, the discussion that follows uses the paragraph numbering of the Final Report as the point of reference.

6.2 General considerations

6.4. In this subsection, the Panel explains the approach it has taken to certain categories of requests in a more global manner. The Panel will then proceed to focus on those requests made by Malaysia and the European Union that raise more substantive issues which warrant being set out and discussed individually.

6.5. Certain typographical or formatting errors have been corrected.[162] Additionally, certain editorial improvements have been made to ensure greater consistency, precision and clarity in terminology.[163] A number of paragraphs referencing party arguments on particular points have been adjusted where a party requested revisions to more precisely and/or fully reflect its position on the point being summarized.[164] The Panel has also sought to accommodate requests by a party to supplement certain footnote citations with additional references to other relevant paragraphs from its submissions.[165] In some instances, consideration of a party's proposed adjustments has resulted in certain other consequential changes to ensure consistency throughout the Report. The Panel has also included several additional cross-references, among interrelated findings and subsections of this Report, to ensure clarity and coherence.[166]

6.6. In its Report, the Panel has followed the approach of introducing each claim and defence with an overview of the parties' positions in a manner that serves to concisely identify the issues in dispute; additional, brief summaries of one or both parties' arguments on particular points have been included in the course of its analysis where the Panel deems it necessary and appropriate to

[162] These include but are not limited to the changes suggested by the parties, in their interim review comments, to para. 7.230, para. 7.635 and heading 7.1.5.2.4.

[163] These include but are not limited to the changes suggested by the parties, in their interim review comments, to paras. 7.27, 7.95, 7.116, 7.130, 7.560, 7.1438, 7.1446, 7.1454.

[164] These include but are not limited to the changes suggested by the parties, in their interim review comments, to paras. 7.72, 7.89, 7.108, 7.121, 7.234, 7.252, 7.424, 7.427, 7.415, 7.420, 7.468-7.470, 7.560, 7.1026, and 7.1037.

[165] These include additions to footnotes accompanying paras. 7.206 and 7.209. The Panel has made such changes without prejudice to its understanding that, when a panel elects to include footnote citations referencing one or both parties' submissions on a particular point, a panel is free to provide a pinpoint citation to the paragraph(s) the Panel considers relevant, as opposed to exhaustively referencing all relevant paragraphs from the parties' written submissions, oral statements, responses to Panel questions, and/or associated comments.

[166] These include additions to paras. 7.264 and 7.1295.

facilitate an understanding of the Panel's own assessment and reasoning on the issue being addressed.[167] Therefore, while the Panel has sought to accommodate any request from a party to adjust the wording of existing argument summaries to more precisely and/or fully reflect the arguments made on the point being summarized, the Panel has generally refrained from inserting substantial amounts of new text, including whole new paragraphs, setting out more detailed argument summaries.

6.7. Some of Malaysia's comments on the interim report take the form of extended reiterations of its arguments on issues that have been extensively debated by the parties, and fully considered by the Panel, sometimes accompanied by a general request that the Panel reconsider its evaluation of those issues. The Panel considers that such comments generally do not require any specific reply from the Panel. It is well established that the interim review stage is not a time to "reargue" or "relitigate" issues[168], in such a way that would require panels to "defend their findings and conclusions".[169] Having said that, insofar as Malaysia is seeking to ensure that its views on certain of the Panel's findings are fully reflected, the Panel sees no impediment to setting out Malaysia's extended comments in full in this section of the Report.[170]

6.8. The discussion that follows is structured using the subheadings of this Report in order to provide context, and for ease of readability. Where a party offers multiple reiterations of the same request, or otherwise presents multiple comments that relate to the same issue, the Panel addresses them together to avoid repetition and fragmentation of its discussion.

6.3 Claims in respect of the EU measures

6.3.1 Preliminary considerations

6.9. In the context of the Panel's discussion at **paragraphs 7.24 to 7.26** of why it refers to the high ILUC-risk "cap" and "phase-out" in the singular and analyses it as a single measure, the European Union observes that "on the multiple occasions on which Malaysia was requested by the Panel to clarify whether it conceptualised the high ILUC cap and phase out as individual measures, Malaysia insisted that it sought distinct findings as regards these 'separate measures'. The European Union concurs that the Panel has a discretion to reformulate measures. However, in this instance, both parties advanced their arguments throughout the proceedings on the basis of the characterisation presented by Malaysia."

6.10. Malaysia does not respond to the European Union's comment.

6.11. The Panel considers that its discussion already clearly reflects and takes into account the manner in which the parties approached this issue. It is not clear if the European Union is requesting the Panel to adjust the existing text to further emphasize the manner in which the parties approached this issue, or if the European Union is taking issue with some aspect (and if so, which aspect) of the Panel's own reasoning on this issue. In these circumstances, the Panel sees no reason to make any change to paragraphs 7.24 to 7.26.

6.3.2 Article 2.2 – Necessary to fulfil a legitimate objective

6.12. In the context of the Panel's findings on "The identification of the objective pursued" by the measures at issue, the Panel observes that there are certain internal tensions and ambiguities in respect of each party's identification of the objective(s) of the measures at issue. The Panel then sets forth, in **paragraph 7.208**, a brief exposition of certain statements and arguments presented

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[167] A panel is not required to fully reproduce all of the parties' arguments as set forth in their submission and may reference and summarize the parties' arguments only to the extent it deems necessary and appropriate to facilitate an understanding of the Panel's own assessment and reasoning. (See Panel Report, *India – Solar Cells*, para. 6.24, and Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 6.3.)

[168] See e.g. Panel Reports, *Japan – DRAMs (Korea)*, para. 6.2; *Japan – Apples (Article 21.5 – US)*, para. 7.23; *US – Poultry (China)*, para. 6.32; and *EU – Energy Package*, paras. 6.13, 6.31, 6.36, 6.42, 6.45, 6.47, 6.55.

[169] Panel Reports, *Japan – DRAMs (Korea)*, para. 6.2; and *Indonesia — Iron or Steel Products (Chinese Taipei)*, Annex A-3, para. 2.3.

[170] The Panel does not consider it is necessarily under any requirement to provide a lengthy exposition of a party's comments on an interim report. A panel's assessment of whether it is appropriate to do so is naturally informed by the circumstances of a particular dispute.

by Malaysia along with the Panel's understanding of how certain of those arguments presented relate to one another, namely as arguments in the alternative. In a comment on paragraph 7.208, Malaysia seeks to clarify that its arguments with respect to the alleged specific objectives of the measures at issue, and the actual objective of protectionism pursued by the European Union, are not "made in the alternative", but rather follow from each other. It explains that the argument that the measures' objectives are protectionist follows from the argument that the European Union wishes to limit GHG emissions by limiting ILUC, which Malaysia considers a futile, inappropriate, and discriminatory attempt given the deficiencies inherent to ILUC and the EU's approach to ILUC.

6.13. The European Union does not respond to Malaysia's comment.

6.14. The Panel has generally sought to accommodate any request by a party to adjust an argument summary to more precisely and/or fully reflect a party's position on a point being summarized. However, the purpose of paragraph 7.208 is to set forth the Panel's understanding of how certain of the arguments presented by the parties on the identification of the measures' objective(s) relate to one another. The Panel is not convinced that the changes proposed by Malaysia to paragraph 7.208 demonstrate any error in the Panel's understanding. Accordingly, the Panel has not made those changes.

6.15. In the context of the Panel's findings on "The stated rationale behind the 7% maximum share and the high ILUC-risk cap and phase-out", Malaysia comments on the conclusion reached by the Panel in **paragraph 7.215**. There, the Panel states that "Recitals 80 and 81 of RED II thus set forth the rationale for addressing ILUC, link the issue of ILUC risks specifically to the issue of GHG emissions, and explain how the 7% maximum share in Article 26(1) and the high ILUC-risk cap and phase-out in Article 26(2), including the concept of low ILUC-risk biofuels, are related to this rationale". Malaysia submits that the Panel's statement is incorrect. According to Malaysia, "limiting" and "decreasing" the amount of biofuels produced from oil crops "cannot equate to their phase out to 0% and the EU's Recitals to the RED II do not contemplate such phase out". Malaysia considers that the European Union "has not provided any indication of the rationale for the high ILUC-risk phase out" and respectfully requests the Panel to review its findings in paragraph 7.215 accordingly.

6.16. The European Union observes that Malaysia invites the Panel to revisit its appreciation of the rationale of the challenged measures. The European Union disagrees and refers the Panel to its written submissions. The European Union considers that it is manifestly incorrect that it has not provided any rationale for the phase out of high ILUC-risk feedstock. Indeed, it explains that the phase out pursues the same objectives as the 7 % maximum share. However, certain crops used for biofuel production present particularly significant risks of indirect land-use change of an environmentally problematic nature, or which would be more likely to lead to high GHG emissions. Therefore, in light of the EU policy objectives, it is reasonable and legitimate to pursue a regulatory approach that seeks to distinguish between crops.[171]

6.17. The Panel sees no reason to change paragraph 7.215. Recital 81 of RED II states that it is appropriate to require Member States "*to set a specific and gradually decreasing limit for biofuels … produced from food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed*". It is clear from these and other elements of Recitals 80 and 81 (which are set out in full at paragraph 7.214) that the considerations set forth in those Recitals relate to the high ILUC-risk cap and phase-out. The essence of Malaysia's comment on paragraph 7.215 seems to be that there is no specific explanation, in Recitals 80 and 81, of why Article 26(2) of RED II, which establishes the high ILUC-risk cap and phase-out, provides that the "limit" set forth in that provision shall gradually decrease "to 0%". The Panel notes that while this may be true, there is nothing in paragraph 7.215 that states or implies that every specific aspect of the 7% maximum share as elaborated in Article 26(1) of RED II, and/or the high ILUC-risk cap and phase-out as elaborated in Article 26(2) of RED II, is individually explained in Recitals 80 and 81 of RED II.

6.18. In the context of the Panel's findings on "The allegation of protectionism in the guise of environmental protection", both parties comment on **paragraph 7.253**:

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[171] The European Union refers to its first written submission, para. 799, and second written submission, para. 108. The European Union further refers to its first written submission, section 5 and paras. 361–362 and 722-73.

a. The European Union requests that the Panel specifically identify the two trade defence measures referenced at paragraph 7.253. The European Union reiterates this comment in relation to **paragraph 7.1446**, in the context of the separate opinion by one panelist.

b. Malaysia seeks to clarify that it did not seek to argue that there is any direct link between the trade defence measures and the measures at issue. Rather, the reference to the trade defence measures was made in the context of providing a holistic overview of the background to the measures at issue, as well as suggesting as indicative that a long and controversial history of trade defence measures and protectionist attitudes by the European Union vis-à-vis oil palm and oil crop-based biofuels cannot be neglected and should be considered as part of the commercial and policy background against which the RED II, with its high ILUC-risk cap and phase-out features, were developed. Therefore, Malaysia respectfully requests the Panel to amend paragraph 7.253 and avoid suggesting that Malaysia considered there to be a direct link between the trade defence measures and the measures at issue.

6.19. The parties do not comment on one another's requests.

6.20. The Panel responds to the issues raised as follows:

a. In response to the European Union's request, the Panel has added a footnote identifying the two trade defence measures referenced by Malaysia in the context of paragraphs 206-208 of its first written submission. The Panel has also made the closely related change proposed by the European Union to the text of paragraph 7.1446.

b. The Panel recalls that Malaysia has argued that the protectionist motive of the measure is evidenced by the fact that the European Union "has a long history of enacting trade barriers" to limit imports of palm oil-based biofuel to protect the EU biofuel industry. The accompanying footnote in Malaysia's submission cross-references the earlier discussion, in the same submission, of the two trade defence measures and their effect on palm oil trade. Paragraph 7.253 addresses the argument as presented by Malaysia. The text of paragraph 7.253 does not state or imply that Malaysia's argument is that there is a direct link between the trade defence measures and the measures at issue. Accordingly, the Panel sees no basis to make the change requested by Malaysia.

6.21. In the context of the Panel's findings on "The allegation of protectionism in the cover of environmental protection", Malaysia comments on the Panel's analysis of the resolution of the European Parliament set out in **paragraph 7.259**. Malaysia disagrees with the Panel's considerations in paragraph 7.259 and requests the Panel to review its formulation of the findings related to the resolution of the European Parliament. Malaysia elaborates the following arguments and observations:

- Malaysia considers that the express reference to domestically cultivated rape and sunflower seeds is not merely an illustrative example, but intentionally refers to crops cultivated in the European Union, and, therefore, indicative of the European Union's actual objective. While Malaysia is not suggesting that proof of the protectionist and discriminative objectives of the RED II, and of its 'ingenious' features of the high ILUC-risk cap and phase-out, can be found in the resolution of the European Parliament, the resolution had clearly set the stage for the actions and policies developed by the European Commission in the Delegated Regulation.

- Malaysia believed to have convincingly and conclusively demonstrated such protectionist and discriminatory traits of the EU measures in its pleadings, but it regrets that only one Panelist understood the overall approach by the European Union and the reality of the system 'engineered' through the high ILUC-risk cap and phase-out, as well as its real objectives.

- Malaysia also finds it rather peculiar that, while the Panel appears to generally accept the validity of the ILUC mechanism as a tool for the European Union to pursue its legitimate objective, it appears to disregard it when it is used by Malaysia to challenge the premises of the EU measures and the flawed approach in terms of the likely consequences. In fact,

the Panel indicates that the "reference to domestically cultivated rape and sunflower seeds appears to be not so much an admission of a protectionist objective, but rather an illustrative example ("such as …") of oil-stock that is not grown in tropical areas where there is a risk of replacement by other tropical vegetable oils".

- On the basis of the ILUC approach, it should not matter whether rape and sunflower seeds are "oil-stock that is not grown in tropical areas where there is a risk of replacement by other tropical vegetable oils". Replacing oil palm-crop based biofuels on the EU market will surely require greater use of other 'like products', certainly produced from either soya, rape or sunflower. Whether this comes directly from the expansion of these crops onto high-carbon stock land or indirectly from the diversion of the use of existing resources from other end uses to biofuel production, this may well result in future ILUC, including in possible greater planting of oil palm for its various uses.

- Yet, the European Union, and seemingly also the Panel, do not appear to appreciate this, weigh it in the overall working of the ILUC approach, and factor it in when assessing the real nature of the objective being sought by European Union. Such objective is not environmental protection, but it is domestic protection of its oil crop producers, ingeniously 'camouflaged' as environmental protection and conservation of exhaustible natural resources.≥

6.22. The European Union observes that Malaysia invites the Panel to revisit its appreciation of the evidence. However, both parties presented submissions in respect of the relevance of the European Parliament's resolution and their respective positions have been evaluated by the Panel. Therefore, the European Union disagrees that there are grounds for the Panel to revisit its findings in this paragraph of the Interim Report. It refers the Panel to section 4.4.8 of its first written submission.

6.23. The Panel notes that Malaysia's comments on paragraph 7.259 reiterate its arguments on issues that have been extensively debated by the parties, and fully considered by the Panel, with a general request that the Panel reconsider its evaluation of those issues. The Panel considers that such comments do not require any specific reply from the Panel. Insofar as Malaysia is seeking to ensure that its views on the Panel's findings are fully reflected, the Panel has accommodated Malaysia by setting out its comments in full.[172]

6.24. In the context of the Panel's findings on "The allegation of protectionism in the cover of environmental protection", Malaysia comments on **paragraphs 7.261 and 7.262** concerning the European Commission's internal legal advice. Malaysia elaborates the following arguments and observations:

- Malaysia respectfully notes that European Commission's internal legal advice raised the issue of WTO inconsistency precisely because the European Commission's Directorate-General for Trade considered the amendment proposed by the European Parliament to be protectionist in nature.

- Notably the European Commission's Directorate-General for Trade considered that the Proposal "appears to violate the non-discrimination obligations under Art. I and Art. III:4 of the General Agreement on Tariffs and Trade (GATT), by establishing an unduly differential treatment between products which appear to be 'like'". Moreover, the Commission's internal legal advice details the potential trade effects, considering that a measure that would disincentivise palm oil as a biofuel feedstock would have "a significant impact on trade flows".

- Malaysia is well aware that the European Commission's internal legal advice did not concern the measures at issue as such. However, Malaysia continues to consider this internal legal advice to be an important element of indicative evidence in the interpretation of the measures at issue and the objective that they are deemed to pursue.

- More specifically, the European Parliament's resolution set out one of the objectives of the European Parliament with respect to the RED II, namely, to prohibit the use of palm oil as

[172] See para. 6.7 above.

a biofuel feedstock. Such outright prohibition would have been inconsistent with the European Union's WTO obligations, as suggested by the European Commission's internal legal advice provided in Exhibit MYS-44. Thus, the European Union was required to find another way to achieve this same objective and the European Union decided to do so with an elaborate mechanism related to the ILUC-risk of biofuel feedstocks. And, coincidentally but unsurprisingly, palm oil ended up being the only biofuel feedstock that is considered as having a high ILUC risk, whose counting for purposes of the European Union's renewable energy targets will be phased out across the European Union by 2030.

6.25. The European Union disagrees that the findings require review and underlines that Malaysia's comment fails to reflect the scope and content of the internal legal advice included in Exhibit MYS-44, which as the Panel identifies, pertained to amendments that were not adopted by the co-legislators and which are not included in RED II. The European Union refers to section 4.47 of its first written submission.

6.26. The Panel notes that Malaysia's comments on paragraph 7.259 reiterate its arguments on issues that have been extensively debated by the parties, and fully considered by the Panel, with a general request that the Panel reconsider its evaluation of those issues. The Panel considers that such comments do not require any specific reply from the Panel. Insofar as Malaysia is seeking to ensure that its views on the Panel's findings are fully reflected, the Panel has accommodated Malaysia's request by setting out its comments in full.[173]

6.27. In the context of the Panel's findings under Article 2.2 regarding the legitimacy of the objective of the measures at issue, the Panel recalls the conclusions reached by the Panel in the context of its analysis of the ISO standards under Article 2.4. In paragraph 7.289 the Panel refers to its earlier conclusions under Article 2.4. In paragraph 7.290, the Panel "concludes, in light of its findings under Article 2.4, that the ISO standards referred to by Malaysia do not 'exclude ILUC from being taken into account' in the context of measures seeking to regulate GHG emissions." In its comments on **paragraphs 7.289 and 7.290**, Malaysia states that it "agrees with and welcomes the Panel's finding" in paragraph 7.289 that "the standards do not cover ILUC". Malaysia states that it argued that the discussed ISO standards "do not explicitly and directly address the issue of ILUC and that it is exactly this circumstance that Malaysia considers as casting significant doubt on the concept of ILUC". Malaysia adds that "[s]till, the fact that the concept of ILUC is not incorporated into any existing international standard does undermine the legitimacy of the use of this concept and measures based on this concept." Malaysia reiterates the same comment in relation to **paragraph 7.513** of the Report, where the Panel reiterates its findings under Article 2.4 and Article 2.2 in the context of its analysis under Article 2.1.

6.28. The European Union disagrees that the finding that there are no existing relevant international standards relating to ILUC demonstrates that measures based on this concept lack legitimacy. It refers generally to its written submissions, but further observes that were this the case, it would be impossible, or "illegitimate" for a member to regulate in the absence of an existing international standard. This does not reflect the logic and structure of the TBT Agreement.

6.29. The Panel considers it useful, in the light of Malaysia's comment, to emphasize that the paragraphs that Malaysia's comments are directed at (i.e. paragraphs 7.289 and 7.513) are paragraphs of the Report in the context of the Panel's findings under Articles 2.2 and 2.1 that refer back to the conclusions reached in the context of the Panel's analysis under Article 2.4. Thus, the statement in paragraph 7.289 (which is that "the standards do not cover ILUC") that Malaysia characterizes as a "finding" that it "agrees with and welcomes" must be construed accordingly, i.e. as a restatement of the conclusions reached in the context of Article 2.4. The Panel considers that Malaysia's reiteration of its argument (i.e. "the fact that the concept of ILUC is not incorporated into any existing international standard does undermine the legitimacy of the use of this concept and measures based on this concept") is an issue that has been extensively debated by the parties, and fully considered by the Panel, and does not require any specific reply.

6.30. In the context of the Panel's findings on "The existence of a risk of ILUC-related GHG emissions with the production of crop-based biofuels", **paragraph 7.304** discusses the IPPC Report *Climate Change and Land*. There, the Panel discusses a statement regarding the "low confidence in attribution of emissions from iLUC to bioenergy" and finds that the "statement read in context

[173] See para. 6.7 above.

appears to address only the uncertainty and variability surrounding the attribution of a particular ILUC effect to a particular feedstock and not, more generally, an assessment of a low confidence in the proposition that a causal relationship exists between biofuel production as a whole and ILUC effects". Malaysia elaborates the following arguments and observations:

- Malaysia respectfully disagrees with this interpretation and points the Panel to the following explanations contained in the same section of the IPCC Report: "estimates of emissions from iLUC are inherently uncertain, widely debated in the scientific community and are highly dependent on modelling assumptions, such as supply/demand elasticities, productivity estimates, incorporation or exclusion of emission credits for coproducts and scale of biofuel deployment. In some cases, iLUC effects are estimated to result in emission reductions. For example, market-mediated effects of bioenergy in North America showed potential for increased carbon stocks by inducing conversion of pasture or marginal land to forestland".

- Indeed, the respective paragraph in the IPCC Report then concludes that: "There is a wide range of variability in iLUC values for different types of biofuels, from –75–55 gCO2 MJ–1. There is low confidence in attribution of emissions from iLUC to bioenergy".

- In view of the greater context provided in this paragraph of the IPCC Report, namely that "estimates of emissions from iLUC are inherently uncertain, widely debated in the scientific community and are highly dependent on modelling assumptions" and that "In some cases, iLUC effects are estimated to result in emission reductions", Malaysia considers that the reference to "low confidence" must be interpreted as referring to the broader difficulty of attributing ILUC to biofuel feedstocks.

6.31. The European Union disagrees that this finding should be reviewed. The IPCC report was the subject of extensive discussion and submission during the proceedings. The European Union refers to its arguments on these points (including for instance its response to Panel question No. 13).

6.32. The Panel notes that Malaysia's comments on paragraph 7.304 reiterate its arguments on issues that have been extensively debated by the parties, and fully considered by the Panel. The Panel considers that such comments do not require any specific reply from the Panel. Insofar as Malaysia is seeking to ensure that its views on the Panel's findings are fully reflected, the Panel has accommodated Malaysia's request by setting out its comments in full.[174]

6.33. In the context of the Panel's findings on "The existence of a risk of ILUC-related GHG emissions with the production of crop-based biofuels", the final sentence of **paragraph 7.306** states that the EU measures at issue do not distinguish between specific drivers of expansion into land with high-carbon stock, as explained further in the section addressing Malaysia's claim under Article 2.1. In its comment on paragraph 7.306, Malaysia disagrees. Malaysia submits that while the measures indeed only concern ILUC, the measures at issue, as they currently apply, do distinguish between specific drivers, namely between oil palm crop-based biofuel feedstocks and other crop-based biofuel feedstocks. If the European Union were interested in addressing the ILUC-risks of all food and feed crops, the measures at issue, namely the high ILUC-risk cap and phase out, should not only apply to oil palm crop-based biofuels, but to all crop-based biofuels. While the measures do apply to all crops, only palm oil as a biofuel feedstock is considered by the European Union to be above the thresholds to be considered high ILUC-risk (*per se* and as a whole) and the measures unfold their limiting effect only on palm oil, while any ILUC-risk of other crops is not being addressed.

6.34. The European Union does not consider that these findings require review and disagrees with the assertion that the ILUC of other conventional biofuels is not addressed. The 7 % maximum share applies to all biofuels. The formula is applied to all conventional biofuels and hence their risk of ILUC is assessed.

6.35. The Panel notes that Malaysia's comments on paragraph 7.306 reiterate its arguments on issues that have been extensively debated by the parties, and fully considered by the Panel. The Panel considers that such comments generally do not require any specific reply from the Panel, other than to note that its findings on this issue are set forth in the context of its analysis of Article 2.1

[174] See para. 6.7 above.

(as indicated in paragraph 7.306). Insofar as Malaysia is seeking to ensure that its views on the Panel's findings are fully reflected, the Panel has accommodated Malaysia's request by setting out its comments in full.[175]

6.36. In the context of the Panel's findings on "The agricultural activities and associated ILUC and ILUC-related GHG emissions in question occurring outside of the territory of the European Union", Malaysia takes issue with **paragraph 7.315**, which provides in relevant part that the measures seek to regulate whether and to what extent products supplying the EU transport fuel market can be counted towards the EU renewable energy targets "and to address the adverse ILUC impacts that EU demand for crop-based biofuels could have". Malaysia states that, in view of the uncertainties surrounding the concept of ILUC and the hypothetical situation of future "adverse ILUC effects", Malaysia respectfully requests this part of the sentence to be deleted.

6.37. The European Union objects to the proposed deletion. In the European Union's view, the text accurately reflects that the measures are seeking to address ILUC effects driven by EU demand.

6.38. The Panel agrees with Malaysia insofar as its comment rests on the premise that panels should generally refrain from making findings that involve speculation about future and hypothetical events.[176] However, the Panel does not consider that paragraph 7.315, and in particular the reference to "the adverse ILUC impacts that EU demand for crop-based biofuels could have", involves speculation about future and hypothetical events. The words "could have" (and not for example "has" or "is having") simply reflect the degree of uncertainty about the adverse ILUC impacts associated with EU demand for crop-based biofuels. Accordingly, the Panel has not made any adjustment to paragraph 7.315.

6.39. In the context of the Panel's overall "Conclusion on the legitimacy of the objective", which is set out at **paragraph 7.317**, Malaysia states that it takes issue with respect to the Panel's considerations related to the alleged objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. Malaysia submits that the Panel ignores the discrepancy between the objective and the way that the measures are being applied, namely that they do not limit ILUC-related GHG emissions from all crop-based biofuels, but only from oil palm crop-based biofuel, given that the specific measures at issue effectively only apply to oil palm crop-based biofuel. Thus, Malaysia submits that the Panel did not assess the measures at issue in their totality and as applied in practice. Malaysia requests the Panel to review and reconsider the related findings.

6.40. The European Union disagrees that these findings require review, and states that the Panel has assessed the arguments of the parties concerning the legitimacy of the objectives pursued.

6.41. The Panel notes that Malaysia's comments on paragraph 7.317 reiterate its arguments on issues that have been extensively debated by the parties, and fully considered by the Panel. The Panel considers that such comments generally do not require any specific reply from the Panel. Insofar as Malaysia is seeking to ensure that its views on the Panel's findings are fully reflected, the Panel has accommodated Malaysia's request by setting out its comments in full.[177]

6.42. In the context of the Panel's findings on "Risks of non-fulfilment of the objective", Malaysia makes a comment on the Panel's conclusion at set forth in **paragraph 7.342**. Malaysia emphasizes that the "risks that non-fulfilment of the objective would create" and the "contribution to the objective" are both elements of the weighing and balancing test and must be considered together and in relation with each other. Malaysia considers that, in view of this balancing test, the Panel cannot come to a conclusion on one element and then consider the other element in light of the conclusion reached regarding the first element.

6.43. The European Union disagrees that the Panel has erred in its analytical approach (and references its first written submission, section 7.3.1.2, section 7.3.2, paras 810-812, and section 7.3.4.2).

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[175] See para. 6.7 above.

[176] See e.g. Panel Report, *Saudi Arabia – IPRs*, para. 7.82 (citing prior panel and Appellate Body reports).

[177] See para. 6.7 above.

6.44. The Panel disagrees with Malaysia's comment, which appears tantamount to stating that the Panel cannot reach any individual conclusion on any of the individual elements of the weighing and balancing test under Article 2.2. The Panel does not see how the task of identifying the risks that non-fulfilment of the objective would create would depend on how those risks, once identified, are weighed against the measure's contribution to its objective. Moreover, it is normal practice for panels and the Appellate Body to strive for analytical clarity by stating conclusions on the individual elements of the weighing and balancing test.

6.45. In the context of the Panel's findings on "Contribution to the objective", Malaysia requests the Panel to clarify how it comes to the conclusion, in **paragraph 7.348**, that "the measures are apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels". Malaysia elaborates the following arguments and observations (which it subsequently reiterates in the context of **paragraph 7.1080**, in which the Panel recalls these findings for purposes of the analysis under Article XX):

- Malaysia particularly takes issue with the mere statement that "The measures have, by design, a limiting effect on EU demand for and consumption of all crop-based biofuels and will by 2030 eliminate RED II-induced EU demand for and consumption of those crop-based biofuels deemed to be high ILUC-risk", which appears to be the Panel's only basis for coming to the conclusion that "the measures are apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels".

- Malaysia submits that the measures do not have "a limiting effect on EU demand for and consumption of all crop-based biofuels and will by 2030 eliminate RED II-induced EU demand for and consumption of those crop-based biofuels deemed to be high ILUC-risk". Rather, as already noted above, the measures at issue, as currently conceived and effectively applied, will only limit EU demand for oil palm crop-based biofuels. In fact, the measures will not eliminate RED II-induced EU demand for and consumption of high ILUC risk crop-based biofuels, but will, at least initially and perhaps only temporarily, increase the planting of certain oil crops other than oil palm, with the perverse effect that there will first need to be significant further expansion onto high-carbon stock land until, following an unscheduled review, the European Union may update its Delegated Regulation and perhaps consider other oil crops as also having a high ILUC risk. A high-ILUC risk that, paradoxically, these very measures of the EU will have triggered.

- Furthermore, it can also be expected that, given the oil palm's efficiencies in its yield, compared to other oil crops, comparatively speaking a lot more land will be required for planting in order to compensate the absence on the market of oil palm crop-based biofuels, thereby defeating the very purpose of the EU's measures. Sadly, it appears that this will only be realised and potentially measured *a posteriori*, but, seemingly, the European Union and the majority within the Panel appear to disregard this reality and prefer a purely legalistic approach to one that truly cared about the environment and climate change mitigation.

- Malaysia strongly disagrees with the Panel that "the measures are apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels" and believes that this flawed understanding of market dynamics, of the EU's measures at issue, and of the future effects of these measures, leads it to wrong assumptions and wrong conclusions.

- Malaysia respectfully requests the Panel to reconsider its position on this crucial matter.

6.46. The European Union notes that Malaysia is inviting the Panel to reconsider its findings on the nature and operation of the EU biofuels regime. Malaysia's comments betray that despite the extensive submissions on these issues, they have failed to appreciate the manner in which the 7% maximum share and the high ILUC risk phase out is designed precisely to incentivise the Member States to modify their energy mix and hence, avoid stimulating further consumer demand for conventional biofuels, including palm oil. The European Union disagrees that the Panel should revisit its findings on this central point and refers to all previous submissions on this issue.

6.47. The Panel considers that its findings under Article 2.2 already clarify how it comes to the conclusion that the measures are apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. The Panel notes that Malaysia's comment on paragraph 7.348, while presented as a request for clarification, essentially reiterates its arguments on issues that have been extensively debated by the parties, and fully considered by the Panel. The Panel considers that such comments generally do not require any specific reply from the Panel. Insofar as Malaysia is seeking to ensure that its views on the Panel's findings are fully reflected, the Panel has accommodated Malaysia's request by setting out its comments in full.[178]

6.48. In the context of the Panel's findings on Malaysia's proposed alternative measures, Malaysia makes similar comments on the first, second, third and fifth proposed alternative measures. In respect of the first proposed alternative, Malaysia comments on the Panel's findings in **paragraph 7.377**. Malaysia elaborates the following arguments and observations on the first proposed alternative measure, and then extends those comments to the second, third and fifth proposed alternatives:

- First of all, Malaysia respectfully requests the Panel to explain how it came to the conclusion that this proposed alternative "appears to be unrelated to the specific objective pursued by the 7% maximum share and the high ILUC-risk cap and phase-out".

- Secondly, Malaysia's approach has been to identify an alternative measure to the concept of ILUC, which Malaysia argued being available in a FLEGT-like system, as successfully implemented by the European Union vis-à-vis multiple trading partners. It should also be noted that it appears to Malaysia that the Panel has embraced the EU argument that ILUC is an adequate concept to attain the European Union's stated objectives. Malaysia has repeatedly argued that this aggregate approach and the ILUC thresholds are both unfair and leading to the wrong assumptions and conclusions, notably with unreasonably trade-restrictive outcomes for certain crops and/or countries. As argued in its submissions, Malaysia considers that the European Union's approach based on aggregated data on actual land-use change (DLUC) is not appropriate to forecast the ILUC risk. This ILUC-risk then applies to an entire crop at a global level, not taking into account local conditions, legal frameworks, and enforcement mechanisms that set all countries apart in terms of preventing expansion onto high-carbon stock land. Malaysia has such systems in place, as it has demonstrated at length in its submissions, it has a track record of fighting deforestation and expansion onto high-carbon stock land, especially in relation to oil palm cultivation, and, for this reason, advocated for a FLEGT-type approach as an alternative measure to ILUC.

- Thirdly, what Malaysia mainly sought to address with its alternative measures was the trade-restrictiveness of the EU's measures vis-à-vis the trading opportunities of individual countries and EU trading partners, such as Malaysia.

- In the context of the Panel's findings on Malaysia's second, third, and fifth proposed alternative measures (and in particular, at **paragraphs 7.380, 7.383, and 7.391**) Malaysia states that in light of the rather mechanical approach followed by the Panel, Malaysia refers to its commentary on the Panel's analysis of the first alternative proposed by Malaysia, which applies mutatis mutandis to Malaysia's second, third and fifth proposed alternative measure. Malaysia also requests the Panel to explain how it came to the conclusion that each of these proposed alternative measures "appears to be unrelated to the specific objective pursued by the 7% maximum share and the high ILUC-risk cap and phase-out".

6.49. The European Union notes that Malaysia is inviting the Panel to reconsider its findings on the first, second, third and fifth proposed alternative measures. However, both parties presented submissions in this respect and their respective positions have been evaluated by the Panel (the European Union refers further to its first written submission, paras. 896-948 and 954-972). Malaysia also argues that the Panel failed to explain how these proposed alternative measures are unrelated to the specific objective pursued by the 7% maximum share and the high ILUC-risk cap and phase-out. Yet, the Panel explained that all these alternative measures appear to be directed at DLUC. Equally, the European Union observes that Malaysia takes issue with the Panel quoting arguments

[178] See para. 6.7 above.

by the European Union. The European Union recalls that the respective arguments of each party have been considered and objects to the implication that the Panel should not refer to the European Union's submissions when setting out its assessment. For all these reasons, the European Union disagrees that there are grounds for the Panel to revisit its findings in these paragraphs of the interim report.

6.50. The Panel considers that its findings under Article 2.2 already clarify how it comes to the conclusion that these proposed alternative measures appear to be unrelated to the specific objective pursued by the 7% maximum share and the high ILUC-risk cap and phase-out. The Panel notes that Malaysia's comment on the Panel's findings, while presented as a request for clarification, essentially reiterates its arguments on issues that have been extensively debated by the parties, and fully considered by the Panel. The Panel considers that such comments generally do not require any specific reply from the Panel. Insofar as Malaysia is seeking to ensure that its views on the Panel's findings are fully reflected, the Panel has accommodated Malaysia's request by setting out its comments in full.[179]

6.51. In the context of the Panel's findings on Malaysia's fourth proposed alternative measure, i.e. "Fourth proposed alternative: market access quotas", Malaysia states (following **paragraph 7.388**) that it wishes to comment on the Panel's considerations regarding the proposed alternative measure simplistically titled "market access quotas", which it believes was not properly understood. Malaysia elaborates the following arguments and observations:

Introduction

- In simple terms, Malaysia believes that, unlike for the other alternative measures that it had proposed and that the Panel considered as unsuitable alternatives to a system based on ILUC, in this case, the reasonably available and less trade-restrictive alternative measure being proposed would be perfectly in line with the objective being pursued by the European Union through the ILUC approach. In fact, for the sole purpose of this argumentation, let us assume that Malaysia agrees with the implementation of the European Union's measure(s) at issue.

- The high ILUC-risk cap started operating on 1 July 2021, requiring that "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 […] not exceed the level of consumption of such fuels" in any given EU Member State at the level of 2019. This is the so-called high ILUC-risk cap. The Panel appears to consider it not to constitute a restriction in the sense of Article XI of the GATT and the European Union has also repeatedly argued that it is not a ban nor a restriction in the sense of Article XI of the GATT. For purposes of the application of this alternative measure being proposed by Malaysia, let us assume that Malaysia agrees with this interpretation.

- The high ILUC-risk cap at the 2019 levels currently applies and will last until 31 December 2023. In essence, the alternative measure proposed by Malaysia foresees that this cap remain in place indefinitely (unless expanded or repealed), that it not gradually decrease to 0% between 31 December 2023 and 31 December 2030 at the latest, and that the opportunities to continue contributing to the EU renewable energy targets through oil palm crop-based biofuels be guaranteed at the 2019 levels and allocated among the supplying countries.

- This proposed alternative measure would not do any harm to the RED II and ILUC legal framework, would obviously be less trade-restrictive than a complete phase out, is reasonably available, and would make an equivalent contribution to the chosen objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. It must be underlined that this is particularly true vis-à-vis a perennial crop like oil palm, which does not need replanting or expansion to continue contributing at the 2019 levels to the EU market of biofuel feedstocks.

[179] See para. 6.7 above.

The alternative measure vis-à-vis the provisional arguments in the Interim Report

- To Malaysia, it seems incredibly simple to understand and to visualise the proposed alternative measure in terms of its less restrictive effects. More specifically, the proposed alternative measure would apply for purposes of achieving both the objectives pursued by the European Union and allow the prevention of the unnecessary and punitive effects on trade of palm oil-producing countries, safeguarding the socio-economic opportunities that this trade offers to communities around the world, especially to smallholders. Malaysia proceeds to address the specific arguments by the Panel and the European Union that led the Panel to consider this alternative measure as not making "an equivalent contribution to the objective pursued as compared with the high ILUC-risk cap and phase-out" and, therefore, as not being a viable alternative measure.

- Firstly, the Panel quotes the European Union as arguing that "maintaining quotas irrespective of the association of a certain oil crop biofuel feedstock to a certain advancement into high-carbon stock land would defeat the purpose of not incentivizing high ILUC-risk feedstocks". In this regard, Malaysia believes that this is simply not true. In fact, the high ILUC-risk cap in place is already disincentivising the use of palm oil as a biofuel feedstock in the EU market. Maintaining access at the 2019 levels does not incentivise further expansion because the plantations providing for these crops already exist and shall continue to produce for many years to come as oil palm is a perennial crop. There is no explanation, either in the RED II, in the Delegated Regulation, or in the European Union's submissions, as to what specific role the high ILUC-risk phase out (i.e., gradual decrease to 0 from 31 December 2023 to 31 December 2030) would play in terms of removing the incentives to further expansion onto high-carbon stock land (Malaysia refers to its comments provided in relation to paragraph 7.215 above). The inability to expand the production and consumption of oil palm crop-based biofuels beyond the 2019 levels already removes any incentive under the RED II. This is particularly the case for perennial crops, where the plantations already exist and will continue to produce, irrespective of the European Union's policies. Therefore, the high ILUC-risk phase out appears to be only punitive in nature and an unduly restrictive feature of the ILUC approach.

- Secondly, the Panel quotes the EU as arguing that the "alternative of capping imports of high ILUC-risk biofuels at a certain level could be realized either by a system of import restrictions, which would be a violation of Article XI of the GATT 1994, or *de facto*, a system of TRQs coupled with out-of-quota prohibitive tariffs, which would violate the EU tariff schedule and therefore Article II of the GATT 1994". This is incorrect and a misrepresentation of the alternative measure proposed by Malaysia. In Malaysia's proposed alternative measure, the system of the simplistically titled "market access quotas" or, in the European Union's words, "import restrictions", would be in no way different from what is currently being implemented by the European Union under the high ILUC-risk cap that is applied until 31 December 2023. As Malaysia understands it, the European Union has argued and the Panel appears inclined to agree that this system is not an import restriction, is not a violation of Article XI of the GATT 1994, and, inasmuch as it appears to be a violation of Article III of the GATT, it is generally allowed under the justifications provided by Article XX(b) and (g) of the GATT. If this were to be the outcome of this dispute, the alternative measure proposed by Malaysia would allow the EU to largely keep its system in place, but minimise the trade-restrictive effects allowing for the cap at the 2019 levels to remain in place indefinitely and avoiding the unnecessary, unreasonably restrictive and punitive effects of the high ILUC-risk phase out. In relation to the second element of the EU's arguments, namely that this alternative measure would be "a system of TRQs coupled with out-of-quota prohibitive tariffs, which would violate the EU tariff schedule and therefore Article II of the GATT 1994", Malaysia believes that, again, the proposed alternative has been misunderstood or intentionally misrepresented by the EU. Malaysia has not advocated for imports to be subject to TRQs and certainly not for any novel "in-quota" or "out of quota" tariff levels to be put in place to administer its proposed alternative measure. Malaysia had loosely compared this system, for illustrative purposes, to the ones regularly administered by the European Union through TRQs, but, in this case, clearly, the proposed alternative measure would not regulate importation. Rather, it would regulate the amounts of oil palm crop-based biofuels allowed to be counted towards the EU renewable energy targets. Obviously, by allowing oil palm crop-based biofuels to be

counted towards the EU renewable energy targets at the 2019 capped levels, the indirect trade effects of the EU measures at issue would be less trade-restrictive.

- Thirdly, with respect to the Panel's consideration that "It is not the case that the level of EU demand for a particular biofuel (e.g. palm oil-based biofuel) is the only variable that affects whether a feedstock crosses the threshold for being considered as high ILUC-risk", Malaysia would like to underline that this should then also be considered with respect to measures taken in response to such determination. Instead, the EU measures at issue only address biofuel feedstocks and attempt to steer EU demand for particular biofuel feedstocks. In any event, under this alternative measure proposed by Malaysia, the EU approach, namely the high ILUC-risk cap, which would prevent any further expansion and remove any incentive to further increase the cultivation of oil palm crops for purpose of producing oil palm crop-based biofuels, would be maintained. In simple terms, the measure at issue, namely the high ILUC-risk cap, would stay in place as currently being implemented by the European Union, but its *de facto* trade-restrictive effects would be minimised, given the removal of the high ILUC-risk phase out. Malaysia believes that this should be the purpose of the WTO system and this is, in particular, the outcome that the proposed alternative measure being reviewed by the Panel would deliver.

- Fourthly, Malaysia believes that the argument provided by the Panel, when it states that it "considers that the amount of consumption in the European Union at a given point in time would not be a good indicator of the extent to which EU demand for biofuels and palm oil feedstock may cause ILUC" is irrelevant vis-à-vis the functioning of the alternative measure being proposed by Malaysia. Again, in simple terms, the measure at issue, namely the high ILUC-risk cap, would stay in place as currently being implemented by the European Union, but its *de facto* trade-restrictive effects would be minimised, given the removal of the high ILUC-risk phase out. Maintaining the opportunity of oil palm crop-based biofuels to be counted towards the EU renewable energy targets at the 2019 (capped) levels indefinitely, would indeed avoid the unnecessary and unreasonably trade-restrictive / punitive effects of the high ILUC-risk phase out. Malaysia submits that this would not be an alternative to the entire ILUC approach, nor a complementary addition to it, clarifies that it would not be an alternative measure to all of the EU's measures at issue, and notes that it would rather be an alternative to the prohibitive trade-restrictive effects of the high ILUC-risk phase out, as it would at least allow producing countries to continue trading at the (capped) levels that were allowed before palm oil started being considered as having a high ILUC risk.

Conclusion

- Therefore, on the basis of the considerations above, with respect to the conclusion reached by the Panel that the alternative measure proposed by Malaysia "would not make an equivalent contribution to the objective pursued as compared with the high ILUC-risk cap and phase-out", Malaysia respectfully submits that the alternative of the simplistically titled "market access quotas", based on the high ILUC-risk cap, would be a reasonably available, less trade-restrictive alternative that would make an equivalent contribution to the chosen objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels.

- Malaysia respectfully requests the Panel to review its assessment of this proposed alternative measure accordingly.

6.52. The European Union notes that Malaysia is repeating its submissions and invites the Panel to reconsider its findings on the fourth proposed alternative measure, the market access quotas. However, both parties presented submissions in this respect and their respective positions have been evaluated by the Panel (the European Union refers to its first written submission, paras. 949-953). Malaysia argues that the Panel fails to apply its finding that the European Union is not the only variable that affects whether a feedstock qualifies as high ILUC-risk to the challenged measure that "would stay in place". Yet, Malaysia disregards the review mechanism provided for in Article 7 of the Delegated Regulation. Therefore, the European Union disagrees that there are grounds for the Panel to revisit its findings in these paragraphs of the interim report.

6.53. The Panel has described Malaysia's fourth proposed alternative measure in paragraph 7.384 of this Report. That description is based, and corresponds to, the description of the measure set forth in Malaysia's submissions. In its extended comment on this aspect of the Report, Malaysia now describes this measure in terms that are substantially different. Indeed, Malaysia now argues that the fourth alternative measure proposed by Malaysia is simply the high ILUC-risk "cap" without the "phase-out". In these circumstances, the Panel considers it appropriate to limit its reply to the following observations. The Panel understands Malaysia's argument to be premised on the understanding that if the European Union were to maintain the high ILUC-risk "cap", without the "phase-out", this would suffice to prevent any further expansion of, and remove any incentive to further increase the cultivation of, oil palm crops for the purposes of producing oil palm crop-based biofuels. The Panel notes that in its reasoning in paragraphs 7.386 to 7.388 it explains that maintaining a system of market access quotas, as proposed by Malaysia in its fourth proposed alternative, would not make an equivalent contribution to the objective pursued as compared with the high ILUC-risk cap and phase-out. This reasoning, and the elaboration that follows in those paragraphs, is also relevant to Malaysia's new version of this alternative measure.

6.54. In the context of the Panel's findings on Malaysia's sixth proposed alternative measure, which is the EU approach applied in its deforestation-free initiative, Malaysia states that it is confused with respect to the Panel's reasoning in **paragraph 7.395**. For Malaysia, the Panel appears to argue that the alternative measure proposed by Malaysia is not "reasonably available" but it does not expressly state so and, instead, talks about the idea that the proposed alternative measure "would not negate or render redundant or immaterial the contribution that the 7% maximum share and the high ILUC-risk cap and phase-out make to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels". Malaysia argues that, while this may indeed be a complex undertaking, it would be a less trade-restrictive alternative that would make an equivalent contribution to the chosen objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The issue of such measure being reasonably available is answered, in Malaysia's view, by the very fact that this approach is currently being rolled out by the European Union under the Deforestation-Free Products Regulation vis-à-vis not only palm oil, but many other products considered by the European Union to be risky in terms of their potential for deforestation and forest degradation and could easily be replicated by other jurisdictions around the world.

6.55. The European Union takes note that Malaysia argues that the existence of the "EU Deforestation Free Products Regulation" demonstrates that its sixth proposed alternative measure is reasonably available. The European Union respectfully suggests that Malaysia is, in effect, inviting the Panel to consider additional evidence and objects. In any event, Malaysia's argument implies an incorrect analytical leap. For the reasons identified by the Panel in its findings, and in line with the European Union's submissions, the alternative proposed by Malaysia would not address ILUC in an equivalent manner. To do so it would need to be replicated in other jurisdictions. The European Union observes that this is not a matter over which it has regulatory control. This is plainly relevant when considering whether this alternative measure is reasonably available, to the European Union.

6.56. For reasons already explained by the Panel in paragraph 7.395, the option proposed by Malaysia would not constitute an "alternative measure" and its apparent rolling out by the European Union would not change the Panel's assessment in this regard. The Panel notes that its reasoning at paragraph 7.395, which Malaysia's comment is directed at, applies the approach that is already explained in paragraph 7.374. There, in paragraph 7.374, the Panel explained that (i) an "alternative measure" is one that either could not co-exist with a challenged measure as it currently stands, or that could co-exist but whose implementation alongside the challenged measure would negate or render redundant or immaterial the contribution that the challenged measure is apt to make to its objective; and (ii) a "complementary measure" is one that could co-exist with a challenged measure as it currently stands, and whose implementation alongside the challenged measure would not negate or render redundant or immaterial the contribution that the challenged measure is apt to make to its objective.

6.3.3 Article 2.1 – Non-discrimination

6.57. In the context of the Panel's findings on the "*De facto* nature of the detrimental impact" on imported palm oil-based biofuel, the European Union takes issue with the Panel's assessment, at **paragraph 7.488**, that "[a]lthough Malaysia has demonstrated that palm oil-, rapeseed oil- and soybean oil-based biofuels are like, the European Union seems to be comparing only the treatment of domestically produced and imported palm oil-based biofuel." The European Union objects to this

sentence, and refers the Panel to paragraph 720 of its first written submission where it argues that "Malaysia must show that the measure (or measures) complained of 'modifies the conditions of competition' to the detriment of the group of imported products (or the group of foreign products). This analysis is absent from Malaysia's first written submission. Malaysia's arguments are essentially limited to bare assertions about the effects of the challenged measure on Malaysian palm oil-based biofuels." The European Union also references paragraph 90 of its second written submission.

6.58. Malaysia does not respond to the European Union's comment.

6.59. The Panel observes that its reasoning set out in paragraphs 7.486-7.488≥addresses the point reiterated by the European Union that "palm oil based biofuel is treated identically under the regulation, irrespective of whether it is produced in the European Union or in any other WTO Member".[180] The Panel also notes the European Union's argument that the Panel must compare the treatment of the group of imported products with the treatment of "exactly the same group of like products" of EU and foreign origin.[181] The Panel recalls in this regard its findings that Malaysia does not export (and thus the European Union does not import from Malaysia) rapeseed oil- and soybean oil-based biofuel. The Panel further understands that the European Union does not import from Malaysia biofuel made from other crops grown there. This is an important factual consideration that has to be taken into account when comparing the treatment of imported products with the treatment of like products of EU and foreign origin. This consideration requires the Panel to assess the treatment of palm oil-based biofuel, which is the only relevant product imported from Malaysia, with the treatment of palm oil-, rapeseed oil- and soybean oil-based biofuel, which all are like products of EU and foreign origin.

6.60. In the context of the Panel's introductory considerations to the "Legitimate regulatory distinction" step of its analysis, Malaysia comments on the Panel's considerations in **paragraph 7.504** with respect to the discussion on the scientific basis for the measures at issue and the related scientific debate. Malaysia agrees that it is not the Panel's task to "resolve scientific debates on the basis of the evidence submitted by the parties" and that it is the Panel's task to "determine whether, considering the entirety of the evidence, there is a reasonable basis for the regulatory distinction drawn by the high ILUC-risk cap and phase-out and the manner in which it is applied". However, Malaysia believes that the Panel has not fulfilled this task and considers that a more critical review of the scientific basis, notably as provided in the European Union's Status Report, would have been in order, given that, *inter alia*, data for certain crops was not available and was assumed. Malaysia reiterates the same comment in the context of paragraph 7.550, where it reiterates that there is no reasonable basis for the regulatory distinction and the manner in which it is applied in the high ILUC-risk cap and phase-out.

6.61. The European Union disagrees that the Panel has erred either in identifying the test to assess the scientific evidence, or in its appreciation of whether the European Union demonstrated that there is a sufficient scientific basis. Malaysia's argument essentially requests that the Panel reconduct its appreciation of the scientific basis in the Status report as certain assumptions for certain crops were made. This critique lacks precision. Assumptions as such are an inherent aspect of scientific methodology. As is implicit in Malaysia's comments, assumptions were relied upon in the absence of available data. The European Union refers to the extensive written submissions on the adequacy of the scientific basis for the measures.

6.62. The Panel notes that Malaysia's comments on paragraph 7.504 reiterate its arguments on issues that have been extensively debated by the parties, and fully considered by the Panel, with a general request that the Panel reconsider its evaluation of the relevant evidence. The Panel considers that such comments generally do not require any specific reply from the Panel. Insofar as Malaysia is seeking to ensure that its views on the Panel's findings are fully reflected, the Panel has accommodated Malaysia's request by setting out its comments in full.[182]

6.63. In the context of the Panel's findings on "Share of expansion rate into land with high-carbon stock as proxy of ILUC risk", Malaysia objects to the paraphrasing of Malaysia's arguments in **paragraph 7.523**. In that paragraph, the Panel refers to Malaysia's argument according to which it

[180] European Union's response to Panel question No. 19, para. 113; European Union's first written submission, para. 1170.

[181] European Union's first written submission, para. 1169.

[182] See para. 6.7 above.

is "impossible to establish a causal link between the cultivation of food and feed crops for the production of biofuel in one geographical location, and the growing of crops in another geographical location". Malaysia states that it did not criticise "this aspect of the measure as assuming that the displaced crop is oil palm grown in Malaysia for food purposes, while accepting the global nature of agricultural markets".

6.64. The European Union does not respond to Malaysia's comment.

6.65. The Panel notes that in paragraph 575 of its first written submission, Malaysia relies on the Finkbeiner Expert Opinion. That expert opinion states, among other things, that "[t]here is no scientific evidence that use of palm oil will likely lead to iLUC of palm oil, if any. The palm oil used for the biofuel could be replaced by any vegetable oil".[183] Malaysia thus puts forward evidence criticizing the apparent link established by the high ILUC-risk formula between the observed DLUC and ILUC within a single crop and referred to in the first sentence of paragraph 7.523. The Panel further notes that Malaysia's argument that "it is impossible to establish a link between cultivation of food and feed crops for biofuel production in one geographical location and the growing of crops in another geographical location" concerns the same issue of causal relationship between DLUC and ILUC. In the light of the foregoing, the Panel considers it appropriate to revise paragraph 7.523 to clarify that Malaysia "puts forward evidence" criticizing the aspect of the high ILUC-risk cap and phase-out discussed in paragraph 7.522.

6.66. In the context of the Panel's conclusion in the section on "Share of expansion rate into land with high-carbon stock as proxy of ILUC risk", **at paragraph 7.529**, Malaysia states that what it particularly challenged is the reliance on expansion into peatland as an additional proxy for ILUC, in addition to expansion into non-peatland (referring to its second written submission, paragraphs. 139-140). Malaysia still struggles to understand why these different types of direct land use change have a different bearing on the general ILUC risk. When an oil crop expands onto high-carbon stock land (DLUC), this does not have an impact on the *indirect* land use change-risk and the related GHG emissions. Malaysia, therefore, questions this distinction in the ILUC formula especially considering that palm oil is the only feedstock that was considered to have a significant expansion into peatland, which, again, appears to penalise a single, intentionally selected crop.

6.67. The European Union disagrees that the Panel ought to reconsider this aspect of the high ILUC risk formula. That formula is intended to identify those crops which present a high risk of expansion on to high-carbon stock land. Peatland is scientifically accepted to have high-carbon stock. (The European Union refers to its first written submission paras. 427-430).

6.68. The Panel notes that Malaysia's comment concerning the section on "Share of expansion rate into land with high-carbon stock as proxy of ILUC risk" reiterates its arguments on issues that have been extensively debated by the parties, and fully considered by the Panel, with a general request that the Panel reconsider its evaluation of the relevant evidence. The Panel considers that such comments generally do not require any specific reply from the Panel. Insofar as Malaysia is seeking to ensure that its views on the Panel's findings are fully reflected, the Panel has accommodated Malaysia's request by setting out its comments in full.[184]

6.69. In the context of the Panel's findings on "The relationship between the share of crop's expansion into land with high-carbon stock and EU biofuel demand", Malaysia takes issue with the Panel's statement in **paragraph 7.531** that "[t]he degree of ILUC risk reflects the pressure that the crop production globally exerts on the agricultural land as a result of an increased demand in any particular sector. Therefore, whenever demand for a biofuel feedstock increases, it contributes to that pressure and, by implication, to the risk of ILUC". In particular, Malaysia takes issue with the absolute formulation of the statement that "whenever demand for a biofuel feedstock increases, it contributes to that pressure and, by implication, to the risk of ILUC". Malaysia objects to this automaticity of linking demand to the ILUC risk. As discussed by the Panel earlier in this paragraph, Malaysia considers that land use change is linked to many factors and drivers and that the EU's measures at issue, as currently applied, only concern a single driver, namely the use of palm oil as a biofuel feedstock.

[183] Finkbeiner Expert Opinion, (Exhibit MYS-45), p. 18
[184] See para. 6.7 above.

6.70. The European Union sees no inconsistency in the Panel's findings. It has never been disputed that land use change has many drivers. This does not imply that it is inconsistent or incorrect to find that "[t]he degree of ILUC risk reflects the pressure that the crop production globally exerts on the agricultural land as a result of an increased demand in any particular sector. Therefore, whenever demand for a biofuel feedstock increases, it contributes to that pressure and, by implication, to the risk of ILUC". The EU Biofuels regime does not purport to address all potential drivers of LUC. It seeks to address ILUC resulting from demand for conventional biofuels.

6.71. The Panel sees no inconsistency in its findings, and no reason to revise paragraph 7.531.

6.72. In the context of the Panel's findings on "The relationship between the share of crop's expansion into land with high-carbon stock and EU biofuel demand", Malaysia takes issue with the Panel's statement in **paragraph 7.535** that "The country-specific approach implied by Malaysia's argument disregards the fact that the concept of ILUC-risk is global". In this regard, Malaysia notes that this would mean that, whenever a risk (or risk concept) is global, local conditions would not need to be taken into account. Malaysia elaborates the following arguments and observations:

- The Panel notes that "any regional differences affecting such expansion would be reflected in the data that is fed into the high ILUC-risk formula". While Malaysia agrees that data from all countries (as available) should be reflected, this is only the case when the European Union does indeed update the underlying data and, more importantly, the outcome remains an aggregate, which means that the measures at issue cannot be tailored to local conditions.

- Malaysia further takes issue with the Panel's considerations with respect to ILUC occurring elsewhere in the world, namely with the statement that "even if in Malaysia there is a lower rate of expansion into high-carbon stock land, such expansion may occur elsewhere in the world as a result of growth in demand for biofuel, and it is for that reason that the EU's approach is to look at the global picture per type of crop". In this context, Malaysia would like to underline that any measures aimed at addressing such expansion should focus on where that expansion takes place. Such approach would be in line with established WTO case law, notably *US-Shrimp*, in which the Appellate Body insisted that, in order to avoid that the application of a (provisionally justified) measure constitutes arbitrary discrimination, the local conditions need to be taken into account. The approach pursued by the Panel appears to be a flagrant deviation from this established case law, which Malaysia strongly objects to.

- In this context, Malaysia wishes to draw the Panel's attention to paragraph 158 of its second written submission, which notes that "Under the EU's aggregate approach that looks at the past expansion of the average annual global production area of biofuel feedstocks on land with high-carbon stock, whatever an individual WTO Member, like Malaysia, does to avoid expansion of agricultural land into high-carbon stock land, would receive no recognition in the EU's scheme until such time that, globally, the issue has been successfully addressed and the annual global expansion has been managed. Malaysia has already underlined the unfairness of such an approach and is very concerned by the policy orientation of the EU, under which it attempts to justify unilateral action with significant implications for trade, when action by individual WTO Members may not be sufficient to address a global problem".

- Malaysia further refers to paragraph 161 of its second written submission, where it noted that "In simple terms, Malaysia believes that individual producing countries should not be penalised for a problem that occurs elsewhere or for something that is considered a global problem". Malaysia continues to believe that a mechanism that relies on aggregate data concerning an entire crop at global level, punishes all producing countries and not only those in which problems persist.

6.73. The European Union does not agree that the Panel ought to reconsider these findings. The European Union does not share the view that the Panel's conclusion can be extrapolated as implying that "this would mean that, whenever a risk (or risk concept) is global, local conditions would not need to be taken into account." The European Union refers to its submissions (and references its

first written submission, paragraphs 868-869; second written submission, paragraph 144; and response to Panel question No. 98).

6.74. The Panel has made some adjustments to the text of paragraph 7.535 in the light of Malaysia's comments. The Panel notes that much of Malaysia's criticism of the Panel's findings in paragraph 7.535 concerns issues that have been extensively debated by the parties, and fully considered by the Panel, with a general request that the Panel reconsider its assessment. Insofar as such comments have been addressed by the Panel, they do not require any specific reply. However, the Panel makes the following observations. The Panel notes that, as elaborated in more detail in section 7 of this Report, the determination of crops subject to the high ILUC-risk cap and phase-out seeks to estimate the risk of ILUC for a specific feedstock. This estimation is based on the share of a feedstock's production area expansion into land with high-carbon stock. It is to be expected that, as argued by Malaysia, the relative share of a crop's expansion into such type of land will vary from one country to another. The Panel recalls in this regard that the share of expansion into land with high-carbon stock operates as a proxy of the risk of ILUC. Given this design of the measure, the risk of causing ILUC, understood as pressure on agricultural land arising from additional biofuel demand, does not change depending on the jurisdiction. A higher demand for feedstock resulting from an increased biofuel demand generates pressure on agricultural land regardless of the geographical location. The foregoing distinguishes the facts of this dispute from those in *US – Shrimp*.

6.75. In the context of the Panel's findings on "The alleged protectionist motive of the measure" at **paragraphs 7.543 and 7.544**, Malaysia refers back to its comments made in the context of the Panel's findings under Article 2.2, and in particular on the trade defence measures, the internal legal advice shared by the European Commission's DG for Trade, and the Resolution of the European Parliament. Malaysia underlines that there was a clear sequence of events that led to only palm oil being considered a high ILUC-risk feedstock subject to the high ILUC-risk cap and phase-out. The European Parliament's resolution set out one of the objectives of the European Parliament with respect to the RED II, namely, to prohibit the use of palm oil as a biofuel feedstock. Such outright prohibition would have been inconsistent with the EU's WTO obligations, as suggested by the European Commission's internal legal advice (provided in Exhibit MYS-44). Thus, the European Union was required to find another way to achieve this same objective and it decided to do so with an elaborate mechanism related to the ILUC-risk of biofuel feedstocks. Coincidentally, but unsurprisingly, palm oil is the only biofuel feedstock that is considered as having a high ILUC risk, whose counting for purposes of the EU renewable energy targets will be phased out by 2030. Malaysia, therefore, very much welcomes the considerations voiced in the separate opinion by one panelist and invites the whole Panel to reconsider its findings in this regard.

6.76. The European Union does not respond to Malaysia's comment.

6.77. The Panel notes that Malaysia's comment on the Panel's findings refers back to its comments on Article 2.2, and those comments have already been addressed above. The Panel considers that Malaysia's reiteration of those comments here does not require any specific reply from the Panel. Insofar as Malaysia is seeking to ensure that its views on the Panel's findings are fully reflected, the Panel has accommodated Malaysia's request by setting out its comments in full.[185]

6.78. In the context of the Panel's findings on "Relative share of expansion rate into land with high-carbon stock", Malaysia comments on **paragraph 7.557** with respect to the discussion on the absolute and relative expansion of production area of biofuel feedstocks. In this context, Malaysia underlines the arbitrariness that it sees in the European Union's design of the measures at issue, notably as they relate to the elements taken into account for the ILUC-risk formula, particularly as they relate to the absolute expansion into high-carbon stock land. In this respect Malaysia refers to its first written submission, paragraphs 120-122, and states that the graph contained there is very illustrative of the facts on the ground, showing the large harvested area for soybean, as compared to the relatively small harvested area for oil palm. The Panel's statement that it "further observes that the measure takes into account the absolute expansion of the production area by requiring that the average annual expansion of the production area affects more than 100 000 hectares" does not appear able to mitigate these concerns.

6.79. The European Union observes that Malaysia is re-arguing once again its case (and references paragraphs 120-122 of Malaysia's first written submission). Malaysia claims that the presence of a

[185] See para. 6.7 above.

minimum threshold of average annual *absolute* expansion (100 000 hectares) since 2008 in the formula would amount to arbitrariness, since oil palm cultivation, in 1980, started on smaller areas compared to other crops. Malaysia's argument does not consider that the minimum threshold of average annual *absolute* expansion is combined, within the formula itself, with a minimum threshold of average annual *relative* expansion. There is, in fact, a double threshold to calculate the global production area, which is intended to mitigate any possible distortions given by different dynamics of cultivation, and has the ultimate goal of considering significant only the expansion into land with high-carbon stock both in terms of the absolute increase of production areas and the relative increase. The European Union does not consider Malaysia's arguments relevant or necessary. If the Panel decides to accept Malaysia's request, the European Union respectfully requests that its own arguments be reflected as well (as in its first written submission, paras. 113-118).

6.80. The Panel notes that Malaysia's comment on paragraph 7.557 reiterates its arguments on issues that have been extensively debated by the parties, and fully considered by the Panel, with a general request that the Panel reconsider its evaluation of the relevant evidence. The Panel considers that such comments generally do not require any specific reply from the Panel. Insofar as Malaysia is seeking to ensure that its views on the Panel's findings are fully reflected, the Panel has accommodated Malaysia's request by setting out its comments in full.[186]

6.3.4 Article 12.3 – Taking account of special needs

6.81. In **paragraph 7.940**, the Panel states that it is not apparent how the European Union could have modified the proposed measures to address Malaysia's concerns without the complete withdrawal of the measures at issue, and in this connection the Panel notes its finding, in the context of Article 2.2, that none of the "alternative measures" proposed by Malaysia would have made an equivalent contribution to the objective of limiting ILUC-related GHG emissions associated with the production of biofuels from food and feed crops. In a comment on paragraph 7.940, Malaysia refers the Panel to its interim review comments relating to the Panel's findings, in the context of Article 2.2, on the alternative measures proposed by Malaysia.

6.82. The European Union does not respond to Malaysia's comment.

6.83. The Panel notes that Malaysia's comment on the Panel's findings under Article 12.3 refers back to its comments on Article 2.2, and those comments have already been addressed above. The Panel considers that Malaysia's reiteration of those comments here does not require any specific reply from the Panel.

6.84. In **paragraph 7.948**, the Panel states that it is not persuaded by Malaysia's argument that the European Union's decision to not conduct an impact assessment for the Delegated Regulation is necessarily relevant to whether it complied with its obligation to "take account of" the special needs of developing country Members and that Malaysia has not demonstrated that any such impact assessment would have been a central mechanism, let alone the exclusive mechanism, for the European Union to have taken account of the special development, financial and trade needs of developing country Members. In a comment on paragraph 7.948, Malaysia clarifies that it did not argue that the failure to conduct a dedicated impact assessment with respect to the specific measures at issue was the "exclusive mechanism, for the European Union to have taken account of the special development, financial and trade needs of developing country Members". However, Malaysia considers that such impact assessment would have been crucial to determine the likely impacts of the measure, including for developing countries. In turn, this would have allowed the European Union to more adequately ensure that the "special development, financial and trade needs" be indeed taken account of. In Malaysia's view, and arguably in that of the other developing countries that intervened as third parties in DS600, they were not.

6.85. The European Union observes that Malaysia invites the Panel to revisit its appreciation of the absence of an impact assessment. The European Union disagrees and refers the Panel to its written submissions.

6.86. The Panel recalls that, in paragraphs 7.948 and 7.949, it finds that the decision to not conduct an impact assessment for the Delegated Regulation is not necessarily relevant to whether it complied

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[186] See para. 6.7 above.

with its obligation to "take account of" the special needs of developing country Members, because Malaysia has not demonstrated that any such impact assessment would have been a central mechanism, let alone the exclusive mechanism, for the European Union to have taken account of the special development, financial and trade needs of developing country Members. In its interim review comment, Malaysia asserts that such impact assessment "would have been crucial to determine the likely impacts of the measure, including for developing countries". The Panel does not consider that Malaysia's assertion warrants any adjustment to the Panel's findings in this paragraph.

6.3.5 Article XX – General exceptions

6.87. Following **paragraph 7.1073**, Malaysia comments on the Panel's findings regarding the individual elements of Article XX in light of the European Union's argument that "the measures at issue are jointly held by the three-pillar exceptions approach". Malaysia appreciates the fact that the Panel did not follow the European Union's "innovative" approach and, instead, based its assessment on the approach suggested by well-established WTO case law. At the same time, Malaysia is surprised that the Panel does not reflect on the European Union's questionable approach at all. Malaysia respectfully requests the Panel to comment on this argument, as it would be most helpful if the Panel were to address and explicitly reject this argument.

6.88. The European Union does not consider it necessary that the Panel comment further on the European Union's approach. The Panel has evaluated the European Union's claim that the measures may be justified under Article XX of the GATT 1994.

6.89. The Panel recalls that the European Union's first written submission characterized its defence under Article XX as "a three-pillar approach", which it explained in the following terms: "[t]he European Union relies concurrently on Article XX(a), (b) and (g) in the present proceedings. This means that the three values-based and science-based objectives are intertwined and for our composite defence to fail it would mean that the three justifications should fail altogether."[187] In the context of its identification of the objective for purposes of Article 2.2 and Article XX, the Panel did not proceed on the European Union's understanding that there are three intertwined objectives. Furthermore, the Panel proceeded to conduct a separate examination under each of the subparagraphs of Article XX invoked, as opposed to seeking to apply these subparagraphs concurrently. The Panel has also made clear that its examination of the measure under any one of those subparagraphs would not affect the conclusions reached in the context of its examination of the measure under the other subparagraphs (see for example paragraph 7.1090). The Panel considers it unnecessary to further address the European Union's references to its so-called "three-pillar approach" and "composite defence".

6.90. Malaysia takes issue with the Panel's findings in **paragraph 7.1081**, in the context of Article XX(g), notably with respect to the Panel's consideration that "[t]he formula applies to all crop-based biofuels, with no differentiation between biofuels made from crops produced in the European Union and biofuels made from crops produced elsewhere". The formula does, in theory, apply to all crop-based biofuels, but, in practice, the measures at issue currently only effectively apply to palm oil as a biofuel feedstock. Furthermore, Malaysia believes that the Panel's comparison "between biofuels made from crops produced in the European Union and biofuels made from crops produced elsewhere" is flawed and should not be conducted under the test of Article XX(g). That comparison is for the review under the test of the chapeau to Article XX. In relation to the test under Article XX(g), the Panel should have compared biofuel made in the European Union (i.e., domestically) from palm oil as a biofuel feedstock and biofuel made outside of the European Union (i.e., abroad) from palm oil as a biofuel feedstock. It is clear that the EU measures never intended to discriminate between domestic and foreign production in that no palm oil is produced domestically in the EU and that the very intention of the EU measure, once oil palm crop-based biofuels were the only ones determined to be considered as having a high ILUC risk, was to prevent their product or consumption from any origin or source.

6.91. The European Union disagrees with Malaysia's assertion that the Panel has misapplied the analysis under Article XX (g). It refers to its written submissions.

6.92. The Panel understands Malaysia to argue that because the measures at issue currently only effectively apply to palm oil as a biofuel feedstock, the Panel is wrong to state that the formula

[187] European Union's first written submission, paras. 1329-1330.

"applies to all crop-based biofuels, with no differentiation between biofuels made from crops produced in the European Union and biofuels made from crops produced elsewhere". The Panel disagrees. As the Panel has explained at paragraph 7.267, while the application of that formula based on the data that was before the EU authorities as of 2019 led to the conclusion that palm-oil based biofuel was, at that time, the only crop-based biofuel that qualified as high ILUC risk, this does not change the fact that the formula applies generally and equally to all crop-based biofuels and may, in the future, lead to other oil-based biofuels being determined to qualify as high ILUC-risk biofuels.

6.93. In the context of the Panel's findings under Article XX(b), the Panel recalls its findings under Article 2.2 and states that its assessment applies *mutatis mutandis* to Article XX(b). In a comment on **paragraph 7.1087**, Malaysia refers the Panel to its interim review comments relating to the Panel's findings, in the context of Article 2.2, on the alternative measures proposed by Malaysia.

6.94. The European Union does not respond to Malaysia's comment.

6.95. The Panel notes that Malaysia's comment on the Panel's findings under Article 12.3 refers back to its comments on Article 2.2, and those comments have already been addressed above. The Panel considers that Malaysia's reiteration of those comments here does not require any specific reply from the Panel.

6.4 Claims in respect of the French measure

6.96. Malaysia comments on the Panel's findings in **paragraphs 7.1296 and 7.1297** with respect to the conclusions on Article XX and the French TIRIB measure. Malaysia makes two different comments:

a. In Malaysia's view, the French TIRIB measure is not directly linked to the EU measures on ILUC and, therefore, to the arguments made by the European Union in this regard.

b. Malaysia considers the Panel's considerations in paragraphs 7.1296 and 7.1297 to be contradictory. While paragraph 7.1296 comes to the conclusion that "the European Union's failure to demonstrate the existence of any provisions or flexibilities for palm oil-based biofuels to be certified as low ILUC-risk requires the Panel to conclude that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for purposes of the French TIRIB measure has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail", paragraph 7.1297 does not then refer to this lack of provisions, but again refers to the finding that "the European Union has failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk, and has failed to demonstrate the existence of any provisions or flexibilities for palm oil-based biofuels to be certified as low ILUC-risk". Malaysia respectfully requests the Panel to clarify its findings with respect to the French TIRIB measure, notably as they concern the justification under Article XX.

6.97. The European Union disagrees on both points:

a. The European Union disagrees with Malaysia's assertion that the French TIRIB measure is not directly linked to the EU measures. In this regard, the European Union recalls its own arguments (in the European Union's first written submission, paras. 1578-1585), as follows. The exclusion from the TIRIB reduction of palm oil-based biofuel is designed to contribute to the same objectives of the EU renewable energy legal framework. The European Union has also demonstrated that the French civil society and the French legislator consider the environmental impact of palm oil cultivation in terms of climate change and loss of biodiversity to be an issue of moral concern. The European Union recalls that the exclusion from the TIRIB reduction of palm oil-based biofuel is consistent with its objectives of avoiding that demand for renewable energy contribute to increased greenhouse gas emissions and that they exacerbate biodiversity loss. Like the European Union, with its measure France seeks to protect various societal values, notably prevent climate change, environmental degradation and biodiversity loss and address the related moral concerns. The objectives pursued by the French measure are therefore also covered by paragraphs (a), (b) and (g) of Article XX.

b. The European Union disagrees with Malaysia's assertion that there are inconsistencies between the Panel's conclusions in paragraphs 7.1296 and 7.1297. In fact, the lack of flexibility provisions for palm oil-based biofuels to be certified as low ILUC-risk is a conclusion of both.

6.98. The Panel responds to Malaysia's comments as follows:

a. The Panel disagrees with Malaysia's view that the French TIRIB measure is not directly linked to the EU measures. The Panel has already explained, in paragraphs 7.1273-7.1276. why it considers that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for purposes of the French TIRIB measure pursues the same objectives as the high ILUC-risk cap and phase-out. In addition to these explanations, the Panel notes that the 2020 report on biofuels from the French Parliament explains that, as palm oil-based biofuels are now considered at the European level as posing a high-ILUC risk, Article 266 *quindecies*, as worded in the 2019 Finance Law, provides that palm oil-based products are not considered to be biofuels.[188] Moreover, the French Constitutional Court has confirmed that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for purposes of the French TIRIB measure responds to concerns about the risk of ILUC-related GHG emissions associated with crop-based biofuels, and the high ILUC-risk posed by oil palm cultivation. In the Panel's view, this further confirms that the French TIRIB measure pursues the same objectives as the high ILUC-risk cap and phase-out. It also confirms that the French legislator relied on RED II and on the Delegated Regulation for considering that palm oil products pose a high ILUC risk, even when the French legislator decided to address those concerns by removing palm oil-based products from the definition of biofuels, making the provisions applicable at the time to high ILUC-risk products (such as the planned progressive elimination and low ILUC-risk certifications) inapplicable for palm oil-based products. In the light of Malaysia's comment, the Panel has adjusted paragraphs 7.1275 and 7.1276 to reflect the foregoing.

b. The Panel has added a cross-reference, in paragraph 7.1296, to its earlier findings that (i) France has relied on RED II and on the Delegated Regulation for considering that palm oil products pose a high ILUC risk, and (ii) the European Union has failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk. The Panel considers that the addition of this cross-reference enhances the clarity and coherence of the findings in these interrelated sections of the Report and addresses the lack of parallelism highlighted by Malaysia. The Panel has also added a footnote to paragraph 7.1297 aimed at clarifying how these findings inform the Panel's assessment of the French TIRIB measure.

6.5 Separate opinion by one panelist

6.99. The European Union observes that **paragraph 7.1442** states that Malaysia challenges the EU and French measures that single out one particular type of crop-based biofuels – i.e. palm oil-based biofuel – and "with a view to eliminating that one type of biofuel from the EU renewable energy market". With respect to the quoted clause of this sentence, the European Union requests that it be clarified that "this is a contested assertion".

6.100. Malaysia suggests that the sentence could be reformulated in a way that presents it as an argument of Malaysia.

6.101. The European Union's request is declined. The sentence discussed by the European Union is in the nature of an introductory statement aimed at distinguishing Malaysia's claims, not a factual finding by the panelist. Moreover, the separate opinion states at the outset (see paragraph 7.1444) that the opinion does "not exhaustively identify and analyse all of the evidence that could be referred to in connection with the issues raised, or repeat all of the arguments and counterarguments of the parties that have a bearing on these issues".

6.102. The European Union observes that **paragraph 7.1448** states that "[t]he measures at issue in this dispute have been the subject of academic analyses and commentary by various institutions,

[188] French Parliament Report n. 2609, (Exhibit EU-205), p. 49.

and some of these studies have been placed on the record". The European Union states that given that reference is made to multiple studies, these multiple studies be referenced in the footnotes.

6.103. Malaysia does not respond to the European Union's comment.

6.104. The European Union's request is declined. The separate opinion states at the outset (see paragraph 7.1444) that "[t]he difference in view underlying this separate opinion is essentially a matter of how much weight to give to certain evidence before the Panel. I will not exhaustively identify and analyse all of the evidence that could be referred to in connection with the issues raised ... Instead, what follows sets forth the basic rationale behind the conclusions I reach by identifying some of the evidence that I give more weight to than the Panel majority." There is no need to reference all of the potentially relevant record evidence in the footnotes.

6.105. Regarding the reference to the paper by Delzeit et al included in **paragraphs 7.1448 and 7.1455**, the European Union states that the Panel member appears to be referring to exhibits from parallel proceedings in DS593 and Exhibit IDN-2 is not on the record in these proceedings. The European Union states that it therefore objects to this reference, and requests that references in this Panel report are made exclusively to documents on the record in these proceedings and are referenced accordingly.

6.106. Malaysia observes that the DSU and the Panel's Working Procedures are silent on the right of a Panel to make cross-references to a related dispute (i.e., DS593) in which the same Panel is presiding and, more importantly, in which both of the disputing Parties are also involved, either as a respondent (the European Union) or as a Third Party (Malaysia). Therefore, Malaysia questions the basis for the EU's comment and respectfully requests the Panel to consider maintaining the text and references in question.

6.107. The European Union's request is declined, as it is based on a mistaken premise. For greater clarity, the reference to the paper by Delzeit et al included at paragraphs 7.1448 and 7.1455 is not a reference to an exhibit from parallel proceedings in DS593. The paper by Delzeit et al is on the record in these proceedings (i.e. DS600), as it was submitted as an exhibit (i.e. Exhibit IDN-2) by Indonesia in its capacity as a third party in DS600.

6.108. The European Union observes that **paragraph 7.1449** states that "[t]his evidence must be assessed holistically, rather than examining each of these statements in isolation from the others". The European Union requests clarification as to whether the term "this evidence" refers to Delzeit only. To the extent that it refers to other "academic analyses and commentary by various institutions", the European Union reiterates its request that this is referenced and identified.

6.109. Malaysia does not respond to the European Union's comment.

6.110. For greater clarity, the reference to "this evidence" in paragraph 7.1449 refers to all of the evidence referenced in the three preceding paragraphs of the separate opinion (i.e. the explicitly protectionist recommendation contained in the 4 April 2017 resolution of the European Parliament; the evidence showing that the European Union has a long history of enacting trade barriers to limit imports of palm oil-based biofuel to protect the EU biofuel industry; and evidence of the anticipated effect of the high ILUC-risk cap and phase-out on EU production of competing vegetable oils and biofuels when assessing the objective of the measure).

6.111. The European Union states that the second sentence of **paragraph 7.1456**, wrongly implies that the formula only looks at relative expansion. The formula examines relative and absolute expansion. Whereas Malaysia asserts that the formula looks at relative expansion (Malaysia's first written submission, paragraph 581), the European Union clarified this point and refers to its own first written submission, paras. 113-115, its response to Panel question No. 38, and the Delegated Regulation. The European Union requests that this is reformulated so as to accurately reflect that both relative and absolute expansion are considered.

6.112. Malaysia considers that the panelist is clearly in agreement with Malaysia's assessment of the ILUC-risk formula and that there is no need for the European Union's proposed insertion.

6.113. The European Union's request is declined. It is understood that the measure takes into account the absolute expansion of the production area by requiring that the average annual expansion of the production area affects more than 100 000 hectares (as per Article 3(a) of the Delegated Regulation). Paragraph 7.1456 states that "the singling out of palm oil-based biofuel, notwithstanding the seemingly similar risk of ILUC-related GHG emissions associated with soybean, seems to stem from how the formula seeks to measure ILUC-related GHG emissions on the basis of relative expansion of land, and the relative share of that expansion into high-carbon stock land." This sentence does not state that the formula seeks to measure ILUC-related GHG emissions "exclusively" or "solely" on the basis of relative expansion of land.

6.114. In a comment following **paragraph 7.1458**, Malaysia states that the separate opinion of this one panelist voiced in paragraph 7.1458 encapsulates Malaysia's arguments with regard to the issues on "legitimate objective", "legitimate regulatory distinction", as well as to the principles of "arbitrary or unjustifiable discrimination" and "disguised restriction on trade". As such, Malaysia requests the whole Panel to review its related findings and adopt this line of reasoning in reaching its final conclusions and recommendations.

6.115. The European Union disagrees that the Panel should adopt the reasoning reflected in the separate opinion of one panelist. That opinion places additional weight on certain evidence, in respect of which the European Union has made extensive submissions.

6.116. The Panel declines Malaysia's request.

7 FINDINGS

7.1 Claims in respect of the EU measures: the 7% maximum share, the high ILUC-risk cap and phase-out, and low ILUC-risk certification

7.1.1 Preliminary considerations

7.1. In this preliminary section, the Panel will first set out certain considerations regarding the definition of the EU measures at issue and will then explain the order of analysis of claims in this section.

7.1.1.1 Preliminary considerations relating to the definition of the EU measures at issue

7.2. As the Panel has already provided, in section 2 of this Report, a comprehensive exposition of the content and context of the measures at issue in this dispute, there is no need to repeat it here. In this section of the Report, the Panel addresses three issues concerning the definition of the EU measures at issue:

a. The measures at issue as individual measures distinct from the broader Biofuels regime;

b. The relationship among the measures and related terminology; and

c. Temporal scope issues arising from the gradual implementation of RED II and the Delegated Regulation.

7.3. The issues above are, to varying extents, cross-cutting in nature. Insofar as there are additional issues regarding the definition or identification of the EU measures at issue that arise only in the context of particular claims under the TBT Agreement or the GATT 1994, the Panel addresses them in the context of the specific claims to which such additional issues pertain.

7.1.1.1.1 The measures at issue as individual measures distinct from the broader Biofuels regime

7.4. In its submissions, the European Union takes issue with the fact that Malaysia challenges the 7% limit /maximum share[189] and the high ILUC-risk cap and phase-out[190] as individual "measures" distinct from what the European Union terms its broader "Biofuels regime".[191] Malaysia asks the Panel to reject the European Union's mischaracterization of the measure(s) as the EU "Biofuels regime", and focus on the specific measures at issue as identified in its panel request and submissions.[192]

7.5. The Panel notes that the European Union questions the characterization of the 7% maximum share and the high ILUC-risk cap and phase-out as individual "measures" primarily in the context of arguing that the alleged measures are not "technical regulations" within the meaning of Annex 1.1 to the TBT Agreement. However, in the Panel's view, the European Union's argument raises a more general issue regarding the Panel's terms of reference and the scope and definition of the measures at issue. Given that the identification of the relevant measure(s) is fundamental to the Panel's analysis of many of the issues that follow, the Panel considers it appropriate to address this issue at the outset.[193]

7.6. The European Union's arguments on this point seem to weave together two alternative arguments. The first argument appears to be that the 7% maximum share and the high ILUC-risk cap and phase-out, as set out in Articles 26(1) and 26(2) of RED II, cannot be assessed as individual "measures" distinct from the broader "EU Biofuels regime".[194] The second argument appears to be that Malaysia is free to "extract" these different components of one provision (i.e. Article 26 of RED II) and identify them as distinct "measures", but it does not follow from this definition of the measures at issue "that those provisions should be scrutinised by the Panel in isolation from their broader context".[195] This second argument would seem to concern *how* the Panel should analyse the specific measures at issue, and not whether they can be assessed as individual "measures".[196] The Panel addresses these arguments separately in the interest of analytical clarity.

7.7. Beginning with the European Union's first line of argument, the Panel sees no basis to question Malaysia's identification of particular aspects of what the European Union refers to as the "Biofuels regime" as the specific measures at issue for the purposes of defining the subject-matter of its complaint. The fact that these aspects (including the 7% maximum share and the high ILUC-risk cap and phase-out) are part of the broader regulatory framework for the promotion of renewable

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[189] Malaysia refers to this measure as the "7% limit", while the European Union refers to it as the "7% maximum share". For reasons elaborated in the next section of this Report, the Panel refers to this measure as the "7% maximum share".

[190] Malaysia and the European Union refer to the high ILUC-risk "cap" and "phase-out" in the plural, as two distinct measures. For reasons elaborated in the next section of this Report, the Panel refers to the high ILUC-risk cap and phase-out as a single measure.

[191] European Union's first written submission, paras. 511-515.

[192] See e.g. Malaysia's second written submission, paras. 10-19; opening statement at the meeting with the Panel, para. 54.

[193] The Panel notes that the European Union naturally focuses on the two "measures" alleged to be "technical regulations" under Article 2 of the TBT Agreement when developing this argument, namely the 7% maximum share and the high ILUC-risk cap and phase-out. The Panel understands that the European Union's argument would presumably extend *mutatis mutandis* to the low ILUC-risk certification measure alleged to constitute a "conformity assessment procedure" under Article 5 of the TBT Agreement.

[194] For instance, the European Union argues that Malaysia "selectively identified only some of the provisions that constitute the EU Biofuels regime, notwithstanding that those provisions operate in conjunction with one another, and could only be assessed as a composite whole". (European Union's first written submission, para. 512.) Consistent with that understanding, throughout its submissions the European Union generally places quotation marks around the word "measures" whenever referring to the 7% maximum share and high ILUC-risk cap and phase-out (for instance, it develops this argument under the heading, "*Neither the EU Biofuels regime nor the 'measures' identified by Malaysia are a 'technical regulation'*").

[195] European Union's first written submission, para. 514.

[196] For instance, the European Union does not appear to be arguing that the 7% maximum share and the high ILUC-risk cap and phase-out are capable of being assessed as individual measures when it argues that "even though Malaysia has dissected isolated provisions of RED II or part thereof and characterised them as individual 'measures' for the purpose of the present proceedings, in order to assess and appreciate the objectives of those 'measures', the EU Biofuels regime must be considered as a composite whole, situated in the broader legal and policy context of which it forms part." (European Union's first written submission, para. 163.)

energy in the European Union provided through RED II does not suggest that they could not validly constitute a challengeable "measure" for the purposes of Malaysia's identification of the subject-matter of its complaint.

7.8. The Panel recalls that a "measure" challengeable under the DSU may in principle consist of any act or omission attributable to a Member[197], and sees nothing in Malaysia's analytical approach to the definition of the measures at issue that "departs from the orthodoxy".[198] The Panel observes that when a complaining Member challenges one or more measures reflected in one or more written instruments, such as a law, regulation, or directive, it would almost invariably be expected to identify one or more specific provisions of the instrument(s) as the relevant measures at issue for the purposes of defining the subject-matter of its complaint. In other words, a complaining Member would almost invariably be expected to selectively identify one or more isolated provisions contained in the relevant written instrument(s) and characterize those provisions as the measure(s) at issue. Indeed, a complaining Member's failure to single out (or isolate) one or more specific (i.e. selectively identified) provisions contained in a law, regulation or other instrument could potentially render a panel request inconsistent with Article 6.2 of the DSU. That provision requires a complaining Member to identify the *specific* measures at issue.

7.9. The Panel does not question that the 7% maximum share and the high ILUC-risk cap and phase-out may be said to "operate in conjunction"[199] with one another, and with various other provisions of RED II, the Delegated Regulation, and other aspects of the broader regulatory framework (which the European Union refers to collectively as its "Biofuels regime"). However, that circumstance alone does not suffice to establish that all of these aspects of the broader EU "Biofuels regime" must be examined as "a composite whole"[200] in the sense of all of these aspects constituting a single, inseparable measure. Once again, it is only to be expected that, when a complaining Member challenges one or more provisions in a written instrument, the specific provision challenged as the measure at issue would operate in conjunction with other provisions in the same instrument and/or closely related instruments. There is nothing in WTO dispute settlement practice to suggest that, in such circumstances, a complaining Member must identify and challenge a single, inseparable measure comprising all provisions that "operate in conjunction" with the specific measure that it seeks to challenge.[201]

7.10. For these reasons, the Panel concludes that the European Union has not established any basis to question Malaysia's identification of particular aspects (i.e. the 7% maximum share and the high ILUC-risk cap and phase-out) of what the European Union refers to as the "Biofuels regime" as the specific measures at issue for the purposes of defining the subject-matter of its complaint.

7.11. Turning to the European Union's second line of argument described above, the Panel fully agrees that it does not follow from Malaysia's identification of the relevant aspects of Articles 26(1) and (2) of RED II as the specific measures at issue "that those provisions should be scrutinised by the Panel in isolation from their broader context".[202] In other words, the Panel accepts that the 7% maximum share, as reflected in Article 26(1) of RED II, and the high ILUC-risk cap and phase-out, as reflected in Article 26(2) of RED II and the Delegated Regulation, can only be understood as components of the broader regulatory framework.

7.12. The Panel recalls that section 2 of this Report already provides a thorough review of the relevant provisions of RED II, the Delegated Regulation, and that broader regulatory framework. The Panel recalls that it has quoted or summarized numerous provisions from the following instruments that comprise the broader EU Biofuels regime other than Articles 26(1) and (2) of RED II, including:

[197] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

[198] European Union's first written submission, para. 515.

[199] European Union's first written submission, para. 512.

[200] European Union's first written submission, para. 512.

[201] To avoid any possible misunderstanding, the Panel is not suggesting that WTO dispute settlement practice prevents a complaining Member from asserting that multiple individual measures that it challenges should be analysed in combination as a single overarching measure. The issue raised by the European Union's argument presently under consideration is whether a complaining Member is *required* to expand the scope of the measures it wishes to challenge by including, as challenged measures, *all* provisions of the regulatory framework insofar as they operate in conjunction with the specific measures at issue.

[202] European Union's first written submission, para. 514.

- Directive 2003/30/EC on the promotion of the use of biofuels or other renewable fuels for transport (referring to Recitals (3) to (6), (22), Articles 3(1), 4(2));

- RED I (referring to Articles 3(1), 3(4), Annex I, Articles 2(i) and (a), 17(2), 17(3), 17(5), 19(6));

- Fuel Quality Directive (referring to Articles 1(5), 1(6));

- ILUC Directive (referring to Recitals (4), (5), (16), (17), (21), (28), (34), Articles 2(2)(b)(iv), 2(1)(w));

- the 2012 Impact Assessment, the 2017 Study Report, the RED II Proposal;

- RED II (referring to Articles 1, 2(1), 2(33), 2(32), 2(27), 2(24), 2(34), 2(40), 2(37), 3(1), 3(2), 7(1), 7(4), 25(1), 26(1), 27, 29, 29(3), 29(4), 29(5), 29(10), 30(6), 30(8), Annex V, 30(1), Annex IX);

- Delegated Regulation (referring to Articles 2(5), 3, the Annex, Articles 4(1)(b), 5, 6, and 7); and

- the 2019 Status Report presented together with the Delegated Regulation.

7.13. Thus, the Panel clearly accepts that in its assessment of the design and operation of the specific measures at issue, it must take into account other provisions of RED II, the Delegated Regulation, and the broader regulatory context to the extent that they are relevant to that assessment. This may include, but is not necessarily limited to, any of the instruments and documents listed above and described in greater detail in section 2 of this Report. However, the Panel reiterates that this does not relate to any issue regarding the identification of the challenged measures as such, but rather to the issue of *how* the Panel should analyse the specific measures at issue.

7.14. Moreover, it appears that there is no actual disagreement between the parties in this regard. In their respective assessments of the 7% maximum share and the high ILUC-risk cap and phase-out, as reflected in Article 26(1) and (2) of RED II respectively, Malaysia and the European Union both refer to numerous other provisions of RED II, the Delegated Regulation, and the broader regulatory framework. The parties do not always agree on *which* other provisions are relevant context for the assessment of the measures at issue, or on *how* certain other provisions are relevant. But such disagreements pertaining to the relevance and weight of particular aspects of the context of the measures at issue cannot be taken to imply that Malaysia is arguing that, as a consequence of its having identified the 7% maximum share and the high ILUC-risk cap and phase-out as the specific measures at issue, it follows that the Panel must assess the specific measures in Article 26(1) and (2) of RED II in isolation from all other relevant provisions of RED II, the Delegated Regulation, or the broader regulatory framework.

7.15. The Panel concludes that the European Union has not established any basis to question Malaysia's identification of particular aspects of what the European Union refers to as the "Biofuels regime" as the specific measures at issue for the purposes of defining the subject-matter of its complaint. The Panel further concludes that there is no disagreement between the parties that, in its assessment of the specific measures at issue, the Panel must take into account other provisions of RED II, the Delegated Regulation, or the broader regulatory context to the extent that they are relevant to the assessment of the design and operation of the specific measures at issue.

7.1.1.1.2 The relationship among the measures and related terminology

7.16. The Panel now turns to the specific measures at issue themselves and sets out certain considerations regarding their relationship as well as related terminology issues.

7.17. In examining the EU measures the Panel will proceed on a claim-by-claim basis. To the extent that Malaysia has raised the same claim against different EU measures, this means that the Panel will group the measures for the purposes of examining that claim. The Panel notes that this is also

the way that Malaysia has presented its claims and that its arguments under such claims to a large extent do not distinguish between measures.

7.18. A second general observation is that the above considerations concerning the Panel's assessment of the measures in the broader context of the regulatory regime as a whole also apply to the relationship between the measures at issue. Beyond this general observation, however, the Panel will address below certain specific issues of how some of the measures relate to each other.

7.19. Turning to the individual measures, the Panel, taking them one by one, makes the following observations.

7.1.1.1.2.1 7% maximum share

7.20. Regarding the first measure, the Panel's observations are of a purely terminological nature. Malaysia's panel request refers to the measure set out in Article 26(1) of RED II as the "7% limit".[203] The European Union calls the same measure "the 7% maximum share."

7.21. The Panel sees nothing inherently problematic in referring to the measure as the "7% limit", or the "7% maximum share", but the Panel will employ the terminology used by the European Union. This formulation is more closely aligned to the terms used in the text of Article 26(1) itself.

7.22. The Panel sees the potential for significant confusion if the same measure is referred to in multiple different ways and therefore this terminology has been harmonized throughout the Report.[204]

7.1.1.1.2.2 The high ILUC-risk cap and phase-out

7.23. The Panel now turns to the high ILUC-risk cap and phase-out, reflected in Article 26(2) of RED II. A first issue concerns the question of whether the high ILUC-risk cap and phase-out are to be treated as one single measure or two distinct measures, and the related question of whether to refer to the measure in the singular or in the plural. A second issue concerns the relationship between this measure, i.e. the high ILUC-risk cap and phase-out, and low ILUC-risk certification.

A single measure or two distinct measures

7.24. In its panel request, Malaysia referred to the high ILUC-risk "cap" and the high ILUC-risk "phase-out" as two measures, and Malaysia follows the same approach in its submissions to the Panel. The European Union's submissions in this dispute follow suit and refer to the high ILUC-risk "cap" and the high ILUC-risk "phase-out" as two distinct measures. The Panel notes that whether two measures (or two aspects of a measure) may be treated as a single measure is a question to be determined by a panel. That determination should be informed by the formulations used by the complaining Member and/or the responding Member but is not controlled by how the parties refer to and characterize the measure(s).[205]

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[203] WT/DS600/6, para. 10.

[204] The Panel notes that it is common for disputing parties to employ different terminology to describe the same measure(s), and it is clear that a panel is free to employ the terminology that it deems appropriate, taking into account a range of considerations such as neutrality, ease of reference, and minimizing the potential for confusion. See e.g. Panel Reports, *US – Origin Marking (Hong Kong, China)*, fn 13 ("origin marking requirement" vs "revised origin marking requirement"); *Turkey – Pharmaceutical Products (EU)*, fn 156 ("localization measure" vs "localisation requirement"); *Australia – Tobacco Plain Packaging*, fn 170 (noting that the different complaining Members "have used different terms when referring collectively to the measures at issue"); *EU – Energy Package*, fn 20 ("government exemption measure" vs "public body measure"); *Argentina – Import Measures* ("Restrictive Trade-Related Requirements" or "RTRRs" vs "Trade-Related Requirements" or "TRRs"), fn 122; *EC and certain member States – Large Civil Aircraft*, fn 11 and para. 7.291 ("Launch Aid" vs "member State Financing"); *US – Continued Zeroing*, fn 4 and paras. 6.26-6.28 (explaining in light of the parties' preferred alternative formulations that the reference to the measure as "the continued application of the 18 duties" at issue was only intended to facilitate the multiple references that we make to the measure at issue throughout this Report).

[205] In cases involving challenges to a "single" measure comprised of multiple components, panels and the Appellate Body have generally considered three main factors: (i) the complainant's presentation of its

7.25. The Panel sees several reasons to refer to the high ILUC-risk cap and phase-out in the singular, and to analyse the high ILUC-risk cap and phase-out as a single measure. As a conceptual matter, the "phase-out" is essentially the "cap" that is gradually decreased to 0 by the end of 2030, at the latest.[206] Moreover, the claims that Malaysia presents in its panel request and also in its submissions regarding the high ILUC-risk "cap" and "phase-out" are the same and apply equally to both the cap and also to the phase-out. Indeed, in response to a question from the Panel asking Malaysia to clarify whether it seeks "distinct determinations and findings in respect of each measure under each of its relevant claims", Malaysia confirms that "both measures [i.e. the "cap" and the "phase-out"] are inconsistent with the same obligations" and "this for the same reasons".[207] In these circumstances, it is not clear what would be added by making "distinct" findings, and distinct determinations, in respect of the two interrelated aspects of the high ILUC-risk cap and phase-out set out in Article 26(2).

7.26. In these circumstances, the Panel considers it appropriate to refer to the challenged measure as "the high ILUC-risk cap and phase-out" in the singular. Here again the Panel sees the potential for significant confusion if the same measure is referred to in multiple different ways and therefore this terminology has been harmonized throughout the Report.

Relationship to low ILUC-risk certification

7.27. The Panel notes that Malaysia's panel request seems to list the high ILUC-risk cap and phase-out on the one hand, and low ILUC-risk certification on the other, as two distinct sets of measures. The Panel will address terminology issues relating to low ILUC-risk certification below. For the purposes of establishing how low ILUC-risk certification relates to the high ILUC-risk cap and phase-out the following considerations apply.

7.28. Low ILUC-risk certification operates as an exemption[208] to the high ILUC-risk cap and phase-out. The extent to which that exemption is to be taken into account in the assessment of the WTO-consistency of the high ILUC-risk cap and phase-out is a function of the Panel's objective assessment of its relevance to the assessment of the measure at issue, i.e. the high ILUC-risk cap and phase-out, under the particular legal standard being applied. The Panel has already stated that in its assessment of the specific measures at issue, it must take other provisions of RED II, the Delegated Regulation, or the broader regulatory context into account to the extent that they are relevant to the assessment of the design and operation of the specific measures at issue.

7.29. By way of illustration, Article 3 of the Delegated Regulation sets out the formula for the identification of high ILUC-risk crop. Consequently the Panel must take Article 3 of the Delegated Regulation into account in its assessment of the design and operation of the high ILUC-risk cap and phase-out. The reason is that Article 3 of the Delegated Regulation is objectively relevant to the assessment of the design and operation of the high ILUC-risk cap and phase-out under certain legal standards being applied in this case, including most notably Article 2.1 of the TBT Agreement and Article XX of the GATT 1994. It must therefore be taken into account, regardless of whether there is language in the panel request to the effect that the claims directed at the high ILUC-risk cap and phase-out must take into account Article 3 of the Delegated Regulation.

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claim(s) in respect of the constituent components; (ii) the respondent's position; and (iii) the operation of and relationship between the components to determine whether they are "autonomous or independent", or more "interdependent" and "integrated". (See Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.7, and fns 168-176 (referring to Panel Reports, *China – Raw Materials*; *US – COOL*; *China – Rare Earths*, *EC – Seal Products*; *Argentina – Import Measures*; *Indonesia – Chicken*; and *India – Solar Cells*); and Appellate Body Reports, *EC – Seal Products*; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*; and *Argentina – Import Measures*, paras. 5.124 and 5.130-5.131).)

[206] This understanding is reinforced by the text of Article 26(2) of RED II, which, in referring to the cap as the "limit", states that "[f]rom 31 December 2023 until 31 December 2030 at the latest, that limit shall gradually decrease to 0 %."

[207] Malaysia's response to Panel question No. 8, p. 6.

[208] Low ILUC-risk certification is an exemption in the sense that low ILUC-risk certification applies only to individual consignments of biofuels and does not affect the classification of the entirety of the crop in question as high ILUC risk. See e.g. Delegated Regulation, recital (12) ("… Certified low ILUC-risk biofuels [….] should be *exempted* from the limit and gradual reduction set for high ILUC-risk biofuels, […]"). (emphasis added) See also Delegated Regulation, Article 6.3, confirming that the "consignments" of biofuels are the ones "to be considered as [low ILUC-risk]".

7.30. Therefore, the Panel concludes that the extent to which the exemption for low ILUC-risk certification (and any other provisions of RED II, the Delegated Regulation, or the broader regulatory framework) must be taken into account in its assessment of the high ILUC-risk cap and phase-out is a function of the Panel's objective assessment of their interrelationship and the particular legal standards being applied.

7.31. Proceeding now with its assessment of their interrelationship and the particular legal standards being applied, the Panel considers that both the low ILUC-risk criteria and certification procedure are in principle relevant its assessment of the high ILUC-risk cap and phase-out under Article 2 of the TBT Agreement and the relevant provisions of the GATT 1994. In particular, the Panel considers that the potential for low ILUC-risk certification is relevant to the assessment of whether the high ILUC-risk cap and phase-out is a technical regulation within the meaning of Annex 1.1 to the TBT Agreement, and if so whether that measure is consistent with Articles 2.1 and 2.2 of the TBT Agreement. The Panel considers that the low ILUC-risk criteria and certification procedure are in principle also relevant to the Panel's assessment of the high ILUC-risk cap and phase-out under the relevant obligations and exceptions in the GATT 1994, including Articles I, III, X:3(a), XI:1, and XX. There are several considerations that lead the Panel to this conclusion.

7.32. First, it is apparent from the text of RED II and the Delegated Regulation that the opportunity for low ILUC-risk certification is integral to the high ILUC-risk cap and phase-out in that, together with the criteria for high ILUC-risk classification, it partly defines the overall scope of application of the "cap and phase-out" requirements that are provided for in the measure. Indeed, the possibility of low ILUC-risk certification is incorporated into Article 26(2) itself, which states in its first paragraph that "the share of [high ILUC-risk biofuels] shall not exceed the level of consumption of such fuels in that Member State in 2019, *unless they are certified to be low indirect land-use change-risk biofuels*".[209] The close relationship between the high ILUC-risk cap and phase-out and low ILUC-risk certification is underscored by the fact that an exemption would not be needed, if the biofuel at issue did not in the first place constitute high ILUC-risk biofuel, to which the high ILUC-risk cap and phase-out applies. In other words, the high ILUC-risk cap and phase-out is integrally related to, and operates in conjunction with, low ILUC-risk certification.

7.33. Second, there have been several prior disputes in which the assessment of the WTO-consistency of a measure under the GATT 1994 and/or the TBT Agreement took into account the manner in which any exemptions to the challenged measure were defined and applied. For example, in *US – Shrimp* the measure at issue was a US import prohibition on shrimp, and the Appellate Body's examination of the measure at issue under the *chapeau* of Article XX of the GATT 1994 focused on certain deficiencies in the manner that the applicable exceptions and related certification procedures were applied.[210] In *EC – Seal Products*, the measure at issue was an EU ban on seal products, and the analysis by both the panel and the Appellate Body turned on the design and application of the exceptions for Inuit or other indigenous communities and marine resource management. The panel in *EC – Seal Products* addressed these exceptions as part of its assessment under Article 2.1 of the TBT Agreement and then again under Article XX.[211] The Appellate Body followed a similar approach in its analysis under Article XX of the GATT 1994.[212]

7.34. Third, the parties to this dispute appear to agree that certain aspects of low ILUC-risk certification, including at least the low ILUC-risk *criteria*, are in principle relevant to the Panel's assessment of the high ILUC-risk cap and phase-out under the TBT Agreement and the GATT 1994. Among other things, Malaysia's first written submission refers to the low ILUC-risk criteria in the context of its description of the high ILUC-risk cap and phase-out as the measure at issue[213] and, in the context of its claims against the high ILUC-risk cap and phase-out, argues that the low ILUC-risk criteria are impracticable and ineffective. According to Malaysia, this serves as additional evidence that the high ILUC-risk cap and phase-out has a detrimental impact on the competitive opportunities of oil palm crop-based biofuel in the European Union for the purposes of Article 2.1 of the TBT Agreement, and also that the high ILUC-risk cap and phase-out has a limiting effect on trade

[209] Emphasis added.

[210] Appellate Body Report, *US – Shrimp*, paras. 161-177.

[211] Panel Reports, *EC – Seal Products*, paras. 7.646-7.651 (cross-referencing its analysis under Article 2.1).

[212] Appellate Body Reports, *EC – Seal Products*, paras. 5.316-5.339. The Appellate Body did not make findings under Article 2.1, because it reversed the panel's finding that the EU Seal Regime was a technical regulation within the meaning of Annex 1.1 to the TBT Agreement.

[213] See e.g. Malaysia's first written submission, paras. 387-388.

for the purposes of Article 2.2 of the TBT Agreement.[214] For its part, the European Union notes that "[t]he low ILUC-risk fuel certification scheme clearly constitutes [an] integral part of the Delegated Regulation and is relevant to assessing both of the 'measures' Malaysia has identified."[215] In the context of addressing the trade-restrictiveness of the high ILUC-risk cap and phase-out, the European Union argues that the trade impact of the measures at issue is minimal in light of *inter alia*, the low ILUC-risk certification provisions.[216] Both parties cross-reference their arguments under the TBT Agreement and the GATT 1994.

7.35. For the foregoing reasons, the Panel considers that, in principle, both the low ILUC-risk criteria and certification procedure could be relevant to, and therefore taken into account in, the Panel's assessment of the design and operation of the high ILUC-risk cap and phase-out when assessing the complaining Member's claims against the high ILUC-risk cap and phase-out.

7.36. Having said this, the Panel recalls the explicit distinction in the TBT Agreement between, on the one hand, disciplines applicable to technical regulations (Articles 2 and 3) and standards (Article 4 and Annex 3) and, on the other hand, disciplines applicable to procedures for assessment of *conformity* with those technical regulations and standards. In at least two prior disputes, panels have concluded that issues relating to the assessment of *conformity* with technical regulations do not fall within the scope of application of Article 2. In both cases, the panels reasoned that any conclusion to the contrary would improperly disregard the structure of the TBT Agreement and the different section headings for Articles 2-4 (Technical Regulations and Standards) and Articles 5-9 (Conformity with Technical Regulations and Standards).[217]

7.37. In this dispute, and for reasons elaborated on in section 7.1.3.1 of this Report, the Panel understands Malaysia to argue that Article 6 of the Delegated Regulation, which the Panel refers to as the "low ILUC-risk certification procedure", is a "conformity assessment procedure" as defined in Annex 1.3 to the TBT Agreement and which is thus subject to the disciplines of Article 5 of the Agreement. The Panel will address in section 7.1.3 of this Report, the claims brought by Malaysia against this alleged "conformity assessment procedure" under Article 5.1, Article 5.2, Article 5.6, and Article 5.8 of the TBT Agreement.

7.38. In light of the foregoing, the Panel does not take account of the low ILUC-risk certification *procedure* in its assessment of the high ILUC-risk cap and phase-out under the obligations in Article 2 of the TBT Agreement. Even if it were legally appropriate to do this, that would simply result in duplication of the Panel's analysis and findings under Article 5 of the TBT Agreement, given that the very same low ILUC-risk certification procedure is fully examined in the context of the claims under Article 5.1, 5.2, 5.6, and 5.8 of the TBT Agreement.

7.39. Based on all of the foregoing considerations, in its assessment of the claims against the high ILUC-risk cap and phase-out under Article 2 of the TBT Agreement, the Panel will take account of the design and operation of the low ILUC-risk criteria (set out in Articles 4 and 5 of the Delegated Regulation) but will not take account of the low ILUC-risk certification procedure (set out in Article 6 of the Delegated Regulation). The reason, as explained above, is that the low ILUC-risk certification procedure is the object of the claims under Article 5 of the TBT Agreement.

7.40. Under the GATT 1994, there is no equivalent distinction to the one reflected in the TBT Agreement between technical regulations and conformity assessment procedures. It is therefore possible for the Panel's assessment of the high ILUC-risk cap and phase-out under the GATT 1994 to take into account the design and operation of both the low ILUC-risk criteria and the low ILUC-risk certification procedure. Thus, in its assessment of the claims under Articles XI:1, III:4, I:1 and X:3(a) of the GATT 1994, the Panel's assessment of the high ILUC-risk cap and phase-out takes account of the low ILUC-risk certification criteria and procedure insofar as they are challenged under those provisions.

[214] Malaysia's first written submission, paras. 568, 595, 622-626.
[215] European Union's first written submission, fn 371.
[216] European Union's first written submission, paras. 1391-1394.
[217] Panel Reports, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.510-7.515; and *Russia – Railway Equipment*, paras. 7.878-7.879.

7.1.1.1.2.3 Low ILUC-risk certification

7.41. The Panel refers to the above considerations regarding the relationship between the high ILUC-risk cap and phase-out and low ILUC-risk certification. In light of, and in addition to, these considerations, the Panel considers it useful to clarify the terminology it uses in this Report to refer to this measure.

7.42. In its findings, the Panel refers to "low ILUC-risk criteria" as the criteria for certification of a biofuel as low ILUC-risk (found e.g. in Articles 4 and 5 of the Delegated Regulation), and the "low ILUC-risk certification procedure" being the procedure for certifying a biofuel as low ILUC-risk (found e.g. in Article 6 of the Delegated Regulation). When the Panel refers to the criteria and the procedure collectively or generically, the Panel uses the formulation "low ILUC-risk certification" or the "low ILUC-risk criteria and certification procedure".

7.43. As elaborated on in the context of its findings on the existence of a "conformity assessment procedure" within the meaning of Annex 1.3 to the TBT Agreement[218], the Panel understands the specific measure challenged by Malaysia for the purposes of the claims under Article 5 of the TBT Agreement to be the low ILUC-risk certification procedure.

7.44. While there is no doubt about what the parties are referring to when using their respective terminology for the 7% maximum share and the high ILUC-risk cap and phase-out, the same is not true with respect to their references relating to low ILUC-risk certification and particular aspects thereof. Therefore, and in contrast to the approach taken to the 7% maximum share and the high ILUC-risk cap and phase-out, the Panel has not attempted to harmonize the use of the terms "low ILUC-risk criteria", "low ILUC-risk certification procedure", or "low ILUC-risk certification" or "low ILUC-risk criteria and certification procedure".

7.1.1.1.3 Temporal scope issues arising from the ongoing implementation of RED II and the Delegated Regulation

7.45. The Panel now turns to certain temporal scope issues arising from the Panel having been established in May 2021, in the context of the ongoing implementation of RED II and the Delegated Regulation over the period 2018-2023. The Panel will begin by setting out a brief chronology of events as relevant factual background and will then address several issues regarding the ongoing implementation of RED II and the Delegated Regulation that merit consideration in light of the timing of the establishment of the panel.

7.46. The Panel recalls that RED II was adopted and entered into force in December 2018. Various provisions of RED II required or foresaw that further actions to implement its Articles 26(1) and (2) would be taken at later points in time. In this respect, the Panel notes the following:

a. Although RED II was adopted on 11 December 2018 and entered into force on 24 December 2018, the period for its transposition (including but not limited to Articles 26(1) and (2)) into national law took almost two and a half years, with a deadline set at 30 June 2021.[219]

b. RED I as amended by Directive 2015/1513 had already laid down a 7% maximum share for accounting conventional biofuels towards both the national renewable energy targets (Article 3(1) second subparagraph) and the transport target (Article 3(4)(d)). These were targets set for 2020. Therefore, EU member States already had to apply the 7% maximum share already in 2020. However, insofar as the 7% maximum share provided for in Article 26(1) of RED II could be lower (as a consequence of the revised benchmark based on the share in 2020), under Article 36(1) of RED II, EU member States were required to bring it into force no later than 1 July 2021. The text of Article 26(1) of RED II does not specify any further actions to be taken to implement its provisions.

[218] See section 7.1.3.1 of this Report.

[219] Article 36 of RED II (entitled "Transposition"), in particular Article 36(1), provides that "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 2 to 13, 15 to 31 and 37 and Annexes II, III and V to IX, by 30 June 2021."

c. Regarding the high ILUC-risk cap and phase-out, under Article 36(1) of RED II, EU member States were required to bring it into force no later than 1 July 2021. In contrast to the 7% maximum share, the text of Article 26(2) of RED II provided for the following intermediate and/or subsequent actions to take place:

i. The European Commission was required to submit to the European Parliament and to the Council a report on the status of worldwide production expansion of the relevant food and feed crops (i.e. the 2019 Status Report) by 1 February 2019.

ii. The European Commission was required to adopt a delegated act in accordance with Article 35 of RED II, to supplement RED II by setting out the criteria for certification of low ILUC-risk biofuels, bioliquids and biomass fuels and for determining the high ILUC-risk feedstock for which a significant expansion of the production area into land with high-carbon stock is observed (i.e. the Delegated Regulation) also by 1 February 2019.

iii. The European Commission was required to review the criteria laid down in the Delegated Regulation and adopt delegated acts in accordance with Article 35 to amend such criteria, where appropriate, and to include a trajectory for the high ILUC-risk "phase-out" provided for in Article 26(2) by 1 September 2023.

iv. From 31 December 2023 until 31 December 2030 at the latest, the cap on high ILUC-risk biofuels shall gradually decrease to 0% (i.e. the "phase-out").

7.47. As provided for in the text of Article 26(2) of RED II, the European Commission took the following actions[220] in March 2019:

a. The European Commission produced its report on the status of worldwide production expansion of the relevant food and feed crops (i.e. the 2019 Status Report). The Status Report is dated 13 March 2019.

b. The European Commission adopted the Delegated Regulation, supplementing RED II. It was also adopted on 13 March 2019, and it entered into force on 10 June 2019.[221]

7.48. The Status Report and the Delegated Regulation provided that the following additional further actions would be taken by 30 June 2021 in order to implement and apply the high ILUC-risk cap and phase-out, and the related low ILUC-risk criteria and certification procedures:

a. Article 7 of the Delegated Regulation, entitled "Monitoring and Review"[222], required the European Commission to conduct a review by 30 June 2021 (and also further reviews thereafter, but without specifying any particular timeframe(s)). More specifically, the European Commission was to review all relevant aspects of the Status Report, in particular the data on feedstock expansion, as well as the evidence on the factors justifying the "small holders" provision in Article 5(1)[223], and, if appropriate, amend the Delegated Regulation, the revised report becoming the basis for the application of the criteria set out in Article 3 of the Delegated Regulation.[224]

b. The Status Report states that measures regarding low ILUC-risk certification "need to be implementable in practice and avoid excessive administrative burden", and that guaranteeing robust compliance verification and auditing "requires an in-depth

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[220] Article 35 of RED II lays down the conditions for the Commission to adopt the "delegated acts" specified in RED II, including the delegated acts specified in Article 26(2) thereof.

[221] The Panel notes that this Delegated Regulation, which "entered into force" on 10 June 2019 and supplements the RED II by laying down the criteria for determining the high ILUC-risk feedstock and for certifying low ILUC-risk biofuels, bioliquids and biomass fuels, does not bring forward or otherwise alter the 30 June 2021 deadline for EU member States to transpose RED II (including but not limited to Articles 26(1) and (2)) into national law.

[222] Article 7 of the Delegated Regulation is further described in paras. 2.55-2.56 of the descriptive part of this report.

[223] Article 5(1) of the Delegated Regulation is set out in para. 2.61 of the descriptive part of this report.

[224] Article 3 of the Delegated Regulation is set out in para. 2.51 of the descriptive part of this report.

assessment that might not be warranted under certain circumstances and could represent a barrier for the successful implementation of the approach".[225] The Status Report also states that "[t]o ensure robust and harmonised implementation, the European Commission will set out further technical rules regarding concrete verification and auditing approaches in an Implementing Act in line with Article 30(8) of the RED II."[226] The Status Report further states that "[t]he Commission will adopt this implementing act by 30 June 2021 at the latest."[227]

7.49. The Panel notes that it is undisputed that, notwithstanding these timeframes:

a. The European Commission did not conduct the review required by Article 7 of the Delegated Regulation by 30 June 2021. Neither had such a review been conducted by the time that the parties filed their final submissions in this dispute.[228]

b. The European Commission did not adopt any implementing act[229] for low ILUC-risk certification by 30 June 2021. However, on 14 June 2022, the European Commission, in accordance with Article 30(8) of RED II, adopted Implementing Regulation (EU) 2022/996 on rules to verify sustainability and GHG emissions saving criteria and low ILUC risk criteria.[230]

7.50. Thus, there has been a gradual implementation of RED II and the Delegated Regulation, in relation to the 7% maximum share and the high ILUC-risk cap and phase-out measures, over the period 2018-2023. Malaysia's panel request is dated 15 April 2021, and the DSB established the panel on 28 May 2021.[231] The relevant events set out above may be summed up as follows in relation to the timing of the establishment of the panel:

a. By the time of the panel request, RED II had already been adopted and entered into force, the Status Report underlying the Delegated Regulation had already been produced, and the Delegated Regulation had also been adopted and entered into force.

b. However, at the time of the panel request and the establishment of the Panel, the 30 June 2021 deadline had not yet passed for:

   i. the transposition of RED II (including but not limited to Articles 26(1) and (2)) into national law;

   ii. the review provided for in Article 7 of the Delegated Regulation; and/or

   iii. the adoption of an implementing act for low ILUC-risk certification as provided for in the Status Report and the Delegated Regulation.

c. In addition, the date for the European Commission to set a trajectory for the high ILUC-risk "phase-out" (1 September 2023), and the deadline for the latest start and the latest end dates of the "phase-out" itself (31 December 2023 until 31 December 2030), had not yet been reached.

7.51. Against this background, the Panel will now turn to several issues regarding the ongoing implementation of RED II and the Delegated Regulation that merit consideration in light of the timing

[225] Status Report (2019), (Exhibits EU-3, MYS-92), pp. 16 and 18.

[226] The Panel notes that, without specifying any deadline, Article 30(8) of RED II requires the Commission to "adopt implementing acts specifying detailed implementing rules, including adequate standards of reliability, transparency and independent auditing and require all voluntary schedules to apply those standards" in order to ensure compliance with notably "the provisions on low or high direct and indirect land-use change-risk" biofuel.

[227] Status Report (2019), (Exhibits EU-3, MYS-92), p. 18.

[228] European Union's response to Panel question No. 56, para. 348.

[229] The Panel notes that, while the Status Report refers to an implementing "act", the European Union also refers to "implementing rules" and an "implementing regulation" in respect of the same action. The instrument eventually adopted by the European Union is referred to as the "Implementing Regulation".

[230] See para. 2.63 above.

[231] See para. 1.3 above.

of the establishment of the Panel. The Panel considers that each of these issues merits consideration taking into account the Panel's duty to determine the scope of the measures and claims properly before it.

7.52. First, the Panel recalls the 30 June 2021 deadline for the transposition of RED II (including but not limited to Articles 26(1) and (2) thereof) into national law, and the fact that the latest start date for the "phase-out" is 31 December 2023. The Panel considers however that none of these deadlines gives rise to any jurisdictional impediment to its consideration of the specific measures at issue. Putting aside questions of what terminology would best characterize the status of the measures before and after the deadline for their transposition into national law on 30 June 2021, the European Union has not suggested that these dates falling after the date of the establishment of the Panel is a circumstance that precludes the Panel from ruling on the measures.

7.53. As a general principle, a Member's mandatory legislation, even if not yet in force or not applied, can be challenged by another WTO Member – at the very least when the entry into force or subsequent application is automatic at a future date and does not depend on further legislative action.[232] Moreover, the fact that an EU directive requires transposition by its member States does not mean that the measure set out in that directive would somehow be shielded from scrutiny by a WTO panel, or not be ripe for consideration prior to the transposition deadline.[233] Here again, the Panel notes that the European Union has not suggested otherwise.

7.54. Returning to the measures at issue, the Panel notes that neither the general transposition date for RED II (30 June 2021) nor the date for the latest start (31 December 2023) of, and the latest end (31 December 2030) to, the "phase-out" precludes any EU member State from transposing the measures into national law *prior* to that time. Nor do they preclude any EU member State from starting to phase out the use of palm oil-based biofuel *prior* to 31 December 2023.[234]

7.55. Second, as a separate issue, to which the Panel now turns, is whether it may take into account factual circumstances and developments arising from the gradual implementation of RED II and the Delegated Regulation insofar as they evolved in the course of the proceedings, i.e. after the request for and establishment of the Panel. The issue, in other words, is whether the Panel is precluded, as a jurisdictional matter, from taking any aspects of the factual situation post-dating the establishment of the Panel into account in its assessment of the design and operation of the high ILUC-risk cap and phase-out, as well as the low ILUC-risk certification criteria and procedure.

7.56. The Panel's terms of reference are governed by Malaysia's panel request. Therefore, the terms of Malaysia's panel request constitute the starting point for the Panel's consideration of whether it is precluded, as a jurisdictional matter, from taking any aspects of the factual situation post-dating establishment of the Panel into account in its assessment of the design and operation of the high ILUC-risk cap and phase-out, and the low ILUC-risk certification criteria and procedure.

7.57. In identifying the "specific measures at issue" for the purposes of Article 6.2 of the DSU, Malaysia's panel request starts by listing several legal instruments in which those measures are laid down. That list includes RED II and the Delegated Regulation[235] as well as:

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[232] Panel Reports, *China – Auto Parts*, fn 202 (referring to *Turkey – Textiles*, para. 9.37, referring to GATT Panel Reports in *US – Superfund, EEC – Parts and Components* and *US – Malt Beverages*). Along the same lines, the panel in *Russia – Tariff Treatment* stated that it saw "no basis on which to exclude from dispute settlement proceedings a measure that is in force, but which has yet to be applied". (Panel Report, *Russia – Tariff Treatment*, para. 7.98)

[233] Panel Report, *EU – Energy Package*, para. 7.394 (where the panel concluded that "having established that the unbundling measure in the Directive applies in and has regulatory effects throughout the entire EU territory, we see no reason to assess the WTO consistency of this measure within each individual EU member State, simply due to the fact that its design and expected operation are such that it requires implementation by EU member States and allows these member States an element of discretion when implementing it.")

[234] In its first written submission, Malaysia asserts that "[w]hile the RED II only foresees a gradual phase out of high ILUC-risk biofuels from being counted towards the EU's renewable energy targets, a number of EU member States have been forging ahead, taking measures that go beyond the RED II and exclude oil palm crop-based biofuel from relevant policies, not providing for exceptions of low ILUC-risk feedstock, or even from being used as a biofuel at all." (Malaysia's first written submission, para. 86)

[235] Malaysia's panel request, para. 23.

> any annexes thereto, amendments, supplements, replacements, renewals, extensions, *implementing measures* or any other related measures, and any exemptions applied.[236]

7.58. In addition to this language indicating that the measures at issue include "*any … implementing measures*", paragraph 32 of Malaysia's panel request indicates that the legal claims under the TBT Agreement and the GATT 1994 enumerated thereafter concern the EU measures at issue, "as embodied and developed in the respective legal and other instruments as specified above in paragraph 23 *and as applied by the relevant authorities*".[237]

7.59. The Panel notes that, as a general rule in WTO dispute settlement proceedings, a panel's terms of reference require it to assess the WTO-consistency of a challenged measure as it existed on the date of the Panel's establishment.[238] However, previous panels and the Appellate Body have confirmed that a panel may consider amending or implementing measures enacted after a panel's establishment. In deciding whether to examine amended or implementing measures, the relevant question is whether that amendment or implementing measure "changes the essence of the measures" identified in the panel request.[239] The extent to which a reference to "related" or "implementing" measures in a panel request may serve to bring measures taken after the establishment of the panel into the scope of a panel's terms of reference is to be assessed "in light of the circumstances of each particular case".[240]

7.60. These principles have been developed by panels and the Appellate Body in the context of considering whether the "specific measures at issue" identified in a panel request can include implementing measures taken after the establishment of a panel. However, insofar as WTO dispute settlement practice allows scope for ruling on measures post-dating the establishment of a panel, it stands to reason, *a fortiori*, that a panel is not precluded from taking the factual situation post-dating establishment of the panel into account in its assessment of the design and operation of a measure that was in existence at the time of the establishment of the panel.[241]

7.61. In light of the foregoing, the Panel considers that it is not necessarily precluded, as a jurisdictional matter, from taking into account factual developments arising from the gradual implementation of RED II and the Delegated Regulation (insofar as they evolved over the course of the proceedings, i.e. after the request for and establishment of the Panel) in its assessment of the design and operation of the high ILUC-risk cap and phase-out. Indeed, both Malaysia and the European Union refer to certain post-establishment events, such as the review of data envisaged in Article 7 of the Delegated Regulation and the adoption of the implementing regulation as provided for in the Status Report and the Delegated Regulation. However, the Panel is not free to do so in a manner that would "change the essence of the measures" identified in the panel request.

7.1.1.2 Order of analysis

7.62. Having clarified the Panel's approach to several issues concerning the definition of the EU measures at issue, the Panel now turns to the order of analysis of the multiple legal claims that Malaysia has raised under the TBT Agreement and the GATT 1994.

7.63. The Panel will first address the order of analysis between the TBT Agreement and the GATT 1994 and will then address the order of analysis among the multiple claims brought under

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[236] Malaysia's panel request, para. 23(v). (emphasis added)

[237] Malaysia's panel request, para. 32. (emphasis added)

[238] Appellate Body Report, *US – Clove Cigarettes,* para. 205. See also Appellate Body Reports, *China – Raw Materials*, para. 260; and *EC – Selected Customs Matters*, para. 187.

[239] See, for example, Appellate Body Report, *Chile – Price Band System*, para. 139; Panel Reports, *Argentina – Footwear (EC)*, para. 8.45; *EC – Bananas III (US)*, para. 7.27, as confirmed by Appellate Body Report, *EC – Bananas III*, para. 140; and *Japan – Film*, para. 10.8.

[240] Panel Report, *India – Agricultural Products*, para. 7.77.

[241] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.809. The panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)* expressed the same view in a comparable situation. That panel recalled the approach followed in disputes where changes were introduced to the challenged measures, or where subsequent events in the course of this proceeding had an impact on the operation of the measures at issue, and then stated that "the same approach may apply equally in situations where the challenged measure remains unchanged, but the surrounding factual circumstances relevant to the assessment of the WTO-consistency of the measure evolve in the course of a proceeding."

those Agreements. In structuring its order of analysis, the Panel has accorded due weight to the manner in which the parties themselves have presented their claims and defences.[242]

7.1.1.2.1 Between the TBT Agreement and the GATT 1994

7.64. The Panel considers that, in the circumstances of this case, it is appropriate to order its analysis to begin with the claims under the TBT Agreement, and then turn to the claims under the GATT 1994. This is the order of analysis followed by both parties in their submissions, and the Panel sees no reason to deviate from it.

7.65. The TBT Agreement may be understood as dealing with the measures that it applies to more specifically and in greater detail than the GATT 1994. As stated in its preamble, the TBT Agreement is intended to "further the objectives of GATT 1994" and, in accordance with the General interpretative note to Annex 1A, the provisions of the TBT Agreement would prevail over those of the GATT 1994 to the extent there is a conflict. Moreover, the TBT Agreement contains numerous specific obligations additional to those imposed under the GATT 1994: Malaysia's claims under Article 2.4, Article 2.5, Article 2.8, and Article 12.3, for example, have no direct equivalent obligation under the GATT 1994.

7.66. The Panel further notes that, when presented with claims under the TBT Agreement and the GATT 1994, considerations similar to those set out above have led previous panels to begin with the claims under the TBT Agreement.[243] While the Panel does not consider that this necessitates the same order of analysis as a general rule and without regard to the circumstances of a particular dispute, it confirms that there is no error in this approach.

7.1.1.2.2 Claims under the TBT Agreement

7.67. As for the claims brought under the TBT Agreement, Malaysia has presented a series of legal claims under Article 2 (technical regulations), Article 5 (conformity assessment procedures), and Article 12 (special and differential treatment for developing country Members). The parties have addressed those claims in that order, and once again the Panel sees no reason to deviate from it.

7.68. Indeed, the Panel considers that there is an inherent logic in that order of analysis. Whether the 7% maximum share and high ILUC-risk cap and phase-out are technical regulations is an issue that would be addressed in the context of resolving the claims under Article 2. The Panel's conclusion on that issue would, in turn, inform its assessment of the applicability of Article 5, given that a conformity assessment procedure is by definition, a procedure used to determine that the relevant requirements *in technical regulations* (or standards) are fulfilled. The Panel's conclusions under Article 2 and Article 5 would, in turn, inform the assessment of the applicability of Article 12, and in particular Article 12.3: this provision concerns the special needs of developing country Members in the preparation and application of *technical regulations* and *conformity assessment procedures*.

7.69. The Panel's order of analysis of the substantive claims under Articles 2.1, 2.2, 2.4, 2.5, 2.8, and 2.9 of the TBT Agreement is also guided by its assessment of the interrelationship among the issues raised in connection with those claims. Like the parties, the Panel will begin its analysis of the claims under Article 2 with the threshold issue that is common to all of them, namely whether the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations within the meaning of Annex 1.1 of the TBT Agreement. In respect of the substantive claims, however, the Panel considers that the interrelationship among the issues raised by the parties under certain of the substantive claims under Article 2 warrants partially deviating from how the parties sequence the claims under Article 2 in their submissions. The Panel briefly elaborates below on the reasons for this.

7.70. The Panel begins its analysis with the claim under Article 2.4 because the Panel's conclusion on the meaning and relevance of the four international standards central to that claim will inform the Panel's analysis of the claims under Articles 2.1 and 2.2. This is because Malaysia relies on its

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[242] See Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.

[243] See Panel Reports, EC – Asbestos, paras. 8.16-8.17; EC – Sardines, para. 7.16; US – Clove Cigarettes, paras. 7.7-7.19; US – Tuna II (Mexico), paras. 7.43 and 7.46; EC – Seal Products, para. 7.69; US – COOL, para. 7.73; US – COOL (Article 21.5 – Canada and Mexico), paras. 7.3 and 7.6; Australia – Tobacco Plain Packaging, paras. 7.6 and 7.13.

understanding of the meaning and relevance of those standards when arguing that the high ILUC-risk cap and phase-out does not reflect any "legitimate regulatory distinction"[244] for the purposes of Article 2.1, and also when arguing that the 7% maximum share and the high ILUC-risk cap and phase-out are more trade-restrictive than necessary to fulfil a legitimate objective for the purposes of Article 2.2.[245] The meaning and relevance of the four international standards is central to the claim under Article 2.4 and the parties devote detailed arguments to this issue. The Panel considers it logical to address the claim under Article 2.4 first and then refer back to its conclusions in the context of addressing any related arguments about the meaning and relevance of the international standards in the context of the claims under Article 2.1 and Article 2.2. Finally, it is worth noting that the assessment of the claim under Article 2.4 is also relevant for assessing later the transparency claims under Article 2.9, since the applicability of these obligations depends on whether a relevant international standard exists, and if one does, whether the measure is in accordance with such a standard.

7.71. The Panel will next address the claim under Article 2.2, because it considers that its conclusions on certain issues under that provision will necessarily inform its analysis of the claim under Article 2.1. More specifically, the Panel's identification of the measures' objective(s), and assessment of whether they constitute a "legitimate objective", is mandated by the text of Article 2.2. To the extent that the Panel is required to undertake a similar analysis in the context of Article 2.1 when assessing whether any detrimental impact on imports stems exclusively from a "legitimate regulatory distinction", the Panel considers it logical to refer back to the conclusions under Article 2.2 in addressing the related issues under Article 2.1. Moreover, if the Panel was to agree with Malaysia's arguments on the 7% maximum share on grounds that fundamentally impugned the European Union's objective of limiting the risk of ILUC-related GHG emissions attributable to conventional biofuel, that would strongly suggest that there is no justification for further ILUC-based distinctions embodied in "high" and "low" ILUC-risk determinations. This would thus potentially allow the Panel to exercise judicial economy over the claims under Article 2.2 and Article 2.1 directed at the high ILUC-risk cap and phase-out. Finally, given that Malaysia has challenged the 7% maximum share only under Article 2.2, this provides added support to the Panel's decision to address the claim under Article 2.2 before the claim under Article 2.1.

7.72. As a general principle, panels are free to structure the order of their analysis as they see fit.[246] Moreover, the parties have not argued that the present case is one in which "there exists a mandatory sequence of analysis which, if not followed, would amount to an error of law" or "have repercussions for the substance of the analysis itself".[247] Indeed, the Panel notes that the ordering of the claims set out above is the same order of analysis that was followed by the panel in *EC – Sardines*. In that case, the panel followed the complainant's suggested order of analysis and addressed the claim under Article 2.4 of the TBT Agreement first, noting that "it would not constitute an error of law to start the examination of the consistency of the EC Regulation with Article 2.4 followed by Articles 2.2 and 2.1 of the TBT Agreement as necessary since such sequential examination would not affect the interpretation of the other provisions."[248]

7.73. As for the remainder of the claims under Article 2 (i.e. Articles 2.5, 2.8, 2.9.2 and 2.9.4), under Article 5 (i.e. Articles 5.1.1, 5.1.2, 5.2.1, 5.6.1, 5.6.2, 5.6.4, and 5.8), and under Article 12 (i.e. Articles 12.1 and 12.3), the Panel addresses them sequentially.

7.1.1.2.3 Claims under the GATT 1994

7.74. Regarding the claims under the GATT 1994, Malaysia orders the analysis in its submissions by addressing Article I:1, Article III:4, Article XI:1, followed by Article X:3(a).

7.75. The Panel notes that it would maintain a degree of parallelism between the sequencing of claims under the TBT Agreement and the GATT 1994 if it first addresses the claim under Article XI:1

[244] Malaysia's first written submission, para. 575.
[245] Malaysia's first written submission, paras. 610(i).
[246] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.
[247] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109. See also Panel Reports, *EC – Seal Products*, para. 7.63; and *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.3.
[248] Panel Report, *EC – Sardines*, para. 7.18. The Panel further notes that in the present dispute the European Union made submissions as to the logical order of analysis under the TBT Agreement and specifically submitted that Article 2.2 should be assessed before Article 2.1. (European Union's second written submission, paras. 43-49.)

followed by the claims of discrimination under Articles III:4 and I:1 of the GATT 1994. As explained further above, the Panel orders its analysis of the claims under the TBT Agreement so as to (after assessing Article 2.4) address the claim under Article 2.2 of the TBT Agreement (more trade-restrictive than necessary) followed by the claim of discrimination under Article 2.1. While the Panel does not consider the meaning of the terms "trade-restrictive" in the context of Article 2.2 to be coextensive with the terms "restrictions … on the importation" of products in Article XI:1 of the GATT 1994, there is a degree of parallelism between the arguments of the parties in relation to these terms in this dispute.

7.76. After addressing the claim under Article XI:1, the Panel will address the claim under Article III:4. The Panel addresses the claim under the national treatment obligation in Article III:4 before the claim under the most-favoured-nation treatment obligation in Article I:1 because the text of Article I:1 includes the reference, in the definition of its scope of application, to "all matters referred to in paragraphs 2 and 4 of Article III". The Panel considers it is logical to address Article III:4 first and refer back to its conclusions in the context of addressing that related element of the legal standard under Article I:1.

7.77. After addressing the claims under Article XI:1, Article III:4, and Article I:1, the Panel will address the claim under Article X:3(a). The Panel notes that, insofar as Malaysia's claim under Article X:3(a) overlaps with its claims under Article 5 of the TBT Agreement, this ordering of the analysis of the claims under the GATT 1994 maintains a degree of parallelism with the order of the claims under the TBT Agreement.

7.1.2 Claims under Article 2 of the TBT Agreement

7.1.2.1 Annex 1.1 – Existence of a "technical regulation"

7.1.2.1.1 Introduction

7.78. Having addressed these preliminary considerations relating to the definition of the EU measures at issue and the order of analysis of the claims under the TBT Agreement and the GATT 1994, the Panel now turns to the threshold issue of whether the 7% maximum share and the high ILUC-risk cap and phase-out are "technical regulations" within the meaning of Annex 1.1 to the TBT Agreement.[249]

7.79. Malaysia submits[250] that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations within the meaning of the definition in Annex 1.1. Based on the various elements of this definition, Malaysia argues that Article 26 of RED II and the Delegated Regulation: (i) are "documents" that apply to an "identifiable group of products"; (ii) that the "composition of biofuel", and more specifically the quality of being made from food or feed crops (for the 7% maximum share) or a specific crop determined to be high ILUC risk (for the high ILUC-risk cap and phase-out) qualifies as a "product characteristic".[251]; and (iii) that each measure "lays down" such characteristics, with which compliance is "mandatory", by virtue of the content and nature of RED II and the Delegated Regulation and the consequence that follows from not being taken into account

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[249] In addition to disagreeing about whether the 7% maximum share and the high ILUC-risk cap and phase-out are "technical regulations" within the meaning of Annex 1.1 to the TBT Agreement, the parties disagree about whether low ILUC-risk certification is, or includes, a "conformity assessment procedure" within the meaning of Annex 1.3 of the TBT Agreement. This is however a separate threshold issue that is specific to the claims under Article 5 of the TBT Agreement, and which will be addressed by the Panel in the section of its Report dealing with the applicability of Article 5. Both of these separate threshold questions would, in turn, inform the applicability of the claims under Article 12 of the TBT Agreement, which concern special and differential treatment of developing country Members in the preparation and application of *technical regulations* and *conformity assessment procedures*.

[250] Malaysia's first written submission, paras. 489-521; second written submission, paras. 20-28; responses to the Panel's questions, pp. 43-48; and comments on the European Union's responses to the Panel questions, pp. 151-153.

[251] Malaysia argues in the alternative that if the high ILUC-risk cap and phase-out does not lay down "product characteristics" because it does not merely apply on the basis of the composition of the biofuels concerned, but rather is applied based on criteria relating to the manner in which these inputs were produced, i.e. in a high ILUC-risk manner, then the high ILUC-risk cap and phase-out lays down "related processes and production methods" within the meaning of Annex 1.1. (Malaysia's first written submission, paras. 504-506)

for achieving EU renewable energy targets (namely that such biofuel is in essence excluded from the EU renewable energy market).

7.80. The European Union submits[252] that neither the EU Biofuels regime nor the specific "measures" identified by Malaysia, i.e. the 7% maximum share and high ILUC-risk cap and phase-out, are technical regulations. The European Union does not dispute that, for the purposes of the definition in Annex 1.1, Article 26 of RED II and the Delegated Regulation are "documents", nor that the composition of a product may, in principle, constitute a "product characteristic". However, the European Union challenges Malaysia's approach for assessing the elements of the Annex 1.1 definition against the measures at issue by : (i) rejecting the way it defines the "identifiable group of products" to which the measures apply; (ii) arguing that the measures at issue are not properly characterized as regulating the "composition of biofuel" (the relevant "product characteristic" identified by Malaysia), noting that the only differentiation in the "measures" at issue in these proceedings relates to "the environmental impact of its production process (including of the raw material used for its production) and not to any product characteristics as such"[253]; (iii) arguing that the measures do not "lay down" any product characteristics; and (iv) arguing that compliance is not "mandatory".

7.81. In addition to these points, the European Union also argues that Malaysia "selectively identified only some of the provisions that constitute the EU Biofuels regime, notwithstanding that those provisions operate in conjunction with one another, and could only be assessed as a composite whole"; that this "definitional approach is highly artificial"; and that "[i]n line with the case law, an objective assessment of whether the 'measures' identified by Malaysia are 'technical regulations', (and therefore fall within the scope of application of the TBT Agreement), requires an assessment of all the constituent elements of the EU Biofuels regime."[254] The Panel recalls that it has already addressed this argument in the previous section of its Report because it raises a more general issue regarding the Panel's terms of reference and the scope and definition of the measures at issue in this dispute.

7.1.2.1.2 Legal standard

7.82. The obligations in Article 2 apply to measures that constitute "technical regulations" by central government bodies.[255] Article 1.2 provides that "for the purposes of this Agreement the meaning of the terms given in Annex 1 applies." Annex 1.1 of the TBT Agreement defines a "technical regulation" as a:

> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

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[252] European Union's first written submission, paras. 511-598; second written submission, paras. 50-59; responses to the Panel's questions, paras. 409-421; and comments on Malaysia's responses to the Panel questions, paras. 133-181.

[253] The European Union rejects Malaysia's alternative argument that the high ILUC-risk cap and phase-out lays down "related processes and production methods", because to fall within the scope of Annex 1.1 those processes and production methods would have to be "related" to "product characteristics". (European Union's first written submission, paras. 581-589)

[254] European Union's first written submission, paras. 512-513.

[255] Annex 1.6 of the TBT Agreement defines a "central government body" as the [c]entral government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question." It is also accompanied by an *Explanatory note* clarifying that:

> In the case of the European Communities the provisions governing central government bodies apply. However, regional bodies or conformity assessment systems may be established within the European Communities, and in such cases would be subject to the provisions of this Agreement on regional bodies or conformity assessment systems.

Article 3 of the TBT Agreement covers technical regulations by "local government bodies" and those by "non-governmental bodies". In this dispute no claim was made that the measures are also inconsistent with Article 3.

7.83. The definition of a "technical regulation" in Annex 1.1 has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.84. Whether a measure constitutes a technical regulation pursuant to the first sentence of Annex 1.1 depends on whether it is a "document"[256] that meets what has been described as a "three-tier test"[257]:

a. it applies to an identifiable product or group of products;

b. it lays down one or more characteristics of the product, or their related processes and production methods (PPM), including the applicable administrative provisions;

c. compliance with which is mandatory.

7.85. These elements are cumulative[258], and thus each must be satisfied for a measure to constitute a technical regulation within the meaning of Annex 1.1 to the TBT Agreement. The Panel will elaborate further on the elements of the legal standard in Annex 1.1 as necessary in the course of its assessment of the issues in dispute.

7.1.2.1.3 'identifiable group of products'

7.86. The first element of the test is whether the measure at issue applies to "an identifiable group of products".

7.87. For a measure to lay down product characteristics (or related PPMs), it must apply to an "identifiable product or group of products".[259] While the product or products at issue need not be expressly named or identified in the document that constitutes the technical regulation, they should at least be *identifiable*.[260] A product might be identifiable, for instance, through the very "characteristic" that is the subject of regulation.[261]

7.88. Malaysia argues that the 7% maximum share and the high ILUC-risk cap and phase-out apply to two different identifiable groups of products: as stated in Article 26(1) of RED II, the 7% maximum share applies to "biofuels, bioliquids and biomass fuels produced from food and feed crops"; and as provided for in Article 26(2), the high ILUC-risk cap and the high ILUC-risk phase-out applies to "oil

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[256] The parties agree that Article 26 of RED II and the Delegated Regulation are "documents" for the purposes of Annex 1.1. European Union's first written submission, paras. 500-501. In light of the applicable legal standard, the Panel sees no reason to disagree. The ordinary meaning of "document" is defined broadly, as "something written, inscribed, etc., which furnishes evidence or information upon any subject". As a result, the term covers "a broad range of instruments or apply to a variety of measures". (Appellate Body Report, *US – Tuna II (Mexico)*, para. 185. See also Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, fn 708; and Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.291-7.298 (discussing Annex 1.1 as part of its thorough interpretation of the same term "document" as used in the definition of "standard" Annex 1.2).)

[257] Panel Reports, *EC – Seal Products*, para. 7.85 (referring to Appellate Body Report, *EC – Sardines*, para. 176, in turn referring to Appellate Body Report, *EC – Asbestos*, paras. 66-70; and Appellate Body Reports, *US – Clove Cigarettes*; *US – Tuna II (Mexico)*; and *US – COOL*); and *Australia – Tobacco Plain Packaging*, para. 7.110.

[258] Appellate Body Reports, *EC – Asbestos*, paras. 66-75 (assessing, sequentially and cumulatively, the measure at issue against the elements forming the definition of "technical regulation" in Annex 1.1); and *EC – Sardines*, para. 176 (recalling its previous report in *EC – Asbestos* and disaggregating the text of Annex 1.1 into "three criteria" that, each, a document "must meet" in order to fall within that definition of "technical regulation").

[259] If a technical regulation is not applicable to at least an *identifiable* product or group of products, "enforcement of the regulation will, in practical terms, be impossible." (Appellate Body Report, *EC – Asbestos*, para. 70.) See also Appellate Body Report, *EC – Sardines*, para. 185.

[260] Appellate Body Report, *EC – Sardines*, paras. 176, 182 and 183 (referring to Appellate Body Report, *EC – Asbestos*, paras. 66-70).

[261] Appellate Body Report, *EC – Asbestos*, para. 70 ("there may be perfectly sound administrative reasons for formulating a 'technical regulation' in a way that does *not* expressly identify products by name, but simply makes them identifiable – for instance, through the 'characteristic' that is the subject of regulation." (emphasis original))

palm crop-based biofuel with high ILUC risk".[262] Malaysia adds that it is not relevant that the "EU Biofuels Regime" may refer to a broader and less clearly identifiable group of products.[263]

7.89. The European Union challenges Malaysia's approach to defining the "identifiable group of products" to which the measures apply. Specifically, the European Union argues that Malaysia has not clearly stated how it defines the relevant "identifiable group of products" and in any event, has not demonstrated that the relevant "identifiable group of products" may be defined as narrowly as "*biofuel made out of food and feed crops*" or as "oil palm crop-based biofuel with high ILUC risk".[264] The European Union does not dispute that Article 26 of RED II and the Delegated Regulation make reference to biofuels made out of food and feed crops[265], but argues that the "measures" at issue form part of a regime that applies to "advanced biofuels"[266] and indeed "all biofuels, bioliquids and biogas used in the transport sector"[267] and that the assessment of the "measures" must take place in that broader context.

7.90. The Panel first notes that although the parties identify different groups of products as relevant identifiable products to which the measure applies for the purposes of this analysis, the European Union does not in fact suggest that the measures do not apply to an identifiable group of products. What is in dispute is how *broadly* or *narrowly* the relevant group of products should be defined, for the purposes of determining whether the measures at issue are technical regulations.

7.91. The Panel understands the European Union to argue that the relevant group of products for the purposes of the analysis encompasses "advanced biofuels" in addition to "biofuels made from food and feed crops" (or even more narrowly as "oil palm crop-based biofuel with high ILUC risk"), and that the Panel's assessment must take place "in the broader context" of the fact that the measure at issue forms part of a regime that applies to "all biofuels, bioliquids and biogas used in the transport sector". In the Panel's view, these arguments suggest that the European Union considers the relevant product group to be the broader category of "biofuels, bioliquids and biogas used in the transport sector", of which both "advanced biofuels" and the group of "biofuels made from food and feed crops" (or even more narrowly as "oil palm crop-based biofuel with high ILUC risk") identified by Malaysia are a part.

7.92. The Panel recalls that RED II establishes a common framework for the promotion of "energy from renewable sources". Within this common framework, RED II lays down rules on the use of energy from renewable sources in the transport sector.[268] Article 26, in turn, is entitled "Specific rules for biofuels, bioliquids and biomass fuels produced from food and feed crops". The text of Article 26(1) likewise refers to "biofuels … produced from food and feed crops", and the text of Article 26(2) refers to "biofuels … produced from food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed". The Delegated Regulation elaborates further on particular aspects in relation to those biofuels that are the object of Article 26, namely "biofuels made from food and feed crops". The 7% maximum share and the high ILUC-risk cap and phase-out are thus provided for in a provision, i.e. Article 26 of RED II, that by its own terms contains "Specific rules for *biofuels, bioliquids and biomass fuels produced from food and feed crops*".[269]

7.93. The Panel considers that, while there may be more than one way of identifying the group of products to which the 7% maximum share and the high ILUC-risk cap and phase-out apply[270], it is

[262] Malaysia's first written submission, para. 494. In para. 494, Malaysia refers variously to "oil palm crop-based biofuel", "biofuel with high ILUC-risk", and "oil palm crop-based biofuel with high ILUC risk".
[263] Malaysia's first written submission, para. 495.
[264] European Union's first written submission, para. 518.
[265] European Union's first written submission, para. 519.
[266] European Union's first written submission, para. 520.
[267] European Union's first written submission, para. 526.
[268] Article 1 of RED II.
[269] Emphasis added.
[270] As reflected in Malaysia's arguments, the high ILUC-risk cap and phase-out introduces a further distinction within the group of "biofuels produced from food and feed crops", namely between biofuels produced from food and feed crops "for which a significant expansion of the production area into land with high-carbon stock is observed" (and, by implication, those biofuels produced from food and feed crops for which no such significant expansion is observed). From this perspective, a more narrowly defined group of products could be identified for Article 26(2). However, from the perspective that biofuels produced from food

clear that both measures apply to "biofuel produced from food and feed crops". Accordingly, the Panel finds that the 7% maximum share and the high ILUC-risk cap and phase-out both apply to an identifiable group of products.

7.1.2.1.4 "lays down product characteristics"

7.94. The Panel now turns to the second element of the test, which is whether the measures "lay[] down product characteristics".

7.95. The first issue before the Panel is whether the "composition of biofuel" – and more specifically the quality of biofuel being produced "from food or feed crops" (for the 7% maximum share) or a specific food or feed crop determined to be high ILUC risk (for the high ILUC-risk cap and phase-out) – qualifies as a "product characteristic" within the meaning of Annex 1.1. After setting out several general observations, the Panel will first address the 7% maximum share before addressing the high ILUC-risk cap and phase-out.

7.96. As described by the Appellate Body, "[t]he heart of the definition of a 'technical regulation' is that the 'document' at issue must 'lay down' — that is, set forth, stipulate or provide — 'product *characteristics*'."[271] The term "product characteristics" has been understood to cover "any objectively definable features, qualities, attributes, or other distinguishing mark of a product" that may relate to "a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity".[272]

7.97. The Panel therefore considers that the quality of a given product (e.g. biofuel) being produced (or not) from a specific raw material or input would in principle fall within the broad category of "product characteristics". The raw materials and inputs used to produce a product "objectively define" the features, qualities and attributes of the product in a manner that enables it to be distinguished.

7.98. The Panel notes that this understanding is consistent with the approach taken in *EC – Sardines*. In that case, the measure was found to be a technical regulation and one "product characteristic" that it required was that "preserved sardines must be prepared exclusively from fish of the species *Sardina pilchardus*."[273] The panel considered that the requirement to use exclusively *Sardina pilchardus* was a product characteristic as it "objectively defines features and qualities" of preserved sardines for the purposes of their marketing as preserved sardines and under the trade description referred to in Article 7 of the EC Regulation.[274] The Appellate Body agreed with the panel's finding that this was an "objectively definable 'feature', 'quality' or 'attribute'" of the product.[275]

7.99. The Panel has already concluded, in the previous section, that while there may be more than one way of identifying the "group of products" to which the 7% maximum share and the high ILUC-risk cap and phase-out apply, it is clear that both measures apply to "biofuel produced from food and feed crops". In the course of its consideration of that issue, the Panel noted that Article 26 is entitled "Specific rules for biofuels, bioliquids and biomass fuels *produced from food and feed crops*". Article 26 thus identifies the products to which the 7% maximum share and the high ILUC-risk cap and phase-out apply by reference to the type of *feedstock* from which they have been obtained.[276]

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and feed crops are a subset of the broader group of "biofuels" products (which, as the European Union notes, also includes "advanced biofuels") the Panel considers that it would also not be inaccurate to identify "biofuels" more generally as a group of identifiable products to which the 7% maximum share and the high ILUC-risk cap and phase-out apply.

[271] Appellate Body Report, *EC – Asbestos*, para. 67. (emphasis original)

[272] Appellate Body Report, *EC – Asbestos*, para. 67.

[273] Panel Report, *EC – Sardines*, para. 7.27; and Appellate Body Report, *EC – Sardines*, para. 190.

[274] Panel Report, *EC – Sardines*, para. 7.27.

[275] Appellate Body Report, *EC – Sardines*, paras. 189-190.

[276] The Panel recalls that "food and feed crops" are defined in Article 2(40) of RED II as "starch-rich crops, sugar crops or oil crops produced on agricultural land as a main crop excluding residues, waste or ligno-cellulosic material and intermediate crops, such as catch crops and cover crops, provided that the use of such intermediate crops does not trigger demand for additional land".

7.100. Regarding the 7% maximum share, the text of Article 26(1) refers to "biofuels … produced from food or feed crops" without any qualification. Thus, Article 26(1) identifies biofuels solely by reference to what they are produced from (i.e. "food and feed crops"). The quality of a biofuel being produced from "food or feed crops" would in principle fall within the broad category of "product characteristics", as that clearly relates to objectively definable features, qualities or attributes of the product in a manner that enables it to be distinguished from other products, such as advanced biofuels or fossil fuels. In respect of the 7% maximum share, the Panel does not understand the European Union to argue otherwise.

7.101. Regarding the high ILUC-risk cap and phase-out, the text of Article 26(2) refers more specifically to "biofuels … produced from food and feed crops *for which a significant expansion of the production area into land with high-carbon stock is observed*".[277] The text of Article 26(2) itself does not specify which food and feed crops so qualify, as this determination is based on the criteria in Article 3 of the Delegated Regulation and the related Annex.

7.102. By its terms, Article 26(2) does not identify biofuels *solely* by reference to what they are produced from (i.e. "food and feed crops"), and also identifies the group of products to which it applies by reference to their *relative degree of ILUC risk*. The high ILUC-risk cap and phase-out in Article 26(2) is further subject to an exemption for individual consignments of any biofuels made from food and feed crops determined to be high ILUC risk, insofar as those consignments are certified as satisfying the *low* ILUC-risk criteria. Thus, in contrast to the 7% maximum share in Article 26(1), the high ILUC-risk cap and phase-out in Article 26(2), and the accompanying exemption for individual consignments satisfying the low ILUC-risk criteria, do not identify biofuels *solely* by reference to what they are made from (i.e. "food and feed crops"). Rather, Article 26(2) explicitly identifies biofuels by reference to their relative degree of ILUC risk. This is a feature of Article 26(2) that cannot be disregarded in the context of characterizing the measures at issue under Annex 1.1.

7.103. However, in the Panel's view it remains the case that Article 26(2) identifies the products to which the high ILUC-risk cap and phase-out apply by reference to the type of feedstock (i.e. raw materials) from which they have been obtained, i.e. *any specific food or feed crop determined to be high ILUC risk*. As already stressed above, the Panel considers that the quality of a biofuel being produced (or not) from a specific raw material or input would in principle fall within the broad category of "product characteristics", regardless of whether the raw materials or inputs are identified generally as "food or feed crops" (in the case of Article 26(1)) or more specifically as "food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed" (in the case of Article 26(2)).

7.104. The European Union is correct that Article 3 of the Delegated Regulation, establishing the criteria for determining high ILUC-risk feedstocks, covers matters relating to the observed impacts of cultivation of specific feed and food crops.[278] Furthermore, the Panel agrees with the European Union that these criteria do not, in and of themselves, relate to any intrinsic or extrinsic characteristic of the biofuels produced from feedstocks.[279] However, the Panel notes that it is not the criteria for the determination of high ILUC-risk crops that the Panel considers to be the relevant product characteristic in this context. The criteria included in the high ILUC-risk formula in Article 3, and the Annex to the Delegated Regulation, serve the purpose of designating an entire crop as a crop from which biofuel cannot be made without its eligibility to count towards EU renewable energy targets being limited by the high ILUC-risk cap and phase-out. This serves as an intermediate step in the determination, which ultimately leads to the designation of each crop as either "high ILUC risk" or not. This determination in turn dictates which biofuels are "high ILUC-risk", based on the crop from which they are made (i.e. their feedstocks or raw materials). The quality of being produced from a specific crop is thus the product characteristic that ultimately dictates the application of the high ILUC-risk cap and phase-out to a particular group of biofuels.

7.105. The Panel observes that the possibility of certifying individual consignments of biofuel from a particular yield of a crop as low ILUC-risk does not alter the characteristic of a biofuel as being made from a high ILUC-risk crop: any consignments of biofuel certified as "low ILUC-risk" is still made from a crop classified as high ILUC risk. The possibility of certification therefore does not detract from the characterization of the entire crop from which the biofuel is obtained (currently only

[277] Emphasis added.
[278] European Union's first written submission, para. 559.
[279] European Union's first written submission, para. 559.

palm oil) as high ILUC risk. It only enables some consignments of high ILUC-risk biofuels, when made from additional yield obtained in accordance with the criteria set out in Articles 4 and 5 of the Delegated Regulation, to be eligible to count towards EU renewable energy targets to the same extent allowed for other biofuels made from food and feed crops.

7.106. In any event, the Panel considers that while low ILUC-risk certification is an important part of the context that must be taken into account in characterizing the measures at issue for the purposes of determining the applicability of the TBT Agreement, the limited exemption for low ILUC-risk certification simply does not shift the "centre of gravity"[280] of the measures for the purposes of characterizing the measures under the TBT Agreement. Only a limited portion of the biofuel made from high ILUC-risk biofuel will be able to qualify for low ILUC-risk certification. By hypothesis, as a group, "high ILUC-risk" biofuels have been determined to present a high risk of ILUC, and low ILUC-risk certification can only be obtained on a consignment-by-consignment basis if it can be demonstrated that the specific biofuel at issue does not give rise to the same level of risk that characterizes the entire group of biofuels classified as "high ILUC risk". Leaving aside the parties' disagreement about whether low ILUC-risk certification is even practicable, the existence of this limited exemption does not alter what the Panel regards as the core features of the 7% maximum share and the high ILUC-risk cap and phase-out.

7.107. The Panel therefore concludes that the quality of a biofuel being produced (or not) from "food or feed crops" (in the case of Article 26(1)) or more specifically as "food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed" (in the case of Article 26(2)) qualifies as a "product characteristic" within the meaning of Annex 1.1. In other words, and at least to that extent, it may be said that the measures at issue relate to the "composition of biofuels" as argued by Malaysia.

7.108. The Panel recalls that Malaysia argues, in the alternative, that if the high ILUC-risk cap and phase-out does not lay down "product characteristics" because it does not merely apply on the basis of the composition of the biofuels concerned, but rather is applied based on criteria relating to the manner in which these inputs were produced, i.e. in a high ILUC-risk manner, then the high ILUC-risk cap and phase-out lays down "related processes and production methods" within the meaning of Annex 1.1.[281] The European Union rejects Malaysia's alternative argument that the high ILUC-risk cap and phase out lays down "related processes and production methods", because to fall within the scope of Annex 1.1 those processes and production methods would still have to be "related" to "product characteristics".[282] Having found that Article 26(1) and (2) identify "product characteristics", the Panel considers it unnecessary to address Malaysia's alternative argument that the measures identify "related processes and production methods" within the meaning of Annex 1.1.

7.109. The Panel now turns to the second prong of the element under consideration, which is whether the 7% maximum share and the high ILUC-risk cap and phase-out "lay down", within the meaning of Annex 1.1, the product characteristic identified. The Panel recalls that the European Union submits that Article 26 of RED II does not "provide for" or "stipulate" the "composition of the products to which they apply", either positively or negatively.[283]

7.110. The verb "lay down" is defined as "establish, formulate definitely (a principle, a rule); prescribe (a course of action, limits, etc.)".[284] Accordingly, the verb "lays down", as used in

[280] In *China – Auto Parts*, the Appellate Body addressed the specific issue of whether a particular charge falls under the scope of Article II:1(b) or Article III:2 of the GATT 1994, but in the course of doing so offered guidance of a more general nature. The Appellate Body observed that in some cases this will be a straightforward exercise, but in others "the picture will be more mixed", and the challenge faced by a panel more complex. In such circumstances a panel should seek to identify "the leading or core features of the measure at issue, those that define its 'centre of gravity' for purposes of characterizing" the measure. (Appellate Body Reports, *China – Auto Parts*, para. 171.)

[281] Malaysia's first written submission, paras. 504-506.

[282] European Union's first written submission, paras. 581-589. In this connection, the European Union reiterates that the measures do not prescribe any "product characteristic" for biofuels made from feed or food crops and do not prescribe the "composition" of any fuel or manner in which such biofuels or the feedstocks must be produced in order to be placed on the EU market.

[283] European Union's first written submission, para. 548.

[284] Appellate Body Reports, *EC – Seal Products*, para. 5.10 (referring to Shorter Oxford English Dictionary, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1562); and *US – Tuna II (Mexico)*, para. 185.

Annex 1.1 of the TBT Agreement means "establishing" or "prescribing" certain product characteristics (or their related processes or production methods). The relevant product characteristics might be prescribed in a "positive" or "negative" form, i.e. the document may provide, positively, that products must possess certain "characteristics", or might prescribe, negatively, that products *not* possess certain "characteristics".[285]

7.111. The Panel first notes that by its own terms, RED II "*lays down rules* … on the use of energy from renewable sources … in the transport sector", for the purposes of meeting EU-wide renewable energy consumption targets.[286] The 7% maximum share and the high ILUC-risk cap and phase-out are among the rules that RED II, by its own terms, "lays down". Specifically, these measures are set out in Article 26 of RED II, which, as already emphasized, is entitled "*Specific rules* for biofuels, bioliquids and biomass fuels produced from food and feed crops". Articles 26(1) and (2) are thus integral and essential components of the calculation rules that define the terms of eligibility of different types of energy sources in the transport sector to be counted as renewable energy for the purposes of meeting RED II targets.

7.112. As regards the 7% maximum share, its essential feature and function within this broader framework is to define and limit the contribution that may be made by biofuels made from "feed and food crops" to meeting these consumption targets. Article 26(1) identifies the products to which this requirement applies by reference to a defining product characteristic, namely being produced from certain types of feedstocks or raw materials, i.e. "food and feed crops". It is the presence of this characteristic that determines the applicability of the requirement at issue. Considered as a whole and in the context of other provisions of RED II, the 7% maximum share specifically limits the eligibility of specific types of biofuels to be counted towards the renewable energy targets in RED II. Thus, the 7% maximum share effectively defines and prescribes one of the characteristics required of biofuels for the purposes of meeting the consumption targets in RED II.

7.113. As regards the high ILUC-risk cap and phase-out, its essential feature and function within this broader framework (i.e. the calculation rules that define the terms of eligibility of different types of energy sources in the transport sector to be counted as renewable energy for the purposes of meeting RED II targets) is to limit and gradually eliminate the eligibility of biofuels made from high ILUC-risk feedstocks to be counted towards those targets. As with Article 26(1), therefore, Article 26(2) identifies the products to which this requirement applies by reference to a defining product characteristic, namely being produced from "food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed". It is the presence of this characteristic that determines the applicability of the requirement at issue. When a determination is made that a biofuel is produced from "food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed", that determination is made in respect of the product generally (as opposed to individual consignments) and thus becomes a very concrete product characteristic (specifically based on the raw material used to produce the product.) Considered as a whole and in the context of other provisions of RED II, the high ILUC-risk cap and phase-out specifically limits the eligibility of specific types of biofuels to be counted towards the renewable energy targets in RED II. Thus, like the 7% maximum share, the high ILUC-risk cap and phase-out also effectively defines and prescribes one of the characteristics required of biofuels for the purposes of meeting the consumption targets in RED II.

7.114. The European Union submits that a biofuel's eligibility to contribute to renewable energy consumption targets under RED II depends on a number of factors, including compliance with the sustainability and GHG emissions savings criteria, and is therefore not determined "solely" by reference to the raw material used to obtain it.[287] The Panel is not persuaded by this argument. The fact that there are other conditions not challenged in these proceedings that also define the eligibility of biofuels to contribute to RED II renewable energy consumption targets does not obscure the specific requirements contained in the 7% maximum share and the high ILUC-risk cap and phase-out which are at issue.

7.115. In the context of arguing that the measures do not "lay down" any product characteristic, the European Union submits that if Malaysia's logic were accepted by the Panel, the scope of the definition of a "technical regulation" under the TBT Agreement would be drastically widened. As a

[285] Appellate Body Report, *EC – Asbestos*, para. 69.
[286] Article 1 of RED II. (emphasis added)
[287] European Union's first written submission, para. 553.

consequence, any "document" that identified products by reference to the raw materials from which they are produced and established some legal effects from that identification would constitute a "technical regulation" because that reference alone would be considered equivalent to "regulating" the "composition" of the product. Under that logic, according to the European Union, any Member's WTO schedule, which commonly distinguishes hundreds of products based on their raw materials and establishes different rates of import duties, would constitute "a conglomerate of technical regulations".[288]

7.116. The Panel is not persuaded that the European Union's comparison to WTO schedules is apposite. The design and operation of the 7% maximum share and the high ILUC-risk cap and phase-out differ significantly from the European Union's hypothetical situation of a duty rate attributed to a product based on its raw material input. The reference in Articles 26(1) and (2) of RED II to the type of feedstock (raw materials) from which the biofuel is produced defines the product characteristics that dictate whether and to what extent a biofuel may or may not be counted by EU member States for the purposes of meeting RED II consumption targets. In doing so, it effectively regulates the product characteristics required of biofuels needed to qualify as renewable energy on the EU market (and thus eligibility to be counted as contributing towards the mandatory sectoral target in the transport sector and overall target of renewable energy consumption). Member's' WTO schedules, in contrast, do not "lay down" (i.e. *prescribe*) product characteristics in the sense of Annex 1.1. Among other things, Member's WTO schedules set out tariffs that apply exclusively to imported products, as opposed to technical regulations that prescribe product characteristics that apply equally to imported and domestic products. Accepting the European Union's argument would, in the Panel's view, ignore essential aspects of the design of the 7% maximum share and the high ILUC-risk cap and phase-out and how they operate in their given regulatory context.

7.117. The Panel notes that the fact that the measures identify the product at issue through the very product characteristics that are the object of the prescriptions at issue does not imply that they cannot constitute a technical regulation. As observed by the Appellate Body, the product might be identifiable through the very "characteristic" that is the subject of regulation.[289] Whether the specific measure at issue is or is not a technical regulation must be determined based on the essential features of the measure considered as a whole.[290]

7.118. The Panel concludes that the 7% maximum share and the high ILUC-risk cap and phase-out "lay down" product characteristics within the meaning of Annex 1.1.

7.1.2.1.5 "with which compliance is mandatory"

7.119. The Panel now turns to the third element of the test, which concerns the terms "with which compliance is mandatory" in Annex 1.1.

7.120. Annex 1.1 makes clear that "compliance" with those product characteristics (or their related PPMs) must be "mandatory" for the measure to be a technical regulation. In contrast, a "standard", as defined in Annex 1.2, is a document "approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, *with which compliance is not mandatory*".[291] The requirement that compliance be mandatory means that the document at issue must "prescribe rules" in "a binding or compulsory

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[288] European Union's first written submission, para. 567.

[289] Appellate Body Report, *EC – Asbestos*, para. 70: "… there may be perfectly sound administrative reasons for formulating a 'technical regulation' in a way that does *not* expressly identify products by name, but simply makes them identifiable – for instance, through the 'characteristic' that is the subject of regulation." (ibid.). (emphasis original)

[290] Appellate Body Report, *EC – Asbestos*, para. 64 ("the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole.").

[291] Annex 1.2 to the TBT Agreement. (emphasis added) The definition of a "standard" is also accompanied by an explanatory note, which states that the "terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purposes of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardizing community are based on consensus. This Agreement covers also documents that are not based on consensus." (*Explanatory note* to Annex 1.2 of the TBT Agreement).

fashion".[292] In *EC – Sardines*, the panel and the Appellate Body considered the measure to lay down product characteristics in a mandatory fashion, because the relevant requirements were contained in provisions that were "binding in [their] entirety and directly applicable in all Member States".[293]

7.121. The European Union submits that as these provisions are measures that have been adopted by the Union and the Commission respectively, they must be implemented by the EU member States and in that "narrow sense", the relevant provisions are "mandatory" on the EU member States.[294] However, the European Union argues that Article 26 of RED II neither imposes any obligation directly on palm oil and palm oil-based biofuel producers (or any producers of other food or feedstocks and the respective biofuels), nor does it fix requirements that the producers of other biofuels and their raw materials must comply with in order to obtain some advantage.[295] The European Union also argues that the 7% maximum share is binding only in the sense of imposing an outer limit.[296]

7.122. The Panel first notes that it is undisputed that RED II and the Delegated Regulation are binding legal instruments that create rights and obligations within the EU legal order. The first sentence of Article 1 of RED II reads:

> This Directive establishes a common framework for the promotion of energy from renewable sources. It sets a *binding* Union target for the overall share of energy from renewable sources in the Union's gross final consumption of energy in 2030.[297]

7.123. Article 3 of RED II provides that "Member States shall collectively ensure that the share of energy from renewable sources in the Union's gross final consumption of energy in 2030 is at least 32%." The Panel notes that EU member States are required to set national contributions to meet, collectively, this binding overall EU target.[298] It is clear therefore from the terms of RED II that the renewable energy consumption targets defined are binding on EU member States.[299]

7.124. Furthermore, the Panel recalls that Article 25(1) of RED II establishes a requirement that EU member States set an obligation on fuel suppliers to ensure that a "minimum share" of the total energy consumption in the transport sector is composed of renewable energy. Pursuant to this provision, which is expressly referenced in Article 26(1) and (2):

> In order to mainstream the use of renewable energy in the transport sector, *each Member State shall set an obligation on fuel suppliers* to ensure that the share of renewable energy within the final consumption of energy in the transport sector is at least 14% by 2030 (minimum share) in accordance with an indicative trajectory set by the Member State and *calculated in accordance with the methodology set out in this Article and in Articles 26 and 27*.[300]

7.125. The mandatory nature of the language in Article 25(1) makes clear that in calculating national contributions towards the renewable energy consumption targets, EU member States cannot derogate from the calculation methodology set out in RED II, including in Article 26. Each EU member State must therefore observe the limitations imposed by the 7% maximum share in calculating its national consumption. The binding effect of the measure extends to fuel suppliers, whom EU member States must oblige to comply with the calculation methodology, including the 7% maximum share and the high ILUC-risk cap and phase-out, in their efforts to achieve the 14% target by 2030.

7.126. The Panel notes the European Union's acknowledgement that the overall consumption targets in Article 3 and the 14% share of renewable energy in transport in Article 25 of RED II are mandatory for EU member States at least "in the narrow sense" that they are prescribed by law.[301]

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[292] Appellate Body Report, *EC – Asbestos*, para. 68.
[293] Panel Report, *EC – Sardines*, para. 7.30; and Appellate Body Report, *EC – Sardines*, para. 194.
[294] European Union's first written submission, para. 591.
[295] European Union's first written submission, para. 592.
[296] European Union's first written submission, para. 594.
[297] Emphasis added.
[298] Article 3(2) of RED II.
[299] Article 2 of RED II.
[300] Emphasis added.
[301] European Union's first written submission, para. 591.

Furthermore, with respect to the 7% maximum share, the European Union acknowledges that the effect of Article 26 of RED II is that only a maximum of 7% of an EU member State's use of conventional biofuels could be counted by that member State as contributing towards the 14% sectoral target in the transport sector and the 32% overall target of renewable energy consumption. Similarly, the Panel considers that the high ILUC-risk cap and phase-out requirement is an integral part of the binding calculation rules that apply to food and feed crop-based biofuels. In the Panel's view, this makes these requirements, on their face, mandatory, i.e. prescriptions that must be complied with by EU member States.[302]

7.127. The Panel notes the European Union's emphasis on certain flexibilities afforded to EU member States in deciding how exactly to implement these requirements. The European Union highlights in this respect that when framing obligations on fuel suppliers at the national level, EU member States may distinguish between different biofuels, bioliquids and biomass fuels produced from food and feed crops, and choose to promote all conventional biofuels or no conventional biofuels.[303] The Panel understands that Article 26(1) of RED II allows an EU member State meeting its renewable targets with less than 7% of conventional biofuels to lower its overall target for the transport sector commensurately; individual EU member States can thus set a lower maximum share if they wish. The Panel understands that EU member States enjoy similar flexibility with respect to setting lower maximum shares of biofuels made from high ILUC-risk feedstocks, within the limits of the high ILUC-risk cap and phase-out. However, the fact that there is flexibility to opt for a *lower* level of contribution from biofuels made from food and feed crops than the *maximum* share established by and allowed under the 7% maximum share, and also for a lower level of contribution from biofuels made from high ILUC-risk feedstocks within the limits of the cap and phase-out, does not modify the binding character of the *upper* limits defined in Article 26(1).

7.128. The conditions imposed by RED II and the Delegated Regulation therefore define in a binding manner the terms of eligibility of different types of fuels, including biofuels, for the purposes of complying with the binding targets established under RED II. Within this framework, the 7% maximum share and the high ILUC-risk cap and phase-out prescribe in a binding manner the characteristics required of biofuel products for the purposes of contributing to the European Union's renewable energy consumption targets in the transport sector. Thus, even though EU member States can define their renewable energy mix for internal purposes, they are not at liberty to derogate from or ignore these requirements in fulfilling their obligations under RED II. In this sense, compliance with the conditions imposed by these two measures relating to the raw materials or inputs of biofuels for the purposes of eligibility to count towards the renewable energy consumption targets is mandatory.

7.129. In the Panel's view, in defining the characteristics required of biofuels to meet the requirements of RED II, Articles 26(1) and (2) prescribe "in a binding or compulsory fashion"[304] the characteristics required of biofuels [made from food and feed crops] to be eligible to contribute to the EU market for renewable sources of energy defined by RED II.

7.130. The Panel notes that, as the European Union observes, neither Article 26 of RED II nor the Delegated Regulation impose rules on the specific composition of biofuels in order for them to be sold on the EU market. Indeed, it is not disputed that conventional biofuels not eligible to contribute to RED II targets can be nonetheless legally sold on the EU market . However, the Panel is not persuaded that this implies that the 7% maximum share and the high ILUC-risk cap and phase-out do not lay down product characteristics with which compliance is "mandatory" within the meaning of Annex 1.1. As the Panel explains below[305], the entirety of the EU conventional biofuel market is

[302] The Panel notes that by their nature, these requirements are addressed to EU member States, rather than to market operators directly. Their binding character, and the binding obligations that they give rise to, therefore arise for EU member States rather than EU citizens. The European Union relies on this distinction in stating that Article 26 of RED II does not impose any obligation "directly" on producers. The Panel is not persuaded however that this consideration affects its assessment of the binding character of the measures. Ultimately, EU member States will themselves need to implement the requirements imposed on them by RED II by requiring operators in their respective territories to act so as to ensure compliance with these requirements.

[303] European Union's first written submission, para. 594.

[304] Appellate Body Report, *EC – Asbestos*, para. 68.

[305] See section 7.1.2.3.5.1 of this Report.

essentially governed by the RED II regime, in the sense that there is little to no demand for biofuels that are not eligible to count towards the EU renewable energy targets.

7.131. In *US – Tuna II (Mexico)*, the measure prescribed the eligibility conditions for access to a voluntary label, and more generally the manner in which any "dolphin-safe" claims could be made in relation to tuna products. The measure essentially controlled eligibility to use a label, and did not otherwise prevent any products from being allowed onto the market. It was nonetheless found to lay down product characteristics with which compliance was mandatory (and thus a "technical regulation"). The Appellate Body observed in the context of the labelling requirement at issue that:

> The text of Annex 1.1 to the *TBT Agreement* does not use the words "market" or "territory". Nor does it indicate that a labelling requirement is "mandatory" *only* if there is a requirement to use a particular label in order to place a product for sale on the market. To us, the mere fact that there is no requirement to use a particular label in order to place a product for sale on the market does not preclude a finding that a measure constitutes a "technical regulation" within the meaning of Annex 1.1. Instead, in the context of the present case, we attach significance to the fact that, while it is possible to sell tuna products without a "dolphin-safe" label in the United States, any "producer, importer, exporter, distributor or seller" of tuna products must comply with the measure at issue in order to make any "dolphin-safe" claim.[306]

7.132. Likewise, in *EC – Sardines* the measure at issue did not condition lawfully placing a product on the market upon possessing (or not possessing) certain characteristics. Rather, the measure prescribed, among other things, which species of sardines could be sold as "preserved sardines" on the EU market. The measure essentially controlled eligibility to use a commercial designation and did not otherwise prevent any products from being allowed onto the market. It was nonetheless found to lay down product characteristics with which compliance was mandatory.[307]

7.133. Thus, in both disputes, compliance with the requirements in the technical regulations at issue was necessary to gain access to a certain advantage or a certain segment of the market. The fact that compliance with the requirements addressed in *US – Tuna II (Mexico)* and *EC – Sardines* was not a condition for selling the product lawfully (i.e. a condition to "place a product for sale on the market", as described by the Appellate Body in *US – Tuna II (Mexico)*) did not detract from the conclusion that they constituted technical regulations. The commonality to these two disputes was the critical fact that in both situations the measures exclusively, mandatorily and exhaustively laid down criteria for the eligibility of the products concerned to receive a certain label or be marketed using a certain term.

7.134. In the Panel's view, the 7% maximum share and the high ILUC-risk cap and phase-out operate in an analogous manner. As pointed out by the European Union, these measures do not create a legal impediment to selling or otherwise placing on the EU market biofuels made from food or feed crops generally or from crops determined to be high ILUC risk. However, they limit access to a particular segment of the EU market comprising biofuels considered as renewable energy sources for the purpose of national contributions to EU renewable energy targets in the transport sector.[308] While it is possible to sell food and feed crop-based biofuel, including that made of high ILUC-risk feedstock, in the European Union, every EU member State must comply with the "maximum share" and cap on the use of these biofuels, or the gradual phase-out, in calculating its share of renewable energy consumption to meet the binding targets of RED II. There is no flexibility for EU member States to ignore these rules in calculating their share of renewable energy, or to abstain from performing such a calculation.

7.135. This was also a key reason in *US – Tuna II (Mexico)* that led the Appellate Body to ultimately conclude that the measure was a technical regulation. In that case, the measure set out "a *single and legally mandated definition* of a 'dolphin-safe' tuna product and *disallows the use of other labels*

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[306] Appellate Body Report, *US – Tuna II (Mexico)*, para. 196. (emphasis original; fns omitted.)

[307] Panel Report, *EC – Sardines*, para. 7.47; and Appellate Body Report, *EC – Sardines*, para. 194.

[308] In other words, compliance with product characteristics laid down in the technical regulation at issue in *US – Tuna II (Mexico)* was required to gain access to the advantages created by the United States' promotion of dolphin-safe tuna just as compliance with the product characteristics laid down in Articles 26(1) and (2) is required to gain access to the advantages created by the European Union's promotion of renewable energy in the transport sector.

on tuna products that do not satisfy this definition [… and that, i]n doing so, the US measure *prescribes in a broad and exhaustive manner the conditions* that apply for making any assertion on a tuna product as to its 'dolphin-safety', regardless of the manner in which that statement is made[, and, a]s a consequence, the US measure *covers the entire field of what dolphin-safe means* in relation to tuna products".[309] Similarly here, there is absolutely no flexibility in terms of allowing alternative criteria for assessing whether biofuels are eligible for the purposes of the 7% maximum share or the high ILUC-risk cap and phase-out, except from those criteria prescribed in the measures. The measures therefore "*prescribe in a broad and exhaustive manner the conditions that apply*" for eligibility, thus covering "*the entire field of what"* eligible biofuels means for attaining RED II's renewable energy targets. This conclusion is not modified by the fact that biofuels that do *not* meet the requirements for eligibility may be lawfully sold on the market to supply the EU transport energy market.

7.136. The Panel is mindful that in *US – Tuna II (Mexico)*, the measure at issue was a labelling requirement, and that labelling requirements are expressly identified in the second sentence of Annex 1.1 as falling within the scope of what may be addressed in a technical regulation. In the present case, as discussed above, it is not alleged that the measure at issue would be covered by the second sentence of Annex 1.1. However, this difference does not imply that the reasoning applied in *US – Tuna II (Mexico)* cannot also find application here, *mutatis mutandis.* The relevant consideration in this respect is that a measure may constitute a technical regulation even if it does not impose particular product characteristics or requirements as a condition for placing a product on the market.[310]

7.137. The Panel observes that limiting the applicability of the relevant provisions of the TBT Agreement to measures that condition the ability to lawfully place products on the market would exclude from the disciplines of the TBT Agreement measures regulating or foreclosing access to a certain advantage or segment of a market on the basis of the characteristics of a product, without excluding the possibility of offering it for sale. In the Panel's view, the text and context of the relevant provisions of the TBT Agreement do not provide a basis for drawing such a distinction between measures that regulate the characteristics required of products to place them on the market altogether and those that regulate the characteristics required of products to access certain specific segments of the domestic market. This is also consistent, in the Panel's view, with the object and purpose of the TBT Agreement, as expressed in its preamble, "that technical regulations … do not create unnecessary obstacles to international trade".

7.138. Based on the above, the Panel finds that the 7% maximum share and the high ILUC-risk cap and phase-out lay down product characteristics "with which compliance is mandatory" within the meaning of Annex 1.1.

7.1.2.1.6 Conclusion on Annex 1.1

7.139. The Panel concludes that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations within the meaning of Annex 1.1 to the TBT Agreement.

7.140. The Panel notes that the European Union reiterates its view that the challenged measures are not technical regulations when responding to each of the claims made under Article 2. The Panel also appreciates that the way the European Union responds to certain of the claims under Article 2 is informed by its view that the measures are not technical regulations. However, having already addressed this issue at the outset, and with a view to avoiding repetition, the remainder of the Panel's findings proceed on the assumption that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations within the meaning of Annex 1.1 to the TBT Agreement.

[309] Appellate Body Report, *US – Tuna II (Mexico)*, para. 199. (emphasis added)

[310] The Panel notes that the requirement "with which compliance is mandatory", stated in the first sentence of Annex 1.1, applies also to the types of measures described in the second sentence. (See e.g. Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.449 (expressing the view that it would be contrary to the object and purpose of the obligations concerning technical regulations if the element that "compliance is mandatory" would not apply to the items described in the second sentence); and Panel Reports, *Australia – Tobacco Plain Packaging*, fn 979 to para. 7.281 (noting what while Annex 1.1 does not expressly refer to the "mandatory" nature of the document in its second sentence, it applies equally.)

7.1.2.2 Article 2.4 – Relevant international standards

7.1.2.2.1 Introduction

7.141. Having concluded that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations within the meaning of Annex 1.1, the Panel now turns to the claims under Article 2 of the TBT Agreement. The Panel begins with the claim under Article 2.4, addressing it before the claims under Articles 2.2 and 2.1 for reasons already set out in the Panel's discussion of its order of analysis.

7.142. Malaysia submits[311] that the European Union violates Article 2.4 by imposing the high ILUC-risk cap and phase-out without using relevant international standards as a basis. More specifically, Malaysia refers to four ISO standards as being the relevant standards for the purposes of its Article 2.4 claim, explaining that they set out a methodology for assessing the environmental performance and sustainability of biofuel. Malaysia contends that this methodology explicitly excludes ILUC from the assessment. For Malaysia, therefore, the high ILUC-risk cap and phase-out contradicts the relevant ISO standards and, therefore, the European Union has not used them as a basis for its technical regulations. Malaysia further submits that these standards are an effective and appropriate means of fulfilling the European Union's primary objective, namely, the avoidance of additional GHG emissions.

7.143. The European Union submits[312] that these four ISO standards are neither relevant standards nor are they effective or appropriate for fulfilling the legitimate objective pursued through the measures at issue. More specifically, the European Union argues that the measures address a matter which is outside of the scope of the four ISO standards as these do not capture ILUC and associated environmental risks. The European Union submits that because of this fact, it has adopted an alternative approach in the Delegated Regulation.

7.1.2.2.2 Legal standard

7.144. Article 2.4 sets forth the obligation that:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problem.

7.145. Article 2.4 has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.146. Based on the text of Article 2.4, a complainant has to show three elements[313] to establish that a technical regulation is inconsistent with the obligation:

a. relevant international standards exist, or their completion is imminent;

b. the international standard(s), or the relevant parts thereof, has/have not been used as a basis for the technical regulation; and

c. the international standard(s), or relevant parts thereof, is/are not an *ineffective* or *inappropriate* means for the fulfilment of the legitimate objectives pursued by the technical

[311] Malaysia's first written submission, paras. 692-709; Malaysia's second written submission, paras. 255-262; Malaysia's responses to the Panel's questions, p. 83-87; and Malaysia's comments on the European Union's responses to the Panel's questions, p. 233-235.

[312] European Union's first written submission, paras. 978-1001; European Union's second written submission, paras. 161-166; and European Union's responses to the Panel's questions, paras. 716-731.

[313] Panel Report, *US – Tuna II (Mexico)*, para. 7.627 (referring to Panel Report, *EC – Sardines*, paras. 7.61-7.139 and Appellate Body Report, *EC – Sardines*, paras. 217-291).

regulation, taking into account fundamental climatic or geographical factors or fundamental technological problems.

7.147. These elements apply cumulatively, and thus each must be satisfied to establish an inconsistency with the first sentence of Article 2.4.

7.148. The Panel will elaborate further on the elements of the legal standard in Article 2.4 as necessary in the course of its assessment of the issues in dispute. As is its prerogative,[314] the Panel will also scrutinize and interpret the meaning of relevant parts of the four ISO standards at issue in this dispute.

7.1.2.2.3 Description of the general content of the four ISO standards

7.149. The four ISO standards in respect of which Malaysia makes its claim under Article 2.4 are the following:

a. ISO standard 14040:2016 entitled "Environmental management — Life cycle assessment — Principles and framework" (hereinafter "ISO 14040:2016")[315]

b. ISO standard 14044:2017 entitled "Environmental management — Life cycle assessment — Requirements and guidelines" (hereinafter "ISO 14044:2017")[316]

c. ISO standard 14067:2018 entitled "Greenhouse gases – Carbon footprint of products – Requirements and guidelines for quantification" (hereinafter "ISO 14067:2018")[317]

d. ISO standard 13065:2015 entitled "Sustainability criteria for bioenergy" (hereinafter "ISO 13065:2015")[318]

7.150. Article 2.4 refers to "international standards" that are "relevant". With respect to the former element, the parties agree that these four ISO documents are international standards within the meaning of this provision. The Panel sees no reason to disagree.[319]

7.151. The Panel observes that ISO 14040:2016 and ISO 14044:2017 both concern the life cycle assessment (LCA) of a product and that, given their commonalities, they can be examined together. ISO 14040:2016 describes the principles and framework of an LCA, whereas ISO 14044:2017

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[314] In *Australia – Tobacco Plain Packaging*, the panel, based on certain guidance by the Appellate Body in *India – Agricultural Products* (an SPS dispute) on the panel's task in identifying and interpreting international standards, which it considered applied *mutatis mutandis* to TBT disputes, stated that "[o]nce the relevant instruments have been identified, their meaning will also need to be discerned and understood" by the panel. (Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.297. See more generally ibid., paras. 7.295-7.297.) In *India – Agricultural Products*, the Appellate Body stated, for instance, that "because the international standard serves as the benchmark against which a Member's compliance under Article 3 [of the SPS Agreement] is to be assessed, it is *incumbent on a panel* to discern the meaning of that standard. In conducting such an assessment, panels have various means available to them. A panel may be guided by any relevant interpretative principles, including relevant customary rules of interpretation of public international law." (Appellate Body Reports, *India – Agricultural Products*, para. 5.79; and *Australia – Tobacco Plain Packaging*, para. 7.296. (emphasis added))

[315] ISO 14040:2016, (Exhibit MYS-242).

[316] ISO 14044:2017, (Exhibit MYS-241).

[317] ISO 14067:2018, (Exhibit EU-32).

[318] ISO 13065:2015, (Exhibit EU-164).

[319] Pursuant to Annex 1.2, a "standard" is a "[d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory". Furthermore, pursuant to Annex 1.4, an "international body or system" is defined as a "body or system whose membership is open to the relevant bodies of at least all Members". Further, as the Appellate Body has clarified, an international standard is one adopted by an "international standardizing body", i.e. a body with "recognized activities in standardization" and whose membership is open to the relevant bodies of at least all Members. (Appellate Body Report, *US – Tuna II (Mexico)*, para. 359. See also Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.278-7.287.) Like the parties, the Panel considers that the ISO standards at issue meet these definitions and are consistent with the Appellate Body guidance with respect to the meaning of the term "international standard". See Malaysia's first written submission, para. 697; European Union's response to Panel question No. 128, para. 724.

specifies requirements and provides guidelines for an LCA.[320] An LCA addresses environmental aspects and potential environmental impacts of a given product throughout that product's life cycle – from raw material acquisition through to its production, use, end-of-life treatment, recycling and final disposal (i.e. cradle-to-grave).[321]

7.152. The Panel observes that ISO 14040:2016 defines LCA as the "compilation and evaluation of the inputs, outputs and the potential environmental impacts of a product system throughout its life cycle".[322] A "product system" is in turn defined as a "collection of unit processes with elementary and product flows, performing one or more defined functions, and which models the life cycle of a product".[323] As ISO 14040:2016 explains, "LCA is conducted by defining product systems as models that describe the key elements of physical systems. The system boundary defines the unit processes to be included in the system."[324] Furthermore, ISO 14040:2016 explains that LCA is a "relative approach, which is structured around a functional unit".[325] A "functional" unit is then defined as the "quantified performance of a product system for use as a reference unit".[326] The functional unit defines what is being studied and all subsequent analyses are relative to that functional unit.[327]

7.153. The Panel notes that an expert study submitted by the European Union describes LCA as "the most accepted tool to assess environmental performance of products" and describes ISO 14040:2016 and ISO 14044:2017 as the "most broadly accepted standards in the field [that] can be regarded as the 'mother' of almost all other standardization activities".[328]

7.154. The Panel now turns to ISO 14067:2018, which as noted above is entitled "Greenhouse gases – Carbon footprint of products – Requirements and guidelines for quantification". It specifies principles, requirements and guidelines for the quantification and reporting of the carbon footprint (CFP) of a product, in a manner consistent with the above standards on LCA.[329] ISO 14067:2018 defines the CFP of a product as the "sum of GHG emissions and GHG removals in a product system, expressed as CO_2 equivalents and based on a life cycle assessment using the single impact category of climate change".[330] According to the standard, this quantification is based on an LCA which must be in conformity with ISO 14044:2017.[331]

7.155. Finally, ISO 13065:2015, which as noted above is entitled "Sustainability criteria for bioenergy", specifies principles, criteria and indicators for the bioenergy supply chain to facilitate assessment of environmental, social and economic aspects of sustainability.[332] The standard defines "bioenergy" as "energy derived from biomass". That this definition covers biofuels is uncontested between the parties.[333] The relevant principles, criteria and indicators are set out in separate chapters of this standard concerning the respective sustainability aspects. As regards environmental sustainability, the standard defines the relevant principle as reducing anthropogenic GHG emissions and stipulates, as an indicator, certain calculations of GHG emissions and GHG removals.[334] In terms

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[320] ISO 14040:2016, (Exhibit MYS-242), Clause 1, first sentence (scope), p. 1; and ISO 14044:2017, (Exhibit MYS-241), Clause 1 (scope), p. 1.

[321] ISO 14040:2016, (Exhibit MYS-242), p. iv.

[322] ISO 14040:2016, (Exhibit MYS-242), Clause 3.2 (Life cycle assessment), p. 2.

[323] ISO 14040:2016, (Exhibit MYS-242), Clause 3.28 (Product system), p. 4.

[324] ISO 14040:2016, (Exhibit MYS-242), Clause 5.2.3 (System boundary), p. 12.

[325] ISO 14040:2016, (Exhibit MYS-242), Clause 4.1.4 (Relative approach and functional unit), p. 3.

[326] ISO 14040:2016, (Exhibit MYS-242), Clause 3.20 (Functional unit), p. 3.

[327] ISO 14040:2016, (Exhibit MYS-242), Clause 4.1.4 (Relative approach and functional unit), p. 6, which states:

> LCA is a relative approach, which is structured around a functional unit. This functional unit defines what is being studied. All subsequent analyses are then relative to that functional unit, as all inputs and outputs in the LCI and consequently the LC1A profile are related to the functional unit.

[328] Finkbeiner Study, (Exhibit EU-166), p. 13.

[329] ISO 14067:2018, (Exhibit EU-32), Clause 1, first sentence (Scope), p. 1.

[330] ISO 14067:2018, (Exhibit EU-32), Clause 3.1.1.1 (Carbon footprint of a product), p. 2.

[331] ISO 14067:2018, (Exhibit EU-32), Clause 6.1 (General), also Clause 1 (Scope), p. 13 and 1.

[332] ISO 13065:2015, (Exhibit EU-164), Clause 1, first sentence (Scope), p. 1.

[333] ISO 13065:2015, (Exhibit EU-164), Clause 3.3 (Bioenergy), p. 1.

[334] ISO 13065:2015, (Exhibit EU-164), Clause 5.2.1.1.1, p. 13, which states:

> Indicator: Provide, in accordance with Clause 6:
> a) Sufficient data to allow the calculation of GHG emissions and GHG removals of a life cycle stage; or

of methodology, the standard stipulates that GHG quantification and reporting shall be undertaken in accordance with the above standard, i.e. ISO 14067:2018, and thus requires an LCA which must be in conformity with ISO 14044:2017.[335]

7.156. In sum, the four ISO standards, read together, provide for an LCA-based quantification of GHG emissions of biofuels. This is uncontested between the parties.

7.1.2.2.4 How the four ISO standards relate to the issue of ILUC

7.157. The Panel observes that of the four standards, only ISO 14067:2018 directly refers to ILUC. The Panel therefore first examines relevant language in that standard, before turning to considerations of whether other more general language in this and the other three standards may also have a bearing on the issue of ILUC. As noted above, ISO 14067:2018 defines ILUC as "change in the use of land which is a consequence of direct land use change […], but which occurs outside the relevant boundary".[336] This definition differs somewhat from the manner in which the European Union has defined ILUC in its measures.[337] However, at the same time, the example provided in the Notes to the ISO standard's definition is similar to the way the measures define ILUC.[338] The Panel does not see that any such differences in how definitions of ILUC are formulated in the ISO standard and the measures would affect the present analysis (nor has either party to this dispute argued so).

7.158. While ISO 14067:2018 refers to ILUC, there is no disagreement between the parties that it excludes ILUC from the LCA methodology set out therein.[339] Indeed, the definition of ILUC in ISO 14067:2018 describes ILUC as occurring "outside the relevant boundary". As described above, the (system) boundary "defines the unit processes to be included in the system". In other words, ILUC lies outside the scope of what is being studied.

7.159. That ILUC is excluded from the LCA methodology is also clear from the following sentence in ISO 14067:2018, which states that:

> Indirect land use change (ILUC) should be included in CFP studies once an internationally agreed procedure exists.[340]

> b) Partial carbon footprint of the bioenergy product calculated as the sum of GHG emissions and removals of one or more processes expressed in gCO_2 equivalents per delivered unit; or
> c) Life cycle carbon footprint calculated as the sum of GHG emissions and GHG removals expressed in gCO_2 equivalents per MJ energy delivered and functional unit.

[335] ISO 13065:2015, (Exhibit EU-164), Clause 6.1 (General), p.20, which states in relevant part:

> This clause establishes the requirements for quantifying GHG emissions to address the GHG principle (see 5.2.1). GHG quantification and reporting shall be undertaken in accordance with ISO/TS 14067 as supplemented by Clause 6. ISO/TS 14067 specifies principles, requirements and guidelines for the quantification and communication of the carbon footprint of a product (CFP), based on International Standards on life cycle assessment (ISO 14040 and ISO 14044) and on environmental labels and declarations (ISO 14020, ISO 14024 and ISO 14025). It includes requirements on data and data quality.

[336] See para. 2.84 above.

[337] "Indirect land-use change occurs when the cultivation of crops for biofuels, bioliquids and biomass fuels displaces traditional production of crops for food and feed purposes. Such additional demand increases the pressure on land and can lead to the extension of agricultural land into areas with high-carbon stock, such as forests, wetlands and peatland, causing additional greenhouse gas emissions." (See para. 2.83 above).

[338] The example in ISO 14067:2018, (Exhibit EU-32), Clause 3.1.7.6 (indirect land use change – iLUC), p. 10:

> If land use on a particular parcel of land changes from food production to biofuel production, land use change might occur elsewhere to meet the demand for food. This land use change elsewhere is indirect land use change.

[339] Malaysia's first written submission, para. 702; second written submission, para. 257; European Union's first written submission, para. 989; second written submission, para. 161.

[340] ISO 14067:2018, (Exhibit EU-32), Clause 6.4.9.5 (Land use change), p. 26.

7.160. The sentence is contained in a Note to Clause 6.4.9.5 of ISO 14067:2018, which stipulates the inclusion of DLUC in the quantification of GHG emissions.[341] Thus, while DLUC is included in that quantification, ILUC currently is not.

7.161. Both parties elaborate on why ILUC effects are currently not included in the LCA-based quantification of GHG emissions. Malaysia sees the non-inclusion of ILUC in the LCA methodology as "a clear recognition that the concept of ILUC is still more conceptual than it is operational.[342] The European Union describes the system boundaries of an LCA as "inherent limitations" of an LCA and quotes the above expert study, stating that "due to the different nature of ILUC and the material and energy flow typically assessed in LCA, it is probably wise to try and address and mitigate iLUC separately from LCA – at least for some time."[343]

7.162. The Panel considers that the sentence in ISO 14067:2018, quoted above, as well as the parties' submissions on this point, demonstrate that the question of whether to include ILUC in an LCA-based quantification of GHG emissions, and if so how, is an open question still the object of ongoing scientific debate. The Panel understands that it is the existence of this scientific debate that explains why there is currently no internationally agreed procedure.[344] Furthermore, the prevailing opinion, to which both parties refer, seems to be that ILUC cannot be measured or observed (at least with sufficient precision to draw conclusions on the levels of ILUC-related GHG emissions) and therefore cannot be included in an LCA study.[345] Moreover, the European Union refers to this view as the reason why it has chosen a different approach from quantification.[346] However, while the parties appear to agree on the fact of, and the reasons for, the non-inclusion of ILUC in the LCA-based quantification, they disagree on what the non-inclusion, and in particular the above sentence in ISO 14067:2018, means.

7.163. To recall, the above sentence in ISO 14067:2018 states that ILUC "should be included in CFP studies once an internationally agreed procedure exists". Malaysia understands this sentence to be a "strong and unambiguous rejection of, as things currently stand, including GHG emissions related to ILUC in the calculation of the carbon footprint of products, including biofuel".[347] In response to the Panel's question on whether the four ISO standards preclude any and all consideration of ILUC effects outside the context of CFP quantification under an LCA approach, Malaysia takes the view that an "operationalised ILUC approach…is clearly counter to the standards that are in place".[348]

7.164. For the European Union, ILUC risks and ILUC emissions are not an integral part of the four ISO standards as they explicitly recommend not to account for GHG emissions related to ILUC in the context of the LCA of the CFP of products as long as no internationally agreed procedure on how to calculate such emissions exists.[349] The European Union further submits that this sentence in ISO 14067:2018 cannot be interpreted in any sense as precluding any Member from following a regulatory approach that takes account of ILUC, whether in the context of an LCA of the CFP of

[341] ISO 14067:2018, (Exhibit EU-32), Clause 6.4.9.5 (Land use change), p. 25, states in relevant part:

> The GHG emissions and removals occurring as a result of direct land use change (dLUC) within the last decades (see NOTE 1) shall be assessed in accordance with internationally recognized methods, such as the IPCC Guidelines for National Greenhouse Gas Inventories and included in the CFP. The net dLUC GHG emissions and removals shall be documented separately in the CFP study report. If site-specific data are applied, they shall be transparently documented in the CFP study report. If a national approach is used, the data shall be based on a verified study, a peer-reviewed study or similar scientific evidence and shall be documented in the CFP study report.
> (fns omitted)

[342] Malaysia's response to Panel question No. 130. See also Malaysia's responses to Panel question Nos. 129 and 131.

[343] European Union's first written submission, paras. 995 and 998.

[344] The Panel notes, in this respect, that Note 6 to Clause 6.4.9.5 of ISO 14067:2018 states that "[t]here is *ongoing research* to develop a methodology and data for the inclusion of iLUC in GHG reporting." (emphasis added)

[345] Recital 81 to RED II; Status Report (2019), (Exhibits EU-3, MYS-92), p. 4. See also Malaysia's first written submission, paras. 64, 438, 452, 575, 576, and 610.

[346] European Union's first written submission, para. 999.

[347] Malaysia's first written submission, para. 702; second written submission, para. 258.

[348] Malaysia's response to Panel question No. 131, pp. 85-86.

[349] European Union's first written submission, para. 989; second written submission, para. 161.

products, or in the context of other methodologies aimed at assessing the environmental impact of the same products.[350]

7.165. The Panel therefore understands Malaysia to interpret the sentence in ISO 14067:2018 quoted above as meaning that the standard effectively proscribes, i.e. does not allow, the inclusion of ILUC before any procedures have been internationally agreed. The Panel considers that the following two textual considerations speak against such an interpretation.

7.166. The first textual consideration is the *sentence itself*, and more specifically its wording and place in the standard. Regarding the wording, the sentence makes a positive statement about the possibility of including ILUC in the methodology of ISO 14067:2018 in the future, rather than a negative statement about excluding ILUC from any assessment currently carried out, as suggested by Malaysia. Indeed, to get to the meaning Malaysia attributes to the quoted sentence, the addition of the word "only" before "once" would seem necessary, and the word "should" would have to be replaced by "shall".[351] Regarding the placement of the quoted sentence in the standard, the sentence is contained in a "Note" to the actual clause i.e. Clause 6.4.9.5, which provides for the inclusion of DLUC in the assessment. Under the ISO's own directives, however, notes to clauses in ISO standards do not have the function of setting out requirements.[352] Instead, their function is simply that of "giving additional information intended to assist the understanding or use of the text of the document".[353]

7.167. The second textual consideration that speaks against Malaysia's reading of the sentence in ISO 14067:2018 quoted above is the *existence of other clauses in ISO 14067:2018*, which also refer to ILUC, namely:

a. Clause 6.4.9.8, like Clause 6.4.9.5, is a sub-clause to Clause 6.4.9 ("Treatment of specific emissions and removals"), and contains a "Summary of requirements and guidance":

    i. Table 1 in Clause 6.4.9.8 refers to ILUC as a specific component of GHG emissions that, in terms of *treatment* in the CFP, "should be considered for inclusion" and, in terms of *documentation* in the CFP study report, "shall be documented separately *if calculated*".[354]

    ii. Additionally, Figure 3 to Table 1, which contains an illustration of the specific components of the CFP and the partial CFP also refers to ILUC emissions and ILUC removals indicating that they "should be considered *separately*" and noting that DLUC and ILUC "can have a positive or negative contribution to the CFP".[355]

b. Clause 7.2 ("GHG values in the CFP study report") requires that GHG emissions and removals occurring as a result of ILUC "shall be documented separately if calculated".

7.168. These clauses and subclauses show that ISO 14067:2018 already envisages the possible inclusion of ILUC in a CFP study at present, i.e. even in the absence of internationally agreed

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[350] European Union's first written submission, para. 992; second written submission, para. 165.

[351] The European Union notes that:

> The verb "should" in ISO standards "indicates a recommendation" and a recommendation is an "expression, in the content of a document, that conveys or suggest[s a] possible choice or course of action deemed to be particularly suitable without necessarily mentioning or excluding others".
> (European Union's first written submission, para. 991. (emphasis original)) See also Malaysia's second written submission, para. 258.

[352] See Clause 24.5 of the ISO/IEC Directives, Part 2, Principles and rules for the structure and drafting of ISO/IEC documents, which states: "Notes shall not contain requirements … or any information considered indispensable for the use of the document, for example instructions (imperative mood), recommendations … or permission … Notes should be written as a statement of fact." (The European Union submitted parts of this document as Exhibit EU-165. The document is available in its entirety at: ISO - Publicly available resources)

[353] See the first para. of Clause 24.1 of the ISO/IEC Directives, Part 2, Principles and rules for the structure and drafting of ISO/IEC documents, which also adds, confirming the understanding that Notes themselves do not set requirements, the "document [i.e. the standard] shall be usable *without* the notes." (emphasis added)

[354] Emphasis added.

[355] Emphasis added.

procedures. As a consequence, this implies that the inclusion of ILUC, in the absence of harmonization through a standard, is a methodological choice by the entity preparing the CFP study.

7.169. The Panel notes that in response to the European Union's arguments concerning these clauses, Malaysia submits that these arguments are unsubstantiated as the European Union "has provided absolutely no evidence demonstrating that such calculation is even possible".[356] The Panel considers however that this argument does not rebut the point that the very existence of these clauses proves that ISO 14067:2018, while not itself offering a methodology for doing so, acknowledges that ISO standard users, including regulators, may already be accounting for GHG emissions from ILUC based on their own methodologies.

7.170. Based on these textual considerations, the Panel finds that the above sentence in ISO 14067:2018 does not address the issue of whether countries may assess ILUC in the absence of internationally agreed procedures, and if so, how they would do so. The Panel therefore does not share Malaysia's interpretation under which the standard would effectively proscribe, i.e. not allow, the inclusion of ILUC before any procedures have been internationally agreed.

7.171. Having assessed the specific references to ILUC in ISO 14067:2018, the Panel now turns to other, more general language found in the four ISO standards referred to above, that may also have a bearing on the issue of ILUC.

7.172. The Panel first examines ISO 13065:2105, because its product coverage (bioenergy, including biofuel) is the most specific amongst the four ISO standards in terms of addressing the assessment of environmental effects of biofuel. Clause 4.12 of ISO 13065:2015, entitled "Direct and indirect effects", states:

> In developing this International Standard, issues concerning direct and indirect effects were carefully considered. The aim of this International Standard is to provide clear guidance to produce consistent and replicable results. The term "indirect effects" can be understood in different ways due to various opinions and definitions. This International Standard considers the measurable environmental, social and economic effects that are under the direct control of the economic operator and caused by the process being assessed. For the purpose of this International Standard, these are defined as "direct effects". *Other effects that do not meet these requirements are not included in this International Standard*.[357]

7.173. Thus, Clause 4.12 makes clear that only "direct effects" are included in the standard and defines the latter as "measurable, under the direct control of the economic operator and caused by the process being analysed". ILUC effects clearly do not qualify as "direct effects" under this definition, and thus are not covered by this standard.

7.174. The Panel notes that, in response to a question from the Panel, Malaysia points to the word "measurable" in this clause, recalling that ILUC effects cannot be measured or observed, which Malaysia identifies as one of its principal concerns with "the EU's attempts to operationalise the concept of ILUC". For Malaysia, Clause 4.12 reflects the general notion that a policy is most effective when its outcomes are predictable.[358] The Panel considers that Malaysia's response does not address whether ISO 13065:2015 prescribes what Members are to do in respect of ILUC. In the Panel's view, Clause 4.12 makes clear what is *not* included in the scope of the methodology and therefore, does not address ILUC, whether positively or negatively.

7.175. In the Panel's view, by not including "indirect effects" such as ILUC in the methodology under ISO 13065:2015, Clause 4.12 leaves open whether or how such effects would be assessed. Furthermore, the Panel notes that ISO 13065:2015 also states that "the indicators in this International Standard might not comprehensively capture all sustainability aspects for all bioenergy processes."[359] Thus, the Panel concludes that ISO 13065:2015, as the most specific standard of the four at issue in terms of addressing the assessment of environmental effects of biofuel, not only makes clear that it does not purport to comprehensively address all sustainability aspects of biofuel,

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[356] Malaysia's second written submission, para. 259.
[357] ISO 13065:2015, (Exhibit EU-164), Clause 4.12, p. 13. (emphasis added)
[358] Malaysia's response to Panel question No. 132.
[359] ISO 13065:2015, (Exhibit EU-164), Introduction, p. vi.

but it also specifically excludes from the scope of its methodology the assessment of "indirect effects" such as ILUC.

7.176. Turning to the other ISO standards, the Panel observes that they also contain language qualifying the scope and methodology they set out, and the role they have in a decision/policy-making process. Thus, ISO 14040:2016 itself describes LCA as just "one of the techniques" that have been developed for the purpose of better understanding and addressing the environmental impacts of products.[360] Furthermore, ISO 14040:2016 states that "LCA is one of several environmental management techniques (e.g. risk assessment, environmental performance evaluation, environmental auditing, and environmental impact assessment) and might not be the most appropriate technique to use in all situations."[361] ISO 14044:2017, building on ISO 14040:2016, contains identical language.[362]

7.177. Furthermore, ISO 14067:2018 states that it "addresses only a single impact category: climate change" and "does not assess any social or economic aspects or impacts, or any environmental aspects and related impacts potentially arising from the life cycle of a product".[363] Annex A details the "limitations of the CFP", which it identifies to be the "focus on climate change as the single impact category, and limitations related to the methodology".[364] In particular with regard to the focus on a single impact category, Annex A points out that "decisions about product impacts that are only based on a single environmental issue can be in conflict with goals and objectives related to other environmental issues" and advises that "CFP or partial CFP should not be the sole component of a decision-making process".[365]

7.178. For the Panel, it is clear from these qualifications in the different standards, that the standards do not purport to confine a regulator to using LCA only and do not purport to comprehensively or exhaustively address every potential environmental impact.

7.179. In sum, the Panel finds that ISO 13065:2015 generally excludes ILUC effects, as indirect effects, from its methodology and that ISO 14067:2018 specifically excludes ILUC effects from the LCA methodology used to quantify GHG emissions. However, neither of these standards (nor the other two standards discussed in this section) contains language that precludes a national regulator from addressing ILUC through its own approach outside internationally standardized methodologies.

7.1.2.2.5 The requirements of Article 2.4

7.180. Having established that the four ISO standards do not include ILUC in their methodology, but also do not preclude a national regulator from addressing ILUC through its own methodology, the Panel now turns to the question whether, in light of this reading, Malaysia's case meets the requirements of Article 2.4. The first element that Malaysia must demonstrate is that the four ISO standards, which the Panel noted above qualify as international standards, are "relevant" international standards within the meaning of Article 2.4.

7.181. Malaysia submits that because the measures at issue are measures which first limit and then exclude palm oil-based biofuel from being counted towards the renewable energy consumption targets on the basis of, essentially, its CFP, the ISO standards for determining the CFP are "relevant" within the meaning of Article 2.4. Malaysia points specifically to ISO 13065:2015 as the standard assessing the sustainability of the entire bioenergy supply chain.[366]

7.182. The European Union submits that the standards are not relevant because the measures at issue address a matter which is outside the scope of those standards.[367] The European Union accepts that they are partially relevant insofar as they relate to the estimation of direct GHG emissions. The

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[360] ISO 14040:2016, (Exhibit MYS-242), Introduction, p. v.

[361] ISO 14040:2016, (Exhibit MYS-242), Introduction, p. vi.; see also European Union's first written submission, para. 997.

[362] ISO 14044:2017, (Exhibit MYS-241), Introduction, p.vi.

[363] ISO 14067:2018, (Exhibit EU-32), Clause 1 (Scope), p. 1.

[364] ISO 14067:2018, (Exhibit EU-32), Annex A, p. 33.

[365] ISO 14067:2018, (Exhibit EU-32), Annex A, p. 33.

[366] Malaysia's first written submission, para. 700.

[367] European Union's first written submission, para. 994.

European Union however contends that Malaysia has not demonstrated that the standards in question are relevant standards for its claim under Article 2.4.[368]

7.183. The Panel notes that the ordinary meaning of "relevant" has been found by previous panels to be "bearing upon or relating to the matter in hand; pertinent".[369] Furthermore, in the context of discussing the second element of Article 2.4 ("use as a basis"), the Appellate Body elaborated on the issue of "relevance". Pointing out that Article 2.4 also refers to "the relevant parts" of international standards, the Appellate Body relied on this language to "define the appropriate focus of the analysis" and limit the examination of the standard to those parts. In this regard, the Appellate Body stated:

> [T]he examination must be limited to those parts of the relevant international standards that *relate to the subject-matter of the challenged prescriptions or requirements*. In addition, the examination must be broad enough to address all of those relevant parts; the regulating Member is not permitted to select only some of the "relevant parts" of an international standard. If a "part" is "relevant", then it must be one of the elements which is "a basis for" the technical regulation.[370]

7.184. The Panel agrees with this interpretation and considers that it reflects a narrow approach to "relevant" by linking it directly to the challenged aspect of the measure at issue. Thus, the "matter" that a standard "bears upon or relates to" is the challenged prescription or requirement itself, not just the product scope or general subject-matter of the measure at issue.[371]

7.185. Applying this interpretation to the case at hand, the Panel considers that the relevance of the four ISO standards for the purposes of the claim under Article 2.4 is not determined by the fact that they apply to biofuel which is the product at issue or that they deal with sustainability issues. Moreover, their relevance is not determined by the fact that these standards apply to aspects of the EU Biofuels regime that are not challenged in this proceeding, or that they contain provisions that define or directly mention ILUC. Instead, their relevance depends on whether they address that which the Panel understands is being addressed by the challenged measure, namely the taking into account of ILUC effects. As the Panel has found above, this is not the case as the standards make clear that they do not cover ILUC.

7.186. In light of this, the Panel finds that the four ISO standards are not "relevant" international standards for the purposes of Malaysia's claim under Article 2.4. This claim must therefore fail.

7.187. Before concluding, the Panel wishes to make three observations. First, the Panel's finding that these four ISO standards are not "relevant" within the meaning of Article 2.4 does not in any way lessen the role that these standards generally play in the discussion on sustainability and environmental performance of products. Furthermore, in this dispute, while these standards are not "relevant" under Article 2.4, they play an important role in providing evidence of the debate on ILUC and the state of that debate, as this section of the Report demonstrates.[372]

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[368] European Union's second written submission, para. 163.

[369] Panel Reports, *EC – Sardines*, para. 7.68; and *Australia – Tobacco Plain Packaging*, para. 7.276 and fn 962.

[370] Appellate Body Report, *EC – Sardines*, para. 250. (emphasis added)

[371] The Panel finds confirmation for this reading in the two cases to date where panels made findings on the relevance of an international standard. In *EC – Sardines*, the standard that the panel found to be "relevant" addressed what was regulated by the challenged measure, namely the product name for sardines. This finding was upheld by the Appellate Body. (Panel Report, *EC – Sardines,* paras. 7.98-7.99; Appellate Body Report, *EC – Sardines*, paras. 230-233.) In *US – Tuna II (Mexico)*, the standard that the panel found to be "relevant" addressed the same requirements as the challenged measure, namely the fishing methods allowed for purposes of the dolphin-safe label. On appeal, the panel's finding on the existence of an international standard was reversed for different reasons. (Panel Report, *US – Tuna II (Mexico)*, paras. 7.700-7.707; Appellate Body Report, *US – Tuna II (Mexico)*, para. 399.)

[372] The Panel recalls, in this respect, the observation made by the panel in *Australia – Tobacco Plain Packaging* that just because a document does not constitute a relevant international standard under the TBT Agreement, it does not follow that such document is deprived of any other probative value for the purposes of other obligations in the Agreement. In that case, the Panel found that, while certain WHO FCTC Guidelines were not relevant international standards under the second sentence of Article 2.5 of the TBT Agreement (which contains a rebuttable presumption of consistency with Article 2.2), they could still be

7.188. Second, as the findings in this section confirm, the absence of international harmonization does not mean that countries are prevented from taking action and developing their own approaches to issues of concern. However, the fact that such national approaches do not fall under the disciplines of international standards does not mean that they do not fall under any WTO disciplines in terms of the scientific and evidentiary basis of the measure. In particular, Articles 2.2 and 2.1 which Malaysia has also raised in this proceeding, impose their own disciplines on technical regulations.[373]

7.189. Third, the Panel observes that its findings under Article 2.4 are based on international standards that currently exist. The Panel agrees with a previous panel's view that Article 2.4 is "not a static obligation and that there is an ongoing obligation to reassess technical regulations in light of new international standards that are adopted or revised", and that the obligation in Article 2.3 of the TBT Agreement contextually supports that view.[374]

7.1.2.2.6 Conclusion on Article 2.4

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

7.1.2.3 Article 2.2 – Necessary to fulfil a legitimate objective

7.1.2.3.1 Introduction

7.191. The Panel now turns to the claim under Article 2.2 of the TBT Agreement. The Panel addresses this claim in the light of its findings under Article 2.4, and prior to addressing the claim under Article 2.1. The Panel does so for the reasons set out in its discussion of the order of analysis among the claims under the TBT Agreement.

7.192. Malaysia submits[375] that the 7% maximum share and the high ILUC-risk cap and phase-out violate Article 2.2. Malaysia accepts that the European Union's asserted policy objectives regarding climate change, biodiversity, and public morals are legitimate, but submits that these are not the objectives of the specific measures at issue. According to Malaysia, the stated objective of the specific measures is to limit "GHG emissions by limiting direct and indirect land use change"[376] and the actual objective is protectionism in the cover of environmental protection. Malaysia presents arguments implying that the stated objective is not "legitimate": it argues that relevant international standards "exclude ILUC from being taken into account"[377]; it maintains in the context of its claims under Article 2.1 that because ILUC can neither be observed nor measured the regulation of ILUC-related GHG emissions is not "legitimate"[378]; and in response to the European Union's arguments, it questions the legitimacy of addressing GHG emissions outside of a Member's own territory. Malaysia further submits that the measures are trade-restrictive, that the risks of the non-fulfilment of the

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(and in fact were used as) evidence of fact under other claims at issue, including Article 2.2 of the TBT Agreement. Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.403-7.416.

[373] It is in the context of these provisions that the Panel will discuss non-standard-specific scientific arguments with respect to the approach that the European Union has adopted, which Malaysia has referred to under the present claim.

[374] Panel Report, *EC – Sardines*, para. 7.81. See also paras. 7.78-7.80, 7.82 and 7.86.

[375] Malaysia's first written submission, paras. 586-691; second written submission, paras. 29-55, 81-104, and 210-239; opening statement at the meeting of the Panel, paras. 30-34; responses to the Panel's questions, pp. 69-82; and comments on the European Union's responses to the Panel's questions, pp. 182-232.

[376] Malaysia's first written submission, paras. 410, 421, 468, 580(ii).

[377] Malaysia's first written submission, paras. 610(i).

[378] In the context of its arguments on the "contribution" step of the necessity test under Article 2.2 of the TBT Agreement, Malaysia argues that "ILUC can neither be observed nor measured and, therefore, it is impossible to attribute ILUC-risks exclusively to oil palm crop-based biofuel"; that "it is impossible to precisely estimate to what extent, if at all, ILUC GHG emissions occur"; and that "[i]nternational standards on the carbon footprint of products such as biofuels also exclude ILUC from being taken into account." (Malaysia's first written submission, para. 610(i).) In the context of its arguments under Article 2.1, Malaysia argues, on those same grounds, that regulating biofuels on the basis of ILUC-risk is "not legitimate". (Malaysia's first written submission, paras. 574-577.)

objective would be limited, and that the measures are not apt to make a material contribution[379] to their objective. Malaysia also identifies multiple less trade-restrictive alternative measures reasonably available to the European Union.

7.193. The European Union submits[380] that the Panel should reject the claims under Article 2.2, and disputes Malaysia's arguments on all of these elements of the legal standard. The European Union argues that the EU Biofuels regime must be considered as a "composite whole", and the "legitimate objective" that the measures pursue is the composite objective of mitigating climate change, preserving biodiversity, and addressing the associated moral concerns of the EU public.[381] In addition to arguing that the measures do not pursue a protectionist objective, the European Union maintains that the difficulties and limitations in assessing ILUC do not mean that ILUC GHG emissions do not exist, and submits that there is no territorial limitation in Article 2.2 of the TBT Agreement or Article XX of the GATT 1994. The European Union also disputes that the measures are "trade-restrictive", recalls that its composite objective implicates values of high importance in the European Union, and argues that the measures are apt to make a material contribution to the composite objective pursued. According to the European Union, the various alternative measures proposed by Malaysia would either be more trade-restrictive than the measures at issue or would not make an equivalent contribution to the composite objective pursued.

7.194. The Panel notes at the outset that there is substantial overlap between the parties' arguments under the different analytical steps of Article 2.2, and further overlap between certain of the parties' arguments under Article 2.2 and Article 2.1. For example, Malaysia stresses that ILUC cannot be observed nor measured when presenting its views on the identification of the measures' true objective, in the context of addressing the "legitimacy" of regulating ILUC-related GHG emissions under Article 2.1, and also when addressing the measures' capacity to contribute to that stated objective. In developing their arguments on these and related issues, both parties cross-reference certain arguments under Article 2.1 in the sections of their submissions addressing Article 2.2, and vice versa; and the parties also cross-reference sections of their arguments under Article 2.1 and Article 2.2 in the sections of their submissions addressing the general exceptions in Article XX of the GATT 1994 (and vice versa). All of these sections cross-reference several up-front sections of the parties' submissions that set out extended discussions on the validity of the concepts of ILUC and the scientific basis for the measures at issue, and the history and factual circumstances surrounding the measures at issue.

7.195. The Panel appreciates that the parties' overlapping arguments under multiple different elements of these provisions is largely a consequence of apparent overlaps in the legal standards that apply under these provisions. However, the Panel does not consider that it is under an obligation to formalistically address the same issues and arguments in the context of every analytical step or provision where they are repeated. It is well established that a panel has "the discretion to address only those arguments it deems necessary to resolve a particular claim".[382] The Panel addresses disputed issues and arguments under the steps in the analysis of Article 2.2 and Article 2.1 that it considers most relevant and appropriate to the issues and arguments raised. Towards that end, the Panel engages in a holistic reading of the parties' arguments under Article 2.2 and Article 2.1 and their submissions more generally. Where appropriate and useful to enhancing the clarity of its reasoning, the Panel employs the technique of cross-referencing.

7.196. The Panel notes that there is also substantial overlap between the parties' arguments concerning the 7% maximum share and the parties' arguments concerning the high ILUC-risk cap and phase-out. Insofar as the parties' arguments are the same, or raise the same or similar issues, the Panel addresses them together to avoid repetition. Naturally, insofar as the parties' arguments

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[379] Malaysia argues that while it does not contest that the measures at issue may make *a* contribution to the achievement of the objectives the European Union alleges to pursue, this contribution, or in other words the extent to which the measures at issue fulfil their objectives, will be very difficult, if not impossible, to determine (whether in quantitative or qualitative terms), and will, in any case, be quite limited." (Malaysia's first written submission, para. 611).

[380] European Union's first written submission, paras. 770-977; second written submission, paras. 102-160; opening statement at the meeting of the Panel, paras. 22-43, 64-98, and 99-121; responses to the Panel's questions, paras. 518-715; and comments on Malaysia's responses to the Panel's questions, paras. 223-242.

[381] The European Union has referred to three objectives as its multiple intertwined objectives pursued concurrently, and has also referred to them as comprising a single, composite objective.

[382] Appellate Body Report, *EC – Poultry*, para. 135.

raise issues that are specific to one of the two different measures, this is reflected in the Panel's reasoning and findings.

7.1.2.3.2 Legal standard

7.197. Article 2.2 sets forth the obligation 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.

7.198. Article 2.2 has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.199. Article 2.2 requires technical regulations not to be more trade-restrictive than necessary to fulfil "a legitimate objective". Thus, the initial steps in the analysis under Article 2.2 would typically[383] consist of:

a. the identification of the objective of the measure at issue, and

b. an assessment of whether it is a "legitimate" objective.

7.200. If the measure is aimed at fulfilling a legitimate objective, the next step of the analysis typically aims to arrive at a "preliminary conclusion"[384] about whether the measure is necessary to fulfil that legitimate objective. This so-called "relational analysis"[385] is based on a "weighing and balancing" of three factors:

a. the trade–restrictiveness of the measure;

b. the risks that non-fulfilment of the objective would create; and

c. the degree of contribution made by the measure to the objective.

7.201. The final step of the necessity test under Article 2.2 consists of a "comparative analysis"[386] whereby the challenged measure is compared against possible alternative measures. More specifically, this step of the analysis entails a comparison of the trade-restrictiveness and the degree of achievement of the objective by the measure at issue with those of possible alternative measures that are reasonably available, apt to make an equivalent contribution to the objective of, and less trade-restrictive than, the challenged measure.

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[383] See Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.3. The Appellate Body has clarified that, in the context of Article 2.2, "the particular manner of sequencing the steps of this analysis is adaptable, and may be tailored to the specific claims, measures, facts, and arguments at issue in a given case." (Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.205.) In certain circumstances, a panel may elect to begin its analysis by considering the "trade-restrictiveness" of the technical regulation at issue. (See e.g. Panel Reports, *US – COOL*, para. 7.554 and fn 742.)

[384] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.203-5.204 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.)

[385] Appellate Body Reports, *US – COOL*, para. 374 (recalling its earlier use of the term "relational analysis" in Appellate Body Report, *US – Tuna II (Mexico)*, para. 318); and *Australia – Tobacco Plain Packaging*, paras. 6.3 and 6.517.

[386] The term "comparative analysis" has been used by previous panels and the Appellate Body. See e.g. Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.199; and *Australia – Tobacco Plain Packaging*, para. 6.4.

7.202. These steps of the analysis under Article 2.2 generally correspond to the steps of the analysis followed when applying those exceptions in Article XX of the GATT 1994 that require that a measure be "necessary" to the fulfilment of a specified objective (these exceptions include Articles XX(a), (b), and (d)). The first and second steps of the analysis also overlap, to a certain extent, with the assessment of whether a measure is one "relating to" the conservation of exhaustible natural resources within the meaning of Article XX(g).[387]

7.203. The Panel will elaborate further on the elements of the legal standard in Article 2.2 as necessary in the course of its assessment of the issues in dispute.

7.1.2.3.3 Identification of the objective pursued

7.204. The Panel begins with the identification of the measures' objective(s). The conclusion reached on this issue will necessarily condition the nature and scope of subsequent steps of the analysis under Article 2.2. More specifically, the identification of the objective is the logical prerequisite to assessing whether that objective is a "legitimate objective" and is also a prerequisite for assessing "the risks non-fulfilment [of the legitimate objective] would create" in accordance with the text of Article 2.2. Furthermore, the Appellate Body has confirmed that a measure's objective also serves as "the benchmark against which a panel must assess the degree of contribution made by a challenged technical regulation, as well as by proposed alternative measures".[388]

7.205. Malaysia accepts that the European Union's wider policy objectives regarding climate change, biodiversity, and public morals are legitimate, but submits that the Panel's determination should focus on the objective of the specific measures at issue. According to Malaysia, the stated objective of the specific measures is to limit "GHG emissions by limiting direct and indirect land use change"[389] and the measures' actual objective is protectionism in the cover of environmental protection.

7.206. The European Union responds that "even though Malaysia has dissected isolated provisions of RED II or part thereof and characterised them as individual 'measures' for the purpose of the present proceedings, in order to assess and appreciate the objectives of those 'measures', the EU Biofuels regime must be considered as a composite whole, situated in the broader legal and policy context of which it forms part".[390] When seen from this broader perspective, it argues, this means that the "legitimate objective" that the measures pursue is the composite objective of mitigating climate change, preserving biodiversity, and addressing the associated moral concerns of the EU public.[391] The European Union therefore takes issue with Malaysia seeking to define the objective of the measures in isolation from the broader objectives of RED II and its Biofuels regime, and with what it sees as Malaysia's disregard of the biodiversity and public morals objectives. The European Union also disputes Malaysia's assertion that the measures pursue a protectionist objective.[392]

7.207. The Panel considers that there are certain internal tensions and ambiguities in respect of each party's identification of the objective(s) of the measures at issue, as briefly elaborated below.

7.208. Malaysia argues that the objective of the measures is to limit "GHG emissions by limiting direct and indirect land use change"[393], yet also asserts that the actual objective of the measures is protectionism in the cover of environmental protection. The Panel understands these to be arguments made in the alternative, with Malaysia arguing that, insofar as the Panel bases its

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[387] The Panel elaborates further on the relationship between the legal standards under Article 2.2 and Article XX(b) and (g) in the context of its interpretation and application of Article XX.

[388] Appellate Body Reports, *US – COOL*, para. 387.

[389] Malaysia's first written submission, paras. 410, 421, 468, 580(ii).

[390] European Union's first written submission, para. 163.

[391] The European Union has referred in the plural to three objectives as its multiple intertwined objectives pursued concurrently, and has also referred to them as comprising a single, composite objective. In its first written submission the European Union referred to the promotion of "energy security" as an objective pursued. (See e.g. European Union's first written submission, para. 14.) However, the Panel does not understand the European Union to argue that the Panel needs to address whether the measures challenged by Malaysia contribute to EU energy security for purposes of Article 2 of the TBT Agreement or Article XX of the GATT 1994.

[392] European Union’s first written submission, paras. 4, 806, 1405.

[393] Malaysia's first written submission, paras. 410, 421, 468, 580(ii).

understanding of the objective of the specific measures on their stated purpose as expressed in the text of RED II and other relevant legal instruments, the objective may thus be understood as limiting GHG emissions by limiting direct and indirect land use change; but that, insofar as the Panel bases its understanding of the objective of the specific measures on their legislative history, attendant circumstances, and other indicators that pertain to the true objective, the true objective is revealed to be protectionism in the cover of environmental protection. Under either of these alternative perspectives, the Panel understands Malaysia to argue that the Panel should focus on the specific measures at issue, not the wider, higher-level objectives of RED II or the EU Biofuels regime.

7.209. The Panel notes that, for its part, the European Union repeatedly stresses the objective of the measures cast at a relatively high level of generality and abstraction, i.e. in terms of climate change, biodiversity and public morals.[394] It identifies the objective of the measures in terms that do not specifically refer to the concept of ILUC or ILUC-related GHG emissions. Indeed, the European Union confirms that what it identifies as the objectives of the specific measures at issue are "not specific to the Delegated Regulation or to RED II, but they are shared by the entirety of the EU's Biofuels Regime".[395] However, the Panel finds it significant that, at the same time, the European Union presents various other arguments implying that the objective of the measure may or even must be understood more specifically in terms of ILUC or ILUC-related GHG emissions. In this connection, the European Union argues that the alternative measures proposed by Malaysia are vitiated by the fact that they fail to address *ILUC and/or ILUC-related GHG emissions* and therefore are not apt to make an equivalent contribution to the objective pursued.[396] The Panel considers that such arguments are entirely consistent with an approach of defining the objective of the measures in relatively narrow and direct terms, that is, by focusing on ILUC and/or ILUC-related GHG emissions, as opposed to the broader and higher-level objectives of climate change, biodiversity and public morals.[397]

7.210. In these circumstances, the Panel's task is not a matter of simply choosing between one of two alternative ways of articulating the objective of the measures at issue. Rather, the Panel must undertake an independent and objective assessment of the proper characterization of the measures' objective, guided by its consideration of the main issues raised by parties in their related arguments.[398]

7.211. The Panel will begin its analysis by setting out the stated rationale behind the specified measures at issue. The Panel then considers the following issues that are raised by the alternative formulations of the measures' objective presented by Malaysia and the European Union. First, the Panel considers the European Union's approach of identifying the measures' objective in terms that focus on the wider objectives of RED II and the EU Biofuels regime. Second, the Panel considers the European Union's argument that the measures' objective should be formulated by reference to not only ILUC-related GHG emissions, but also associated biodiversity and EU public morals concerns. Third, the Panel addresses Malaysia's argument that the measures' legislative history, their attendant circumstances, and other indicators establish that the measures' true objective is protectionism in the cover of environmental protection.

7.212. Before turning to these issues, the Panel notes that neither party has suggested that the objective of the 7% maximum share should be defined *differently* from the objective of the high

[394] See generally section 5 of the European Union's first written submission.

[395] European Union's first written submission, para. 1363.

[396] European Union's first written submission, paras. 900 (all of the proposed alternatives are vitiated by the fact that "they fail to address ILUC"), 940, 944-945, 947 (stating that alternative certification schemes proposed by Malaysia "do not address ILUC risks" and that "Malaysia should explain what an enhanced certification scheme would prevent ILUC to an extent equivalent to the EU measures it has challenged"), 958 (observing that "Malaysia seems to constantly provide alternatives without considering the ILUC approach", 959 (reiterating that the RED certification "is irrelevant to ILUC"), 967 and 971 (concluding that "all those 'alternatives' address only certain aspects (e.g. legality, sustainability criteria) and do not extend to ILUC risks" and that " Malaysia seems to confirm that the alternatives to which it is referring are not real alternatives because they only deal with DLUC and not with ILUC").

[397] The Panel appreciates that such arguments could also be understood as speaking to what constitutes an "equivalent contribution" to the higher-level objectives relating to climate change, biodiversity and EU public morals concerns.

[398] There is nothing unusual in this regard. As long clarified by the Appellate Body, a panel must always "independently and objectively assess" the objective of the specific measures at issue without being bound by either party's characterization of the objective pursued. (Appellate Body Report, *US – Tuna II (Mexico),* para. 314).

ILUC-risk cap and phase-out. The parties' arguments relating to the objective of the specific measures at issue generally do not distinguish between them. The Panel will therefore address these measures together, except insofar as the parties' arguments draw relevant distinctions that merit separate consideration of the 7% maximum share and the high ILUC-risk cap and phase-out.

7.1.2.3.3.1 The stated rationale behind the 7% maximum share and the high ILUC-risk cap and phase-out

7.213. The Panel observes that the rationale behind the measures at issue was explained as early as 2015, in the form of the ILUC Directive which amended RED I for the stated purpose of "address[ing] the impact of indirect land-use change given that current biofuels are mainly produced from crops grown on existing agricultural land".[399] From the earliest explanations of the rationale behind the EU measures, there is an indication that the European Union's concern is directed at ILUC-related GHG emissions. According to the ILUC Directive, "when [ILUC] involves the conversion of land with high carbon stock *it can lead to significant greenhouse gas emissions*."[400] The Panel recalls and hereby incorporates by reference the discussion at paragraphs 2.15 to 2.22 of this Report, which reference the ILUC Directive, the European Commission's 2016 proposal for a "recast" Directive to address ILUC, and the 2017 Study Report relating to ILUC.

7.214. The Panel further observes that the text of RED II itself, and in particular its Recitals 80 and 81, explains the ILUC-related justification for the measures at issue:

> (80) To prepare for *the transition towards advanced biofuels and minimize the overall direct and indirect land-use change impacts*, it is appropriate to limit the amount of biofuels and bioliquids produced from cereal and other starch-rich crops, sugars and oil crops that can be counted towards the targets laid down in this Directive, without restricting the overall possibility of using such biofuels and bioliquids. The establishment of a limit at Union level should not prevent Member States from providing for lower limits to the amount of biofuels and bioliquids produced from cereal and other starch-rich crops, sugars and oil crops that can be counted at national level towards the targets laid down in this Directive, without restricting the overall possibility of using such biofuels and bioliquids.
>
> (81) Directive 2009/28/EC introduced a set of sustainability criteria, including criteria protecting land with high biodiversity value and land with high-carbon stock, *but did not cover the issue of indirect land-use change*. *Indirect land-use change occurs when the cultivation of crops for biofuels, bioliquids and biomass fuels displaces traditional production of crops for food and feed purposes. Such additional demand increases the pressure on land and can lead to the extension of agricultural land into areas with high-carbon stock, such as forests, wetlands and peatland, causing additional greenhouse gas emissions.* Directive (EU) 2015/1513 of the European Parliament and of the Council recognises that *the magnitude of greenhouse gas emissions-linked indirect land-use change is capable of negating some or all greenhouse gas emissions savings* of individual biofuels, bioliquids or biomass fuels. While there are risks arising from indirect land-use change, research has shown that the scale of the effect depends on a variety of factors, including the type of feedstock used for fuel production, the level of additional demand for feedstock triggered by the use of biofuels, bioliquids and biomass fuels, and the extent to which land with high-carbon stock is protected worldwide.
>
> While *the level of greenhouse gas emissions caused by indirect land-use change cannot be unequivocally determined with the level of precision required to be included in the greenhouse gas emission calculation methodology, the highest risks of indirect land-use change have been identified for biofuels, bioliquids and biomass fuels produced from feedstock for which a significant expansion of the production area into land with high-carbon stock is observed. It is therefore appropriate, in general, to limit food and feed crops-based biofuels, bioliquids, and biomass fuels promoted under this Directive* and, in addition, to require *Member States to set a specific and gradually decreasing limit for biofuels, bioliquids and biomass fuels produced from food and feed crops for which a*

[399] ILUC Directive, (Exhibit MYS-168), Recital (4), p. 2.

[400] Malaysia's first written submission, para. 325 (referring to ILUC Directive, (Exhibit MYS-168), Recital (4), p. 2.). (emphasis added)

> *significant expansion of the production area into land with high-carbon stock is observed. Low indirect land-use change-risk biofuels, bioliquids and biomass fuels should be exempt from the specific and gradually decreasing limit.*[401]

7.215. Recitals 80 and 81 of RED II thus set out the rationale for addressing ILUC, link the issue of ILUC risks specifically to the issue of GHG emissions, and explain how the 7% maximum share in Article 26(1) and the high ILUC-risk cap and phase-out in Article 26(2), including the concept of low ILUC-risk biofuels, are related to this rationale.

7.216. The Panel further notes that the Delegated Regulation reiterates that the measures at issue are taken to address the issue of ILUC, through its 16 Recitals that explain the measures at issue by reference to ILUC. The Delegated Regulation recalls that "ILUC can occur when land previously devoted to food or feed production is converted to produce biofuels, bioliquids and biomass fuels", and that "[i]n that case, food and feed demand still needs to be satisfied, which may lead to *the extension of agricultural land into areas with high carbon stock such as forests, wetlands and peat land, causing additional greenhouse gas emissions*."[402] It recalls that the "sustainability and greenhouse gas saving criteria" set out in RED I and carried forward into Article 29 of RED II "do not account for ILUC emissions".[403] It reiterates that the 2015 ILUC Directive:

> [N]ot only acknowledged the existence of ILUC emissions, but also recognised, despite the uncertainty in calculating them, that *the magnitude of greenhouse gas emissions linked to ILUC can lead to negating some or all of the greenhouse gas emissions savings of individual biofuels*, as defined in that Directive, and bioliquids. *Therefore*, it introduced an overall limit to the amount of those fuels produced from cereal and other starch-rich crops, sugars and oil crops and from crops grown as main crops primarily for energy purposes on agricultural land that can be counted towards targets set out in Directive 2009/28/EC. That limit consists of a 7% maximum contribution of such fuels towards the final consumption of energy in rail and road transport in each Member State.[404]

7.217. The Delegated Regulation also includes the observation that "*the impact of ILUC* on the potential of biofuels, bioliquids and biomass fuels *to achieve greenhouse gas emission savings* is particularly pronounced for oil crops", and that "[r]enewable fuels made from such feedstocks are *therefore widely considered as having a higher ILUC-risk*" and that this is reflected in both RED I and RED II.[405] It states that "[t]he report on feedstock expansion also highlights that *the impact of the expansion of the production area of oil crops into land with high-carbon stock* on the potential of biofuels, bioliquids and biomass fuels *to achieve greenhouse gas emission savings* depends on several factors."[406]

7.218. In light of the foregoing, the Panel understands that the stated rationale for the 7% maximum share and the high ILUC-risk cap and phase-out is to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.1.2.3.3.2 The wider objectives of the EU Biofuels regime

7.219. The parties approach the analysis of the identification of the objective from different standpoints. Malaysia focuses on the specific objective of the measures at issue, whereas the European Union frames its arguments by reference to broad policy objectives common to RED II and the EU Biofuels regime more generally.

7.220. The Panel notes that the objective of any challenged measure in WTO dispute settlement proceedings could in principle be formulated and understood either in terms of its relatively narrow and direct objective, or in terms of one or more higher level objectives which are one or more steps removed from that relatively narrow and direct objective. For instance, in this case the objective of the specific measures at issue could in principle be formulated and understood in terms of the

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[401] Recitals 80 and 81 of RED II. (emphasis added)
[402] Recital 2 of the Delegated Regulation. (emphasis added)
[403] Recital 3 of the Delegated Regulation.
[404] Recital 4 of the Delegated Regulation. (emphasis added)
[405] Recital 8 of the Delegated Regulation. (emphasis added)
[406] Recital 9 of the Delegated Regulation. (emphasis added)

relatively narrow and direct objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. However, that relatively narrow and direct formulation of the objective of the specific measures at issue can be understood not as an end in and of itself, but as a means towards fulfilling the higher-level objective of mitigating climate change, which may in turn be understood as a means to fulfilling further higher-level objectives relating to the consequences of climate change on the planet and human, animal or plant life or health.

7.221. There is nothing inherent in the concept of identifying a measure's objective that dictates the level of immediacy or specificity at which it must be defined. Furthermore, the text of Article 2.2 itself gives examples of legitimate objectives which are cast at a relatively high level of generality (e.g. "national security requirements", "the prevention of deceptive practices", "protection of human health or safety, animal or plant life or health", and "the environment"). In *US – Clove Cigarettes*, the panel observed in this regard that "the 'legitimate objectives' explicitly mentioned in the text of Article 2.2 of the TBT Agreement are formulated at a high level of generality" and added that "defining the objective of [the measure banning flavoured cigarettes] in terms of 'reducing youth smoking' may already be more specific than required under Article 2.2, which refers generally to the 'protection of human health' as a legitimate objective."[407] There are several examples of other panels referring to the "objective" of a measure at a level of generality commensurate with the level of generality set out in the text of Article 2.2.[408]

7.222. On the other hand, the Panel recognizes that framing the analysis under Article 2.2 in terms of the relatively narrow and direct objective of the specific measure at issue, rather than on broader objectives that are one or more steps removed from that objective, is an approach that comports well with certain other considerations. For instance, the direction set out in the text of Article 2.2 to identify and assess the nature and gravity of "the risks that non-fulfilment [of the legitimate objective] would create" may be difficult to apply, and not particularly meaningful, if the objective is identified at a high level of generality. This element of the analysis would seem to presuppose that the objective is understood in a more particular way, given the related directive set out in the text of Article 2.2 that "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".

7.223. Furthermore, in a number of cases under Article 2.2, and indeed Article XX of the GATT 1994, panels have formulated the objective of the measure at issue in a manner that focuses on its relatively immediate and direct objective. For example, in *Brazil – Retreaded Tyres*, the panel identified the objective of the import ban at issue in relatively specific terms as "the reduction of the exposure to risks arising from the accumulation of waste tyres"[409], and it found that this objective fell within the broader goal of protecting human, animal or plant life or health. In *US – Tuna II (Mexico)*, the panel identified the objectives of the US dolphin-safe labelling measure as including the "objective of preventing consumers of tuna products from being deceived by false dolphin-safe allegations" and stated that measure's objective fell "within the broader goal of preventing deceptive practices".[410]

7.224. Additionally, as already noted, the Appellate Body has stated that the identification of a measure's objective serves as "the benchmark against which a panel must assess the degree of contribution made by a challenged technical regulation, as well as by proposed alternative measures".[411] The Appellate Body stressed that because the identification of the objective pursued serves that function, "the importance of a panel identifying with sufficient clarity and consistency the objective or objectives pursued by a Member through a technical regulation cannot be overemphasized".[412] These considerations do not necessarily support an approach of identifying a measure's objective at a high level of generality.

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[407] Panel Report, *US – Clove Cigarettes*, fn 635.

[408] For instance, in *EC – Sardines*, the panel identified the objective of the measure in the context of addressing the claim under Article 2.4 of the TBT Agreement, and identified the "the three legitimate objectives" pursued by the EC Regulation at issue as "market transparency", "consumer protection" and "fair competition". (Panel Report, *EC – Sardines*, para. 7.123.)

[409] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 179.

[410] Panel Report, *US – Tuna II (Mexico)*, para. 7.437.

[411] Appellate Body Reports, *US – COOL*, para. 387.

[412] Appellate Body Reports, *US – COOL*, para. 387.

7.225. In light of the foregoing, the Panel does not consider that there is some requisite level of specificity with which the relevant "objective" must always be defined for the purposes of Article 2.2. Instead, the Panel will ground its approach on the particular circumstances of this case.

7.226. For the reasons elaborated below, the Panel considers it appropriate to seek to identify the particular objective of the specific measures at issue, as opposed to the wider objectives of the RED II as a whole.

7.227. First, the Panel considers that in this case the European Union's approach of framing the analysis under Article 2.2 in terms of its higher-level objectives of climate change, biodiversity, and EU public morals is a corollary of its view that the 7% maximum share and the high ILUC-risk cap and phase-out cannot be assessed as individual "measures" distinct from what the European Union terms its broader "Biofuels regime". The Panel has already addressed and rejected this argument. The Panel has concluded that the European Union has not established any basis to question Malaysia's identification of particular aspects (i.e. the 7% maximum share and the high ILUC-risk cap and phase-out) of what the European Union refers to as the "Biofuels regime" as the specific measures at issue for the purposes of defining the subject-matter of its complaint.[413]

7.228. Second, the Panel considers that as a general matter, it does not prejudice a responding Member to identify a measure's objective in relatively specific terms. Indeed, to the extent that the objective of the measures is defined at a very high level of generality in terms of e.g. "climate change mitigation" and "avoidance of biodiversity loss", the range of measures that might validly be considered as "alternatives" might become commensurately very expansive. Conversely, a narrower and more specific formulation of the objective by reference to the specific measure at issue will narrow the range of measures that might validly be considered as "alternatives".

7.229. Third, the Panel notes that while the European Union generally refers to its broad policy objectives for the purposes of establishing that these are "legitimate objectives", at the same time it also presents various arguments that imply that the objective of the measure may or even must be understood more specifically in terms of ILUC or ILUC-related GHG emissions. The Panel finds it highly significant that, as already noted above, the European Union argues that the alternative measures proposed by Malaysia are vitiated by the fact that they fail to address *ILUC and/or ILUC-related GHG emissions* and therefore are not apt to make an equivalent contribution to the objective pursued.[414] As already observed, such arguments are entirely consistent with an approach of defining the objective of the measures in relatively narrow and direct terms that focus on ILUC and/or ILUC-related GHG emissions, as opposed to the broader and higher-level objectives of climate change, biodiversity and public morals.[415]

7.230. The Panel understands that the European Union's concern with identifying the objective in terms of the specific ILUC-related objective of the challenged measures, as opposed to the broader policy objectives it pursues through RED II, may stem from the notion that limiting the risk of ILUC-related GHG emissions caused by conventional biofuel "cannot be understood as an end in itself, but is rather a means to secure the broader policy goals"[416] of climate change mitigation, environmental protection and biodiversity, and the protection of EU public morals. The Panel accepts that it is no doubt true that limiting the risk of ILUC-related GHG emissions caused by conventional biofuel cannot be understood as an end in itself, disconnected from any higher-level objectives and values. However, the Panel does not consider that focusing on the objective of the specific measures at issue implies otherwise.

7.231. To the contrary, the assessment of whether the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuel is a "legitimate objective" under Article 2.2, and falls within the range of policies covered by one or more of the general exceptions in Article XX, necessarily involves an assessment of how the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuel is related to the conservation of exhaustible natural resources, the protection of human, animal or plant life or health, and environmental protection

[413] See section 7.1.1.1.1 of this Report.

[414] See fn 396 above.

[415] The Panel appreciates that such arguments could also be understood as speaking to what constitutes an "equivalent contribution" to the higher-level objectives relating to climate change, biodiversity and EU public morals concerns.

[416] European Union's first written submission, para. 283.

more generally. However, for analytical clarity the Panel considers that the identification of the objective of the specific measures at issue is separate from the issue of whether that objective, once identified, falls within the broader objectives of conserving exhaustible natural resources, protecting human, animal or plant life or health, or the environment more generally.[417]

7.232. For these reasons, the Panel agrees with Malaysia that it is appropriate to identify the objective of the specific measures at issue, as opposed to the wider objectives of RED II or the EU Biofuels regime as a whole, to serve as the benchmark against which the Panel must assess, for the purposes of the Article 2.2 claim, the legitimacy of the objective, the risks that its non-fulfilment would create, the measures' contribution to that objective, and the availability of any less trade-restrictive alternative measures that would make an equivalent contribution to that objective.

7.233. As set out in the previous section, that objective may be identified as limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.1.2.3.3.3 ILUC-related biodiversity and public morals concerns

7.234. Malaysia considers that the principal objective of the measures is specifically to limit "GHG emissions by limiting direct and indirect land use change"[418], and not a wider set of concerns emphasized by the European Union relating to biodiversity and EU public morals. In Malaysia's view, these other alleged objectives are either unrelated, or merely ancillary, to the objective of limiting ILUC-related GHG emissions.

7.235. The European Union submits that Malaysia's arguments under Article 2.2 wrongly assume that the EU measures pursue only one objective, i.e. GHG emissions reduction. The European Union stresses throughout its submissions that the measures at issue pursue the composite objective of mitigating climate change, preserving biodiversity, and addressing the associated moral concerns of the EU public.

7.236. The Panel considers that although Article 2.2 refers to "a legitimate objective" in the singular, there is no reason in principle why a given measure could not pursue several different objectives. In *US – Clove Cigarettes*, the panel stated that "it would be entirely possible, both as a factual and a legal matter, for a single technical regulation to pursue more than one objective."[419] On appeal, the Appellate Body agreed that "measures, such as technical regulations, may have more than one objective" and that it may not be uncommon for a measure to have "a multiplicity of objectives".[420] In *EC – Seal Products*, the panel accepted that "there is no reason in principle why the measure at issue could not have several objectives".[421]

7.237. The Panel also accepts that, in circumstances where a measure pursues a multiplicity of objectives, those different objectives may reflect competing interests, and that, where this is so, it may be relevant to the assessment of the measure under the TBT Agreement and the GATT 1994. For instance, where a measure pursues more than one objective, it will in principle be necessary for a complaining Member to identify a less trade-restrictive alternative measure that makes an equivalent contribution to each of those objectives (and not merely one of them) in order to establish a violation of Article 2.2. The assessment of whether a detrimental impact on imports "stems exclusively from a legitimate regulatory distinction" under Article 2.1, and the assessment of whether discrimination is "arbitrary or unjustifiable" under the *chapeau* of Article XX of the GATT 1994, could likewise be distorted if a measure with multiple competing objectives is analysed as though it had a monolithic objective.

7.238. However, while the Panel does not exclude the possibility that the 7% maximum share and the high ILUC-risk cap and phase-out could be demonstrated to have more than one objective, and possibly competing objectives, it is not persuaded that, for the purposes of settling this dispute, it

[417] As the first WTO panel to address the general exceptions in Article XX(b) observed, the initial step of the analysis involves an assessment of whether "the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health". (Panel Report, *US – Gasoline*, para. 6.20.)

[418] Malaysia's first written submission, paras. 410, 421, 468, 580(ii).

[419] Panel Report, *US – Clove Cigarettes*, para. 7.342.

[420] Appellate Body Report, *US – Clove Cigarettes*, paras. 113 and 115.

[421] Panel Reports, *EC – Seal Products*, para. 7.400.

would be material to consider that the measures pursue the protection of biodiversity and EU public moral concerns as separate objectives from the objective to limit the risk of ILUC-related GHG emissions.

7.239. According to the logic of the European Union's own explanations of how these three objectives are interlinked, it would appear that any measure that addressed ILUC-related GHG emissions associated with crop-based biofuels would necessarily address the relevant biodiversity and EU public morals objectives at the same time and with the same degree of contribution to each separate objective. Therefore, to the extent that the EU concerns relating to climate change, biodiversity and EU public morals are properly characterized as different objectives, from the perspective of the measures at issue these objectives would be entirely complementary.

7.240. In the context of rebutting Malaysia's arguments on possible less trade-restrictive alternative measures, the European Union argues that Malaysia's arguments wrongly assume that the EU measures pursue only one objective (GHG emission reduction). According to the European Union, any alternative measure must address all of these aspects of the composite objective pursued, not just the objective of addressing GHG emissions or climate change.[422]

7.241. It appears to the Panel that the fundamental premise of the European Union's rebuttal, as elaborated further below in the context of assessing the alternative measures proposed, is that the alternative measures are vitiated insofar as they do not address *ILUC* associated with crop-based biofuels. However, the European Union has not explained how there could be a less trade-restrictive alternative measure that made an equivalent contribution to the objective of limiting *ILUC-related GHG emissions* associated with crop-based biofuels, without simultaneously making an equivalent contribution to the objective of limiting ILUC-related *biodiversity* loss, and without simultaneously making an equivalent contribution to protecting *EU public morals* associated with ILUC-related GHG emissions and ILUC-related biodiversity loss. The Panel agrees with Malaysia's observation that given the linkages between what Malaysia considers as the measures' primary objective of "the avoidance of additional greenhouse gas emissions caused by indirect land-use change" and the other objectives, "by making an equivalent contribution to that primary objective, the alternative measures would also make an equivalent contribution to the broader objectives that the EU states to pursue".[423]

7.242. The Panel is not persuaded by the European Union's argument that it must consider how the measures pursue the protection of biodiversity and EU public moral concerns as separate objectives from the objective to limit the risk of ILUC-related GHG emissions.

7.1.2.3.3.4 The allegation of protectionism in the cover of environmental protection

7.243. The Panel now turns to Malaysia's argument that the measures' legislative history, their attendant circumstances, and other indicators establish that the measures' true objective is protectionism in the cover of environmental protection. There are differences between the arguments that Malaysia presents with respect to the 7% maximum share and the high ILUC-risk cap and phase-out. The Panel will therefore examine the two measures in turn.

7.244. Beginning with the 7% maximum share, Malaysia submits that:

> the question for the Panel to answer is, however, whether this primary objective is indeed the objective pursued by the measures at issue, or whether the true objective of the high ILUC-risk cap and the high ILUC-risk phase out is to give protection to the European producers of biofuels other than oil palm crop-based biofuel and European producers of oil crop feedstock other than palm oil (such as rapeseed oil and soyabean oil), *and the true objective of the 7% limit is to give protection to European producers of biofuels other than biofuels made of food and feed crops and European producers of feedstock other than feedstock from food and feed crops*. As Malaysia argued above there are, both in the text of the *measures* at issue and their negotiating history, strong indications that providing protection to European producers is an important, even if not the sole, objective of the measures at issue. The fact that the high ILUC-risk cap and the high ILUC-risk phase out only apply to oil palm crop-based biofuel and not to other

[422] European Union's first written submission, para. 901.
[423] Malaysia's second written submission, para. 215.

> oil crop-based biofuels, and *the fact that the 7% limit applies only to biofuels made of food and feed crops, indicate that providing protection to European producers of the biofuels and their feedstocks not affected by the measures at issue may be the true objective of these measures*.[424]

7.245. The Panel notes however that despite making this assertion against the 7% maximum share, in its first written submission Malaysia develops its allegation of protectionism only in respect of the high ILUC-risk cap and phase-out. In the passage above Malaysia cross-references paragraphs of its first written submission[425] that appear to be directed solely at the high ILUC-risk cap and phase-out measure in support of its assertion that the "measures at issue" are aimed at "providing protection to European producers". Its first written submission contains no equivalent arguments, and indeed no further explicit arguments or elaboration, in relation to the alleged protectionist objective of the 7% maximum share.

7.246. In addition, the arguments that Malaysia presents in the context of seeking to demonstrate the alleged protectionist motivation of the high ILUC-risk cap and phase-out measure would seem to contradict its assertion that the 7% maximum share has a protectionist objective. As will be addressed further below, Malaysia argues that the European Union has singled out palm oil-based biofuel to shield other types of crop-based biofuels from competition, in order to protect EU producers of those other types of crop-based biofuels (and/or the food or feed crops used as inputs). However, the 7% maximum share applies to *all* crop-based biofuels (including but not limited to palm oil-based biofuels).

7.247. Insofar as Malaysia's allegation regarding the protectionist objective of the 7% maximum share is linked to the stated objective of promoting greater use of advanced biofuels[426], the Panel does not see that a stated policy of promoting advanced biofuels is inconsistent with the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The Panel recalls that Recital 80 of RED II states that the rationale for the measures is "[t]o prepare for *the transition towards advanced biofuels* and minimize the overall direct and indirect land-use change impacts". Advanced biofuels are not made from crops[427], and therefore do not, under the stated rationale for the measures, pose any risk of ILUC-related GHG emissions. This means that the very problems identified specifically in respect of crop-based biofuel production would make the promotion of advanced biofuels a logical corollary of limiting the consumption of conventional crop-based biofuels.

7.248. For these reasons, the Panel finds that Malaysia has failed to substantiate its assertion that the true objective of the 7% maximum share is protectionism in the cover of environmental protection or has an objective other than that of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.249. Turning to the high ILUC-risk cap and phase-out, Malaysia argues that the protectionist objective of the high ILUC-risk cap and phase-out can be inferred from several circumstances, including: (a) the European Union's history of seeking to limit imports of oil palm crop-based biofuel, *inter alia* through illegal trade barriers; (b) the measure's legislative history and the stated intentions of the European Parliament; and (c) the design and structure of the measure, including in particular a multitude of elements showing the arbitrariness of the European Union's formula and methodology that led to the designation of palm oil-based biofuel as high ILUC risk.[428]

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[424] Malaysia's first written submission, para. 602(b). (emphasis added)

[425] In para. 602(b) of its first written submission, Malaysia cross-references paras. 49-54 and 339-345 of its first written submission.

[426] Such an argument appears to be suggested by Malaysia's statement, quoted above, that the true objective of the 7% limit is to give protection to European producers of biofuels "other than biofuels made of food and feed crops" and European producers of feedstock "other than feedstock from food and feed crops".

[427] Article 2(34) of RED II defines "advanced biofuels" to mean biofuels produced from the feedstock listed in Part A of Annex IX, which lists various materials including algae, biowaste, nut shells, corn cobs, and tree bark.

[428] Malaysia's first written submission, paras. 49-54 and 339-345.

7.250. The Panel considers that it is well established that panels may make findings based on inferences and circumstantial evidence[429], particularly in circumstances where direct evidence is unlikely to exist. Therefore the Panel does not consider that a complaining Member must adduce direct evidence in all cases and is open to the possibility that a trade-related measure with a stated environmental objective would be shown, on the basis of circumstantial evidence, to serve a protectionist objective.[430] Moreover, the Panel understands that, in line with the Appellate Body's guidance[431], it must consider the inference that might reasonably be drawn on the basis of the totality of the evidence, rather than focusing on individual pieces of evidence in isolation (which might become more significant when viewed in their totality). However, for analytical clarity, the Panel will proceed by examining the specific arguments and categories of evidence presented by Malaysia before turning to its global assessment.

7.251. Malaysia submits, in the context of presenting arguments on the protectionist motive of the measure in the context of Article 2.1, that the protectionist motive of the measure is evidenced by the fact that the European Union "has a long history of enacting trade barriers" to limit imports of palm oil-based biofuel to protect the EU biofuel industry.[432]

7.252. The European Union responds that Malaysia's reference to an allegedly long history of enacting trade barriers to palm oil "is unsubstantiated and ultimately irrelevant".[433]

7.253. The Panel considers that any connection between the trade defence measures referenced by Malaysia[434] and the high ILUC-risk cap and phase-out is very attenuated if it exists at all. The Panel notes that trade defence measures follow investigations that are typically initiated by the domestic industry and are imposed based on methodologies specifically prescribed by the relevant national legislation and regulated by the Anti-Dumping and SCM Agreements. The Panel recognizes that the trade defence measures on imported biofuels taken by the European Union can be viewed as evidence that domestic EU producers have, at various points, sought protection from imports of biofuels, including (but not limited to) palm oil-based biofuel. However, there appears to be no evidence on record of any link between EU trade defence measures and the high ILUC-risk cap and phase-out. Indeed, according to Malaysia, the effect of the European Union's imposition of anti-dumping duties on imports of biofuel from Indonesia and Argentina was an increase in Malaysia's exports of palm oil to the European Union.[435] For these reasons, the Panel does not consider that past trade defence measures adopted by the European Union on imports of biodiesel suggest a protectionist objective in respect of the high ILUC-risk cap and phase-out, in contradiction of the stated objective of limiting the risk of ILUC-related GHG emission associated with crop-based biofuels.

7.254. Malaysia notes that in 2017, the European Parliament adopted a Resolution that called on the Commission to take measures to phase out the use of vegetable oils that drive deforestation,

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[429] See e.g. Appellate Body Reports, *Canada – Aircraft*, para. 198 (stating that "panels routinely draw inferences from the facts placed on the record. The inferences drawn may be inferences of fact: that is, from fact A and fact B, it is reasonable to infer the existence of fact C."); *US – Continued Zeroing*, para. 357 (stating that "a panel may have a sufficient basis to reach an affirmative finding regarding a particular fact or claim on the basis of inferences that can be reasonably drawn from circumstantial rather than direct evidence."); and Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.778 (stating that "[a]s a consequence of the applicable evidentiary standard being closer to that of a balance of probabilities, and not that of certainty or proof beyond a reasonable doubt, it is well established that panels may make findings of fact based on inferences and circumstantial evidence.")

[430] Malaysia notes that the Panel may distinguish "goals that might reasonably be expected to be touted in a piece of legislation with those that would not. Indeed, Malaysia, takes it for granted that the EU is prudent enough not to memorialise protectionist motivations in its preambular language, even when the negotiating history provides evidence to the contrary." (Malaysia's second written submission, fn 13 to para. 39.)

[431] See e.g. Appellate Body Report, *US – DRAMS*, paras. 141-158.

[432] Malaysia's first written submission, para. 584.

[433] European Union's first written submission, para. 768.

[434] See Malaysia's first written submission, paras. 206-208 (identifying two antidumping measures: Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, OJ L 315, 26.11.2013 (Exhibit MYS-140); and Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia, OJ L 317, 9.12.2019 (Exhibit MYS-141).

[435] Malaysia's first written submission, para. 208.

including palm oil, as a component of biofuels, preferably by 2020.[436] In this resolution, the European Parliament recommended "finding and promoting more sustainable alternatives for biofuel use, such as European oils produced from domestically cultivated rape and sunflower seeds". According to Malaysia, this statement by the European Parliament evidences the objective that biofuels be replaced by "domestically cultivated rape and sunflower seeds", thereby "clearly indicating the economic focus and protectionist agenda of the high ILUC-risk mechanism and the related phase out".[437]

7.255. The European Union responds that it is appropriate to describe the European Parliament's resolution of 4 April 2017 in greater detail to address Malaysia's selective reading of that resolution. The European Union quotes from several of the recommendations to the European Commission and the EU member States set out in the resolution, including but not limited to potential ILUC-related GHG emissions associated with EU biofuel demand. The European Union submits that "[i]t is abundantly clear that the European Parliament looks into the possible effects of the EU demand of biofuels on climate change, deforestation and biodiversity, from an environmental perspective and from a moral viewpoint at the same time", and adds that "the only reference to the promotion of EU domestic crops that can be used for biofuel production comes at the very end of the document and is motivated by the need to find 'sustainable alternatives."[438]

7.256. The Panel recalls that the legislative history of a measure is a source of information that may be taken into account to inform a panel's assessment of its design, structure, and intended operation.[439] However, where evidence is submitted to reflect the subjective intent of legislators as distinct from the motivations expressed in the resulting legal instrument, an appropriate degree of caution needs to be exercised in relying on such evidence.[440] Nonetheless, depending on the circumstances of the case, the declared intention of legislators can play an important role.[441]

7.257. The Panel observes that the resolution of the European Parliament of 4 April 2017 called for a phase-out of palm oil as a biofuel component preferably by 2020. In this 15-page resolution, the European Parliament conducts an analysis of the climate change, environmental, deforestation and social implications of palm oil production (and to some extent that of other vegetable crops and agriculture in general). The European Parliament refers to the "indirect effects of EU biofuel demand associated with tropical forest destruction" and notes that "once Indirect Land Use Change (ILUC) is taken into account, crop-derived biofuels can in some cases even result in a net increase in greenhouse gas emissions, e.g. the burning of habitats with high-carbon stocks like tropical forests and peatland."[442] In this and other respects discussed below, the resolution appears to be fully consistent with the understanding that the objective of the high ILUC-risk cap and phase-out is to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.258. In this resolution the European Parliament recognized that simply banning or phasing out the use of palm oil as a component of biofuels could give rise to replacement tropical vegetable oils in all probability being grown in the same ecologically sensitive regions as palm oil and which may have "a much higher impact on biodiversity, land use and greenhouse gas emissions than palm oil itself". It is in this context that the European Parliament recommends the promotion of "more *sustainable* alternatives for biofuel use, such as … oils produced from domestically cultivated rape and sunflower seeds".[443]

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[436] European Parliament Resolution of 4 April 2017, (Exhibit MYS-102).

[437] Malaysia's first written submission, para. 50.

[438] European Union's first written submission, paras. 275-276.

[439] Appellate Body Report, *US – Tuna II (Mexico)*, para. 314; and Panel Report, *US – 1916 Act*, para. 6.17. See also Appellate Body Reports, *US – COOL*, para. 395; and *Colombia – Textiles*, para. 5.80.

[440] Panel Reports, *US – COOL*, para. 7.691; and Appellate Body Reports, *US – COOL*, para. 420. See also Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 27, DSR 1996: I, 97, at 119; and *Chile – Alcoholic Beverages*, para. 62.

[441] Panel Reports, *Mexico – Taxes on Soft Drinks*, para. 8.91 (referring to Appellate Body Report, *Canada – Periodicals*, pp. 30-32, DSR 1997:1, p. 449, at pp. 475-476); and *EC – Approval and Marketing of Biotech Products*, paras. 7.522-7.523.

[442] European Parliament Resolution of 4 April 2017, (Exhibit MYS-102), paras. 76 and 77. It should be noted that in this Resolution, the European Union "welcomes the fact that Malaysian primary forest levels have increased since 1990, but remains concerned that current deforestation levels in Indonesia are running at a rate of -0,5 % total loss every five years" (General considerations, para. 11).

[443] European Parliament Resolution of 4 April 2017, (Exhibit MYS-102), paras. 82-83. (emphasis added)

7.259. Thus, by its own terms, the resolution recommends a ban or phase-out of consumption of palm oil-based biofuel in the European Union for reasons related to the risk of ILUC-related GHG emissions. It recognizes that the possible unintended consequence could be substitution effects, in the same sensitive regions, which could have a much higher impact. In this context, it recommends the promotion of more sustainable alternatives, and contemplates domestically cultivated rape and sunflower seeds to avoid giving rise to what are referred to in the resolution as "replacement tropical vegetable oils". This reference to domestically cultivated rape and sunflower seeds appears to be not so much an admission of a protectionist objective, but rather an illustrative example ("such as …") of oil-stock that is not grown in tropical areas where there is a risk of replacement by other tropical vegetable oils. This is therefore not, in the Panel's view, evidence that the high ILUC-risk cap and phase-out has an objective other than limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.260. The Panel recalls that on 17 January 2018, the European Parliament called for the phasing out, by 2021, of palm oil-based biofuel for calculating EU renewable energy targets. As with the resolution of the European Parliament of 2017, the Panel sees nothing in the proposed amendment that contradicts the understanding that the high ILUC-risk cap and phase-out has the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The fact that the proposed amendment singled out palm oil as the only biofuel feedstock to be excluded from counting towards the EU renewable energy consumption targets does not, in itself, speak to whether such an exclusion would be justified, or call into question the stated objective of limiting ILUC-related GHG emissions associated with crop-based biofuel.

7.261. The Panel notes that the European Parliament's proposed amendment raised substantive concerns in the European Commission about the compatibility of those amendments with the European Union's WTO obligations. Malaysia has submitted as an exhibit, in this connection, to internal legal advice regarding the consistency of the proposed amendment with EU and WTO law.[444] The Panel notes that there is a question of how much weight it should accord to such internal legal advice in the context of its objective assessment of the matter.[445] However, leaving that question to one side, the Panel considers that the contents of that opinion do not identify any aspect of the opinion that calls into question, or is inconsistent with, the measure's stated objective to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.262. Furthermore, while the legal opinion does express concerns about the WTO-consistency of the proposed amendment that would have phased out palm oil-based biofuel by 2021, the high ILUC-risk cap and phase-out that was ultimately adopted differs in a material respect from that proposed amendment. Whereas the proposed amendment would have singled out palm oil-based biofuel in a way that gave rise to the concerns set out in the legal opinion, the high ILUC-risk cap and phase-out that was subsequently adopted is directed at any crop-based biofuels that are classified as high ILUC risk, and is implemented through the Delegated Regulation which sets out a formula that applies generally and equally to all crop-based biofuels. While the application of that formula based on the data that was before the European Union authorities as of 2019 led to the conclusion that palm oil-based biofuel was, at that time, the only crop-based biofuel that qualified as high ILUC risk, this does not change the fact that the formula applies generally and equally to all crop-based biofuels and may, in the future, lead to other oil-based biofuels being determined to qualify as high ILUC-risk biofuels. It is possible that this material difference between the proposed amendment and the high ILUC-risk cap and phase-out may have actually been informed by the internal legal advice presented regarding the possible WTO-consistency of the proposed amendment.

7.263. The Panel now turns to Malaysia's argument that a protectionist objective can be inferred from "a multitude of elements"[446] showing the arbitrariness of the EU formula and methodology that led to the designation of palm oil-based biofuel as high ILUC risk. Malaysia lists the following

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[444] Letter of DG Trade to DG Energy, (Exhibit MYS-44).

[445] In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, the panel observed, in somewhat analogous circumstances, that "it is perfectly normal for different individuals or agencies within a government, or advising a government, to hold different views on certain legal issues. In addition, we consider that it is to be expected that a Member's view on certain issues may change or evolve over time. … More generally, if a complaining party considers that certain arguments or analysis contained in an agency's opinions are compelling, then it may present those arguments or analysis to the Panel – authorship by an organ or agency of the responding party does not itself contribute to the force of the arguments or analysis." (Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.52.)

[446] Malaysia's first written submission, para. 53.

elements, with an indication that it elaborates on them elsewhere in its submissions: the "science" referenced in the Status Report, or the lack thereof when data was simply estimated and assumed; the selection of a reference period that covers the period of the expansion of the oil palm cultivated area, but conveniently does not cover earlier periods during which the expansion of oil crops other than palm oil mainly occurred; the consideration of inconsistent data relating to different periods of time for the various crops and the lack of consistent reliable data, which means that the data used to calculate the expansion in the context of the Delegated Regulation cannot be considered to be reliable; the fact that the European Union infers, from data on past expansion, that the defined trends would continue; the arbitrary selection of a threshold of 10% for the share of the expansion of the global production area for a given feedstock into land with high-carbon stock; and the prohibitively complex rules for the determination and certification of low ILUC-risk biofuels, bioliquids and biomass fuels, which will, if at all, allow only a very limited amount to be certified.

7.264. The Panel observes that the arguments Malaysia presents here are many of the same arguments that Malaysia makes under the "legitimate regulatory distinction" step of the analysis under Article 2.1. The Panel considers that the issues raised by Malaysia are more appropriately addressed together with other aspects of the design and operation of the measure as part of the examination of the "legitimate regulatory distinction" step under Article 2.1. In any event, the Panel considers that even if these issues were to be addressed in the context of making a finding on whether the measure has a protectionist objective, the Panel's findings under Article 2.1 do not provide support for Malaysia's allegation that the high ILUC-risk cap and phase-out has a protectionist objective.

7.265. The Panel understands Malaysia's overarching argument to be that consideration of all of the evidence reviewed above demonstrates that the classification of oil palm crop as high ILUC risk is merely an *ex post* rationalization, through the invention of the high ILUC-risk concept, to ban palm oil-based biofuel in line with the earlier protectionist statements of EU lawmakers. As noted at the outset, the Panel accepts that individual pieces of evidence in isolation may become more significant when viewed in their totality, insofar as they are interrelated. However, the Panel is not persuaded that this is the picture that emerges from considering the evidence in its totality in this case. The Panel fails to see anything in the arguments and evidence of Malaysia that contradicts the conclusion that the objective of the high ILUC-risk cap and phase-out is to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.266. The Panel therefore finds that Malaysia has not substantiated its assertion that the measures' actual objective is protectionism in the cover of environmental protection.

7.1.2.3.3.5 Conclusion on the identification of the objective

7.267. The Panel understands that the stated rationale for the 7% maximum share and the high ILUC-risk cap and phase-out is to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels. The Panel agrees with Malaysia that it is appropriate to identify the objective of the specific measures at issue, as opposed to the wider objectives of RED II or the EU Biofuels regime as a whole. The Panel is not persuaded by the European Union's argument that the Panel must consider how the measures pursue the protection of biodiversity and EU public moral concerns as separate objectives from the objective to limit the risk of ILUC-related GHG emissions. The Panel finds that Malaysia has not substantiated its assertion that the measures' actual objective is protectionism in the cover of environmental protection.

7.1.2.3.4 Legitimacy of the objective

7.268. The Panel recalls that the identification of the measures' objective conditions the nature and scope of subsequent steps of the analysis under Article 2.2, including the assessment of whether it is a "legitimate objective". The Panel now proceeds to consider whether limiting the risk of ILUC-related GHG emissions posed by crop-based biofuels is a legitimate objective.

7.269. Malaysia presents arguments implying that the stated objective is not "legitimate": it argues that relevant international standards "exclude ILUC from being taken into account"[447]; it maintains in the context of Article 2.1 that because ILUC can neither be observed nor measured the regulation

[447] Malaysia's first written submission, paras. 610(i).

of ILUC-related GHG emissions is not "legitimate"[448]; and it questions the legitimacy of addressing GHG emissions outside of a Member's own territory.

7.270. The Panel begins by addressing whether the particular objective of limiting the risk of ILUC-related GHG emissions posed by crop-based biofuels *prima facie* falls within the scope of one or more of the legitimate objectives that are reflected in the text of Article 2.2, the Preamble to the TBT Agreement, and/or Article XX. After conducting that analysis, and before reaching a definitive conclusion on the legitimacy of the objective pursued, the Panel will address a number of issues that are raised by Malaysia's arguments and that, in the Panel's view, are pertinent to the appraisal of the legitimacy of the objective. These issues include: (a) the status of ILUC under current international standards; (b) the existence of a risk of ILUC-related GHG emissions associated with the production of crop-based biofuels; and (c) the fact that agricultural activities and the associated ILUC and ILUC-related GHG emissions in question occur outside of the territory of the European Union.

7.1.2.3.4.1 Relation to the legitimate objectives specified in Article 2.2, the Preamble to the TBT Agreement, and Article XX

7.271. The Appellate Body has indicated that the objectives expressly listed in Article 2.2 "provide a reference point for which other objectives may be considered to be legitimate in the sense of Article 2.2" and "objectives recognized in the provisions of other covered agreements may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective under Article 2.2."[449] The Panel considers that the provisions of other covered agreements that may provide guidance and inform the analysis in this regard would include, most notably, the objectives set out in the general exceptions of Article XX of the GATT 1994. The Panel now proceeds to address whether the specific objective of limiting the risk of ILUC-related GHG emissions *prima facie* falls within the scope of one or more of the legitimate objectives specified in the text of Article 2.2 and/or Article XX.

7.272. The Panel considers that although it is free to develop its own reasoning in light of the arguments of the parties[450], it is it not free to make a case for either party. In the context of its assessment of the high ILUC-risk cap and phase-out under Article XX, the Panel would not be able to consider the applicability of the general exceptions generally, but would be confined to the particular exceptions invoked by the European Union. Accordingly, the Panel focuses on the specific subparagraphs of Article XX put forward by the European Union in its submissions.

7.273. First, in the context of Article XX, the European Union argues that the high ILUC-risk cap and phase-out is justified under Article XX(g), as a measure relating to the conservation of "exhaustible natural resources".

7.274. The Appellate Body has stated that Article XX(g) covers measures directed at the "the preservation of the environment, especially of natural resources"[451], and in past cases a broad range of policies have been found to fall within the scope of measures relating to the conservation of exhaustible natural resources. The Appellate Body has held that the terms "exhaustible natural resources" must be read "in light of contemporary concerns of the community of nations about the

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[448] In the context of its arguments on the "contribution" step of the necessity test under Article 2.2 of the TBT Agreement, Malaysia argues that "ILUC can neither be observed nor measured and, therefore, it is impossible to attribute ILUC-risks exclusively to oil palm crop-based biofuel"; that "it is impossible to precisely estimate to what extent, if at all, ILUC GHG emissions occur"; and that "[i]nternational standards on the carbon footprint of products such as biofuels also exclude ILUC from being taken into account." (Malaysia's first written submission, para. 610(i).) In the context of its arguments under Article 2.1, Malaysia argues, on those same grounds, that regulating biofuels on the basis of ILUC-risk is "not legitimate". (Malaysia's first written submission, paras. 574-577.)

[449] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 313; and *US – COOL*, para. 370.

[450] The Appellate Body has stated that "the Panel is not bound by the arguments raised by a party and can use those arguments freely to develop its own legal reasoning to supports its findings and conclusions in the matter under consideration. Moreover, if the panel's analysis was shaped solely by the parties' arguments, the panel may not be able to conduct an objective assessment of the matter, as required under Article 11 of the DSU." (Appellate Body Reports, *Brazil – Taxation*, para. 5.171 (referring to Appellate Body Reports, *EC – Hormones*, para. 156; *Korea – Dairy*, para. 139; and *US – Certain EC Products*, para. 123).)

[451] Appellate Body Reports, *China – Raw Materials*, para. 355.

protection and conservation of the environment"[452] and has concluded that "exhaustible natural resources" covers both living and non-living exhaustible natural resources.[453] In past cases, measures taken to conserve clean air[454], sea turtles[455], petroleum[456], and various mineral resources[457] have been found to be measures relating to the conservation of "exhaustible natural resources" under Article XX(g).

7.275. The Panel notes that the conservation of exhaustible natural resources is not specifically mentioned as a legitimate objective in either Article 2.2 or the Preamble to the TBT Agreement. However, both refer to the "the protection of … the environment" and Article XX(g) covers measures directed at the "the preservation of the environment, especially of natural resources".[458] In other words, measures taken with the objective of conserving exhaustible natural resources in the sense of Article XX(g) would in principle fall within the scope of measures to taken to protect "the environment" in the sense of Article 2.2 and the Preamble to the TBT Agreement.

7.276. The Panel recalls that as set out in Recitals 80 and 81 of RED II, 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, leading to "the extension of agricultural land into areas with high-carbon stock, such as forests, wetlands and peatland, causing additional greenhouse gas emissions".[459] Thus, the measures seek to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels, which would arise when the cultivation of crops for biofuels displaces traditional production of crops for food and feed purposes requiring the extension of agricultural land into areas with high-carbon stock, including forests, wetlands and peatland. The objective of the 7% maximum share and the high ILUC-risk cap and phase-out therefore *prima facie* relates to the conservation of an "exhaustible natural resource", namely high-carbon stock land (forests, wetlands and peatland). Furthermore, in addition to high-carbon stock land being an exhaustible natural resource in and of itself, the Panel considers that measures taken to conserve high-carbon stock land, and thereby avoid the GHG emissions that would be released through their use, are related to the conservation of a wide range of exhaustible natural resources that are threatened by increased GHG emissions and climate change.

7.277. The Panel is therefore satisfied that the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels *prima facie* falls within the scope of the objective of "the conservation of exhaustible natural resources" within the meaning of Article XX(g), and within the scope of the objective of "the protection … of the environment" under Article 2.2 and the Preamble to the TBT Agreement and is therefore *prima facie* a "legitimate objective".

7.278. Second, in the context of Article XX, the European Union argues that the high ILUC-risk cap and phase-out is justified under Article XX(b), as a measure necessary to protect human, animal or plant life or health.

7.279. The Panel notes that in past cases, a broad range of policies has been found to fall within the scope of measures taken for the protection of human, animal and plant life or health. These include policies relating to the reduction of air pollution as a result of consumption of gasoline[460], the reduction of risks arising from the accumulation of waste tyres[461], and even the protection of monkeys in the wild.[462]

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[452] Appellate Body Report, *US – Shrimp*, para. 129.
[453] Appellate Body Report, *US – Shrimp*, para. 131
[454] Appellate Body Report, *US – Gasoline*, p. 14.
[455] Appellate Body Report, *US – Shrimp*, para. 131.
[456] Appellate Body Report, *US – Shrimp*, para. 128.
[457] Appellate Body Report, *US – Shrimp*, para. 128; and Panel Reports, *China – Raw Materials*, para. 7.369.
[458] Appellate Body Reports, *China – Raw Materials*, para. 355.
[459] Recital 81 of RED II.
[460] Panel Report, *US – Gasoline*, para. 6.21.
[461] Panel Reports, *China – Raw Materials*, para. 7.479 (referring to Panel Reports, *US – Gasoline*, para. 6.21 and *Brazil – Retreaded Tyres*, paras. 7.108 and 7.115).
[462] Panel Report, *Brazil – Retreaded Tyres*, paras. 7.108 and 7.115.

7.280. The Panel notes that the objective of protecting human, animal or plant life and health is referred to as a legitimate objective in very similar terms in Article XX(b)[463], Article 2.2[464], and the Preamble to the TBT Agreement.[465] Panels and the Appellate Body have stated that "few interests are more 'vital' and 'important' than protecting human beings from health risks, and protecting the environment is no less important".[466]

7.281. The Panel recalls that as set out in Recitals 80 and 81 of RED II, the measures at issue are aimed at limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. In *Brazil – Retreaded Tyres*, the Appellate Body suggested that "measures adopted in order to attenuate global warming and climate change" would fall within the scope of Article XX(b) in the context of providing guidance on how panels should assess certain "complex public health or environmental problems" under the necessity test in Article XX(b).[467] In *Brazil – Taxation*, the panel found that "the reduction of CO_2 emissions is one of the policies covered by subparagraph (b) of Article XX, given that it can fall within the range of policies that protect human life or health".[468] The Panel sees no reason to disagree, considering that global warming and climate change pose one of the greatest threats to life and health on the planet. The objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels therefore *prima facie* relates to the protection of human, animal or plant life or health.

7.282. The Panel is therefore satisfied that the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels *prima facie* falls within the scope of the objective of protecting human, animal or plant life or health within the meaning of Article XX(b), Article 2.2 and the Preamble to the TBT Agreement and is therefore *prima facie* a "legitimate objective".

7.283. In the context of Article XX, the European Union has argued that the high ILUC-risk cap and phase-out is justified under Article XX(a), as a measure necessary to protect public morals.

7.284. For reasons already set out in the context of the Panel's identification of the objective of the measures at issue, the Panel is unpersuaded that there is any need to make an additional ruling on whether the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels would fall within the scope of the objective protecting EU public morals. In this connection, the Panel observes that a finding on whether the high ILUC-risk cap and phase-out additionally pursues a "legitimate objective" of protecting EU public morals would have no impact on the outcome of the proceedings. If the Panel were to agree with the European Union that the same measure that pursues the legitimate objectives of protecting human, animal and plant life and health and the conservation of exhaustible natural resources also pursues the objective of protecting EU public morals, this would merely serve to establish an additional basis for the overall conclusion that the measure pursues a legitimate objective for the purposes of Article 2.2. Were the Panel to agree with Malaysia that the measure does not pursue the objective of protecting EU public morals, this would not alter the conclusion that the measure pursues the legitimate objectives of protecting human, animal and plant life and health and the conservation of exhaustible natural resources.

7.285. In light of the foregoing, the Panel finds that the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels is *prima facie* a "legitimate objective" under Article 2.2, given that this objective is *prima facie* within the scope of policies related to the conservation of exhaustible natural resources (forests, wetlands, and peatland) and the environment more generally, and is also *prima facie* within the scope of policies directed to the protection of human, animal or plant life or health. Before reaching a definitive conclusion on the legitimacy of the objective pursued, however, the Panel considers it necessary to consider and address a number of issues that are raised by Malaysia's arguments and that, in the Panel's view, are pertinent to the appraisal of the legitimacy of the objective. While some of these issues are interrelated, the Panel addresses them sequentially for analytical clarity.

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[463] Article XX(b) refers to measures necessary "to protect human, animal or plant life or health".

[464] Article 2.2 refers to the "protection of human health or safety, animal or plant life or health".

[465] The sixth Recital of the Preamble to the TBT Agreement refers to "the protection of human, animal or plant life or health".

[466] Panel Report, *Brazil – Retreaded Tyres*, para. 7.108. See also Appellate Body Report*, Brazil – Retreaded Tyres*, para. 179.

[467] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

[468] Panel Reports, *Brazil – Taxation*, para. 7.880.

7.1.2.3.4.2 The status of ILUC under current international standards

7.286. Article 2.4 of the TBT Agreement provides that Members shall use relevant international standards as a basis for their technical regulations except when such international standards or their relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued. Given that Article 2.4 contemplates that there may be situations where basing a technical regulation on international standards would be an ineffective or inappropriate means for fulfilling the legitimate objective pursued, it follows that the assessment of whether a measure's objective is "legitimate" cannot be based solely on the measure's relationship to international standards.

7.287. However, the Panel considers that its appraisal of the legitimacy of limiting the risk of ILUC-related GHG emissions posed by crop-based biofuels should begin with the manner in which ILUC is treated under the international standards cited by the parties to the dispute. The reason is that Malaysia's arguments imply not only that the 7% maximum share and the high ILUC-risk cap and phase-out are not based on relevant international standards, but that the very objective of the measures – i.e. limiting the risk of ILUC-related GHG emission associated with crop-based biofuels – is at odds with multiple relevant international standards.

7.288. Indeed, if the Panel were to share Malaysia's reading of those standards and find that the ISO standards referred to "exclude ILUC from being taken into account"[469] in the context of measures seeking to regulate GHG emissions, which is the view that Malaysia asserts in the context of its arguments under Article 2.2, then this would be highly relevant to the Panel's appraisal of the legitimacy of the measures' objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. As the Panel has already explained when setting out its order of analysis among the claims under the TBT Agreement, it is for this reason that the Panel began its analysis of the claims under the TBT Agreement with the claim under Article 2.4.

7.289. The Panel has concluded, in the context of addressing the claim under Article 2.4, that ISO 13065:2015 generally excludes ILUC effects, as indirect effects, from its methodology and that ISO 14067:2018 specifically excludes them from the LCA methodology used to *quantify* GHG emissions, but that neither of the standards contains language that *precludes* a regulator from addressing ILUC through its own approach outside the standardized methodologies. Thus, the Panel found that the standards do not cover ILUC and observed that the absence of international harmonization does not mean that countries are prevented from taking action and developing their own approaches to issues of concern. In other words, the conclusions reached by the Panel in the context of its analysis of the ISO standards under Article 2.4 do not disturb, and indeed are fully consistent with, the Panel's assessment that the objective of limiting the risk of ILUC-related GHG emissions posed by crop-based biofuels is *prima facie* a legitimate objective for the purposes of Article 2.2.

7.290. The Panel therefore concludes, in light of its findings under Article 2.4, that the ISO standards referred to by Malaysia's do not "exclude ILUC from being taken into account" in the context of measures seeking to regulate GHG emissions.

7.1.2.3.4.3 The existence of a risk of ILUC-related GHG emissions associated with the production of crop-based biofuels

7.291. Malaysia presents arguments implying that the stated objective is not "legitimate", on the grounds that because ILUC can neither be observed nor measured the regulation of ILUC-related

[469] Malaysia's first written submission, para. 610(i).

GHG emissions is not "legitimate".[470] Among other things, Malaysia states that ILUC is a "is based on unsubstantiated assumptions".[471]

7.292. The Panel observes that in the context of Article XX(b), when assessing whether a measure is taken to protect human, animal or plant life or health, prior panels have often commenced their analysis by determining the existence of the risk to human, animal or plant life or health (health risk) that the challenged measure aims to reduce.[472] For instance, in *EC – Asbestos*, the panel determined, as the first step in its analysis, whether chrysotile-asbestos posed a risk to human life or health.[473] In *Brazil – Retreaded Tyres*, the panel began by assessing whether the accumulation of waste tyres posed risks to human, animal or plant life or health.[474] As the panel in *EC – Asbestos* observed, "inasmuch as they include the notion of 'protection', the words 'policies designed to protect human life or health' imply the existence of a health risk."[475]

7.293. In a more recent case under Article XX, the panel in *Turkey – Pharmaceuticals (EU)* surveyed prior rulings under Article XX(b), (a), and (j), and concluded that panels and the Appellate Body have generally required the regulating Member "to demonstrate, at a minimum, that the asserted risk … was more than a merely hypothetical possibility" and that "in the context of Article XX(b), as in the context of the other sub-paragraphs of Article XX, a party invoking a general exception must identify some degree of probability that the alleged risk exists".[476] After recalling prior panel and Appellate Body reports involving the approach taken to measures aimed at limiting risks, the panel stated that:

> The Panel does not consider that there is any rigid or pre-determined threshold or evidentiary standard that should be applied in this respect. Insofar as a responding party presents evidence and arguments demonstrating that there is a substantial degree of probability of a specified risk to human life or health materializing, it will be easier for the responding party to discharge its burden of proving that the challenged measure was taken to protect against that risk, thus qualifying as a measure taken to protect human life or health under Article XX(b). Conversely, insofar as a responding party asserts the existence of a risk without establishing any substantial degree of probability, such that the risk appears to be theoretical, abstract or otherwise hypothetical, it will be more difficult for the responding party to discharge its burden of proving that the challenged measure was taken to protect against that risk.[477]

7.294. The Panel sees no reason to follow a different approach in the context of Article 2.2. Accordingly, the Panel proceeds to address whether the risk of ILUC-related GHG emissions being caused by the production of crop-based biofuels is a risk that appears to be theoretical, abstract or otherwise hypothetical, or is rather a risk that can be established with a substantial degree of probability. In assessing that issue, the Panel considers that the appropriate standard of review is whether the European Union had a reasonable basis to conclude that increasing demand for crop-based biofuels increases the risk of ILUC-related GHG emissions.[478]

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[470] In the context of its arguments on the "contribution" step of the necessity test under Article 2.2 of the TBT Agreement, Malaysia argues that "ILUC can neither be observed nor measured and, therefore, it is impossible to attribute ILUC-risks exclusively to oil palm crop-based biofuel"; that "it is impossible to precisely estimate to what extent, if at all, ILUC GHG emissions occur"; and that "[i]nternational standards on the carbon footprint of products such as biofuels also exclude ILUC from being taken into account." (Malaysia's first written submission, para. 610(i).) In the context of its arguments under Article 2.1, Malaysia argues, on those same grounds, that regulating biofuels on the basis of ILUC-risk is "not legitimate". (Malaysia's first written submission, paras. 574-577.)

[471] Malaysia's opening statement at the meeting of the Panel, para. 30.

[472] Panel Reports, *EC – Asbestos*, para. 8.170; *Brazil – Retreaded Tyres*, para. 7.42; *China – Rare Earths*, para. 7.156; *Brazil – Taxation*, para. 7.859; and *Indonesia – Chicken*, para. 7.209.

[473] Panel Report, *EC – Asbestos*, paras. 8.170, 8.182, and 8.185-8.194.

[474] Panel Report, *Brazil – Retreaded Tyres*, paras. 7.42, and 7.53-7.93.

[475] Panel Report, *EC – Asbestos*, para. 8.170. See also Appellate Body Reports, *EC – Seal Products*, para. 5.197.

[476] Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.170.

[477] Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.171.

[478] The Panel elaborates further on the standard of review in the context of addressing the claim under Article 2.1, when examining various calculations leading to the classification of palm oil as a high ILUC-risk feedstock, as well as the underlying data and assumptions.

7.295. The Panel recalls that Recital 81 of RED II, already quoted in full earlier in this section, explains in relevant part that:

> Indirect land-use change occurs when the cultivation of crops for biofuels, bioliquids and biomass fuels displaces traditional production of crops for food and feed purposes. Such additional demand increases the pressure on land and can lead to the extension of agricultural land into areas with high-carbon stock, such as forests, wetlands and peatland, causing additional greenhouse gas emissions.

7.296. In the Panel's view, the idea that increasing demand for crop-based biofuels increases the risk of ILUC-related GHG emissions is a straightforward proposition. Indeed, this proposition appears to be the logical corollary of certain known facts relating to the production of agricultural goods, and it does not appear that Malaysia's arguments actually dispute any of those facts.

7.297. The Panel understands that because available agricultural land is limited, any increased demand for crop-based biofuels can only be met by: (1) increasing productivity on existing agricultural land, (2) expanding into non-agricultural land (including high-carbon stock land), or (3) expanding into existing agricultural land at the expense of cultivation for other purposes.

7.298. The Panel does not understand Malaysia to suggest that increased demand for crop-based biofuels can be accommodated exclusively through increased productivity yield improvements on existing agricultural land. According to the Study Report, scientific evidence indicates that the increase in potential yields, i.e. the yield that can be reached with current technology at optimal conditions, ranges between 0.6% and 1.1% annually.[479] However, there is uncertainty whether this rate in increase in potential yield could be maintained[480], and whether yield increases for some crops can meet the increased overall levels of demand.

7.299. Furthermore, the Panel observes that even if any increased demand for crop-based biofuel could be met exclusively by growing more food and feed crops on existing agricultural land, it would remain the case that by exploiting such productivity gains to supply food and feed crops for the purpose of producing biofuels, the additional supply of food and feed crops achieved through productivity gains is not then available to be used for food and feed purposes. Thus, unless global food demand were to remain fixed (or decrease), the utilization of increased yields of food and feed crops to supply biofuel demand would mean they are not available for, and in this sense diverted from, use for food and feed purposes.

7.300. The Panel recalls that increased EU demand for crop-based biofuels cannot be met by expanding biofuel production destined for the EU market into non-agricultural land (including high-carbon stock land). Under RED I and RED II, any biofuel crops produced in high-carbon stock land will not be eligible to be counted towards the EU renewable energy targets on account of the sustainability and GHG emissions criteria in Article 29. Accordingly, suppliers are incentivized to serve the EU market either by using existing "biofuel" land (either by increasing productivity or capturing part of the biofuel production destined to non-EU markets) or by expanding biofuel production into existing "non-biofuel" agricultural land.

7.301. There is therefore a substantial likelihood that increasing demand for crop-based biofuel will be met, in the case of EU demand for biofuel, by expanding biofuel production into existing agricultural land at the expense of cultivation for other purposes. Given that the global demand for food and feed crops has been increasing and is unlikely to decrease any time soon, it follows that there is a substantial likelihood that food and feed production *displaced* by crop-based biofuel production will expand into non-agricultural land, including into land with high-carbon stock, in the absence of significant productivity yield improvement.

7.302. The Panel understands that there is no certainty that food and feed production displaced by crop-based biofuel production will expand into land without a previous history of agricultural production, such as pasture areas, savannahs, or forests (i.e. non-agricultural land). The Panel also understands that, where such expansion does occur, the land that will be converted into new agricultural land will not necessarily be forest, peatland, or other high-carbon stock land that raises

[479] Study Report (2017), (Exhibit EU-28), p. 63, referring to Baldos & Hertel, 2016; Burney, Davis, & Lobell, 2010).

[480] Study Report (2017), (Exhibit EU-28), p. 64.

concerns relating to GHG emissions. However, it is clear that a basic driver for deforestation is increased demand for agricultural commodities.[481]

7.303. In sum, crop-based biofuel is a product from food and feed crops, using agricultural land, that can also used for other purposes (e.g. food). If biofuel is produced from food or feedstock and/or agricultural land previously used for food production, the demand in food must then be met by food production that expands into non-agricultural land or displaces other crop production, which in turn expands into non-agricultural land, if global food demand does not decrease, and/or the productivity does not increase, by a corresponding amount.

7.304. A review of the evidence submitted by the parties on ILUC risks associated with crop-based biofuels suggests that this issue has received increased attention in the literature, including in peer-reviewed publications and IPCC reports. The IPCC report on *Climate Change and Land* notes that "[b]ioenergy from dedicated crops are in some cases held responsible for GHG emissions resulting from indirect land use change (iLUC), that is the bioenergy activity may lead to displacement of agricultural or forest activities into other locations, driven by market-mediated effects". The report further mentions that "iLUC emissions are potentially more significant for crop-based feedstocks such as corn, wheat and soybean, than for advanced biofuels from lignocellulosic materials."[482] While the IPCC report contains a statement regarding the "low confidence in attribution of emissions from iLUC to bioenergy", the findings of the IPCC report appear to be consistent with the findings reported in the Study Report.[483] Both reports acknowledge the variability, and therefore uncertainty, in the estimation of ILUC-related GHG emissions attributed to biofuels. This statement read in context appears to address only the uncertainty and variability surrounding the attribution of a particular ILUC effect to a particular feedstock and not, more generally, an assessment of a low confidence in the proposition that a causal relationship exists between biofuel production as a whole and ILUC effects.

7.305. Furthermore, the review of existing ILUC modelling studies in the Study Report, which are concerned with the *quantification* of GHG emissions, reveals that the modelling estimates of ILUC-related GHG emissions associated with biofuel demand vary depending on the study design, methodological approach, parameter assumptions, scenarios considered, omitted factors, definitions of specific variables and data sources. The existence of large variability in the modelling estimates makes it difficult to assess with accuracy the specific *quantity* of ILUC-related GHG emissions by specific types of conventional biofuel crops. That being said, although the number of modelling studies on advanced biofuels is limited, available estimates of ILUC-related GHG emissions attributed to crop-based biofuels tend to be, on average, larger than the estimates of ILUC-related GHG emissions associated with advanced biofuels.[484] This is in large part due to the fact that, unlike conventional biofuels, advanced biofuels do not compete directly with food and feed crop production. This finding is consistent with the underlying assumption of RED II according to which conventional biofuels present a higher risk of ILUC-related GHG emissions than advanced biofuels. It follows that, all other things being equal, the economic modelling studies corroborate, or at least do not undermine, the conclusion that an increase in conventional biofuel demand and production increases the risk of ILUC-related GHG emissions.

7.306. The question of whether ILUC can be directly measured, observed or precisely quantified does not speak to whether the production of crop-based biofuels creates a *risk* of ILUC-related GHG emissions. If an increase in crop-based biofuel is produced from crop land previously used for food production, demand in food must then be met by food production that expands into non-agricultural land or displaces other crop production which in turn expands into non-agricultural land, if global food demand does not decrease, and/or the productivity does not increase, by a corresponding amount. The existence of a causal link between the risk of ILUC-related GHG emissions and crop-based biofuel production, and more specifically, the existence of a risk of ILUC-related GHG emissions arising from increasing EU demand for crop-based biofuels, is more than "theoretical" in the Panel's view. It is another question to try to assess whether GHG emissions associated with a particular expansion into high-carbon stock land, or with an expansion rate of a specific crop, could

[481] See e.g. European Parliament Resolution of 4 April 2017, (Exhibit MYS-102), para. 4, noting that "73% of global deforestation arises from the clearing of land for agricultural commodities, with 40% of global deforestation caused by conversion to large-scale monocultural oil palm plantation".

[482] IPCC Report, "Climate Change and Land", (Exhibits EU-225, MYS-89), section 2.6.1.5.

[483] Study Report (2017), (Exhibit EU-28).

[484] Study Report (2017), (Exhibit EU-28), pp. 8-9.

be attributed to EU biofuel demand. This, however, is not what the measures seek to achieve, as they do not distinguish between specific drivers of expansion into land with high-carbon stock, as explained further in the section addressing Malaysia's claim under Article 2.1.

7.307. Therefore, at the present time and subject to future technological developments, the Panel considers that there is a risk that additional demand for crop-based biofuel increases the risk of ILUC-related GHG emissions. The Panel does not consider the risk of ILUC-related GHG emissions being caused by the production of crop-based biofuels to be a risk that appears to be theoretical, abstract or otherwise hypothetical. Rather, it is a probable risk based on known facts and evidence presented in this dispute.

7.308. The Panel concludes that there exists a reasonable basis for the European Union to conclude that increasing demand for crop-based biofuels increases the risk of ILUC-related GHG emissions. The Panel notes this conclusion leaves open any questions relating to the *quantification* of ILUC-related GHG emissions, and it also leaves open all questions relating to whether there is a sound basis for concluding that different conventional biofuels present different levels of ILUC risk. The Panel returns to the latter issue in the context of the "legitimate regulatory distinction" step of the analysis under Article 2.1.

7.1.2.3.4.4 The agricultural activities and associated ILUC and ILUC-related GHG emissions in question occurring outside of the territory of the European Union

7.309. The Panel notes that the wording of Article 2.2 and Article XX do not speak to any territorial or jurisdictional limitation on the scope of the measures that may be examined thereunder, and Malaysia did not initially raise any issue in this regard in the context of presenting its arguments under Article 2.2 (or elsewhere). In its first written submission, the European Union advanced a series of arguments in support of its view that there is no explicit or implicit territorial limitation in either Article XX of the GATT 1994 or in Article 2.2 of the TBT Agreement. Malaysia, without engaging with the European Union's argument directly, stated that it would "draw the Panel's attention to the well-considered and helpful comments on this issue made by Colombia in its Third Party Submission"[485], where Colombia argues that there is an implied jurisdictional limitation of Article XX of the GATT 1994.

7.310. In these circumstances, the Panel considers that its appraisal of the legitimacy of the objective of limiting the risk of ILUC-related GHG emissions posed by crop-based biofuels should take account of the fact that the agricultural activities and associated ILUC and ILUC-related GHG emissions in question are mostly expected to occur outside of the territory of the European Union.

7.311. The Panel recalls that the objectives expressly listed in Article 2.2, and also those in Article XX, provide a reference point for which other objectives may be considered to be legitimate in the sense of Article 2.2.[486] In this connection, the Panel notes that none of the examples of "legitimate objectives" listed in the text of Article 2.2 necessarily have any inherent jurisdictional or territorial limitation, and it may be difficult to reconcile such a limitation with such objectives as "the environment". Likewise, the objectives in Article XX(g) (the "conservation of exhaustible natural resources") and (b) (the protection of "human, animal or plant life or health"), which the Panel considers particularly relevant to its analysis for reasons already given earlier in this section, do not have any inherent jurisdictional or territorial limitation. The Panel further notes that while Annex A(1)(a), (b) and (c) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) specify that SPS measures only include those measures applied to protect human, animal or plant life or health "within the territory of the Member", there is no similar textual qualification in Article 2.2 or Article XX (nor, more broadly, is there such a qualification in the definition of TBT measures in Annexes 1.1, 1.2 and 1.3).

7.312. Past rulings by panels and the Appellate Body under the TBT Agreement and the GATT 1994 have addressed situations in which the challenged measure distinguished between products on the basis of fishing and harvesting methods occurring outside of its own jurisdiction and territory. These cases include *US – Shrimp*, *US – Tuna II (Mexico)*, and *EC – Seal Products*. These prior cases suggest that the fact that the interest being protected is situated outside the territory of the Member having

[485] Malaysia's second written submission, para. 207.
[486] Appellate Body Report, *US – Tuna II (Mexico)*, para. 313.

adopted the measure is not, in itself, an obstacle to the possible justification of a measure under Article XX of the GATT 1994, or even under the TBT Agreement.

7.313. At the same time, the Panel is mindful that in prior cases, panels and the Appellate Body have refrained from making any broad interpretative rulings on the existence of any implied jurisdictional or territorial limitation under Article 2.2 and Article XX. In *US – Shrimp* and *EC – Seal Products*, the Appellate Body assessed whether there was a "sufficient nexus" between the regulating Member and the activities being regulated.[487] The Panel considers it appropriate to follow a similar approach and focus on relevant case-specific arguments and circumstances.

7.314. The Panel notes that the measures at issue in this dispute are concerned with land use change as an issue related to GHG emissions, which are linked to climate change. Climate change is inherently global in nature. Therefore, there is a nexus between EU territory and the objective of limiting the risk of ILUC-related GHG emissions.

7.315. Moreover, the Panel does not consider that the measures can be characterized as regulating GHG emissions outside the European Union. The measures seek to regulate whether and to what extent products supplying the EU transport fuel market can be counted towards the EU renewable energy targets, and to address the adverse ILUC impacts that *EU demand* for crop-based biofuels could have. In this respect, the objective of RED II is to promote the use of renewable green energy in the EU transportation sector for environmental reasons and in particular to lower GHG emissions and to combat climate change; the European Union has assessed that the resulting increase in EU demand for crop-based biofuel could undermine that objective; and the measures therefore regulate EU demand for those products. Finally, the Panel observes that the ILUC-related GHG emissions from crop-based biofuels that the European Union is seeking to limit do not exclusively arise outside the European Union's borders and may very well occur also within the European Union's own territory.

7.316. The Panel finds that there is a sufficient nexus between the regulating Member and the activities being regulated.

7.1.2.3.4.5 Conclusion on the legitimacy of the objective

7.317. The Panel finds that the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels is a "legitimate objective" under Article 2.2, given that this objective falls within the scope of policies related to the conservation of exhaustible natural resources (forests, wetlands, and peatland) and the environment more generally, and falls also within the scope of policies directed to the protection of human, animal or plant life or health. The Panel concludes, in light of its findings under Article 2.4, that the ISO standards referred to by Malaysia do not "exclude ILUC from being taken into account" in the context of measures seeking to regulate GHG emissions. The Panel concludes that there exists a reasonable basis for the European Union to conclude that increasing demand for crop-based biofuels increases the risk of ILUC-related GHG emissions associated with crop-based biofuels. The Panel further concludes that there is a sufficient nexus between the regulating Member and the activities being regulated.

7.318. The Panel therefore finds that the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels is a "legitimate objective" for the purposes of Article 2.2.

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[487] In *US – Shrimp*, the Appellate Body stated that "[w]e do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)." (Appellate Body Report, *US – Shrimp*, para. 133.) In *EC – Seal Products* the Appellate Body stated that "the EU Seal Regime is designed to address seal hunting activities occurring 'within and outside the Community' and the seal welfare concerns of 'citizens and consumers' within the EU member States". On that basis, and taking into account the participants' agreement that there was a "sufficient nexus" between the public moral concerns and activities addressed by the measure, on the one hand, and the European Union, on the other hand, the Appellate Body did not consider it necessary to address this question of "systemic importance" further for purposes of resolving that dispute. (Appellate Body Reports, *EC – Seal Products*, para. 5.173.)

7.1.2.3.5 Trade-restrictiveness, risks of non-fulfilment, and contribution to the objective

7.319. Having found that the 7% maximum share and the high ILUC-risk cap and phase-out are aimed at fulfilling a "legitimate objective", the next step of the Panel's analysis is to arrive at a "preliminary conclusion"[488] about whether the measures are necessary to fulfil that legitimate objective. This consists of a relational analysis based on a "weighing and balancing" of three factors:

a. the trade–restrictiveness of the measure;

b. the risks that non-fulfilment of the objective would create; and

c. the degree of contribution made by the measure to the objective.

7.320. The parties present opposing arguments in relation to each of these factors. The Panel will address each factor individually, following which it will set out its weighing and balancing of its findings under each factor to reach a preliminary conclusion on the necessity of the measures at issue under Article 2.2.

7.1.2.3.5.1 Trade-restrictiveness

7.321. The Panel begins with the first factor set out above, namely the trade-restrictiveness of the 7% maximum share and the high ILUC-risk cap and phase-out.

7.322. The Panel recalls that, under the applicable legal standard and in accordance with the ordinary meaning to be given to the terms, a technical regulation is "trade-restrictive" within the meaning of Article 2.2 insofar as it has "a limiting effect on international trade".[489] In prior cases, panels and the Appellate Body have confirmed that a demonstration of trade-restrictiveness "could be based on qualitative or quantitative arguments and evidence, or both, including evidence relating to the characteristics of the challenged measure as revealed by its design and operation".[490] Where a panel considers that the design and structure of a measure is sufficient to establish that it will have "a limiting effect on trade", it is not necessary to make findings on the actual trade effects, or the anticipated effects, of the challenged measure.[491]

7.323. Malaysia argues that by establishing a limitation on the total quantity of crop-based biofuels that are eligible to count towards the 14% target in the European Union for the transport sector (with the entirety of EU crop-based biofuel demand being essentially defined by the RED II regime) the 7% maximum share and the high ILUC-risk cap and phase-out have, by design, a "limiting effect on trade" insofar as crop-based biofuels are imported into the European Union.[492]

7.324. The Panel agrees. Under RED II, the overall target for the share of renewable energy to be used in the transport sector is set at 14% by 2030. The measures at issue establish an express limitation on the total quantity of crop-based biofuels that are eligible to count towards the 14% target. It is undisputed that the entirety of the EU conventional biofuel market is essentially governed by the RED II regime, in the sense that there is little to no demand for biofuels not eligible to count towards the 14% target. The crop-based biofuels subject to the 7% maximum share include (without necessarily being limited to) crop-based biofuels imported into the European Union, and palm oil-based biofuel is also imported into the European Union. It follows that the measures at issue have, by design, a limiting effect on international trade.

[488] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.203-5.204 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.)

[489] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1072; and Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.384-6.386.

[490] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1072; and Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.384-6.386.

[491] Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.392.

[492] Malaysia's first written submission, paras. 593-598.

7.325. The European Union presents several arguments aimed at showing that the 7% maximum share and high ILUC-risk cap and phase-out are not "trade-restrictive" measures.[493] For the reasons that follow, the Panel is unpersuaded by these arguments.

7.326. First, the European Union stresses that the measures at issue do not "ban" the importation of crop-based biofuels and cannot be treated as equivalent to "elimination of a product from the market".[494] In the context of seeking to establish that the challenged measures do not constitute a "ban", the European Union observes that biofuels that are not eligible to count towards the target "are still consumed, albeit in small quantities, in the European Union".[495] In addition, it argues that the low ILUC-risk certification ensures that the use of palm oil-based biofuel can contribute to the renewable energy targets to the same degree as other conventional biofuels.[496]

7.327. The Panel considers that the relevance of this argument to the question of whether the measures have a "limiting effect on trade" is unclear, as a measure falling short of a complete ban can still clearly have a "limiting effect on trade". Insofar as the European Union's position is that since Malaysia has argued that the measures at issue (in particular the high ILUC-risk cap and phase-out) are tantamount to a ban on palm oil-based biofuel, Malaysia needs to demonstrate that these measures constitute a *de facto* ban to prove that they are "trade-restrictive"[497], the Panel is not persuaded. The Panel recalls that what needs to be established for the purposes of demonstrating the trade-restrictiveness of a measure, under Article 2.2 and Article XX, is that the measure has "a limiting effect on international trade".

7.328. Second, the European Union argues that insofar as it is correct that there is no real market for biofuel in the European Union outside the RED II regime, such that the biofuels market was created by the RED regime itself, it follows that the measures are part of a regime that has a trade restricting effect only for *fossil fuels*, and a trade *enhancing* effect for *biofuels*. It follows from this, the European Union argues, that the measures set a cap on the trade-restrictiveness of the public intervention with respect to *fossil fuels*. It cannot be the case, the European Union argues, that "once a Member alters the functioning of the market and restricts trade in certain products [i.e. fossil fuels] it should do that without *any* limitation for the trade which was *artificially created* for other products" [i.e. biofuels].[498]

7.329. The Panel considers that the logical implication of the European Union's argument is that where a Member artificially creates a market for certain products (e.g. biofuels), any limitation on the eligibility of which products have access to that market, including through a total ban, would not have any "limiting effect on trade" in those products. By this logic, an amended version of RED II that immediately set a 0% share for all crop-based biofuels would not be trade-restrictive, and thus could not be said to be any more "trade-restrictive" than the current measure. The Panel considers that the disciplines under Article 2.2, and for that matter under Article 2.1 and Article III:4, apply in the same way irrespective of whether a given market exists only because the government created it.

7.330. Third, the European Union argues that, in assessing whether the measures at issue have a "limiting effect on trade", the Panel should consider whether Malaysia's possible loss of exports to the EU market "might have been compensated by an increase in exports to India and China", and whether the high ILUC-risk cap and phase-out has import-*enhancing* effects with respect to conventional biofuels from *other* WTO Members.[499] The European Union relies on the statement by the panel in *Australia – Tobacco Plain Packaging* that, in assessing whether a technical regulation has limiting effects on international trade, "consideration might be given to 'the value or other

[493] The European Union's position appears to be that Malaysia has failed to demonstrate that the 7% maximum share and the high ILUC-risk cap and phase-out are "trade-restrictive" at all. However, the European Union also presents certain arguments to the effect that the "trade impact" of the measures at issue "is minimal". (See e.g. European Union's first written submission, para. 1394.) The Panel proceeds on the understanding that these may be construed as arguments in the alternative, and not as concessions that the challenged measures are in fact "trade-restrictive" (which would obviate the need for further consideration of its arguments on that issue).

[494] European Union's first written submission, paras. 835-836.

[495] European Union's first written submission, para. 837.

[496] European Union's first written submission, paras. 839-840.

[497] See e.g. European Union's opening statement, paras. 73-78.

[498] European Union's first written submission, para. 843. (emphasis added)

[499] European Union's first written submission, paras. 847-848.

importance of imports in respect of the importing and/or exporting Members concerned', as well as 'both import-enhancing and import-reducing effects on the trade of other Members'".[500]

7.331. The Panel does not consider that this argument finds support in prior dispute settlement practice under Article 2.2 or Article XX. Indeed, the panel in *Australia – Tobacco Plain Packaging* itself concluded that:

> We see no basis in the terms of Article 2.2 to assume, as Australia proposes, that the effects of a technical regulation on international trade, and specifically the existence and extent of a "trade-restrictive" effect, should be assessed only on the basis of the effect of the measure on trade of all WTO Members, in all products that are the subject of the technical regulation. Indeed, we consider that the adoption of that interpretation would have the effect that a WTO Member could have no recourse to Article 2.2 of the TBT Agreement in respect of a particular product in which its trade were being restricted, in the event that the trade of (an)other Member(s) increased. Further, following Australia's logic, in order to succeed in a claim under Article 2.2, a Member would in all cases need to establish the existence of a limiting effect not only in respect of its own exports, but in respect of the entirety of exports from all Members. This interpretation would, in our view, diminish the rights of Members under Article 2.2.[501]

7.332. The Panel further notes that the specific paragraph of that panel report that contains the sentence relied upon by the European Union in developing its argument reiterates that "the 'trade-restrictiveness' of a technical regulation need not be assessed only on the basis of the effect of the measure on trade between *all* WTO Members, in *all products* that are the subject of the technical regulation."[502]

7.333. The foregoing considerations apply equally to the 7% maximum share and the high ILUC-risk cap and phase-out. While it is evident that the 7% maximum share is less trade-restrictive than the high ILUC-risk cap and phase-out, both measures are "trade-restrictive" for the purposes of Article 2.2 because they establish a limitation on the total quantity of crop-based biofuels that are eligible to count towards the 14% target in the European Union, with the entirety of EU conventional biofuel demand being essentially defined by the RED regime. The measures thereby have, by design, a "limiting effect on trade" insofar as crop-based biofuels are imported into the European Union.[503] The fact that the European Union has created the market in question does not modify this assessment.

7.1.2.3.5.2 Risks of non-fulfilment of the objective

7.334. Having found that the 7% maximum share and the high ILUC-risk cap and phase-out are trade-restrictive, the Panel now turns to the second factor that is taken into account in the weighing and balancing step of the analysis, which is "the risks that non-fulfilment [of the objective] would create".

7.335. The Appellate Body has explained[504] that Article 2.2 does not prescribe further a particular methodology for assessing "the risks non-fulfilment would create" or define how they should be "tak[en] account of". In some contexts, it might be possible and appropriate to seek to determine separately the nature of the risks, on the one hand, and to quantify the gravity of the consequences that would arise from non-fulfilment, on the other hand; in other contexts, however, it might be difficult, in practice, to determine or quantify those elements separately with precision. In such contexts, it may be more appropriate to conduct a conjunctive analysis of both the nature of the risks and the gravity of the consequences of non-fulfilment, in which "the risks non-fulfilment would

[500] European Union's first written submission, paras. 785 and 847-848 (quoting Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1088.)
[501] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1078.
[502] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1088. (emphasis original)
[503] The Panel recalls that, where the design and structure of the measure is sufficient to establish that it will have a limiting effect on trade, it is not necessary to make findings on the actual trade effects, or the anticipated effects, of the challenged measure. (See e.g. Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.392.)
[504] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.218.

create" are assessed in qualitative terms. The Appellate Body has confirmed that "the manner of such consideration is adaptable to the particularities of a given case."

7.336. Malaysia argues that "the measures at issue, at best, only make a limited contribution to the primary objective being pursued by the EU, and, therefore, the risks and consequences that non-compliance with these measures would create are also limited."[505]

7.337. The European Union, referring to its broad policy objectives, submits in relation to this element of the analysis that "climate change, biodiversity and related moral concerns are regarded as values of high importance in the European Union and embedded into its constitutional fabric."[506] The European Union also argues that the nature of the risks and the fact that the consequences are far-reaching and difficult to predict with certainty, as they pertain to climate change, biodiversity destruction and absence of protection of EU public morals, mean that a qualitative analysis would be more suitable to a quantitative one.[507]

7.338. The Panel has found that the objective of the 7% maximum share and the high ILUC-risk cap and phase-out is to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels. Having so identified the objective of the measures, the Panel considers that the risk that the non-fulfilment of that objective would create is that the GHG emissions savings expected to result from the promotion of crop-based biofuels through RED II would be partially undermined, or even completely negated, by their ILUC-related GHG emissions.

7.339. The Panel reaches this conclusion based on several different considerations. First and foremost, this understanding of the risks that non-fulfilment of the objective would create corresponds to the understanding that is expressly set out in the ILUC Directive, Recital 81 of RED II, and the Delegated Regulation. In the context of setting forth the stated rationale for the measures at issue, Recital 81 of RED II, which has already been quoted in full earlier in this section of the Report, recalls that the ILUC Directive "recognises that the magnitude of greenhouse gas emissions-linked indirect land-use change is capable of negating some or all greenhouse gas emissions savings of individual biofuels, bioliquids or biomass fuels". This is repeated in Recital 4 of the Delegated Regulation.

7.340. Additionally, the parties themselves appear to share the same understanding. In its submissions, the European Union refers to this potential consequence.[508] Malaysia likewise states, in the context of addressing "the risk non-fulfilment would create", that "[t]he consequence of refraining from taking necessary steps towards this objective", which Malaysia formulates as "avoiding additional GHG emissions by limiting direct and indirect land-use change", would be "greater GHG emissions and the partial or even total voiding of the GHG reductions achieved with the RED II".[509]

7.341. The Panel is not of the view that consideration of "the risks that non-fulfilment [of the objective] would create" necessitates the quantification of the risks, or an attempt to establish the degree of probability of those risks materializing. Rather, and as the Appellate Body has explained[510], in some contexts it may be possible to quantify the gravity of the consequences that would arise from non-fulfilment, whereas in other contexts this may be assessed in qualitative terms. The Panel notes that in some cases, prior panels have identified "the risks of non-fulfilment" of the objective in terms of one or more simple corollaries flowing from the objective identified. For example, in *Australia – Tobacco Plain Packaging*, the panel found that the objective of the measures was "to improve public health by reducing the use of, and exposure to, tobacco products", and found that "the nature of the risk of not fulfilling the TPP measures' legitimate objective" was that "public health would not be improved, as the use of, and exposure to, tobacco products would not be reduced."[511]

[505] Malaysia's first written submission, para. 628.
[506] European Union's first written submission, para. 892.
[507] European Union's first written submission, para. 894.
[508] European Union's first written submission, paras. 36, 120, 234.
[509] Malaysia's first written submission, para. 629.
[510] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.218.
[511] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1287.

7.342. The Panel therefore finds that the "risks that non-fulfilment [of the objective] would create" are that GHG emissions savings resulting from the promotion of conventional biofuels through RED II are partially undermined, or even completely negated, by their ILUC-related GHG emissions. As already noted above, avoiding GHG emissions is a central element in combating climate change, in itself a key objective of current international and domestic efforts. The foregoing considerations apply equally to the 7% maximum share and the high ILUC-risk cap and phase-out, given that the Panel considers that both measures have the same objective.

7.1.2.3.5.3 Contribution to the objective

7.343. Having considered the first two factors that inform the weighing and balancing step of the analysis, the Panel now turns to the third factor, which is the degree of contribution made by the measures to their objective.

7.344. The present case has several parallels with *Brazil – Retreaded Tyres,* and therefore the Panel considers it useful to briefly summarize the Appellate Body's analysis in that dispute.

7.345. The measure at issue in *Brazil – Retreaded Tyres*, namely, a ban on imports of retreaded tyres, was particular in at least two respects. First, the import ban formed part of a comprehensive policy designed and implemented by Brazil to deal with the public health and environmental consequences of waste tyres. As the Appellate Body recognized, "certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures".[512] Consequently, the Appellate Body noted, it may prove difficult in the short term "to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy".[513] Second, the Appellate Body considered that the results obtained from, for example, certain preventive actions to reduce the incidence of diseases, "can only be evaluated with the benefit of time".[514] It referred, in this connection, to "measures adopted in order to attenuate global warming and climate change".

7.346. The Appellate Body in *Brazil – Retreaded Tyres* was thus confronted with the particular challenge of assessing the contribution of a measure that formed part of a broader policy scheme, and that was not yet having, or likely itself to produce, an immediately discernible impact on its objective. The Appellate Body thus sought to determine whether the measure was "apt to make a material contribution" to its objective.[515] It ultimately found that the broader regulatory scheme was designed to induce changes in the practices and behaviour of commercial actors in order to reduce the number of waste tyres generated and, thereby, to reduce the risks to human, animal, and plant life and health arising from the accumulation of waste tyres.[516]

7.347. In the present case, the 7% maximum share and the high ILUC-risk cap and phase-out do not take the form of a ban on imports of any crop-based biofuel. However, the measures have, by design, a limiting effect on EU demand for and consumption of all crop-based biofuels, and will by 2030 eliminate RED II-induced EU demand for and consumption of those crop-based biofuels deemed to be high ILUC risk. As with the import ban at issue in *Brazil – Retreaded Tyres*, the objective of the measures is related to the protection of human, animal or plant life or health (which the Appellate Body accepted "is both vital and important in the highest degree".)[517] Furthermore, it appears to be common ground between the parties in this case that it is not possible to quantify the extent to which the 7% maximum share and the high ILUC-risk cap and phase-out contribute to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The measure at issue in *Brazil – Retreaded Tyres* was likewise one that did not have an immediately discernible impact on its objective. In these circumstances, the Appellate Body accepted that a measure could be considered "necessary" even if the contribution of the measure "is not immediately

[512] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[513] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[514] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[515] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150.
[516] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 154.
[517] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 144.

observable"[518], and considered that the relevant standard was whether the measure was *apt to make a material contribution* to its objective.

7.348. The Panel considers that the 7% maximum share and the high ILUC-risk cap and phase-out are apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. The measures have, by design, a limiting effect on EU demand for and consumption of all crop-based biofuels and will by 2030 eliminate RED II-induced EU demand for and consumption of those crop-based biofuels deemed to be high ILUC risk. It follows that the measures are apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. In light of the design and intended operation of the 7% maximum share and the high ILUC-risk cap and phase-out, the Panel considers that there is a direct correlation between their aptitude to contribute to their objectives and their degree of trade-restrictiveness.

7.349. Malaysia submits that there are several reasons why the extent to which the measures at issue fulfil their objectives, will be very difficult, if not impossible, to determine (whether in quantitative or qualitative terms), and will, in any case, be quite limited."[519] The Panel has elected to address most of these arguments elsewhere in its analysis, either in the context of assessing whether the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels is a "legitimate objective" or in the context of the "legitimate regulatory distinction" step of the analysis under Article 2.1.

7.350. For instance, Malaysia argues[520] ILUC cannot be observed or measured and therefore there is no evidence showing that oil palm crop-based biofuel exported from Malaysia into the European Union will cause ILUC. Malaysia argues that it is therefore impossible to establish a causal link between the cultivation of food and feed crops for producing biofuel in one geographical location, and the growing of crops in another geographical location. As a result, Malaysia argues that it is not possible to quantify the contribution, if any, of the limitation on the importation of the cap and phase-out to the stated objective.

7.351. The Panel considers this argument to be pertinent to the assessment of whether the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels is a "legitimate objective" and has elected to address it in that context. The Panel found that there exists a reasonable basis for the European Union to conclude that increasing demand for crop-based biofuels increases the risk of ILUC-related GHG emissions. The Panel therefore considers that this argument does not undermine its conclusion that the high ILUC-risk cap and phase-out is apt to make a material contribution to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuel.

7.352. Malaysia also argues[521] that even if the European Commission's new ILUC methodology is taken at face value, this methodology fails to demonstrate that the cap and phase-out contributes to preventing ILUC GHG emissions, and in fact it is likely to increase GHG emissions. The reason is that reducing the consumption of oil palm crop-based biofuel in the European Union in favour of rapeseed or other crop-based biofuel would reduce the amount of rapeseed oil or other crops produced for food purposes by an equivalent amount, which may therefore trigger ILUC effects elsewhere in the world. The phase-out of palm oil-based biofuels may also result in a shift towards palm oil being supplied for food and feed purposes in the European Union, which would not be subject to the sustainability and GHG emissions saving criteria under RED I and RED II. Finally, even if the cap and phase-out could actually limit global consumption of palm oil, the high yield and the high-carbon sequestration value of oil palm, compared to other oil crops, means that ILUC GHG emissions would likely increase.

7.353. The Panel notes that the issues raised by Malaysia relating to potential substitution effects are also raised in the context of the "legitimate regulatory distinction" step of the analysis under Article 2.1. The Panel considers it appropriate to address these arguments together with other aspects of the design and operation of the measure in that context. The Panel notes that its conclusions under Article 2.1 do not undermine its conclusion that the high ILUC-risk cap and phase-

[518] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[519] Malaysia's first written submission, para. 611.
[520] Malaysia's first written submission, para. 610(i) and (ii).
[521] Malaysia's first written submission, paras. 610(iii) and (v) and 627.

out is apt to make a material contribution to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuel.

7.354. Malaysia further argues[522] that because the high ILUC-risk cap and phase-out targets existing crop production for which the alleged emissions have already occurred in the past, as well as feedstock produced from yield increases to existing land, such production does not cause ILUC because it does not result in additional land use. In its view, this further undermines the ability of the measures at issue, and in particular the high ILUC-risk cap and phase-out, to contribute to their objective.

7.355. The Panel notes that the issues raised by Malaysia are also raised in the context of the "legitimate regulatory distinction" step of the analysis under Article 2.1. The Panel considers it appropriate to address these arguments together with other aspects of the design and operation of the measure in that context. Here again, the Panel notes that its conclusions under Article 2.1 do not undermine its conclusion that the high ILUC-risk cap and phase-out is apt to make a material contribution to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuel.

7.356. Malaysia also highlights the fact that, in the context of arguing that the measures are not trade-restrictive, the European Union states that its measures will affect only "a drop in the ocean of palm oil world production and consumption, and the EU measures challenged by Malaysia are not capable of significantly affecting global trade in palm oil and palm oil biofuels".[523] Malaysia expresses surprise at this line of argumentation, "as it seems to be in direct contradiction to the stated raison d'être of the limitations on palm oil set out in the offending measures" and suggests that the European Union is overstating the impact of the measures when "in other contexts, the EU relies on the supposition that EU demand is quite consequential in this area; asserting that it is *necessary* to stifle that demand, with haste, in order to promote the stated goals of the measures."[524]

7.357. The Panel does not consider that the contribution that the 7% maximum share and the high ILUC-risk cap and phase-out are apt to make to their objective (i.e. limiting ILUC-related GHG emissions associated with crop-based biofuels) is undermined by the fact that the measures focus only on a relatively narrow aspect of the problem of GHG emissions, and directed only at the European Union's own demand and consumption of biofuels. It is often the case that a given measure will "only address[] a specific component of the overall risk"[525] it pertains to. *A fortiori*, in the context of a global issues like climate change and GHG emissions the assessment of whether a single measure taken by a single Member is apt to make a material contribution to its objective cannot be directed at the global impact of the measure in quantitative terms.

7.358. Rather, a "contribution" exists "when there is a genuine relationship of ends and means between the objective pursued and the measure at issue".[526] That is the case here. The measures seek to address certain negative externalities of the European Union's policy promoting the use of renewable energy sources in the transport sector. Therefore, insofar as the measures aim at correcting a specific aspect of that policy, it is to be expected that the measures' contribution will be limited to that specific element.

7.359. The Panel concludes that, while it is not possible to quantify the extent to which the 7% maximum share and the high ILUC-risk cap and phase-out contribute to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels, the measures are apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. The conclusion follows from the fact that the 7% maximum share has, by design, a limiting effect on EU demand for and consumption of all crop-based biofuels, and from the fact that the high ILUC-risk cap and phase-out has, by design, a limiting effect on EU demand for and consumption of those crop-based biofuels deemed to be high ILUC risk.

[522] Malaysia's first written submission, paras. 610(iv).
[523] European Union's first written submission, para. 838.
[524] Malaysia's first written submission, para. 95.
[525] Panel Report, *Brazil – Retreaded Tyres*, para. 7.214.
[526] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 210.

7.1.2.3.5.4 Weighing and balancing of the three factors

7.360. Having considered the trade-restrictiveness of the measures, the risks that non-fulfilment of their objective would create, and the degree of contribution made by the measures to the objective, the Panel now proceeds to the "weighing and balancing" of these factors in order to reach a "preliminary conclusion" on the necessity of the measures at issue.

7.361. In the context of considering these three factors individually, the Panel has concluded that:

a. The 7% maximum share and the high ILUC-risk cap and phase-out are trade-restrictive for the purposes of Article 2.2 because they establish a limitation on the total quantity of crop-based biofuels that are eligible to count towards the 14% target in the European Union, with the entirety of EU conventional biofuel demand being essentially defined by the RED regime. While it is evident that the 7% maximum share is less trade-restrictive than the high ILUC-risk cap and phase-out, both measures thereby have, by design, a limiting effect on trade insofar as crop-based biofuels are imported into the European Union. The fact that the European Union has created the market in question does not modify this assessment.

b. The 7% maximum share and the high ILUC-risk cap and phase-out have the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels, and the risk that non-fulfilment of that objective would create is that the GHG emissions savings expected to result from the promotion of crop-based biofuels through RED II would be partially undermined, or even completely negated, by their ILUC-related GHG emissions.

c. While it is not possible to precisely quantify the extent to which the 7% maximum share and the high ILUC-risk cap and phase-out contribute to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels, the measures are apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. This conclusion follows from the fact that the 7% maximum share has, by design, a limiting effect on EU demand for and consumption of all crop-based biofuels, and from the fact that the high ILUC-risk cap and phase-out has, by design, a limiting effect on EU demand for and consumption of those crop-based biofuels deemed to be high ILUC risk.

7.362. The Panel appreciates that the exercise of "weighing and balancing" implies that the flexibility of such an exercise does not allow for the setting of pre-determined thresholds in respect of any particular factor, and therefore the Appellate Body has stated that it does "not see that mandating in advance a pre-determined threshold level of contribution would be instructive or warranted in a necessity analysis".[527] Thus, a panel may be found to have erred insofar as it considers that it is required to apply a standard of "materiality" as a generally applicable pre-determined threshold in its "contribution" analysis.[528]

7.363. Having said this, the Panel notes that in every case where a panel or the Appellate Body has found that a measure is apt to make a material contribution to the fulfilment of its objective, the preliminary conclusion reached in the context of the weighing and balancing step has been that the measure is necessary. This includes cases where the measure was highly trade-restrictive, including cases where the measure was an outright ban on the importation or sale of the products at issue (including for example *Brazil – Retreaded Tyres* and *US – Clove Cigarettes*). Indeed, the Appellate Body has suggested that the only circumstance in which a panel could end its analysis at this juncture and find that a measure is more trade-restrictive than necessary based on the "weighing and balancing", and not continue with a comparison of the measure against the proposed alternative measures, would be if the measure "makes *no* contribution to the achievement of the legitimate objective".[529]

7.364. The Panel preliminarily concludes that the measures are necessary to fulfil their objective, on the grounds that they are "apt to make a material contribution" to the achievement of that

[527] Appellate Body Reports, *EC – Seal Products*, para. 5.215.
[528] Appellate Body Reports, *EC – Seal Products*, para. 5.216.
[529] Appellate Body Report, *US – Tuna II (Mexico)*, fn 647 to para. 322.

objective, and that this is the requisite degree of contribution required in the circumstances of this case having weighed and balanced their trade-restrictiveness and the risks that non-fulfilment of the objective would create.

7.1.2.3.6 Alternative measures

7.365. The Panel has reached the preliminary conclusion that the 7% maximum share and the high ILUC-risk cap and phase-out are necessary under Article 2.2. Accordingly, the next and final step of the analysis of the necessity test under Article 2.2 is a comparison of the challenged measures with possible alternative measures.

7.366. Malaysia has identified six possible alternative measures to the high ILUC-risk cap and phase-out and the 7% maximum share. In response to a question from the Panel asking Malaysia to clarify which of the challenged measures each of the proposed alternative measures relates to, Malaysia responded that each of the alternative measures proposed by Malaysia "respond to the primary objective of the EU (*i.e.*, the avoidance of additional GHG emissions) and, thereby, also the broader secondary objectives", and that Malaysia's proposed alternatives "are focused on accomplishing as much or more than the EU measures (*i.e.* the 7% limit, the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification) are able to collectively accomplish in this respect".[530] The Panel therefore proceeds on the understanding that Malaysia has identified six alternative measures, each of which is to be understood as being a less trade-restrictive alternative measure that could replace both the high ILUC-risk cap and phase-out, and the 7% maximum share.

7.367. The Panel will proceed to individually examine the six less trade-restrictive alternative measures that have been identified. According to Malaysia, the 7% maximum share and the high ILUC-risk cap and phase-out are more trade-restrictive than necessary to fulfil a legitimate objective, because the following measures are reasonably available to the European Union, that would make an equivalent contribution to the stated objective, while being less trade-restrictive:

a. a legality scheme, such as the European Union's Forest Law Enforcement, Governance and Trade (FLEGT) scheme;

b. certification by public authorities, such as the catch certificate under the European Union's Illegal, Unreported and Unregulated (IUU) fishing scheme;

c. certification by existing non-governmental organizations, such as under the International Sustainability and Carbon Certification (ISCC) and the Roundtable on Sustainable Palm Oil (RSPO) and the RSPO-RED;

d. market access quotas;

e. the sustainability certification scheme and requirements adopted under the Indonesia-EFTA Comprehensive Economic Partnership Agreement (CEPA); and

f. the European Union's approach applied in its deforestation-free initiative.

7.368. Before reviewing these measures individually, the Panel considers it useful to recall certain aspects of the applicable legal standard that will guide its analysis of the alternative measures proposed by Malaysia.

7.1.2.3.6.1 The purpose of identifying alternative measures

7.369. The Panel recalls that consideration of less trade-restrictive alternative measures is a conceptual tool to analyse whether the measures at issue are more trade-restrictive than necessary.[531] The question that a panel seeks to answer in considering possible alternative measures

[530] Malaysia's response to Panel question No. 120, p. 79.

[531] See e.g. Appellate Body Reports, *Australia – Tobacco Plain Packaging (Honduras)*, para. 6.461; *US – Tuna II (Mexico)*, para. 320; and *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.200.

is whether there are one or more less trade-restrictive measures that the regulating Member could adopt to *replace* a challenged measure.

7.370. Accordingly, a panel must be satisfied that any proposed alternative measure is indeed less trade-restrictive than the measure at issue, that it is reasonably available to the regulating Member, and that it would make an equivalent contribution to the challenged measure's objective.[532] As indicated above, all these elements of the comparative analysis are cumulative. The Appellate Body has confirmed that a measure's objective serves as "the benchmark" against which a panel must assess the degree of contribution made "by proposed alternative measures".[533] Thus, in assessing whether a proposed alternative measure would make an equivalent contribution to the challenged measure's objective, it is important to start this analysis by clearly identifying the objective that serves as the benchmark.

7.371. The Panel has identified the objective of the 7% maximum share and the high ILUC-risk cap and phase-out as limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The Panel has also found that this is a "legitimate objective", and the Panel has further found that the measures at issue are apt to make a material contribution to that objective. Accordingly, to establish that the measures are more trade-restrictive than necessary at this juncture of its analysis, the Panel would need to be satisfied that one or more of the proposed alternatives would make an equivalent contribution to the objective of *limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels* and that these alternatives are less trade-restrictive than the challenged measures.

7.372. The Panel considers that it is necessary, but not sufficient, that any proposed alternative measure be less trade-restrictive, be reasonably available, and make an equivalent contribution to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The Panel must further consider whether any proposed alternative is correctly viewed as an *alternative* to, or rather as *complementary* to, the 7% maximum share and the high ILUC-risk cap and phase-out. In *Brazil – Retreaded Tyres*, the Appellate Body upheld the panel's finding, made in the context of applying the necessity test in Article XX(b), that certain alternatives proposed by the complaining Member were "complementary" to the challenged import ban, and constituted "mutually supportive elements of a comprehensive policy to deal with" waste tyres and "[t]herefore, these measures cannot be considered real alternatives to" the import ban.[534] As the underlying panel observed, "it is possible that different measures may address different aspects of the same risk and complement each other towards addressing this risk".[535]

7.373. While the Appellate Body has not had occasion to elaborate further on the distinction between alternative and complementary measures, the distinction would seem to be reasonably straightforward. Necessity tests under Article 2.2 and Article XX do not prevent a regulating Member from taking more than one measure at the same time to fulfil any given objective. By way of illustration, a technical regulation that laid down GHG emissions standards for scooters that have a limiting effect on trade (in respect of non-compliant scooters) could not be shown to be more trade-restrictive than necessary via a demonstration that introducing a subsidy for homeowners to install solar panels (or purchase electric bikes, or electric cars) would make at least an equivalent contribution to the reduction of GHG emissions. Such measures would in principle be complementary, not alternative, measures.

7.374. An alternative measure is therefore one that either could not co-exist with a challenged measure as it currently stands, or that could co-exist but whose implementation alongside the challenged measure would negate or render redundant or immaterial the contribution that the challenged measure is apt to make to its objective. A complementary measure is one that could co-exist with a challenged measure as it currently stands, and whose implementation alongside the challenged measure would not negate or render redundant or immaterial the contribution that the challenged measure is apt to make to its objective.

[532] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 322; and *US – COOL*, para. 471.
[533] Appellate Body Reports, *US – COOL*, para. 387.
[534] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 211. See also ibid., para. 172.
[535] Panel Report, *Brazil – Retreaded Tyres*, para. 7.213.

7.1.2.3.6.2 Assessment of the alternative measures proposed by Malaysia

First proposed alternative: a legality scheme, such as the EU's Forest Law Enforcement, Governance and Trade (FLEGT) scheme

7.375. Malaysia argues[536] that an alternative measure would be a legality scheme that links environmental and sustainability certification to compliance with specific local laws and regulations, aligned with the EU requirements, modelled on the EU FLEGT scheme.[537] Malaysia argues that exporting countries could enter into agreements with the European Union for the purposes of assuring the conformity of their exports with the agreed rules and their national rules, and issue licences assuring the legality and provenance of the specific consignment of palm oil-based biofuel "from a plantation on a land with low-carbon stock and that did not displace other crops onto land with high-carbon stock".[538] Malaysia clarifies that it is advocating for an approach that would look at the individual consignment and certify whether it has been grown on high-carbon stock land and that it did not lead to displacement of other food or feed crops "within a given jurisdiction", and observes that "[t]his is as much as an individual producing country can assure."[539] Malaysia underscores the unfairness of the European Union's current global approach to regulating ILUC, according to which "whatever an individual WTO Member, like Malaysia, does to avoid expansion of agricultural land into high-carbon stock land, would be moot until such time that, globally, the issue has been successfully addressed and the annual global expansions has been managed."[540]

7.376. The European Union responds[541] that the sustainability criteria in Article 29 of RED II and the reference to ILUC in Article 26(2) of RED II go beyond a legality check, and that "[l]ocal laws do not address concerns related to the global impact of policy-induced increases in aggregate demand."[542] According to the European Union, what matters is the prevention of certain policy effects, whether the LUC involved is legal or illegal. The European Union adds that the Voluntary Partnership Agreements (VPAs) concluded under the EU FLEGT regime "are not so effective in preventing illegal destruction of forests".[543] In addition, the European Union observes that insofar as the alternative would be confined to ensuring that biofuel was not produced by expanding into land with high-carbon stocks, this "is already a requirement under the sustainability criteria. Hence, the proposed alternative is in reality a suggestion to remove the measure at issue altogether."[544]

7.377. The Panel observes that Malaysia's first proposed alternative measure, i.e. a legality scheme that links environmental and sustainability certification to compliance with specific local laws and regulations, aligned with the EU requirements, appears to be unrelated to the specific objective pursued by the 7% maximum share and the high ILUC-risk cap and phase-out. This proposed alternative also appears to be directed at *DLUC* associated with the production of *individual consignments* of crop-based biofuels, as opposed to constituting an alternative measure that would make an equivalent contribution to its chosen objective of limiting the risk of *ILUC*-related GHG

[536] Malaysia's first written submission, paras. 636-650; second written submission, paras. 224-227; and response to Panel question No 121, pp. 81-82.

[537] Malaysia notes that the concept of the FLEGT scheme was introduced through the EU's Timber Regulation, which was adopted in 2013. Malaysia explains that the EU Timber Regulation prohibits, prospectively (i.e. not, as under the ILUC approach, retrospectively and *per se* for an entire commodity) the placing of illegally harvested timber on the EU market, covering both imported and domestically produced timber and timber products. Voluntary Partnership Agreements (VPAs) between the EU and timber-producing countries also promote trade in legal timber products and help to close the EU market to illegal products. At the heart of each VPA is a "timber legality assurance system", which verifies that wood products conform to national laws. Once verified as legal, partner countries can give FLEGT licences to timber products destined for the EU market. Malaysia explains the details of supply chain control under the FLEGT scheme at paras. 640-644 of its first written submission.

[538] Malaysia's first written submission, para. 647.

[539] Malaysia's response to Panel question No. 121, p. 81. Malaysia adds that "[i]n order to ensure that this approach be non-discriminatory, as capable as possible in deterring LUC, and able to restrict the importation of commodities that encroach onto high-carbon stock land, the same import certification requirements should be applied on all crops and commodities. A comprehensive DLUC approach, applied to all crops, would be the best available alternative measure to the unreliable, unmeasurable, and discriminatory ILUC approach." (Malaysia's response to Panel question No. 121, p. 82.)

[540] Malaysia's second written submission, para. 225.

[541] European Union's first written submission, paras. 918-933; and response to Panel question No. 122, paras. 675-681.)

[542] European Union's first written submission, para. 922.

[543] European Union's first written submission, paras. 923-930.

[544] European Union's response to Panel question No. 122, para. 677.

emissions associated with crop-based biofuels. In addition, the Panel does not see why the 7% maximum share and the high ILUC-risk cap and phase-out could not co-exist with a legality scheme that links environmental and sustainability certification to compliance with specific local laws and regulations, aligned with the EU requirements. Given that the measures at issue have a focus that is different from the proposed alternative, the challenged measures would continue to be apt to make a material contribution to their objectives if they operated alongside the proposed alternative. As such, the first alternative appears to be complementary, and not a genuine alternative, to the EU measures at issue.

Second proposed alternative: certification by public authorities, such as the catch certificate under the EU's Illegal, Unreported and Unregulated (IUU) fishing scheme

7.378. Malaysia argues[545] that a second alternative measure would be a certification scheme that relies on controls by public authorities, such as the approach introduced by the European Union for catch certificates under its IUU fishing scheme. According to Malaysia, this IUU fishing scheme is a less trade-restrictive framework because under this system, "the fact that a single species is fished in illegal, unreported, or unregulated fashion, does not trigger its effective import restriction from all countries and for all quantities, as in the case of biofuel feedstocks that are considered to have a high ILUC-risk under the RED II and the Delegated Regulation."[546] Malaysia submits that a licensing system, including controls and traceability along the supply chain, would allow the European Union to "prohibit the importation of only the products that caused relevant land-use change, while maintaining the trade opportunities for all the rest".[547]

7.379. The European Union responds[548] that as an exception to the high ILUC-risk cap and phase out, the RED II and the Delegated Regulation already allow for the certification of low ILUC-risk biofuels, bioliquids and biomass fuels. Furthermore, the IUU Regulation uses a more complex toolbox than the one described by Malaysia, which focuses on only one, the catch certificate, amongst the panoply of complementary measures provided by the IUU Regulation. The European Union adds that there is a lack of precise information on the effectiveness of the EU rules to combat illegal, unreported and unregulated fishing, as the respective instrument did not benefit from a similar fitness check as the FLEGT system. The European Union submits that the two instruments have different purposes and operate in a different manner; as already explained, the IUU framework offers both carrots and sticks as part of its toolbox. The European Union further submits that Malaysia has not shown how the IUU system would be suitable in a completely different policy context.

7.380. The Panel observes that Malaysia's second proposed alternative measure, i.e. a certification scheme that relies on public authorities to certify that individual consignments of biofuels were not produced in an illegal, unreported, or unregulated fashion, or in a way that "caused relevant land-use change", appears to be unrelated to the specific objective pursued by the 7% maximum share and the high ILUC-risk cap and phase-out. This proposed alternative also appears to be directed at *DLUC* associated with the production of *individual consignments* of crop-based biofuels, as opposed to constituting an alternative measure that would make an equivalent contribution to its chosen objective of limiting the risk of *ILUC*-related GHG emissions associated with crop-based biofuels. Given that the measures at issue have a focus that is different from the proposed alternative, the challenged measures would continue to be apt to make a material contribution to their objective if they operated alongside the proposed alternative. As such the second alternative appears to be complementary, and not a genuine alternative, to the EU measures at issue.

Third proposed alternative: certification by existing non-governmental organizations, such as under the International Sustainability and Carbon Certification (ISCC) and the Roundtable on Sustainable Palm Oil (RSPO) and the RSPO-RED

7.381. Malaysia argues[549] that "enhanced certification requirements", without opting for the arbitrary high ILUC-risk approach and the merely theoretical low ILUC-risk certification, would be an

[545] Malaysia's first written submission, paras. 651-657; and second written submission, paras. 231-232.
[546] Malaysia's first written submission, para. 655.
[547] Malaysia's first written submission, para. 655.
[548] European Union's first written submission, paras. 934-942; and response to Panel question No. 122, paras. 685-687.)
[549] Malaysia's first written submission, paras. 658-666; and second written submission, paras. 234-236.

alternative option that is reasonably available to the European Union and that is less trade-restrictive. It refers to two voluntary certification schemes that "already exist and have been operating for a number of years in this very area of regulation, notably the certification of sustainable biofuel feedstocks: i) The ISCC; and The RSPO, with the specific RSPO-RED scheme".[550] Malaysia states that the ISCC "allows for the implementation and certification of sustainable, deforestation-free, and traceable supply-chains of feedstocks", and "[t]he European Commission recognised the 'ISCC EU' certification system in 2011. Since then, palm oil producers have been able to demonstrate compliance with the sustainability requirements of the RED I in all EU member States, by obtaining an 'ISCC EU' certificate."[551] Malaysia explains that a specific certification framework known as the "RSPO-RED" scheme had been set up by the RSPO for compliance with RED I. According to Malaysia, these alternatives are in place to pursue compliance with the sustainability criteria introduced under the RED I "and only minimally differs from the approach selected by the EU under the RED II with respect to ILUC".[552]

7.382. The European Union responds[553] that the RSPO-RED is a scheme set up in response to RED I, thus it only addresses DLUC and is irrelevant to ILUC. The European Union explains that ILUC needs to be addressed in addition to these schemes, precisely because the "sustainability criteria" (and thus the RED certification regime) are not designed to address ILUC. The European Union states that Malaysia does not explain how these alternatives could make an equivalent contribution to the objectives pursued as long as they do not address ILUC risks, nor what it means by "enhanced" in this context. It adds that insofar as this enhanced certification requirement would be confined to the evaluation of relevant land-use change within a given jurisdiction, "Malaysia's alternative with regard to certification does not take into account the fact that ILUC is global in nature and that different feedstocks have different ILUC risks."[554]

7.383. The Panel observes that Malaysia's third proposed alternative measure, i.e. certification by existing non-governmental organizations, also appears to be unrelated to the specific objective pursued by the 7% maximum share and the high ILUC-risk cap and phase-out. This proposed alternative also appears to be directed at *DLUC* associated with the production of *individual consignments* of crop-based biofuels, as opposed to constituting an alternative measure that would make an equivalent contribution to its chosen objective of limiting the risk of *ILUC*-related GHG emissions associated with crop-based biofuels. The principal difference between the second and third alternative measures appears to reside in which type of body (governmental or non-governmental) would be entrusted with certifying individual consignments. Given that the measures at issue have a focus that is different from the proposed alternative, the challenged measures would continue to be apt to make a material contribution to their objective if they operated alongside the proposed alternative. The third alternative therefore also appears to be complementary, and not a genuine alternative, to the EU measures at issue.

Fourth proposed alternative: market access quotas

7.384. Malaysia argues[555] that another alternative would have been for the European Union to have established a system of market access quotas. These quotas would have allowed the counting towards EU renewable energy targets up to the amount used in the European Union when the relevant feedstock exceeded the threshold for being considered as having a high ILUC risk, as set out in Article 3 of the Delegated Regulation. More specifically, Malaysia submits that the amounts to be considered eligible for a quota of the EU market for oil crop-based biofuels could have been calculated on the basis of the EU market share of each oil crop-based biofuel when the criteria for the determination of high ILUC-risk were first met. Malaysia argues that it is both illogical and unacceptably trade-restrictive to exclude the entire production of any particular oil crop-based biofuels once the rate of expansion into high-carbon stock land meets the threshold for being high ILUC risk, and thereafter make any amount of that feedstock that is to be counted towards the EU's renewable energy targets subject to low ILUC-risk certification. According to Malaysia, the practical implementation of this mechanism would be no harder for the European Union than what it often implements and has implemented in relation to many other agricultural commodities (e.g. bananas,

[550] Malaysia's first written submission, para. 658.
[551] Malaysia's first written submission, paras. 659-660.
[552] Malaysia's first written submission, para. 666.
[553] European Union's first written submission, paras. 944-948; and response to Panel question No. 122, paras. 688-690.
[554] European Union's response to Panel question No. 122, para. 690.
[555] Malaysia's first written submission, paras. 667-674; and second written submission, para. 214.

sugar, poultry, beef, etc.) through tariff-rate quotas and WTO-compatible import licensing procedures apportioning the quotas to individual producing countries.

7.385. The European Union responds[556] that maintaining quotas irrespective of the association of a certain oil crop biofuel feedstock to a certain advancement into high-carbon stock land would defeat the purpose of not incentivizing high ILUC-risk feedstocks. The European Union adds that this alternative of capping imports of high ILUC-risk biofuels at a certain level could be realized either by a system of import restrictions, which would be a violation of Article XI of the GATT 1994, or *de facto*, a system of TRQs coupled with out-of-quota prohibitive tariffs, which would violate the EU tariff schedule and therefore Article II of the GATT 1994. Therefore this alternative measure would be WTO-inconsistent and consequently is not available.

7.386. The Panel considers that Malaysia's fourth proposed alternative, i.e. maintaining a system of market access quotas that would allow biofuels containing high ILUC-risk feedstock to count towards EU renewable energy targets up to the amount consumed in the European Union when the relevant feedstock exceeded the threshold for being considered as having a high ILUC risk, as set out in Article 3 of the Delegated Regulation, would not make an equivalent contribution to the objective pursued as compared with the high ILUC-risk cap and phase-out. Malaysia's argument appears to rest on assumptions that the global demand for a particular feedstock (e.g. palm oil) remains fixed, whether it is used for biofuel production or other applications; that global demand for the corresponding biofuel (e.g. palm oil-based biofuel) also remains fixed with the exception of EU demand; and that the only variable that changes in a way that would be relevant to whether the feedstock (e.g. palm oil) crosses the threshold for being considered as high ILUC-risk is the level for EU demand for that particular biofuel (e.g. palm oil-based biofuel. Unless those assumptions are correct, then there is no basis to make the further assumption that where a relevant feedstock exceeds the threshold for being considered as having a high ILUC risk, this is the consequence of, or otherwise attributable to, the amount of the corresponding crop-based biofuel that was being consumed in the European Union at the time that the threshold was exceeded).

7.387. The Panel does not see the basis for these assumptions. It is not the case that the level of EU demand for a particular biofuel (e.g. palm oil-based biofuel) is the only variable that affects whether a feedstock crosses the threshold for being considered as high ILUC risk. This is because one cannot attribute a specific share of expansion to a particular driver of demand.[557] To the contrary, the expansion rate for a given feedstock (e.g. palm oil), which is the basis for the determination of whether that feedstock is determined to be high ILUC risk, is determined for the feedstock as a whole and irrespective of its use (e.g. food, cosmetics, biofuel, or other application), and is determined globally. The Panel therefore considers that the amount of consumption in the European Union at a given point in time would not be a good indicator of the extent to which EU demand for biofuels and palm oil feedstock may cause ILUC.

7.388. The Panel further observes that if Malaysia's argument was correct, such that a capping of EU demand for palm oil-based biofuel at a certain level should be expected to singularly halt or reverse the expansion rate of the corresponding feedstock in such a way as to reverse its classification as high ILUC risk, then this outcome should be expected to occur as a consequence of the European Union's cap and phase-out of its consumption of palm oil-based biofuel. If this outcome did materialize, then the review mechanism provided for in Article 7 of the Delegated Regulation should lead to palm oil-based biofuel no longer being classified as high ILUC risk.

Fifth proposed alternative: a sustainability certification scheme and requirements modelled on those adopted under CEPA

7.389. Malaysia argues[558] that another alternative measure would be "specific import requirements applied on a consignment basis", by which it means a measure akin to the sustainability certification scheme and requirements adopted under the Indonesia-EFTA CEPA. Malaysia explains that this trade agreement contains a Chapter on Trade and Sustainable Development and provides for an article on "Sustainable management of the vegetable oils sector and associated trade". In April 2021,

[556] European Union's first written submission, paras. 949-953; and response to Panel question No. 122, paras. 691-697.

[557] As further explained in the section addressing Malaysia's claim under Article 2.1 and more specifically whether the detrimental impact stems exclusively from a legitimate regulatory distinction.

[558] Malaysia's first written submission, paras. 675-681.

Switzerland adopted an "Ordinance on Preferential Importation of Sustainable Produced Palm Oil from Indonesia" that implements Article 8.10 of the Indonesia-EFTA CEPA for Switzerland, and Article 2 of the Ordinance lists four certification systems that will be recognized as proof of compliance with the sustainability objectives set out in Article 8.10 of the Indonesia-EFTA CEPA, namely (a) the RSPO "Identity Preserved" (RSPO IP); (b) the RSPO "Segregated" (RSPO SG); (c) the ISCC PLUS "Segregated"; and (d) the Palm Oil Innovation Group (POIG) certification combined with RSPO IP or RSPO SG. Malaysia submits that this alternative approach would also be less trade-restrictive because, instead of introducing anew a certification system based on an as yet undefined low-ILUC risk criteria and procedures, "it is based on already available and applied schemes of certification, which would only need to be enhanced to also address relevant land-use changes".[559]

7.390. The European Union responds[560] that this suggestion by Malaysia seems again to rely on sustainability criteria which do not encompass ILUC considerations, which comes as no surprise because Malaysia seems to constantly provide alternatives without considering the ILUC approach, together with the low ILUC-risk possibility. The European Union states that it would welcome clear explanations on how its concerns are addressed by this suggested "alternative", as the only reference to ILUC in Malaysia's submissions is to the fact that its proposal "is based on already available and applied schemes of certification, which would only need to be enhanced to also address relevant land-use changes".[561] The European Union recalls that the RED certification regime also applies on a consignment basis and also addresses sustainability criteria. The European Union states that "[u]nfortunately, it is irrelevant to ILUC and that is why additional considerations refined the European Union's approach."[562]

7.391. The Panel observes that Malaysia's fifth proposed alternative measure, i.e. a sustainability certification scheme and requirements modelled on those adopted under the Indonesia-EFTA CEPA, appears to be unrelated to the specific objective pursued by the 7% maximum share and the high ILUC-risk cap and phase-out. This proposed alternative, like the first, second and third proposed alternatives, also appears to be directed at *DLUC* associated with the production of *individual consignments* of crop-based biofuels, as opposed to constituting an alternative measure that would make an equivalent contribution to its chosen objective of limiting the risk of *ILUC*-related GHG emissions associated with crop-based biofuels. The Panel considers that for the same reasons given in respect of the first, second, and third proposed alternatives, the fifth alternative appears to be complementary, and not a genuine alternative, to the EU measures at issue.

Sixth proposed alternative: the EU approach applied in its deforestation-free initiative

7.392. In its first written submission, Malaysia refers to the legislative proposal by the Commission for its initiative on deforestation-free supply chains.[563] Malaysia argues that "[t]he policy choice of the EU in this instance, if confirmed in the measure that will eventually be adopted, is a DLUC approach, which vindicates the suggestion made above in terms of the available alternatives (e.g., FLEGT and IUU schemes)."[564] According to Malaysia, "[g]iven that the European Commission intends to specifically address 'deforestation caused by agricultural expansion' through future policy instruments based on a DLUC approach, this would render the EU's rationale for ILUC under the RED II obsolete."[565] In its second written submission, Malaysia identifies the deforestation-free initiative as an additional alternative measure.[566] Malaysia argues that unlike the measures at issue, this alternative measure does not provide for the exclusion of an entire crop, but only prohibits the placing on the EU market of the specific products that have contributed to deforestation and foresees related due diligence obligations for operators.

[559] Malaysia's first written submission, para. 679.
[560] European Union's first written submission, paras. 954-960; and response to Panel question No. 122, para. 698.
[561] Malaysia's first written submission, para. 679.
[562] European Union's first written submission, para. 959.
[563] Malaysia's first written submission, paras. 75, 634, and 688-689.
[564] Malaysia's first written submission, para. 689.
[565] Malaysia's first written submission, para. 689.
[566] Malaysia's second written submission, paras. 228-230.

7.393. The European Union responds[567] that differences in scope and approach between that newly proposed instrument and the measures at issue make clear that it is not itself a reasonably available alternative measure. According to the European Union, the deforestation initiative is "radically different from RED II, the Delegated Regulation and the Status Report", and such differences have important implications for the purported alternatives.[568] The European Union submits that it has explained in detail why the sustainability criteria applying a DLUC approach were not sufficient to address ILUC, and that the sustainability criteria found in Article 29 RED II do not address ILUC.

7.394. The Panel observes that Malaysia's sixth proposed alternative measure i.e. prohibiting the placing on the EU market of the specific products that have contributed to deforestation based on the "DLUC" approach reflected in the EU deforestation initiative, may be understood as being indirectly related to the specific objective pursued by the 7% maximum share and the high ILUC-risk cap and phase-out. The Panel accepts that the ILUC of one agricultural activity is always the DLUC of another agricultural activity. The Panel therefore accepts that a comprehensive system of regulating the *DLUC*-related impact of products *other than biofuels*, including DLUC in the form of deforestation, could potentially contribute to limiting the risk of *ILUC*-related GHG emissions associated with *crop-based biofuels*.

7.395. However, such a measure would not negate or render redundant or immaterial the contribution that the 7% maximum share and the high ILUC-risk cap and phase-out make to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The reason is that only a fraction of the agricultural products produced in the world are imported to and consumed in the European Union and would therefore be subject to the EU deforestation-free initiative. Thus, for this measure to be a real alternative that would be capable of rendering the EU rationale for limiting ILUC-related GHG emissions associated with crop-based biofuels "obsolete",[569] at a minimum all countries in the world would have to create and administer the same scheme. Until such time as all countries adopt a uniform scheme to regulate the DLUC of all agricultural products and ban any further crop expansion into non-agricultural land, measures like the deforestation-free initiative will remain a complementary measure, and not a genuine alternative, to the 7% maximum share and the high ILUC-risk cap and phase-out.

7.1.2.3.6.3 Conclusion on the proposed alternative measures

7.396. The Panel finds that none of the alternative measures put forward by Malaysia demonstrate that the 7% maximum share and the high ILUC-risk cap and phase-out are more trade-restrictive than necessary to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.1.2.3.7 Conclusion on Article 2.2

7.397. The Panel therefore concludes 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 in Article 2.2 of the TBT Agreement to ensure that technical regulations are not more trade-restrictive than necessary to fulfil a legitimate objective.

7.398. One panelist has reached a different conclusion, as set out in section 7.4 of this Report.

7.1.2.4 Article 2.1 - Non-discrimination

7.1.2.4.1 Introduction

7.399. The Panel now turns to the claim under Article 2.1 of the TBT Agreement. The Panel addresses this claim in light of its findings under Articles 2.2 and 2.4, for reasons already set out in the Panel's discussion of its order of analysis.

[567] European Union's first written submission, paras. 905-917; and response to Panel question No. 122, paras. 682-684.

[568] European Union's first written submission, paras. 916-917.

[569] Malaysia's first written submission, para. 689.

7.400. Malaysia submits[570] that the European Union violates the national treatment and the MFN obligations under Article 2.1 because the high ILUC-risk cap and phase-out discriminates between oil palm crop-based biofuel from Malaysia and like oil crop-based biofuel of EU origin, as well as among like oil crop-based biofuels of different foreign origin. More specifically, Malaysia claims that the high ILUC-risk cap and phase-out limits and eventually excludes the eligibility of palm oil-based biofuel to count towards EU renewable energy targets, while allowing biofuel made from rapeseed oil and soybean oil to count towards these targets within the 7% maximum share. Malaysia argues that the detrimental impact on palm oil-based biofuel does not stem from a legitimate regulatory distinction.

7.401. The European Union submits[571] that the challenged measure does not discriminate against imported products and that any difference in treatment between products stems exclusively from a legitimate regulatory distinction. More specifically, the European Union contests that palm oil-, rapeseed oil- and soybean oil-based biofuels are like products or that the measure adversely affects the competitive opportunities for palm oil-based biofuel on the EU market. The European Union adds that, in any event, any detrimental impact on palm oil-based biofuel stems exclusively from a legitimate regulatory distinction based on the risk of ILUC-related GHG emissions associated with the production of palm oil.

7.1.2.4.2 Legal standard

7.402. Article 2.1 sets forth the obligation that:

> 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.

7.403. Article 2.1 has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to these prior cases.

7.404. According to the text of Article 2.1, it must be established in respect of a technical regulation that:

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 favourable than accorded to like domestic products and like products from other countries.[572]

7.405. Regarding the last element of this legal test, a panel considering a claim under Article 2.1 should seek to ascertain "whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products or like products originating in any other country".[573] However, a finding of a detrimental impact alone is not dispositive of less favourable treatment under Article 2.1. Instead, when assessing a claim under this provision a panel must further analyse whether the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction.[574]

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[570] Malaysia's first written submission, paras. 522-585; second written submission, paras. 240-244; responses to the Panel's questions, pp. 46-55 and 57-69; and comments on the European Union's responses to the Panel's questions, pp. 160-168 and 172-182.

[571] European Union's first written submission, paras. 599-769; second written submission, paras. 60-101; responses to the Panel's questions, paras. 437-465, 471-474, 476-482 and 484-517; and comments on Malaysia's responses to the Panel's questions, paras. 184-198 and 211-222.

[572] Appellate Body Reports, *US – Clove Cigarettes*, para. 87; *US – COOL*, para. 267; and *US – Tuna II (Mexico)*, para. 202.

[573] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 215; and *US – Clove Cigarettes*, para. 180.

[574] Appellate Body Reports, *US – Clove Cigarettes*, para. 182; *US – Tuna II (Mexico)*, para. 215; *US – COOL*, para. 271; and *EC – Seal Products*, para. 5.311.

7.406. As a general matter, the parties do not contest the legal standard developed under Article 2.1.[575] In the absence of any disagreement between the parties, the Panel proceeds on the same understanding of the applicable legal standard.

7.407. The Panel will therefore elaborate further on the elements of the legal standard as necessary in the course of its assessment of the issues in dispute.

7.1.2.4.3 Like products

7.408. Malaysia submits that the high ILUC-risk cap and phase-out discriminates against palm oil-based biofuel, which is like other oil crop-based biofuels, in particular those made from rapeseed oil and soybean oil.[576] Malaysia argues that all three types of oil crop-based biofuels share the same or similar basic physical characteristics and end-uses, and that this similarity is also reflected in consumer tastes and habits as well as in the tariff classification.[577]

7.409. The European Union contends that Malaysia has failed to properly identify the universe of like products by unduly limiting the scope of the likeness analysis to palm oil-, rapeseed oil- and soybean oil-based biofuels.[578] The European Union further contests that palm oil-based biofuel is like biofuel made from rapeseed oil or soybean oil due to different physical characteristics, end-uses or consumer tastes and habits.[579] The European Union also makes an alternative argument that if the Panel were to find rapeseed oil- and soybean oil-based biofuels to be like palm oil-based biofuel, then other biofuels made from sunflower oil, waste material and animal fat would also be like products.[580]

7.1.2.4.3.1 Preliminary considerations

7.410. The Panel considers it useful to briefly explain at the outset certain characteristics of biofuels, and related terminology, that are relevant to the analysis that follows. The Panel then turns to the disputed issue of whether, for the purposes of the likeness analysis in this claim, Malaysia has properly identified the "universe of like products".[581] After setting forth these preliminary considerations, the Panel turns to the disputed issue of whether palm oil-, rapeseed oil- and soybean oil-based biofuels are like products.

Characteristics of biofuels

7.411. The general category of oil crop-based biofuels refers to biofuels that are made from vegetable or tropical oils obtained from various food and feed crops, including oil palm, soybean, rapeseed, sunflower, etc.[582] They undergo a process called transesterification, which consists of mixing the fatty acids in oil of vegetable or animal origin with alcohol and a catalyst.[583] Biofuel produced through this method is called biodiesel and has a chemical composition of a fatty acid methyl ester (FAME).[584] Biodiesel (or FAME) made from palm oil is called palm methyl ester (PME);

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[575] Malaysia's first written submission, para. 524; European Union's first written submission, para. 601. In its third-party submission, the United States expresses the view that the legal standard developed under Article 2.1, and in particular the requirement that any detrimental impact on imported products "stem exclusively from" a legitimate regulatory distinction, has no basis in the text of the TBT Agreement and significantly narrows the scope of regulatory action permitted under the Agreement. In its view, a measure is not inconsistent with Article 2.1 or Article III:4 if the detrimental impact experienced by imports is explained by factors unrelated to the foreign origin of the product. (United States' third-party submission, paras. 11-20).

[576] Malaysia's first written submission, para. 536.

[577] Malaysia's first written submission, paras. 536-546; responses to Panel questions Nos. 75-85; and comments on the European Union's response to Panel question No. 81.

[578] European Union's first written submission, paras. 610-628; and second written submission, para. 69.

[579] European Union's first written submission, paras. 630-676; second written submission, paras. 70-74; and responses to Panel question Nos. 84-85.

[580] European Union's second written submission, paras. 615 and 621.

[581] The Panel's finding in this regard will also be relevant for the assessment of other claims of discrimination made by Malaysia, where the European Union raises the same issue.

[582] UFOP Global Market Supply 2019/2020, (Exhibits EU-121, MYS-212), p. 27.

[583] European Technology and Innovation Platform, "Transesterification to biodiesel", (Exhibit MYS-113), p. 2. Feedstocks for the production of biodiesel include not only vegetable oils, but also other feedstocks of organic origin, such as used cooking oil (UCO) or animal fat.

[584] This is the case if methanol is used as the catalyst. European Technology and Innovation Platform, "Transesterification to biodiesel", (Exhibit MYS-113), p. 2.

when made from rapeseed oil is called rapeseed methyl ester (RME); and when made from soybean oil is called soybean methyl ester (SBME).[585]

7.412. Biodiesel can also be made from animal fat and waste material, such as used cooking oil.[586] Biodiesel, frequently a mix of various biofuels, is blended with diesel, which is then sold as transport fuel. Biodiesel should be distinguished from bioethanol, which is made from sugar-rich and starch-rich crops through the fermentation process of sugars contained in these plants.[587] Unlike biodiesel, bioethanol is mixed with petrol.

7.413. Oil crops are also used as feedstocks for the production of hydrotreated vegetable oil (HVO) or biomass-to-liquids biofuels (BTL). HVO is produced through the process of hydrogenation, whereby oxygen is separated from the triglyceride of the oil through the use of hydrogen.[588] Unlike biodiesel, the chemical composition of HVO is similar to diesel fuel. As a result, HVO is particularly suitable to replace diesel fuel and it is sometimes referred to as "renewable diesel" or "green diesel".[589] In order to produce BTL, biomass is converted to syngas through decomposition and gasification, which is then catalytically converted into alkanes through the Fischer-Tropsch synthesis.[590]

Identification of the universe of like products

7.414. Malaysia's claim under Article 2.1 concerns the treatment of imported palm oil-based biofuel as compared with the treatment of like rapeseed oil- and soybean oil-based biofuel of EU or foreign origin. Although Malaysia refers in its submissions in general terms to "oil crop-based biofuels", it confirms that the focus of its claim is the treatment of PME, as compared to RME and SBME, which it refers to interchangeably with oil palm crop-based biofuel, rapeseed oil crop-based biofuel and soybean oil crop-based biofuel.[591]Malaysia further explains that HVO can be made from all oil crop biofuel feedstocks interchangeably.[592]

7.415. The European Union takes issue with Malaysia's identification of the universe of like products. According to the European Union, Malaysia has unduly limited the likeness analysis to a subset of biofuels that "according to [Malaysia's] own logic should have been included in the universe of like products".[593] Relying on the Appellate Body's ruling in *US – Clove Cigarettes*, the European Union submits that a proper likeness analysis should involve the "universe" of like products, going beyond the products identified by Malaysia.[594] This universe is determined, based on the competitive relationship between and among products and extends beyond palm oil-, rapeseed oil- and soybean oil-based biofuels.[595] According to the European Union, Malaysia fails to explain the exclusion from the likeness analysis of a number of products, such as HVO and biofuels made from certain other vegetable and tropical oils, animal fat and waste material.[596] The European Union submits that comparing the treatment of only certain selected like products distorts the outcome of the analysis by failing to reflect the measure's overall impact on like products imported from Malaysia and like

[585] Soybean methyl ester oil is also sometimes abbreviated as "SME". In this dispute, the Panel uses the term SBME to avoid confusion with sunflower methyl ester.

[586] European Technology and Innovation Platform, "Transesterification to biodiesel", (Exhibit MYS-113), p. 2.

[587] T. Seljak, M. Buffi, A. Valera-Medina, C.T. Chong, D. Chiaramonti, T. Katrasnik, "Bioliquids and their use in power generation – A technology review", Renewable and Sustainable Energy Reviews 129 (2020) 109930, (Exhibit EU-261), p. 6.

[588] Greenea, "Is HVO the Holy Grail of the world biodiesel market?", (Exhibit MYS-14), p. 2.

[589] Greenea, "Is HVO the Holy Grail of the world biodiesel market?", (Exhibit MYS-14), p. 2.

[590] Greenea, "Is HVO the Holy Grail of the world biodiesel market?", (Exhibit MYS-14), p. 2.

[591] Malaysia's responses to Panel question No. 75 and comments on the European Union's responses to Panel question No. 81.

[592] Malaysia's response to Panel question No. 75.

[593] European Union's first written submission, paras. 612 and 628.

[594] European Union's first written submission, paras. 608-609; and comments on Malaysia's response to Panel question No. 83, para. 194 (referring to Appellate Body Report, *US – Clove Cigarettes*, paras. 191-192).

[595] European Union's first written submission, paras. 609-624; and comments on Malaysia's response to Panel question No. 83, para. 194.

[596] European Union's first written submission, paras. 613-618 and 624-625.

products of EU and foreign origin.[597] In that respect, the European Union points out that palm oil-based HVO represents up to 10% of EU-produced biodiesel.[598]

7.416. Malaysia rejects the European Union's argument that it has incorrectly identified the like products to be compared.[599] According to Malaysia, it is appropriate to focus the analysis of like products on the three types of biofuels, namely those made from palm oil, rapeseed oil and soybean oil, whether in the form of FAME or HVO.[600] Malaysia maintains that sunflower oil has been used only marginally to produce biofuel in EU member States and omitting that product from the analysis is clearly reasonable.[601]

7.417. The Panel considers that a complainant has a degree of leeway in how it frames its claim under Article 2.1, including the identification of the imported and domestic products to compare. However, this does not mean that a complainant's choice of products to compare for the purposes of a likeness analysis is free of any scrutiny. It cannot be excluded that in particular factual circumstances a complainant might identify only an artificially defined subset of like products to compare in a manner that could distort the picture of the adverse impact of the measure on the groups of like products as it has defined them. This seems to be the concern that was recognized by the Appellate Body in *US – Clove Cigarettes*, which the European Union relies on[602], when stating that "a panel is not bound by its terms of reference to limit its analysis to those products identified by the complaining Member".[603] Accordingly, a panel must be able to look beyond the like products identified by the complainant to determine which domestic products and products of foreign origin are in a sufficiently close competitive relationship with the products imported from the complaining Member to be considered like.[604]

7.418. However, the Panel does not consider that Malaysia's identification of the products to compare for the purposes of its claim under Article 2.1 is geared towards artificially skewing the outcome of the assessment. It is uncontested by the parties that the European Union's imports of biofuel from Malaysia consists exclusively of oil palm crop-based biofuel, and more specifically PME.[605] Nor do the parties contest that the European Union produces and imports from other countries biofuel made from rapeseed oil, soybean oil and palm oil.[606] Under these circumstances, and especially given that Malaysia does not produce on a commercial scale biofuel made from other feedstocks than palm oil, it is not clear how including biofuels made from other feedstocks than palm oil, rapeseed oil and soybean oil in the assessment of less favourable treatment would artificially skew the outcome of the assessment.[607]

7.419. The Panel further considers inapposite the European Union's reliance on the Appellate Body report in *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, which, in the European Union's view, stands for the proposition that a likeness analysis must comprise the "universe of like products".[608] In that dispute, the Appellate Body faulted the panel not for a failure to assess whether all products that are potentially in a competitive relationship are like, but for limiting the comparison of the treatment accorded by the measure to a subset of the products the panel found to be like.[609] The Appellate Body's findings thus concern a different type of situation and do not support the

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[597] European Union's first written submission, para. 619.
[598] European Union's first written submission, para. 618.
[599] Malaysia's first written submission, para. 59; and second written submission, para. 240.
[600] Malaysia's second written submission, para. 60.
[601] Malaysia's second written submission, para. 61.
[602] Appellate Body Report, *US – Clove Cigarettes*, paras. 191-194.
[603] Appellate Body Report, *US – Clove Cigarettes*, para. 191.
[604] Appellate Body Report, *US – Clove Cigarettes*, para. 191.
[605] Malaysia's response to Panel question No. 83, pp. 52-53; European Union's first written submission, paras. 1168-1172.
[606] Malaysia's response to Panel question No. 83; European Union's response to Panel question No. 83, para. 457.
[607] The Appellate Body arrived at a similar conclusion in *US – Clove Cigarettes* based on the factual circumstances established by the panel. (Appellate Body Report, *US – Clove Cigarettes*, para. 200.)
[608] European Union's first written submission, para. 612.
[609] Although, the panel found that US tuna products and tuna products originating in other countries are like, the panel considered the impact of the measure only on Mexican tuna products made from tuna caught through other methods than setting on dolphins with the impact of the measure on US or other origin tuna products made from tuna caught through other methods than setting on dolphins. (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.70.)

European Union's contention that a complainant is obliged, as a general matter, to identify the "universe of like products".

7.420. The Panel notes that the European Union argues that, if the Panel were to find rapeseed oil- and soybean oil-based biofuel to be like palm oil-based biofuel, then other biofuels made from sunflower oil, waste material and animal fat would also be like products.[610] However, the Panel considers that the European Union has not substantiated this contention with sufficient arguments or evidence. The European Union refers in general terms to certain characteristics of HVO, references findings in a merger decision and a trade defence measure that HVO and FAME are interchangeable, refers to a US government report finding that FAME faced strong competition from HVO and relies on data showing an increase in the use of waste material and animal fat as biofuel feedstock to argue that they compete with PME, SBME and RME.[611] Other than that, however, the European Union fails to seriously engage in a discussion on whether any of these products is like palm oil-based biofuel.

7.421. The Panel concludes that for the purposes of its claim under Article 2.1, Malaysia may limit the scope of its "like products" demonstration to a comparison of biofuels made from rapeseed oil and soybean oil with palm oil-based biofuel as regards both FAME and HVO.

7.1.2.4.3.2 The likeness analysis

7.422. The parties agree that similarly to Articles I:1 and III:4, the likeness analysis under Article 2.1 entails a determination of the "nature and extent of a competitive relationship between and among products".[612] Both parties also rely in their submissions on four criteria relevant for the assessment of like products:

a. physical properties of the products;

b. the extent to which the products can serve the same or similar end-uses;

c. consumers' perception of the products as alternatives; and

d. the tariff classification of the products.[613]

7.423. Indeed, when called upon to assess whether products are like in the context of non-discrimination obligations, panels and the Appellate Body have frequently relied on the above-listed four criteria developed in the Report of the Working Party on Border Tax Adjustments.[614] They have done so when considering claims under Articles I:1 and III of the GATT 1994, and also when considering claims under Article 2.1 of the TBT Agreement.[615]

7.424. The Panel will follow the same general approach, bearing in mind that the notion of "like products" may vary depending on the specific obligation at issue[616] and that the four likeness criteria are neither "treaty-mandated" nor a "closed list of criteria" for determining the legal characterisation of products.[617] The Panel's determination whether products are like thus has to be based on all of the pertinent evidence relating to each of the four criteria, none of which is determinative for the Panel's conclusion.[618] The Panel should consider them in a holistic manner, while remaining mindful that:

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[610] European Union's second written submission, paras. 614-615 and 621.

[611] European Union's first written submission, paras. 615-622, and response to Panel question No. 81, para. 449.

[612] Malaysia's first written submission, para. 528 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 120). European Union first written submission, para. 637.

[613] Malaysia's first written submission, para. 530 (referring to Appellate Body Report, *EC – Asbestos*, para. 101). European Union first written submission, para. 637.

[614] Appellate Body Report, *EC – Asbestos*, para. 85; Panel Report, *US – Clove Cigarettes*, para. 7.121.

[615] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.281

[616] Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 21; *EC – Asbestos*, para. 102; and Panel Report, *US – Clove Cigarettes*, para. 7.122.

[617] Appellate Body Report, *EC – Asbestos*, para. 101.

[618] Appellate Body Report, *EC – Asbestos*, paras. 101-103. See also Ecuador's third-party submission, pp. 17-18.

> In many cases, the evidence will give conflicting indications, possibly within each of the four criteria. For instance, there may be some evidence of similar physical properties and some evidence of differing physical properties. Or the physical properties may differ completely, yet there may be strong evidence of similar end uses and a high degree of substitutability of the products from the perspective of the consumer.[619]

7.425. The overarching question is thus whether the degree of competition between the products is sufficiently close to regard them as like. The Appellate Body recognized in this regard that "[t]here is a spectrum of degrees of "competitiveness" or "substitutability" of products in the marketplace, and that it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word like in Article III:4 of the GATT 1994 falls". [620] The Appellate Body also found that "Article 2.1 requires the panel to identify the domestic products that stand in a sufficiently close competitive relationship with the products imported from the complaining Member to be considered like products within the meaning of that provision".[621]

7.426. Having recalled the applicable legal principles that will guide its analysis, the Panel turns to the analysis of various aspects of the competitive relationship between palm oil-based biofuel and rapeseed oil- and soybean oil-based biofuel.

Physical properties

7.427. Malaysia submits that PME, RME and SBME share a number of similar physical characteristics and have the same chemical structure of FAME.[622] With respect to the CFPP, Malaysia argues that "any difference in FAME's CFPP values can easily be compensated either by mixing different types of biodiesels or by using additives in pure biodiesel, in particular during wintertime".[623] The European Union argues that the characteristics relevant to assessing whether palm oil-based biofuel, rapeseed oil-based biofuel and soybean oil-based biofuel are like include the CFPP, the cetane number and the iodine value.[624] The European Union considers that Malaysia has failed to explain if the FAME blends used in Northern Europe include palm oil at all and how many countries are concerned and if palm oil based biofuel can fully replace other biofuels in FAME blends in Southern Europe.[625]

7.428. The Panel observes that biodiesel, or FAME, is characterized by the basic chemical composition of monoalkyl esters of long-chain fatty acids derived from vegetable oils or animal fats.[626] The exact chemical composition of this type of biofuel is dependent on the fatty acid composition of the feedstock and determines some of the fuel's properties.[627] However, the fact that the three biodiesel fuels are made from different feedstocks could only be relevant to the Panel's analysis insofar as it affects the competitive relationship between the final products.[628]

7.429. It is uncontested between the parties that PME, RME and SBME share the basic chemical composition of FAME. Where the parties' views differ is the significance of the differences in certain specific properties of the three biofuels. For the purposes of addressing these arguments, Table 3 provides an overview of the various relevant biofuels' basic physical and chemical properties, followed by a brief explanation provided by Malaysia.

Table 3: Physical properties of PME, RME and SBME[629]

Properties	PME	RME	SBME
CN	62	56-61	48-56
ΔH (kJ kg-)	37400-38320	37300-37780	39720-40080

[619] Appellate Body Report, *EC – Asbestos*, para. 120.
[620] Appellate Body Report, *EC – Asbestos*, para. 99.
[621] Appellate Body Report, *US – Clove Cigarettes*, para. 191.
[622] Malaysia's first written submission, para. 537.
[623] Malaysia's second written submission, para. 70.
[624] European Union's response to Panel question No. 81, paras. 451-454.
[625] European Union's first written submission, para. 648.
[626] Moser, "Biodiesel Production, Properties, and Feedstocks", (Exhibit MYS-119), p. 286.
[627] Moser, "Biodiesel Production, Properties, and Feedstocks", (Exhibit MYS-119), p. 287.
[628] Panel Reports, *Philippines – Distilled Spirits*, para. 7.37.
[629] Malaysia's first written submission, para. 537.

Properties	PME	RME	SBME
CP(°C)	15 ± 1	0 ± 1	1± 1
PP(°C)	-9 ± 1	-9 ± 1	-5 ± 1
CFPP(°C)	12 ± 1	-7 ± 1	-4 ± 1
OSI(h)	10.3± 0.1	6.4 ± 0.1	5.0 ± 0.1
V ($mm^{-2}s^{-1}$)	4.58 ± 0.01	4.42 ± 0.01	4.12 ± 0.01
lub (μm)	126 ± 1	169 ± 1	136 ± 3
AV (mg of KOH g-1)	0.01 ± 0.01	0.01 ± 0.01	0.04 ± 0.01
Iodine value	54	110	134

7.430. Malaysia explains the different characteristics of biodiesel as follows:

> Cetane number (CN) is the ability of fuel to ignite quickly after injection. The higher value the better [ignition] of fuel. This is an important parameter considered during selection of FAMEs for use as biodiesel. CN is included in a fuel quality specification in petroleum diesel standard. CN of oil palm crop-based biodiesel is higher than that of the standard number (>51), because palm oil and palm kernel oil are rich in saturated fatty acids. The [cold flow properties include] three important parameters for low temperature characteristics of biodiesel fuel, namely, CP (cloud point), PP (pour point) and CFPP (cold filter plugging point). At the cloud point (CP), the crystals first become visible as cloud when fuel is cooled under the conditions described by ASTM D2500-09 or ISO 3015:1992. The pour point (PP) is the lowest temperature at which fuel can flow and the amount of wax that crystallizes is sufficient to gel the fuel. Viscosity (V) is one of the most important properties of biodiesel. Viscosity influences the ease of starting the engine, the spray quality, the size of the particles (drops), the penetration of the injected jet and the quality of the fuel-air mixture combustion. Fuel viscosity has both an upper and a lower limit. Fuel with a too low viscosity provides a very fine spray, the drops having a very low mass and speed. This leads to insufficient penetration and the formation of black smoke specific to combustion in the absence of oxygen (near the injector). A too viscous biodiesel leads to the formation of large drops, which will penetrate the wall opposite to the injector. Lubricity describes the ability of the fuel to reduce the friction between surfaces that are under load. This ability reduces the damage that can be caused by friction in fuel pumps and injectors. Lubricity is an important consideration when using low and ultra-low sulfur fuels. Biodiesel may be used as a lubricity improver. Biodiesel quality can be affected by oxidation during storage (in contact with air) and hydrolytic degradation (in contact with water). The two processes can be characterised by the oxidative stability and hydrolytic stability of the biodiesel. Biodiesel oxidation can occur during storage while awaiting distribution or within the vehicle fuel system itself. The stability of biodiesel can refer to two issues: long-term storage stability or aging and stability at elevated temperatures or pressures as the fuel is recirculated through an engine's fuel system. The iodine value is a measurement of total unsaturation of fatty acids measured in g iodine/100 g of biodiesel sample, when formally adding iodine to the double bonds. Biodiesel with high iodine value is easily oxidized in contact with air.[630]

7.431. In the Panel's view, it follows from the above overview that a number of physical characteristics of PME, RME and SBME, while not identical, are similar. This includes the properties particularly relevant to the products' nature as a biofuel, such as viscosity, density, and flash point. The Panel notes that the European Union does not explain why properties other than CFPP, cetane number and iodine value would not be relevant to the assessment whether the biofuels at issue are like. Ignoring these similarities, would run counter to the established practice of holistically assessing whether two or more products are like based on the totality of evidence before the Panel.[631] Finally, the Panel will consider the significance of the differences in certain physical properties, such as CFPP, when assessing their impact on end-uses and consumer perceptions of PME, RME and SBME.

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[630] Malaysia's first written submission, fn 393.
[631] Appellate Body Reports, *EC – Asbestos*, para. 114.

End-uses

7.432. Having considered the physical properties of biofuels, the Panel now turns to the main disputed issues pertaining to the second criterion, which is the extent to which the different products can serve the same or similar end-uses.[632]

7.433. The core differences that are the focus of the parties' arguments relate to the cold flow properties, in particular the CFPP, as well as the iodine value and cetane number. Malaysia argues that such differences do not significantly affect the competitive relationship between the three biofuels, especially because they are usually blended together and into diesel fuel.[633] Malaysia adds that it does not need to show that the products are suitable for all consumers or that they actually compete in the entire market.[634] The European Union submits that the differences in the characteristics of PME, RME and SBME, especially with regard to cold flow properties, are material and affect their end-uses.[635]

7.434. The Panel notes that the parties do not dispute that PME, RME and SBME are all primarily used as biofuel mixed with diesel transport fuel, in addition to certain other applications.[636] Where the parties disagree is the extent of substitutability between the three types of biofuel.

7.435. The European Union argues that due to a higher CFPP value of PME, its substitutability with RME and SBME is limited, including when blended.[637] The European Union relies in this regard on the EU and EU member States' standards setting out the CFPP requirements for FAME. The European Union points out that the FAME 0 blend with a CFPP of 0°C, the most common biofuel blend on the EU market, can contain no more than 20% of PME.[638] The European Union further submits that the use of PME as biofuel is very low in certain EU member States with colder climates, such as Austria, Denmark or the Czech Republic.[639]

7.436. Malaysia maintains that any differences in cold flow properties could be addressed either through mixing with other biofuels or additives.[640] Malaysia points out in this regard that the European Commission's findings in an anti-dumping investigation into the imports of biodiesel from the United States considered the differences in CFPP to be "minor" and could "easily be compensated either by mixing different types of biodiesel or by using additives".[641]

7.437. The Panel considers that the evidence submitted by the parties confirms that low-temperature operability is an important factor to be considered for the use of biofuel in diesel engines in colder climates.[642] The CFPP is the lowest temperature at which a given volume biodiesel flows through a wire mesh filter.[643] Below that temperature, solid particles crystalize in the fuel and plug

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[632] The Panel notes that evidence relating to certain aspects of a product could be relevant to more than one likeness criterion, and the physical property of a product may "shape and limit" its end-uses (Appellate Body Reports, *US – Clove Cigarettes*, para. 126; and *EC – Asbestos*, para. 102.) To the extent that the physical properties of PME, RME and SBME "shape and limit" their end-uses, the Panel's assessment of the other likeness criteria will be of particular relevance for determining the significance of the similarities and differences in the products' physical properties.

[633] Malaysia's first written submission, para. 538; and response to Panel question No. 85, p. 55.

[634] Malaysia's first written submission, para. 534. (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 142 and *Philippines – Distilled Spirits*, para. 220).

[635] European Union's first written submission, paras. 644-656.

[636] Malaysia's first written submission, para. 540. European Union's response to Panel question No. 77, para. 439.

[637] European Union's first written submission, para. 645. Although the European Union makes these arguments in the context of the products' physical properties, the Panel understands that to the extent that they concern the use of biofuels in FAME blends in different countries, they are equally relevant to the products' end-uses.

[638] European Union's first written submission, para. 649.

[639] European Union's first written submission, para. 658.

[640] Malaysia's first written submission, paras. 146-147.

[641] Malaysia's first written submission, para. 538 (referring to Commission Regulation (EC) 193/2009, (Exhibit EU-134)).

[642] Moser, "Influence of Blending Canola, Palm, Soybean, and Sunflower Oil Methyl Esters on Fuel Properties of Biodiesel", (Exhibit EU-138), p. 4304.

[643] Moser, "Biodiesel Production, Properties, and Feedstocks", (Exhibit MYS-119), p. 301.

the fuel filter, rendering the engine inoperable.[644] As a result, and as argued by the European Union, PME is less commonly used as biofuel in colder climates than RME and SBME and, by implication, not fully substitutable with the latter two products in certain geographical areas.[645] However, in other areas, such as western and southern Europe (including France, Netherlands, Spain, and Italy), PME is more frequently used.[646] The Panel notes in this regard that the measure at issue does not distinguish between different parts of the European Union, but applies uniformly to the entirety of its territory.

7.438. In addition the Panel observes that biofuels are commonly used with various additives such as flow improvers enhancing the operability of biofuels and the scope of the degree of substitution.[647] The Panel notes the European Union's argument that blending biofuels or mixing them with additives to obtain fuel suitable for use in transport in certain conditions suggests that they have different properties and qualities.[648] The Panel cannot, however, ignore the fact that PME, RME, and SBME, even if combined with additives, all are used nearly exclusively for transport fuel. Moreover, the Panel notes that in warmer climates, PME, RME and SBME are nearly perfect substitutes and demonstrate a very high degree of competition.

7.439. Regarding the differences in the cetane number, which reflects the fuel's ability to ignite, studies and research papers submitted by the parties show that some quantities of SBME can in fact meet the minimum value prescribed by the EU standard EN 14214.[649] In addition, the cetane number of SBME can be increased through a specific design of the distillation process or the use of so-called cetane boosters.[650]

7.440. As for the iodine value, which relates to fuel's oxidation stability, the evidence relied on by the European Union confirms that SBME does not comply with the iodine value in the EU standard EN 14214 for biodiesel, but notes that "the incentives persist to maximize the use of S[B]ME and PME due to their lower cost".[651] This indicates that PME, RME and SBME compete as biofuels regardless of the differences in the iodine values. The Panel also notes that in the context of a trade remedy investigation, the European Union itself found that iodine values of rapeseed oil and soybean oil (which determine the iodine value of the biofuel) "correlate to some extent".[652]

7.441. Indeed, both PME and SBME have been imported into and produced in the European Union in significant quantities primarily for the use as biofuel.[653] This would not have been the case had

[644] Moser, "Influence of Blending Canola, Palm, Soybean, and Sunflower Oil Methyl Esters on Fuel Properties of Biodiesel", (Exhibit EU-138), p. 4304.

[645] Biofuel supply data reported under the Fuel Quality Directive and submitted by the European Union shows that PME was either not supplied as fuel at all, or supplied in limited quantities, in Austria (3.2% of total FAME), the Czech Republic (0.8% of total FAME) and Denmark (none). (See Austria's reporting under Article 7a of the Fuel Quality Directive for 2019, (Exhibits EU-141, p. 56); Czech Republic's reporting under Article 7a of the Fuel Quality Directive for 2019, (Exhibit EU-142), pp. 56-57; and Denmark's reporting under Article 7a of the Fuel Quality Directive for 2018, (Exhibit EU-143), pp. 56-71.

[646] USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit EU-128), p. 31.

[647] Arbeitsgemeinschaft Qualitätsmanagement Biodiesel e.V., "Cold Properties of Biodiesel", (Exhibit EU-140), pp. 1-2.

[648] Arbeitsgemeinschaft Qualitätsmanagement Biodiesel e.V., "Cold Properties of Biodiesel", (Exhibit EU-140), pp. 2-3.

[649] Depending on the study, the cetane number of SBME varies between 48-56, 37-52, and 48-52. (See Moser, "Influence of Blending Canola, Palm, Soybean, and Sunflower Oil Methyl Esters on Fuel Properties of Biodiesel", (Exhibit EU-138), p. 4303; K. Azly Zahan and M. Kano, "Biodiesel Production from Palm Oil, Its By-Products, and Mill Effluent: A Review", Energies, Vol. 11 (2018), 2132, (Exhibit MYS-20), p. 9; and Eni press release of 15 April 2021: "Eni: New Systems Installed at the Venice Biorefinery to Eliminate Palm Oil Entirely", EU-146, p. 4.)

[650] Concawe, "Guidelines for handling and blending FAME", (Exhibit MYS-123), p. 10.

[651] USDA FAS, "GAIN, Biofuels Annual: European Union", 22 June 2021, (Exhibit EU-131), p. 29.

[652] Commission Regulation (EC) 193/2009, (Exhibit EU-134), p. 26.

[653] In 2018 and 2019, palm oil was the third most-used feedstock for the production of biodiesel, as distinguished from HVO, in the European Union, following rapeseed oil and UCO. (ETC/CME Eionet Report, Greenhouse gas intensities of road transport fuels in the EU in 2018 - Monitoring under the Fuel Quality Directive, November 2020, (Exhibit EU-132), p. 9; and ETC/CME Eionet Report, Greenhouse gas intensities of transport fuels in the EU in 2019 - Monitoring under the Fuel Quality Directive, October 2021, (Exhibit EU-133), p. 9.) The volume of biodiesel imports to the European Union fluctuated over the years due to trade defence measures imposed by the European Union on the imports of biodiesel from, among other countries, Argentina and Indonesia. It is notable that biodiesel imported from these two countries to the European Union, which is

there been no or only limited substitution between the three products as a consequence of certain differences in their physical properties. A market research report submitted by the European Union confirms that in 2020 RME, being more expensive, "had difficulties competing with cheaper imported soybean oil methyl ester (S[B]ME) and palm oil methyl ester (PME)" on the EU market.[654]

7.442. Furthermore, the Panel notes that both parties rely on the findings concerning the substitutability between PME, RME and SBME made by the European Union in the context of anti-dumping and countervailing duty investigations into the imports of biodiesel from the United States and from Argentina and Indonesia. Malaysia relies on the European Commission's findings that the differences in CFPP values between PME, RME and SBME are minor and do not "play any role in most blends sold in the Community market".[655] The European Union, for its part, refers to the findings nuancing the conclusions of earlier trade defence instruments regarding importance of differences in CFPP values between different biofuels.[656]

7.443. The Panel must base its likeness analysis on the evidence and arguments presented by the parties and should not accord undue weight to findings made by a national investigating authority in the context of adopting anti-dumping and countervailing duty measures. The Panel further notes that the findings at issue were subsequently reviewed by the panel in *EU – Biodiesel (Indonesia)*. Having said this, in the Panel's view the findings of the trade defence investigations relied on by the parties, read in their proper context, confirm that despite certain differences in product characteristics, there is a significant degree of overlap between PME, RME and SBME.[657] The European Union found in these investigations, among other things, that "PME is in competition with biodiesel produced in the Union, which is not just RME but also biodiesel made from other feedstocks".[658]

7.444. The parties also discuss the panel's findings in *EU – Biodiesel (Indonesia)* relating to the above-mentioned determinations of the European Commission in anti-dumping and countervailing duty investigations. Malaysia relies on that panel report for the proposition that PME competes with SBME from Argentina, RME and other biodiesels produced by the EU industry, but the European Union argues that such reliance is misplaced. The European Union submits that the relevant statement that the three biofuels compete is taken out of its context. It is also nuanced, argues the European Union, by a finding that PME was not found to be like a CFPP 0 biodiesel blend and noting the differences in the cetane number or iodine value.[659]

7.445. It is true, as the European Union points out, that in the relevant passage of the report in *EU – Biodiesel (Indonesia)*, the panel merely restates a finding of the investigating authority.[660] The panel then considers aspects of the competitive relationship that the investigating authority failed to address, such as the extent of competition between PME and a CFPP 0 blend.[661] Importantly,

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respectively almost exclusively SBME and PME, rapidly gained market share when the trade defence measures were repealed or amended. (Transport and Environment, "The trend worsens: More palm oil for energy, less for food", (Exhibit MYS-79), pp. 3-4.)

[654] USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit EU-131), p. 27.

[655] Malaysia's first written submission, para.538, referring to Commission Regulation (EC) 193/2009, (Exhibit EU-134).

[656] European Union's first written submission, para. 642 (referring to Commission Implementing Regulation (EU) 2019/244 of 11 February 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Argentina, OJ 2019 L 40, p. 1, (Exhibit EU-135). The Panel notes, however, that in the European Union's view, the findings of likeness between PME, RME and SBME in EU trade defence instruments were made in a different regulatory context and were limited in scope. European Union's first written submission, paras. 641-643.

[657] Commission Regulation (EC) 193/2009, (Exhibits EU-134), pp. 26-27; and Council Implementing Regulation (EU) 1194/2013, (Exhibit MYS-140), pp. 3-4.

[658] Council Implementing Regulation (EU) 1194/2013, (Exhibit MYS-140), p. 3.

[659] European Union's first written submission, paras. 641-643, referring to Malaysia's first written submission, paras. 543-544.

[660] Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.154.

[661] The panel found that:

> The fact that the imported and domestic products were considered to be like products does not automatically mean that each of the products included in the basket of imported products is alike in all respects to each of the products included into the basket of domestic products. Nor does the fact that the imported and domestic products were considered to be like products address the particular competitive dynamic that PME may only be used in a blend, and is actually a component of the different blends sold to end users in the EU market. PME might compete with

these findings concern the existence of price undercutting under Article 3.2 of the Anti-Dumping Agreement and not the determination whether products are like.[662] While it cannot be excluded that such considerations could be relevant to a likeness analysis, they seem to be of limited assistance in the current dispute. First, the quoted passage concerns different products than those subject of the likeness analysis in the case at hand. Second, the Panel has already addressed the role of cold flow properties, and CFPP in particular, in the competitive relationship between PME, RME and SBME and the findings of the panel in *EU – Biodiesel (Indonesia)* do not undermine the Panel's conclusions in this respect.

7.446. In sum, the Panel is of the view that despite certain differences in physical characteristics, PME, RME and SBME all have the same primary end-use of biofuel mixed with diesel. The Panel notes that the products are not all used in the same degree in colder conditions. However, this does not call into question the fact that they constitute nearly perfect substitutes in warmer climates and that overall, there is a significant overlap in the use of PME, RME and SBME as biofuels.

Consumer perceptions

7.447. Having considered the physical properties of biofuels, and their end-uses, the Panel now turns to the main disputed issues pertaining to the third criterion, which is consumer perception of the products as alternatives.

7.448. The Panel further notes that the determinations made by the EU investigating authority in the above-referenced national proceedings indicate that final consumers are not aware of, or concerned by, the composition of the biofuel blend, if the product meets the required CFPP.[663] This is also the view held by Malaysia.[664] Malaysia further submits that the choices of direct consumers of biofuels, i.e. economic operators that blend them together and/or with diesel, are dictated by the CFPP value and price.[665] The European Union agrees that in the absence of a feedstock labelling requirement, final consumers are not aware of the biofuel content blended with diesel.[666]

7.449. The Panel considers that the evidence of consumer perceptions relating to the CFPP corroborates its findings regarding the significant degree of overlap in the use of PME, RME and SBME as biofuels. Economic operators involved in blending of biofuels mix PME, RME and SBME with a view to obtaining a blend conforming with the CFPP specifications required by the customer.[667] Consistent with the Panel's findings above, if the specification requires a particularly low CFPP, the amount of PME will admittedly be lower compared to fuel destined for warmer climates. Within the specification, however, PME competes with RME and SBME.

7.450. The European Union submits that the consumers' tastes and habits must nevertheless be considered due to the widespread public concern with deforestation associated with palm oil production and the impact of such concerns on decisions of fuel suppliers.[668] The European Union posits that a more general concern with products containing or made from palm oil has manifested itself in the food industry and is also relevant to the fuel sector.[669] The European Union argues that there is a latent demand for palm oil-free fuels that the Panel should consider in the determination whether PME is like RME and SBME.[670] According to the European Union, the consumers' preference for palm oil-free fuel is reflected in the decisions by certain EU fuel suppliers to avoid or reduce producing palm oil-based biofuels.[671] In the European Union's view, this shows that if there was a

RME to the extent that they both are used to produce a blend. However, this does not mean that PME and blended CFPP 0 biodiesel are in competition with each other.
(Panel Report, *EU – Biodiesel (Indonesia)*, paras. 7.156.)

[662] Panel Report, *EU – Biodiesel (Indonesia)*, paras. 7.149-7.154.
[663] Council Implementing Regulation (EU) 1194/2013, (Exhibit MYS-140), p. 15.
[664] Malaysia's second written submission, para. 72.
[665] Malaysia's first written submission, para. 542.
[666] European Union's first written submission, para. 666.
[667] Council Implementing Regulation (EU) 1194/2013, (Exhibit MYS-140), p. 15.
[668] European Union's first written submission, paras. 665-666.
[669] European Union's first written submission, paras. 667-669.
[670] European Union's first written submission, para. 669(quoting Appellate Body Report, *EC – Asbestos*, para. 174).
[671] European Union's first written submission, para. 667.

labelling requirement for the composition of biofuels, the latent preferences and tastes of EU consumers would become manifest and indicate palm oil-based biofuel is not like other biofuels.[672]

7.451. The Panel finds unconvincing the evidence produced by the European Union and pertaining to decisions by certain biofuel and fuel producers reducing the use of oil palm crop-based biofuel in their fuel blends.[673] In particular, other than mentioning only in general terms sustainability considerations, the evidence does not elucidate the specific reasons behind such decisions or that they were in fact driven by consumers' preferences.[674]

7.452. Furthermore, the statements by biofuel and fuel producers submitted by the European Union appear to postdate the adoption of certain EU and member State regulatory measures, including those challenged in this dispute. It is therefore unclear whether these statements reflect consumers' preferences or business decisions dictated by a change in the regulatory environment. For example, Repsol's information about replacing palm oil used at its Bilbao refinery with used cooking oil (UCO) should be viewed in the context of the "Spain's climate change bill" debated at the time in the Parliament.[675] In a similar vein, before announcing a decrease in the use of palm oil as biofuel feedstock, Total had unsuccessfully challenged the exclusion of PME from the scope of renewable energy sources for the purposes of the TIRIB.[676]

7.453. In the Panel's view, the European Union thus has failed to substantiate its assertion that consumer preferences against palm oil-based biofuels are of such nature and magnitude that could rebut the findings of a high degree of competition reached so far on the basis of the analysis of the products' physical properties and end-uses.

Tariff classification

7.454. Turning to the tariff classification, Malaysia points out that PME, RME and SBME are all classified under the same six-digit heading.[677] It adds that the EU Combined Nomenclature does not distinguish between biofuels based on the feedstock.[678] In the European Union's view, the classification of PME, RME and SBME under the same heading is not determinative given the evidence of differences between the products.[679] According to the European Union, the lack of detail of its tariff classification undermines Malaysia's claim of likeness.[680]

7.455. The Panel notes that in circumstances where there is a sufficiently detailed tariff classification, the fact that two products are classified under the same tariff sub-heading can be an indication of product similarity.[681] It is uncontested between the parties that PME, RME and SBME are classified under the same heading six-digit heading 3826.00 "Biodiesel and mixtures thereof, not containing or containing less than 70 % by weight of petroleum oils or oils obtained from bituminous minerals".[682] As explained in the footnote to the heading, the term biodiesel covers "mono-alkyl esters of fatty acids of a kind used as a fuel, derived from animal or vegetable fats and

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[672] European Union's first written submission, para. 670.

[673] European Union's first written submission, paras. 666-668.

[674] Excerpt from the website of Preem, a Swedish fuel company, (Exhibits EU-144), p. 1.; Midttun, Knut Myrum Næss, and Proadpran Boonprasurd Piccini "Biofuel Policy and Industrial Transition—A Nordic Perspective" in Energies 2019, 12(14), 2740, (Exhibit EU-145), pp. 5-6; Eni press release of 15 April 2021: "Eni: New Systems Installed at the Venice Biorefinery to Eliminate Palm Oil Entirely", (Exhibit EU-146), p. 1; Press article from Argusmedia of 11 September 2020: "Spain's climate bill threatens biofuel projects: Repsol", (Exhibit EU-147), p. 2; Total's webpage (accessed on 22 April 2021): "GRANDPUITS: A ZERO-CRUDE PLATFORM BY 2024", (Exhibit EU-148), p. 2; Total's webpage (accessed on 22 April 2021): "LA MÈDE: A MULTIPURPOSE FACILITY FOR THE ENERGIES OF TOMORROW" (Exhibit EU-149), p. 2; and Press article of 1 April 2021 from Le Monde « Total condamné à revoir son étude d'impact sur l'utilisation del'huile de palme dans une raffinerie », (Exhibit EU-150).

[675] Press article from Argusmedia of 11 September 2020: "Spain's climate bill threatens biofuel projects: Repsol", (Exhibit EU-147), pp. 2-3.

[676] Press article, 11 October 2019 (Exhibit MYS-245); and THEN24, "TotalEnergies will no longer use palm oil from 2023", (Exhibit EU-324).

[677] Malaysia's first written submission, para. 546.

[678] Malaysia's first written submission, para. 546.

[679] European Union's first written submission, para. 672.

[680] European Union's second written submission, para. 74 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21).

[681] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21.

[682] HS Nomenclature, 2017, Chapter 38, (Exhibit MYS-42), p. 8.

oils whether or not used".[683] It follows that a number of FAME biofuels of organic origin, including those made from animal fat, UCO ad other waste material, as well as blends of different biofuels and with mineral diesel, fall within the scope of this heading.[684] The customs classification of PME, RME and SBME under the same six-digit heading thus is consistent with the indication that they all belong to the category of biodiesel fuels and corroborates the finding that they share certain product characteristics and have the same application. It is not, however, dispositive of the question whether the three products are like.

Conclusion on the likeness of RME, SBME and PME

7.456. As noted above, Article 2.1 requires the panel to identify the domestic products that stand in a sufficiently close competitive relationship with the products imported from the complaining Member to be considered like products within the meaning of that provision.[685] In the Panel's assessment, evidence of such a close competitive relationship has been put forward by the parties in this dispute. The Panel therefore finds that Malaysia has demonstrated that RME and SBME produced in the European Union and/or imported from other countries are like PME imported from Malaysia.

Malaysia's additional argument concerning HVO made from palm oil, rapeseed oil and soybean oil

7.457. In addition to PME, Malaysia considers HVO made from palm oil, rapeseed oil and soybean oil to also be like products.[686] Although its submissions could have been more detailed in this regard, Malaysia does include in its first written submission arguments concerning the likeness of HVO made from different feedstocks.[687] Malaysia also submits arguments that HVO and FAME are like products.[688] At the same time, Malaysia clarifies that "a determination of likeness between FAME and HVO is not a primary or even necessary, likeness analysis in this case (which Malaysia asserts is a comparison of biofuel feedstocks)".[689] Overall, the Panel understands from Malaysia's submissions that its claim of discrimination involves the treatment of both PME, as opposed to RME and SBME, and HVO made from palm oil, as opposed to HVO made from rapeseed oil and soybean oil. Based on this understanding, the Panel will now assess likeness within the latter group of products.

7.458. Malaysia submits that HVO displays the same physical and chemical properties, and delivers the same performance irrespective of the feedstock used to produce it.[690] As a result, HVO made from palm oil is, according to Malaysia, "not only 'like' vis-à-vis other oil crop-based biofuels, but in fact identical to any other HVO oil crop-based biofuels".[691] In particular, and unlike FAME, HVO can be used by all customers in all seasons in all EU member States regardless of the feedstock used.[692] Finally, Malaysia points out that the EU tariff classification does not differentiate between HVO made from different feedstocks.[693]

7.459. According to the European Union, Malaysia's assertions regarding the substitutability of HVO made from different feedstocks are unsubstantiated.[694] The European Union contends that HVO producers may prefer certain vegetable oils as feedstocks because of price, physical characteristics,

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[683] HS Nomenclature, 2017, Chapter 38, (Exhibit MYS-42), p. 2.
[684] European Union's second written submission, para. 73.
[685] Appellate Body Report, *EC – Asbestos*, para. 99.
[686] Malaysia's response to Panel question No. 75, pp. 47-48.
[687] Malaysia's first written submission, paras. 539, 541 and 545-546.
[688] Malaysia's second written submission, paras. 62-67; responses to Panel questions No. 82, p. 52, and No. 84, p. 54.
[689] Malaysia's response to Panel question No. 82, p. 52. See also Malaysia's comments on the European Union's response to Panel question No. 81, p. 163.
[690] Malaysia's first written submission, para. 539.
[691] Malaysia's first written submission, para. 539.
[692] Malaysia's first written submission, paras. 160, 541 and 545; response to Panel question No. 85, p. 55.
[693] Malaysia's first written submission, para. 546. Malaysia notes however that is it not clear whether HVO is classified by customs nomenclatures as biodiesel or as oil obtained from bituminous materials. (Malaysia's response to Panel question No. 84, p. 54.)
[694] European Union's comments on Malaysia's response to Panel question No. 75, para. 188.

and regulatory requirements.[695] To support this assertion, the European Union relies on data on the use of different feedstocks for biofuel production, including HVO.[696]

7.460. The Panel observes that HVO, or hydrotreated vegetable oil, is a mixture of paraffinic hydrocarbons and has a chemical composition similar to mineral diesel fuel.[697] The evidence before the Panel confirms that HVO can be produced from many types of vegetable oils, resulting in the same chemical composition and without affecting the biofuel's characteristics.[698] Its properties, in particular relating to cold flow, depend on the production process rather the feedstock.[699] HVO is used as fuel in diesel engines either blended with mineral diesel or fully replacing it.[700]

7.461. Although the European Union maintains that certain fuel suppliers may prefer HVO made from specific feedstocks, the Panel notes that it does not adduce sufficient evidence to substantiate this assertion. In any event, this argument seems to be contradicted by evidence showing that the properties of HVO and its use remain the same regardless of the feedstock used.[701] There is also no information on the record confirming price differentiation of HVO depending on the feedstock used. In sum, the Panel finds that rapeseed oil-based HVO and soybean oil-based HVO is like HVO made from palm oil.

7.462. As Malaysia refers to FAME and HVO made from palm oil, rapeseed oil and soybean oil as, respectively, palm oil-based biofuel, rapeseed oil-based biofuel and soybean oil-based biofuel, so will the Panel in the remaining sections of this report.

7.1.2.4.4 Detrimental impact on palm oil-based biofuel

7.463. Having determined the groups of like products at issue, the Panel turns to the question whether products imported from Malaysia are accorded less favourable treatment than like products of EU or foreign origin. Considering the nature of the obligation in Article 2.1, panels and the Appellate Body have found its scope to overlap with the non-discrimination obligation in Article III:4 and noted a similar formulation of the two provisions.[702] As such, Article III:4 was found to provide relevant context for the interpretation of Article 2.1.[703]

7.464. In light of these considerations, panels and the Appellate Body have found that establishing less favourable treatment under Article 2.1 involves an assessment of whether the technical regulation "modifies the conditions of competition to the detriment of the group of imported products vis-à-vis the group of domestic products" and/or *vis-à-vis* the group of imported products originating in other countries.[704] As noted above, the existence of a detrimental impact on imported products is not dispositive of less favourable treatment under Article 2.1. A panel must further analyse whether the detrimental impact stems exclusively from a legitimate regulatory distinction.[705]

7.465. Therefore, the Panel will first determine whether the high ILUC-risk cap and phase-out has a detrimental impact on imported palm oil-based biofuel as compared to the group of like products of EU and/or foreign origin. Should the Panel find the existence of such detrimental impact, it will then assess whether it stems exclusively from a legitimate regulatory distinction.

7.466. The Panel's assessment of whether the measure has a detrimental impact on imported products requires an inquiry into the measure's impact on the equality of competitive opportunities

[695] European Union's comments on Malaysia's response to Panel question No. 75, para. 188.
[696] European Union's comments on Malaysia's response to Panel question No. 75, para. 188.
[697] SAE International, "HVO as a Renewable Diesel Fuel", (Exhibits MYS-126), p. 2; and ETIP Bioenergy, "Hydrogenated vegetable oil (HVO)", (Exhibit MYS-131), p. 1.
[698] L.P. Lindfors, "High Quality Transportation Fuels from Renewable Feedstock", Neste Oil Corporation Espoo, Finland, XXIst World Energy Congress Montreal, Canada September 12-16, 2010, (Exhibit MYS-127), p. 4; and ETIP Bioenergy, "Hydrogenated vegetable oil (HVO)", (Exhibit MYS-131), p. 2.
[699] SAE International, "HVO as a Renewable Diesel Fuel", (Exhibit MYS-126), p. 2.
[700] Greenea, "Is HVO the Holy Grail of the world biodiesel market?", (Exhibits MYS-14), p. 1; ETIP Bioenergy, "Hydrogenated vegetable oil (HVO)", (MYS-131), p. 1.
[701] SAE International, "HVO as a Renewable Diesel Fuel", (Exhibit MYS-126), p. 2.
[702] Appellate Body Reports, *US – Clove Cigarettes*, para. 100; and *EC – Seal Products*, para. 5.122.
[703] Appellate Body Reports, *EC – Seal Products*, para. 5.122.
[704] Appellate Body Reports, *US – Clove cigarettes*, para. 180; and *US – COOL*, para. 268.
[705] Appellate Body Reports, *US – Clove Cigarettes*, para. 182; *US – Tuna II (Mexico)*, para. 215; *US – COOL*, para. 271 and *EC – Seal Products*, para. 5.311.

between imported products and like domestic products or like products originating in other countries.[706] In this regard, it is not necessary for the Panel to rely on evidence of actual effects of the measures on trade in the relevant market.[707] Rather, a panel may base its assessment on evidence of the design, structure and expected operation of the measure.[708]

7.467. Malaysia submits that the high ILUC-risk cap and phase-out limits and eventually excludes palm oil-based biofuel from being counted towards the EU renewable energy targets, but not biofuels made from rapeseed oil and soybean oil.[709] Malaysia argues that as a result, there will be little to no demand in the European Union for palm oil-based biofuel.[710] Malaysia submit in this regard that the market for biofuels would not exist in the European Union without the EU renewable energy targets.[711]

7.468. The European Union submits that in order to demonstrate that a measure modifies the conditions of competition to the detriment of imported products, the complainant has to provide evidence relating to the relevant market, show that eligibility to contribute towards the renewable energy targets is equivalent to a market access condition and not conduct the comparison on the basis of a flawed approach to the product scope.[712] More specifically, the European Union contends that limiting the relevant market to the market for oil crop-based biofuels is overly narrow and is not supported by evidence.[713] The European Union submits that the Panel is required to examine the competitive opportunities afforded to all like products from the complaining member and these are to be compared with those afforded to all like domestic products (or all like other foreign products).[714]

7.469. The European Union further contests that the measures at issue prohibit or condition access to the EU market for palm oil-based biofuel.[715] The European Union submits in this regard that Malaysia has not demonstrated the alleged effects of the measure on the conditions of competition.[716] According to the European Union, the renewable energy targets seek to ensure greater penetration of renewables over fossil fuels but do not guarantee specific market share for any specific biofuel. It is the EU member States that may, but are not required to, provide financial support for certain types of biofuels.[717] The European Union thus contests that any detrimental impact can be attributed to the EU measure.

7.470. The European Union submits that Malaysia's case is wrongly premised on the notion that because it happens to only produce palm oil-based biofuel from the group of like products, it can show less favourable treatment because the measure affects biofuels produced from palm oil. The European Union asserts that this is not the correct comparative exercise.[718] The European Union thus refers back to its arguments concerning the scope of like products, arguing that Malaysia has isolated the treatment of certain specific biofuels skewing the analytical approach.[719] In the European Union's view, there is no differentiation in the treatment of imported and domestically produced palm oil-based biofuel.[720]

7.471. The parties' arguments appear to raise a number of distinct albeit related issues, which the Panel will address in turn. The first issue concerns the modification of the conditions of competition on the EU biofuel market. The second issue concerns the question whether the measure equally

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[706] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.29.
[707] Appellate Body Reports, *US – COOL*, para. 325; and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.29.
[708] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.15.
[709] Malaysia's first written submission, paras. 566-570; second written submission, paras. 83-90 and 241.
[710] Malaysia's first written submission, paras. 563-565.
[711] Malaysia's first written submission, para. 563.
[712] European Union's first written submission, paras. 691-692.
[713] European Union's first written submission, paras. 703-708; and second written submission, paras. 86.
[714] European Union's first written submission, para. 719.
[715] European Union's first written submission, paras. 717-732.
[716] European Union's first written submission, paras. 724-732.
[717] European Union's first written submission, para. 731-732; and second written submission, para. 82.
[718] European Union's first written submission, para.724.
[719] European Union's second written submission, para. 86.
[720] European Union's first written submission, para. 723.

affects products imported from Malaysia and products of EU or foreign origin. The third issue concerns the attributability of any detrimental impact to the high ILUC-risk cap and phase-out.

7.1.2.4.4.1 Modification of conditions of competition on the biofuel market

7.472. The Panel now turns to the question whether the high ILUC-risk cap and phase-out modifies the conditions of competition in the relevant market to the detriment of products imported from Malaysia. It is uncontested between the parties that the high ILUC-risk cap and phase-out does not formally prohibit the importation or distribution of palm oil-based biofuel on the EU market. However, Article 2.1 covers not only those measures that condition access to a Member's market, but also those that result in a detrimental impact by creating incentives to choose certain products (domestic or imported from other countries) over others (imported from the complaining Member).[721] Otherwise, the obligation of no less favourable treatment could easily be circumvented by adopting measures that formally do not condition access to the market, but in other ways discriminate *de jure* or *de facto* against imported products by causing a detrimental impact on competitive opportunities for imported products that does not stem exclusively from a legitimate regulatory distinction.[722] This assessment should focus on the design and operation of the measure at issue taking into account the relevant regulatory context.

7.473. In section 2 of this Report, the Panel has set out the relevant regulatory background for both the 7% maximum share and the high ILUC-risk cap and phase-out. The Panel refers to that discussion in order to avoid unnecessary repetition. Here, the Panel merely recalls that Article 25(1) of RED II imposes on EU member States a target of at least 14% of the final consumption of energy in the transport sector from renewable energy sources to be achieved by 2030 at the latest. Article 7(4) of RED II identifies "biofuels, biomass fuels and renewable liquid and gaseous transport fuels of non-biological origin" as the renewable energy sources qualifying for the targets.[723] It follows that EU member States must consume sufficient "biofuels, biomass fuels and renewable liquid and gaseous transport fuels" in order to meet the target set in Article 25(1) of RED II. Data shows that biofuels, especially those made from food and feed crops, account for the vast majority of this consumption.[724]

7.474. Biofuels, biomass fuels and other gaseous and liquid fuels can be used in internal combustion engines. Petrol and diesel are by far the most popular fuels used in such engines. Evidence submitted by the parties shows that currently, biofuels are not cost-competitive with fossil fuels, and this is unlikely to change in the foreseeable future.[725] It is thus accepted that on a global scale, statutory blending requirements and other forms of support are the main driving force promoting the consumption of biofuels.[726] EU member States thus need to and do promote the consumption of biofuels either through mandating the minimum use or through support schemes in order to ensure they meet their national contributions towards the 14% target. It is on the basis of these considerations, that Malaysia argues that the renewable energy consumption targets create the market and demand for biofuels in the European Union which would otherwise not exist.[727]

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[721] See e.g. Panel Reports, *US – COOL*, para. 7.372 ("the COOL measure creates an incentive to use domestic livestock – and a disincentive to handle imported livestock – by imposing higher segregation costs on imported livestock than on domestic livestock"); Appellate Body Reports, US – COOL, para. 270 ("[w]hile a measure may not require certain treatment of imports, it may nevertheless create incentives for market participants to behave in certain ways, and thereby treat imported products less favourably"). See also Panel Reports, *India – Solar Cells*, para. 7.95; and *Mexico – Taxes on Soft Drinks*, para. 8.117.

[722] Appellate Body Report, *US – Clove Cigarettes*, para. 215.

[723] Article 7(4)(a) of RED II.

[724] In 2019, biofuels constituted approximately 90% of the renewable energy consumed in the transport sector in the European Union, and food and feed crop-based biofuel accounted for 60% of the total consumption of renewable energy in the transport sector. (Eurostat, Consumption of renewable energy in the transport sector in the EU-27 in 2011-2019, (Exhibit IDN-13), p. 1.)

[725] A research paper by the Kiel Institute concludes that:

> Our findings lead to several conclusions. First, we find that given current fossil fuel prices, biofuels are not cost-competitive compared to fossil oil-based fuels … Without policies such as the RED II, biofuel consumption in the EU would return to a negligible level.
> (Delzeit et al, Kiel Working Paper No. 2203, (Exhibit IDN-2), p. 17.)

[726] UFOP Global Market Supply 2019/2020, (Exhibits EU-121, MYS-212), p. 36.

[727] Malaysia's first written submission, para. 563.

7.475. Although the European Union contests the existence of such a dependency between the renewable energy consumption targets and biofuel demand[728], it acknowledges that:

> [T]he effect of the EU biofuels regime is to encourage a shift towards those forms of renewable energy best able to meet the Union's policy objectives … Member States are incentivised to rely less on those biofuels which are dependent on the input of agricultural commodities to meet their targets.[729]

7.476. Indeed, evidence submitted by the parties confirms that demand for biofuels in the European Union is "almost exclusively"[730] driven by the European Union's and its member States' renewable energy policies and that in the absence of blending mandates applying to biofuel made from a particular feedstock, there is no or little demand for biofuel made from that particular feedstock. Relatedly, the evidence on the record does not support the European Union's contention that environmental concerns would drive demand for biofuels regardless of any governmental support.[731]

7.477. Logically, it follows that if the EU member States cannot use biofuel made from a particular feedstock to meet their national contributions to the EU-wide renewable energy target, there will be no reason to promote its use as fuel. As a result, and given the price difference between fossil fuels and biofuels, there will be little to no demand for biofuels that are excluded from counting towards the renewable energy targets.

7.478. The Panel recalls that currently, the only biofuel deemed to be high ILUC-risk is that made from palm oil.[732] Pursuant to Article 26(2) of RED II, its eligibility to count towards the targets is capped at 2019 levels and those levels will be gradually reduced to zero by 2030, at the latest. This rule is mandatory in that it must be observed by EU member States and fuel suppliers for the purpose of calculating EU-wide and national renewable energy consumption in the transport sector. In sum therefore, limiting and gradually excluding the eligibility to count towards the targets by virtue of the high ILUC-risk cap and phase-out will result in a decrease if not complete absence of demand for palm oil-based biofuel on the EU market.

7.479. Certain arguments of the European Union, especially those made in the context of the measure's contribution to the pursued objectives, corroborate the existence of a link between the high ILUC-risk cap and phase-out and limiting or eliminating the demand for palm oil-based biofuels on the EU market. The European Union submits *inter alia* that "the high ILUC-risk phase-out makes sure that the EU Biofuels Regime will gradually induce less and less demand for high ILUC-risk crop biofuels".[733] A decrease in demand for biofuels made from high ILUC-risk feedstocks (only palm oil-based biofuel at present), is therefore an intended consequence of the design and operation of the measure. In the Panel's view, there is thus a genuine relationship between the high ILUC-risk cap and phase-out and the detrimental impact on the competitive opportunities for palm oil-based biofuel on the EU biofuel market.[734]

7.480. The Panel finds illustrative in this regard the evidence of decreasing consumption in the European Union's transport sector of biofuels not meeting the sustainability and GHG emissions saving criteria under RED I (non-compliant biofuels). As pointed out by Malaysia, the high ILUC-risk cap and phase-out has a similar design in that, analogous to non-compliant biofuels under RED I, it adversely impacts the eligibility of high ILUC-risk biofuel to be counted towards the renewable energy consumption targets.[735] The expected operation of the high ILUC-risk cap and phase-out on palm oil-based biofuel, including the effects on the biofuel's use in the transport sector, will thus be

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[728] European Union's first written submission, para. 716.

[729] European Union's first written submission, para. 722, second written submission, para. 80.

[730] UFOP Global Market Supply 2019/2020, (Exhibit EU-121, MYS-212), p. 36; and USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit EU-131), p. 24.

[731] While the European Union submits evidence relating to moral concerns with climate change, this evidence does not show that consumers would buy more expensive fuel with the addition of biofuels.

[732] This is the result of the application of the requirements and formula in Article 3 of the Delegated Regulation.

[733] European Union's response to Panel question No. 102, paras. 545-546. The European Union also recognizes that the high ILUC-risk cap "caps the demand for … biofuels induced by the EU Biofuels Regime".

[734] Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 134; *US – Clove Cigarettes*, fn 372 and *EC – Seal Products*, para. 5.105.

[735] Malaysia's first written submission, para. 564.

analogous to the sustainability and GHG emissions savings criteria. That consumption fell to negligible levels reaching 0.8% of the consumption of compliant biofuels in 2019.[736] The European Union argues that failing to meet the sustainability and GHG emissions savings criteria results not only in ineligibility to count towards the renewable energy targets but also impacts the possibility of using the fuel on the EU market pursuant to the Fuel Quality Directive.[737] However, the European Union does not point to any specific provision of that directive which would support this assertion.[738]

7.481. To demonstrate the detrimental impact of the measure, Indonesia acting as a third party, submits an overview of adopted or proposed legislation in selected EU member States. These legislative acts and proposals aim to limit the possibility of counting towards national contributions to the renewable energy targets biofuels made from high ILUC-risk feedstocks, and envisage terminating support schemes for such biofuels or introducing limitations to placing them on the market.[739] In the Panel's view, the EU member States' policies implementing Article 26(2) of RED II constitute an additional illustration of the operation of the high ILUC-risk cap and phase-out on the EU biofuel market.

7.482. Furthermore, Article 26(2) of RED II contains a derogation from the high ILUC-risk cap and phase-out for biofuels certified as low ILUC risk. Specific yields can become eligible for counting towards EU renewable energy targets in the same manner as other crop-based biofuels only if they meet certain conditions set out in Articles 4 and 5 of the Delegated Regulation (the low ILUC-risk certification criteria) and undergo a certification procedure.[740] Low ILUC-risk certification thus applies to specific yields and not a crop as a whole. In that sense, low ILUC risk certification does not alter the general characterization of a biofuel feedstock as high ILUC risk. Pursuant to the low ILUC-risk certification criteria, in order to qualify for certification, yields must meet certain specific conditions. First, only yields going beyond the so-called dynamic yield baseline are eligible for certification.[741] Second, such yields need to be obtained through measures that either pass the financial attractiveness or barriers test; are applied on abandoned or severely degraded land; or are applied by smallholders.[742]

7.483. As a result, only a limited amount of a high ILUC-risk crop can qualify for low ILUC-risk certification and thereby become eligible to count towards the renewable energy targets beyond the limitations imposed by the high ILUC-risk cap and phase-out. This means that any mitigation of the detrimental impact of the high ILUC-risk cap and phase-out is considerably limited. At the same time, the Panel does not consider that limiting low ILUC-risk certification to additional yields generates a detrimental impact of its own. In the Panel's view, any commercial disadvantage related to this requirement stems directly from and is a corollary of the classification of a crop as high ILUC risk.

7.484. In light of the above considerations, the Panel is unpersuaded by the European Union's argument that Malaysia presents a flawed analysis of the relevant market conditions. The Panel is of the view that by limiting and eventually excluding palm oil-based biofuel from eligibility to count towards renewable energy targets, the high ILUC-risk cap and phase-out modifies the conditions of competition to the detriment of this biofuel.

7.485. The Panel notes the European Union's additional argument in this regard that a WTO Member should be allowed to distinguish between products on the basis of the perceived differences relating to the measure's objectives.[743] The Panel agrees. However, the Panel considers that this argument is more appropriately addressed in the context of the analysis on whether the detrimental impact of the measure stems exclusively from a legitimate regulatory distinction.

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[736] Eurostat, Energy from renewable sources – SHARES, (Exhibit MYS-43).
[737] European Union's first written submission, para. 715.
[738] European Union's first written submission, para. 715.
[739] Examples of EU member States' measures restricting oil palm crop-based biofuel, (Exhibit IDN-1).
[740] Section 2.3.3 above.
[741] Articles 2(6) and 4 of the Delegated Regulation.
[742] Article 5 of the Delegated Regulation.
[743] European Union's response to Panel question No. 90, para. 473 (referring to Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.2514.

7.1.2.4.4.2 *De facto* nature of the detrimental impact

7.486. Turning to the European Union's argument that the measure does not differentiate between palm oil-based biofuel imported from Malaysia and that of EU origin or other origin, the Panel agrees that the high ILUC-risk cap and phase-out does not distinguish expressly between palm oil-, rapeseed oil- and soybean oil-based biofuel based on their origin. However, the Panel notes that Malaysia's makes a claim of *de facto* discrimination.[744] A measure that appears on its face to be origin neutral can nevertheless discriminate *de facto* against imported products in contravention of Article 2.1.[745] A panel's analysis whether the measure has a *de facto* detrimental impact on the group of imported products must take into account the totality of the facts and circumstances before it, including the relevant features of the market at issue.[746] A panel has to determine on this basis whether there is a genuine relationship between the measure at issue and any adverse impact on competitive opportunities for imported versus like domestic products.[747] The European Union appears to agree with this approach insofar as it emphasizes the importance of assessing all aspects of the competition between like products on the relevant market.[748]

7.487. The Panel observes that the European Union is not only an importer but also a producer of palm oil-based biofuel (but not of palm oil as such).[749] In that sense, the Panel agrees with the European Union that the high ILUC-risk cap and phase-out also affects some of its domestic production. However, as noted above, an important factual consideration is that among all the biofuel products that compete in the market and which the European Union imports or produces itself, palm oil-based biofuel is the only one that Malaysia exports to that market. This means that the measure, while neutral on its face, disproportionally affects products imported from Malaysia.

7.488. This is the essence of *de facto* discrimination. Under these circumstances, the Panel must compare the treatment of the only product imported from the complainant with all domestic products and products of other origin found to be like.[750] Although Malaysia has demonstrated that palm oil-, rapeseed oil- and soybean oil-based biofuels are like, the European Union seems to be comparing only the treatment of domestically produced and imported palm oil-based biofuel.[751]

7.1.2.4.4.3 Attributability of the detrimental impact to the high ILUC-risk cap and phase-out

7.489. The Panel now turns to the European Union's argument that any detrimental impact on the palm oil-based biofuel should not be attributed to the EU measure, as the EU member States enjoy discretion in determining their energy mix and national contributions to the EU renewable energy target.[752]

7.490. It is true that some of the EU member States' measures submitted as evidence go further than appears to be required by RED II.[753] However, there is no doubt that they seek to implement, among other provisions, Article 26(2) of RED II.[754] RED II and the Delegated Regulation impose

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[744] Malaysia's first written submission, para. 572.

[745] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 225; and *US – COOL*, para. 269.

[746] Appellate Body Reports, *US – COOL*, para. 286.

[747] Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 134; and *US – Clove Cigarettes*, fn 372.

[748] European Union's first written submission, para. 703.

[749] Oil World Annual 2021, (Exhibit MYS-17). See also Malaysia's response to Panel question No. 83, p. 53; European Union's response to Panel question 83, para. 457; and comments on Malaysia's response to Panel question No. 75, para. 192.

[750] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.70.

[751] In addition, for the reasons explained in preliminary considerations to the discussion of the like products analysis, the Panel is also unpersuaded by the European Union's argument that the outcome of Malaysia's detrimental impact analysis is skewed because of the complainant's focus on a subset of like products.

[752] European Union's first written submission, paras. 726-731.

[753] Certain EU member States decided to exclude from counting towards the renewable energy targets not only palm oil-based biofuel but also soybean oil-based biofuel, while other prohibited using palm oil-based biofuel as transport fuel altogether. (Examples of EU member States' measures restricting oil palm crop-based biofuel, (Exhibit IDN-1), pp. 11, 17, 33 and 35.)

[754] The translated text of the EU member States' measures either mimics the language of Article 26(2) of RED II or contains explicit references to that provision. (Examples of EU member States' measures restricting oil palm crop-based biofuel, (Exhibit IDN-1).)

binding obligations on the EU member States, which they cannot derogate from and which have regulatory effects throughout the EU territory.[755] Therefore, while EU member States may enjoy some margin of discretion in adopting support schemes for renewable energy or regulate the use of certain fuels, they cannot count palm oil-based biofuel towards the renewable energy targets to the same extent as rapeseed oil- and soybean oil-based biofuel.[756]

7.491. In fact, EU member States are obliged to "set an obligation on fuel suppliers" to ensure meeting the 2030 target share of renewable energy, "calculated in accordance with the methodology set out in … Article 26" of RED II.[757] It follows that it is not only the EU member States that must observe the rules set out in Article 26 of RED II, but also that these rules become mandatory for fuel suppliers operating on the EU market.

7.492. Therefore, the Panel finds that the detrimental impact on palm oil-based biofuel can clearly be attributed to the high ILUC-risk cap and phase-out.

7.1.2.4.4.4 Conclusion on detrimental impact

7.493. In sum, the Panel finds that the high ILUC-risk cap and phase-out limits market opportunities for palm oil-based biofuel. By contrast, because rapeseed oil- and soybean oil-based biofuels are not subject to the measure, they can potentially benefit from the full scope of commercial opportunities provided within the 7% maximum share. In fact, evidence submitted by the parties suggests that rapeseed oil- and soybean oil-based biofuel may benefit from increased opportunities, as a result of demand shifting from oil palm crop-based biofuel.[758] Therefore the high ILUC-risk cap and phase-out has a detrimental impact on imported palm oil-based biofuel as compared to the group of domestic like products.

7.494. Contrary to the European Union's argument, this finding should not be understood as requiring the European Union to continue "to intervene in the energy market" in favour of all types of biofuels, including those that do not meet European Union's policy objectives.[759] Rather, such support, if falling within the ambit of Article 2.1, should not lead to less favourable treatment of imported products *vis-à-vis* domestic like products and like products of other origins. In any event, as mentioned above, establishing a measure's detrimental impact on imported products is not sufficient to demonstrate a violation of the no less favourable treatment obligation in Article 2.1. A panel must also analyse whether the detrimental impact stems exclusively from a legitimate regulatory distinction, which is the next question the Panel will address.

7.1.2.4.5 Legitimate regulatory distinction

7.495. As noted above in the context of setting out the applicable legal standard under Article 2.1, a finding of a detrimental impact on imported products alone is not dispositive of whether there is less favourable treatment under Article 2.1. A panel must further analyse whether the detrimental impact "stems exclusively from a legitimate regulatory distinction".[760] In making this determination, the Panel needs to assess the design, structure and operation of the measure at issue in order to determine whether the technical regulation is applied in an even-handed manner and, as a result, whether the detrimental impact on imported products stems exclusively from a legitimate regulatory

[755] Panel Report, *EU – Energy Package*, para. 7.397.
[756] With the exception of consignments of biofuels certified as low ILUC risk.
[757] Article 25(1) of RED II.
[758] Delzeit et al, Kiel Working Paper No. 2203, (Exhibit IDN-2), p. 11.
[759] European Union's first written submission, para. 727.
[760] Appellate Body Reports, *US – Clove Cigarettes*, para. 182; *US – Tuna II (Mexico)*, para. 215; *US – COOL*, para. 271; and *EC – Seal Products*, para. 5.311. This interpretation of Article 2.1 has been grounded in the context provided by other provisions of the TBT Agreement, in particular Article 2.2, which "suggests that 'obstacles to international trade' may be permitted insofar as they are not found to be 'unnecessary'" and the sixth recital of the Preamble. It is also consistent with the object and purpose of the TBT Agreement, which has been found to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate. (Appellate Body Report, *US – Clove Cigarettes*, paras. 171 and 174.)

distinction.[761] Overall, the parties seem to be in agreement as regards the basic elements and nature of the legal test under Article 2.1.[762]

7.496. Malaysia submits that the detrimental impact on imports of palm oil-based biofuel does not stem exclusively from a legitimate regulatory distinction. More specifically, Malaysia argues that the high ILUC-risk cap and phase-out does not impose a regulatory distinction that is legitimate.[763] Malaysia further argues in the alternative that even if such *legitimate* regulatory distinction were to exist, it is not applied in an even-handed manner.[764] In this connection, Malaysia contends that the measure is not calibrated to the risk, because it does not apply to biofuels made from feedstocks with higher estimated ILUC emissions than palm oil.[765]

7.497. The European Union maintains that any impact of the high ILUC-risk cap and phase-out on palm oil-based biofuel stems exclusively from a legitimate regulatory distinction.[766] The European Union submits that the measure pursues long-standing and legitimate policy goals of the EU Biofuels Regime relating to climate change mitigation, environmental and biodiversity objectives and moral concerns.[767] The European Union relies in this regard on the scientific grounds underpinning the EU Biofuels regime generally and the high ILUC-risk cap and phase-out more specifically.[768] The European Union further contests that the measure is not applied in an even-handed manner, pointing to the existence of a rational relationship between the measure and its stated objective.[769]

7.498. Whether the detrimental impacts stems exclusively from a particular legitimate regulatory distinction needs to be considered in light of the nature and object of the distinction at issue and the manner in which it operates. The parties' arguments focus on two main questions: whether the regulatory distinction based on high ILUC-risk is legitimate, and if so whether it is applied in an even-handed manner.

7.499. The Panel notes that the specific arguments raised by the parties relating to these two questions largely overlap.[770] The Panel appreciates that these overlaps are largely a consequence of apparent overlaps in aspects of the legal test under Article 2.1 at issue, either of which, if demonstrated, leads to the conclusion that the detrimental impact does not stem exclusively from a legitimate regulatory distinction. The Appellate Body has recognized these overlaps, observing that "where a regulatory distinction is not designed and applied in an even-handed manner – because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination – that distinction cannot be considered 'legitimate'".[771] The Panel recalls in this regard that it has "the discretion to address only those arguments it deems necessary to resolve a particular claim".[772] Therefore, the Panel does not consider that it is under an obligation to

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[761] Appellate Body Reports, *US – Clove Cigarettes*, para. 182; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.33. Past panels and the Appellate Body have not elaborated on the meaning of "even-handedness". The Appellate Body has noted, however, that "there is no set formula as to how a complainant must make out its case" under Article 2.1 and cautioned against applying the rules on burden of proof in a formalistic or mechanistic fashion. In a similar vein, the first compliance panel in *US – Tuna II (Mexico)* understood "even-handedness" not as a separate criterion, but rather as an "analytical tool, a kind of rhetorical measure or test that deploys a fluid, broadly equitable concept as a proxy or gauge". (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.33; and Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.93.)

[762] Malaysia's first written submission, paras. 571-572. European Union's first written submission, paras. 694-697.

[763] Malaysia's first written submission, paras. 574-577; and second written submission, para. 243.

[764] Malaysia's first written submission, paras. 578-584; and second written submission, para. 244.

[765] Malaysia's first written submission, paras. 580-581

[766] European Union's first written submission, paras. 735-752; and second written submission, paras. 91-96.

[767] European Union's first written submission, para. 742.

[768] European Union's first written submission, paras. 744-752; and second written submission, para. 96.

[769] European Union's first written submission, paras. 753-768; and second written submission, paras. 99-100.

[770] The Panel notes that Malaysia makes similar arguments asserting that high ILUC-risk is not a legitimate regulatory distinction and that the measure is not applied in an even-handed manner because only palm oil-based biofuel is considered as high ILUC-risk and subject to the high ILUC-risk cap and phase-out as a result of the application of the criteria in Article 3 of the Delegated Regulation. (Malaysia's first written submission, paras. 575 and 578.)

[771] Appellate Body Reports, *US – COOL*, para. 271.

[772] Appellate Body Report, *EC – Poultry*, para. 135.

assess the parties' arguments formalistically, addressing each and every element raised by the parties following the order of their submissions.[773]

7.500. Having said this, the Panel will conduct its analysis following the general structure of the arguments as made by the parties, by focusing on the two main questions raised. The Panel will thus first identify the relevant regulatory distinction drawn by the high ILUC-risk cap and phase-out and address whether this distinction is *a priori* legitimate. To that end, the Panel will consider any aspects of the measure that, in the Panel's view, pertain to the very essence of the regulatory distinction at issue, irrespective of the exact context in which they were raised by the parties. If the Panel finds that the regulatory distinction based on high ILUC risk is *a priori* legitimate, it will then consider aspects of the measure that, in the Panel's view, are pertinent to assessing whether the distinction is applied in an even-handed manner, including whether it is applied in a manner that constitutes arbitrary or unjustifiable discrimination.

7.501. The Panel further notes that the parties' arguments made in relation to Malaysia's claim under Article 2.1 concern the scientific underpinnings of the concept of ILUC and high ILUC risk. The parties also extensively discuss the scientific studies produced as evidence, the underlying data, assumptions, their sources, as well as their use in the high ILUC-risk formula. The parties' views differ on the degree of scrutiny that the Panel should exercise in reviewing such evidence.[774]

7.502. The Panel recalls that its mandate to "make an objective assessment of the matter before it" under Article 11 of the DSU involves a duty to examine and consider all the evidence on the record and to evaluate the relevance and probative force of each piece thereof.[775] Insofar as discharging this duty could involve reviewing scientific evidence, the Panel considers that while it may not be in a position to draw definitive conclusions on the methodological merits of the approaches presented and the underlying scientific information, the Panel can consider whether the body of evidence, as a whole, provides a reasonable basis in support of the proposition for which it is being invoked.[776] To the extent that this Panel is called upon to review the robustness of such evidence, its assessment may include, where relevant:

> [A] consideration of whether such evidence 'comes from a qualified and respected source', whether it has the 'necessary scientific and methodological rigor to be considered reputable science' or reflects 'legitimate science according to the standards of the relevant scientific community', and 'whether the reasoning articulated on the basis of the scientific evidence is objective and coherent'.[777]

7.503. Acting within these parameters, panels may rely on evidence reflecting a minority scientific opinion, provided that this opinion emanates from respected sources and reflects legitimate and reputable science in light of the evidence on the record.[778] It would thus not be sufficient for the complainant to simply put forward a different scientific opinion or point out some imperfections in the approach adopted by the regulating Member, as long as the evidence on the record as a whole provides a reasonable basis for that approach.[779]

7.504. Therefore, the Panel is of the view that its task in this dispute is not to attempt to resolve scientific debates on the basis of the evidence submitted by the parties.[780] Rather, the Panel must

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[773] The Panel notes that the parties' arguments under Article 2.1 also cross-reference sections of their arguments under Article 2.2 and Article XX (and vice versa). All of these sections also cross-reference several up-front sections of their submissions setting forth extended discussions on the validity of the concepts of ILUC and high ILUC risk, as well as the scientific basis for the measures at issue, and the history and factual circumstances surrounding the measures at issue.

[774] Malaysia's response to Panel question No. 59, pp. 32-33. European Union's response to Panel question No. 59, paras. 361-386; comments on Malaysia's response to Panel question No. 59, paras. 98-107.

[775] Appellate Body Report, *Korea – Dairy*, para. 137.

[776] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.627. The Panel is mindful that in *Australia – Tobacco Plain Packaging*, the panel adapted the findings previously made in the context of Article 5.1 of the SPS Agreement for the purposes of assessing a claim made pursuant to Article 2.2 of the TBT Agreement. However, the Panel is of the view that the same considerations could be relevant, *mutatis mutandis*, in the context of an inquiry under Article 2.1.

[777] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.516. (referring to Appellate Body Report, *US – Continued Suspension*, paras. 591-592.)

[778] Appellate Body Report, *EC – Asbestos*, para. 178.

[779] Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.641-7.642.

[780] Panel Reports, *US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, paras. 7.150-7.151.

determine whether, considering the entirety of the evidence, there is a reasonable basis for the regulatory distinction drawn by the high ILUC-risk cap and phase-out and the manner in which it is applied.

7.1.2.4.5.1 The regulatory distinction at issue

7.505. The starting point for determining whether the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction is a consideration of the regulatory distinction that explains the difference in treatment giving rise to the detrimental impact.[781] In this context, panels may examine not only the particular distinction causing the detrimental impact, but also other probative elements that may shed light on the design of the measure and its operation.[782] In *US – Tuna II (Mexico)*, the Appellate Body considered the difference in treatment resulting in the detrimental impact on imported tuna as the central element of the regulatory distinction at issue:

> The aspect of the measure that causes the detrimental impact on Mexican tuna products is thus the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand. The question before us is thus whether the United States has demonstrated that this difference in labelling conditions is a legitimate regulatory distinction, and hence whether the detrimental impact of the measure stems exclusively from such a distinction rather than reflecting discrimination.[783]

7.506. Moreover, the stated objectives of a measure identified for the purposes of an analysis under Article 2.2, if a claim concerning that provision is made in parallel, could further assist panels in identifying the relevant regulatory distinction at issue.[784]

7.507. The Panel has found above that the detrimental impact on palm oil-based biofuel stems from the classification of palm oil as a high ILUC-risk feedstock (currently the only one) and, as a result, subjecting palm oil-based biofuel to the cap and phase-out. This classification is a result of the application of the high ILUC-risk formula set out in Article 3 of the Delegated Regulation and relying on the data contained in its Annex. The details of the formula, including its different elements are explained in detail in the descriptive part of this Report.[785] The formula is designed to determine the degree of ILUC-risk for individual biofuel feedstocks using as proxy the observed share of a feedstock's production area expansion into land with high-carbon stock, adjusted for productivity.[786] If that share exceeds 10%, the biofuel feedstock is determined to be high ILUC risk.

7.508. The classification of palm oil as a high ILUC-risk feedstock is thus a reflection of the degree of the risk of ILUC and of ILUC-related GHG emissions associated with the feedstock's production.[787] Therefore, it is the high degree of ILUC risk that lies at the heart of the regulatory distinction at issue rather than, for example, quantification of the respective volumes of GHG emissions linked to ILUC caused by production of any particular biofuel feedstock.[788] In short, the measure draws a regulatory distinction between different types of biofuels based on whether the feedstock used for its production presents a high degree of ILUC risk.

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[781] Panel Reports, *EC – Seal Products*, para. 7.174; and Appellate Body Reports, *US – COOL*, para. 341.

[782] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.96.

[783] Appellate Body Report, *US – Tuna II (Mexico)*, para. 284.

[784] The Panel notes that in *US – Tuna II (Mexico)*, the Appellate Body relied in compliance proceedings on its earlier findings, as well as on the findings of the original panel, concerning the identification of the measure's objectives under Article 2.2 when examining Mexico's claim under Article 2.1. (See Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.16.)

[785] See the descriptive part of this Report.

[786] The Panel understands the feedstock's production area to encompass the global production area of a crop used for biofuel production regardless of the specific purpose for which it is grown (i.e. including for non-biofuel applications).

[787] European Union's first written submission, paras. 176-177.

[788] In this report, the terms "crop" and "feedstock" are used interchangeably following such use of these terms by the parties in their submissions. The Panel notes in this regard that the references to feedstock's "production area" in the Delegated Regulation and other accompanying documents essentially mean the total cultivation area of the crop whether used to produce the feedstock or for other applications.

7.509. Understood in this way, the regulatory distinction at issue is commensurate with the measures' objective identified in the context of Malaysia's claim under Article 2.2. The Panel has concluded in that context that the stated rationale for the 7% maximum share and the high ILUC-risk cap and phase-out is to limit the *risk* of ILUC-related GHG emissions associated with food and feed crop-based biofuels. The classification of palm oil as high ILUC-risk feedstock, as a result of the application of the high ILUC-risk formula, thus constitutes the key regulatory distinction that the measure draws between palm oil-based biofuel on the one hand, and biofuels made from other food and feed crops, including rapeseed oil and soybean oil, on the other hand.

7.510. The Panel's understanding of the regulatory distinction at issue is further confirmed by the design of the low ILUC-risk criteria, which, at least formally, are aimed at tempering the detrimental impact of the high ILUC-risk cap and phase-out. These criteria are designed to account for the fact that the risk of causing ILUC is mitigated with respect to consignments of feedstocks produced within schemes that avoid displacement effects.[789] The *risk* of ILUC associated with a specific consignment is thus a central element of the low ILUC-risk criteria (although low ILUC-risk certification does not change the classification of a feedstock as a whole as high ILUC-risk).

7.1.2.4.5.2 Legitimacy of the regulatory distinction

7.511. The Panel now turns to the issue of whether a regulatory distinction based on a feedstock's degree of ILUC risk cannot be *a priori* legitimate.

7.512. Malaysia submits that the regulatory distinction based on the concepts of ILUC and high ILUC-risk cannot be legitimate because both concepts have an insufficient scientific basis and specifically target palm oil-based biofuel.[790] To support this contention, Malaysia repeats a number of arguments it makes with respect to different elements of the legal test under Articles 2.2 and 2.4, including those pertaining to the legitimacy of the measure's objective and the treatment of ILUC under international standards. More specifically, Malaysia submits that ILUC cannot be observed or quantified and as such cannot form the basis of a legitimate regulatory distinction.[791] According to Malaysia, this is reflected in the exclusion of ILUC from being taken into account in the international standards on the calculation of carbon footprint.[792]

7.513. When examining regulatory distinctions at issue under Article 2,1, in past disputes, and especially when considering whether the distinctions at issue were legitimate, some panels and the Appellate Body referred to conclusions reached regarding the existence of a "legitimate objective" of a measure under Article 2.2, if such claim was made in parallel.[793] The Panel recalls that in the context of Malaysia's claims under Article 2.2 it has concluded that the objective of limiting the risk of ILUC-related GHG emissions associated with food and feed crop-based biofuels is a "legitimate objective" within the meaning of that provision. In that context, the Panel has found that the risk of ILUC-related GHG emissions, while currently not directly observable or precisely quantifiable, is not a risk that appears to be theoretical, abstract or otherwise hypothetical.[794] In the context of its assessment of the claim under Article 2.4, which has informed the Panel's assessment under Article 2.2, the Panel has further found that ISO standards referred to by Malaysia do not "exclude ILUC from being taken into account" where measures seek to address the risk of GHG emissions.[795]

7.514. The Panel has thus found a reasonable basis for the European Union to consider that increasing demand for food and feed crop-based biofuels increases the risk of ILUC-related GHG emissions. In the Panel's view, all these considerations are equally relevant to the question whether the regulatory distinction drawn by the high ILUC-risk cap and phase-out is a legitimate one.

[789] Recital 37 to RED II. In a similar vein, Recital 12 to the Delegated Regulation stipulates that:
Under certain circumstances, the ILUC impacts of biofuels, bioliquids and biomass fuels generally considered as high ILUC-risk can be avoided and the cultivation of the related feedstock can even prove to be beneficial for the relevant production areas. […] Certified low ILUC-risk biofuels, bioliquids or biomass fuels should be exempted from the limit and gradual reduction set for high ILUC-risk biofuels, bioliquids and biomass fuels.

[790] Malaysia's first written submission, paras. 575-576.

[791] Malaysia's first written submission, paras. 575-576.

[792] Malaysia's first written submission, para. 575.

[793] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 242-243; and Panel Reports, *US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, paras. 7.186-7.187.

[794] See para. 7.307 above.

[795] See para. 7.290 above.

However, the Panel has already explained in the context of its assessment under Article 2.2 that this conclusion leaves open any questions relating to estimating the degree of ILUC risk. In particular, this conclusion leaves open any questions relating to the specific aspects of the high ILUC-risk classification, including the elements of the high ILUC-risk formula. The Panel has indicated that it would return to the issue in the context of the "legitimate regulatory distinction" step of the analysis under Article 2.1.

7.515. Some of the parties' arguments concerning the high ILUC-risk classification relate to its conceptual underpinnings, including certain basic elements of the high ILUC-risk formula. Others focus on specific parameters or values on the basis of which the formula operates. The Panel considers the former to be relevant to the issue of the *a priori* legitimacy of the regulatory distinction, and therefore, will considers these in this section.

7.516. Based on the parties' arguments the Panel thus considers the following issues to present fundamental questions regarding the *a priori* legitimacy of the regulatory distinction based on high ILUC-risk: (i) the European Union's reliance on the share of expansion rate into land with high-carbon stock as proxy of ILUC risk; (ii) the relationship between EU biofuel demand and a specific share of feedstock's production area expansion; and (iii) distinguishing between different crops based on their degree of ILUC risk.[796] The Panel will address these issues in turn.

Share of expansion rate into land with high-carbon stock as proxy of ILUC risk

7.517. The formula uses, as a proxy for the level of ILUC risk, the observed share of a feedstock's production area expanding into land with high-carbon stock, adjusted for productivity.[797] If this share exceeds 10%, the feedstock is determined to be high ILUC risk. It is thus the past expansion rate of a feedstock's production area into land with high-carbon stock that is an indicator of the likelihood of causing ILUC and ILUC-related GHG emissions.

7.518. It is uncontested between the parties that ILUC and its effects currently cannot be observed or quantified with precision.[798] The parties seem, however, to draw opposite conclusions from this fact. Malaysia contends that because ILUC cannot be directly observed and quantified, it cannot form the basis of a regulatory distinction seeking to address ILUC-related GHG emissions associated with production of biofuel feedstocks.[799] The European Union argues, for its part, that due to the same considerations it had to opt for a different methodology that uses the observed expansion into land with high-carbon stock as a proxy of the risk of ILUC.[800]

7.519. Malaysia criticizes the methodology developed by the European Union and its use to estimate the risk of ILUC.[801] Malaysia submits that an expansion of a feedstock's production area into land with high-carbon stock (i.e. DLUC) is unrelated to GHG emissions associated with ILUC and that factors other than increased biofuel demand could lead to such an expansion.[802] According to Malaysia, there is no scientific evidence to support the proposition that where the production of certain crops leads to large DLUC effects, this also comes with a higher risk of ILUC.[803] Malaysia further submits that there are serious doubts as to the rational relationship between the regulatory distinction drawn by the high ILUC-risk cap and phase-out and the measure's objectives.[804]

[796] The Panel notes that Malaysia raises some of these issues, or certain aspects thereof, to support its contention that the high ILUC-risk cap and phase-out is applied in manner that constitutes arbitrary or unjustifiable discrimination, or otherwise is not applied in an even-handed manner. However, in the Panel's view, these arguments relate to the very essence of the regulatory distinction based on the degree of ILUC risk, rather than the manner in which the distinction has been *applied* in the case at hand.

[797] The Panel understands the feedstock's production area to encompass the global production area of a crop used for biofuel production regardless of the specific purpose for which it is grown (i.e. including for non-biofuel applications).

[798] In the context of Malaysia's claim under Article 2.2, the Panel has found that "[t]he existence of large variability in the modelling estimates makes it difficult to assess with accuracy the specific quantity of ILUC-related GHG emissions by specific types of conventional biofuel crops". See para. 7.305 above.

[799] Malaysia's first written submission, paras. 576-577.

[800] European Union's first written submission, paras. 396-405.

[801] Malaysia's second written submission, paras. 132-138.

[802] Malaysia's second written submission, para. 135 and 581.

[803] Finkbeiner Expert Opinion, (Exhibit MYS-45), p. 18.

[804] Malaysia's first written submission, para. 575.

7.520. The European Union maintains that relying on a crop's share of expansion into land with high-carbon stock as a proxy of ILUC risk is justified due to the limitations of available techniques of precisely modelling ILUC-related GHG emissions.[805] The European Union contends that feedstocks for which LUC has been observed are more likely to expand their production area to meet an increasing demand than those for which such phenomena have not been observed.[806] Therefore, high levels of observable DLUC are, in the European Union's view, indicative of the risk of ILUC. The European Union adds that using observable expansion of a feedstock production area as proxy of ILUC risk suffers from a significantly lower degree of parametric uncertainty than the modelling approach.[807]

7.521. The Panel understands that under the high ILUC-risk formula, the share of a feedstock's production area expansion into land with high-carbon stock reflects land use change that is relevant to both DLUC and ILUC effects of a given biofuel feedstock. The former takes place when additional demand for the crop directly causes expansion of its production area into land with high-carbon stock. The latter occurs when, to meet additional demand for biofuel, the existing agricultural production of the same crop is diverted from non-fuel purposes to producing biofuel feedstock. Because the demand for agricultural commodities is not diminishing and productivity improvements are insufficient to meet the additional demand, such diversion is likely to lead to expansion of non-biofuel agricultural production of the same crop, including into land with high-carbon stock. Such expansion resulting from the diversion of production between different applications within a single crop is what the high ILUC-risk formula is aimed at capturing.

7.522. The formula thus establishes a link between the observed DLUC and the likelihood of ILUC within a single crop by estimating that crop's pressure on the existing agricultural production resulting from increased biofuel demand. In the Panel's view, the existence of this link is reinforced taking into account the operation of the sustainability and GHG emissions saving criteria under RED II. These criteria exclude eligibility to count towards the renewable energy targets of biofuels produced as a result of DLUC into areas designated in Article 29 of RED II, including land with high-carbon stock. Arguably, the sustainability and GHG emissions savings criteria thus create an incentive to serve the EU biofuel market by expanding into existing agricultural land, instead of into land with high-carbon stock, including the same crop's production area used for non-fuel purposes.

7.523. The Panel further notes that Malaysia puts forward evidence criticizing this aspect of the measure as assuming that the displaced crop is oil palm grown in Malaysia for food purposes, while accepting the global nature of agricultural markets.[808] According to Malaysia, it is impossible to establish a link between cultivation of food and feed crops for biofuel production in one geographical location and the growing of crops in another geographical location.[809]

7.524. The Panel understands Malaysia's argument to mean that relying on palm oil's share of production area expansion into land with high-carbon stock may lead to extrapolating the situation of oil palm to the displaced crop, which can be grown anywhere in the world. The Panel notes in this regard that it is uncontested between the parties that expansion of agricultural production triggered by ILUC of a biofuel feedstock can occur anywhere in the world.[810] Admittedly, the land use change caused by expansion of non-biofuel agricultural production is not directly captured by the formula and thus cannot be attributed to any specific biofuel feedstock.

7.525. The Panel does not consider this aspect of the methodology to be problematic. The Panel recalls that the measure does not attempt to attribute to biofuel feedstocks any specific levels of ILUC-related GHG emissions. Instead, the measure seeks to estimate the pressure that an increased demand for a particular biofuel feedstock exerts on existing non-biofuel agricultural production. This pressure reflects the degree of the risk of causing ILUC. Estimating such a degree of risk does not require attributing land use change to the expansion of any particular feedstock displacing non-biofuel agricultural production. Rather, there appears to be a reasonable basis for focusing on that feedstock's own land use change effects reflecting its propensity to expand the production area in

[805] European Union's first written submission, paras. 396-405.

[806] European Union's first written submission, paras. 421-422; and response to Panel question No. 38, paras. 223-224.

[807] European Union's response to Panel question No. 38, paras. 222-230.

[808] Malaysia's first written submission, para. 575.

[809] Malaysia's first written submission, para. 575.

[810] Malaysia's second written submission, para. 140. European Union's first written submission, para. 464.

response to an increase in demand. This, in the Panel's view, confirms the existence of a rational connection between expansion of a feedstock's production area into land with high-carbon stock and the risk of ILUC-related GHG emissions.

7.526. The European Union acknowledges that addressing ILUC-related effects on the basis of the share of a feedstock's production area expansion is not a perfect methodology that is free from uncertainties. The Panel agrees and observes that the approach pursued by the measure requires making a number of assumptions concerning certain elements of the high ILUC-risk formula. The Panel notes, however, that the methodology is based on an observable phenomenon (the share of expansion into land with high-carbon stock), thereby increasing the probability that the formula captures the causal connection between the demand for the crop in question and ILUC risk. Therefore, as long as the methodology as a whole bears a rational connection to the measure's objective, the regulatory distinction cannot be said to be *a priori* not legitimate solely on the grounds that the European Union has decided to use observable land use change effects as a proxy of ILUC.[811]

7.527. Accepting a contrary proposition would *de facto* deprive WTO Members of the right to regulate risks that do not lend themselves to quantitative analysis, or which are not sufficiently studied, even though such risks constitute a genuine cause of concern.[812] Nothing in the text of the TBT Agreement supports such an interpretation of Article 2.1. To the contrary, the Preamble to the TBT Agreement expressly recognizes that "no country should be prevented from taking measures necessary … for the protection … of the environment".[813] To that end, Article 2.2 lists as a relevant consideration for assessing regulatory risks "*available* scientific and technical information". This confirms, in the Panel's view, that the TBT Agreement does not require WTO Members to regulate only where perfect data is available.[814]

7.528. The Panel is further unconvinced by Malaysia's reliance on the expert report submitted in this dispute to support the contention that a crop's share of expansion into land with high-carbon stock cannot be used as a proxy of the risk of ILUC. The Panel notes that the expert report at issue considers reliance on ILUC from the perspective of estimating the levels of related GHG emissions using an LCA-based approach.[815] The premise of Malaysia's argument thus seems to be misguided, because, as explained at length in the preceding paragraphs, the measure focuses on the risk of ILUC instead of seeking to attribute specific GHG emissions levels to any feedstocks. The Panel thus considers that the measure does not need to establish a direct causal link between the production of biofuel feedstock in one geographical location and the growing of crops in another geographical location that leads to land use change effects.

7.529. In sum, the Panel considers that the evidence on the record provides a reasonable basis for relying on the expansion of a feedstock's production area into land with high-carbon stock as a proxy of ILUC risk. The measure captures land use change effects of crops used as biofuel feedstocks at least within biofuel and non-biofuel applications of a single crop, but also across different food and feed crops. As such, the measure establishes a rational connection between the expansion into land with high-carbon stock and the risk of ILUC. In the Panel's view, because the measure does not seek to attribute specific quantities of ILUC-related GHG emissions to any particular biofuel feedstock, it is not necessary to establish a direct causal link between the displacement of non-biofuel agricultural production by a crop used to produce biofuels and the ILUC-related GHG emissions.

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[811] Insofar as Malaysia is challenging specific data and assumption used in the high ILUC-risk formula, they are addressed in the next section.

[812] The Panel recalls that in the context of Malaysia's claim under Article 2.2 it has found that the risk of ILUC-related GHG emissions, while currently not directly observable or precisely quantifiable, is not a risk that appears to be theoretical, abstract or otherwise hypothetical.

[813] Recital 6 to the Preamble to the TBT Agreement.

[814] The Panel notes that in the context of Article 5 of the SPS Agreement, prior panels and the Appellate Body have found that a Member can choose either a quantitative or qualitative methodology to conduct a risk assessment. (See e.g. Appellate Body Report, *EC – Hormones*, para. 187.) Sometimes a quantitative approach may not be appropriate, in particular when reliable specific numeric data is not available. (Panel Report, *Australia – Apples*, para. 7.441.) The Appellate Body has recognized that various elements of a Panel's analysis under Article 2.2 could likewise involve both a quantitative and qualitative assessment. (Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.211.)

[815] Finkbeiner Expert Opinion, (Exhibit MYS-45), pp. 9-10.

The relationship between the share of crop's expansion into land with high-carbon stock and EU biofuel demand

7.530. Malaysia submits that the distinction based on the concepts of ILUC and high ILUC-risk in particular is not legitimate, because it is impossible to determine the share of a crop's expansion driven by an increase in EU biofuel demand as opposed to other factors.[816] The European Union acknowledges that it is impossible to attribute a specific rate of expansion to each driver given the multitude of different causes of the expansion.[817] The European Union maintains that its approach is justified because the impact of cultivating a particular crop is the same regardless of its use.[818] The European Union observes that because demand for agricultural commodities is not diminishing and cannot be met through productivity increases, an increase in biofuel demand will lead to expansion of non-biofuel agricultural production and, by implication, land use change.[819]

7.531. In the preceding subsection, the Panel has found that because the measure does not seek to attribute specific levels of ILUC-related GHG emissions to any particular feedstocks, it does not need to establish a direct causal link between the displacement of non-biofuel agricultural production by a crop used to produce biofuels and the ILUC-related GHG emissions. In the Panel's view, a similar rationale applies to Malaysia's argument that the European Union's methodology fails to attribute ILUC-related GHG emissions to EU biofuel demand. The Panel agrees that the high ILUC-risk formula does not account for different drivers of demand for crops used to make biofuel feedstocks. However, attributing land use change to specific factors should not matter insofar as the degree of ILUC risk is associated with the global average share of expansion into high-carbon stock land of a crop as a whole (i.e. for all applications). The degree of ILUC risk reflects the pressure that the crop production globally exerts on the agricultural land as a result of an increased demand in any particular sector. Therefore, whenever demand for a biofuel feedstock increases, it contributes to that pressure and, by implication, to the risk of ILUC.

7.532. The Panel further notes Malaysia's argument that the high ILUC-risk determination applies to the entire crop, regardless of the place of cultivation, whether the specific yields in question have displaced any food and feed crops and local efforts with respect to sustainability.[820] Malaysia submits that a country-specific or even region-specific approach based on measuring the DLUC of all crops would be more appropriate, precise and non-discriminatory.[821] In Malaysia's view, taking such an approach would allow taking into account national and regional differences, which focusing on global expansion of a crop fails to do.[822]

7.533. The European Union contends that the approach proposed by Malaysia ignores the global nature of ILUC and lacks feasibility.[823] The European Union reiterates that, as far as oil crops used as biofuel feedstocks are concerned, their expansion into land with high-carbon stock, including any changes in the trends potentially resulting from domestic policies, is captured by the high ILUC-risk formula, which is subject of a review.[824]

7.534. The Panel recalls that in the context of Malaysia's claim under Article 2.2, it has addressed various alternative measures proposed by Malaysia, based on a DLUC approach applicable to all crops placed on the EU market. Here, the Panel's assessment is focused on the alleged discrimination between the conditions in Malaysia and in other countries where LUC occurs. It is uncontested between the parties that a high ILUC-risk classification applies to the entire crop, regardless of the geographical location.

7.535. The Panel disagrees with Malaysia's argument that such a global approach to the risk of ILUC is flawed because it fails to consider the conditions "of biofuel production" prevailing in Malaysia. The Panel recalls in this regard that its determination of whether the relevant regulatory distinction is applied in a manner that constitutes arbitrary or unjustifiable discrimination involves consideration

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[816] Malaysia's first written submission, para. 581.
[817] European Union's first written submission, para. 118.
[818] European Union's response to Panel question No. 39, para. 239.
[819] European Union's first written submission, paras. 380-382.
[820] Malaysia's first written submission, para. 66.
[821] Malaysia's second written submission, paras. 158-169; response to Panel question No. 30, p. 12.
[822] Malaysia's second written submission, para. 162.
[823] European Union's comments on Malaysia's response to Panel question No. 30, paras. 35-37.
[824] European Union's comments on Malaysia's response to Panel question No. 46, para. 54.

of the conditions that are "relevant" for that purpose.[825] The relevant condition in the high ILUC-risk cap and phase-out is the degree of ILUC risk posed by the biofuel feedstock. This degree of risk is estimated on the basis of the share of that feedstock's production area expansion into high-carbon stock land. The country-specific approach implied by Malaysia's argument disregards the fact that the concept of ILUC-risk is global in nature. The global ILUC-risk profile of each crop distinguishes this case from certain prior cases (such as *US – Shrimp*) in which the regulating Member's failure to adequately account for country-specific circumstances was found to constitute arbitrary or unjustifiable discrimination between countries where different "conditions prevail[ed]" within the meaning of the chapeau of Article XX of the GATT 1994. Further, any regional differences affecting such expansion would be reflected in the data that is fed into the high ILUC-risk formula. As such, the measure thus reflects the conditions of biofuel feedstock production, including in Malaysia. Therefore the Panel considers that the evidence submitted by the parties provides a reasonable basis for designating a global ILUC-risk profile of a crop rather than determining it on a country-by-country basis.

7.536. The Panel thus concludes that it is not necessary to demonstrate a direct causal link between a specific share of a feedstock's production area expansion and demand for biofuel made from that feedstock in the European Union. The Panel further concludes that even though the measure does not distinguish between different drivers of the production area expansion, it is rationally related to its objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. This is because the measure applies only to biofuels consumed on the EU market.

Distinguishing between different biofuel feedstocks based on their degree of ILUC risk

7.537. Another defining feature of the high ILUC-risk cap and phase-out is that it seeks to attribute different degrees of ILUC risk (i.e. high and not high) to different biofuel feedstocks. This approach appears *a priori* consistent with the underlying assumption of the measure that the degree of ILUC risk is associated with a specific feedstock, and reflected in that feedstock's share of production area expansion into land with high-carbon stock, rather than with any specific condition causing the expansion.

7.538. According to Malaysia, differentiating between crops on the basis of their alleged ILUC-risk levels contradicts the evidence that ILUC effects cannot be measured or quantified.[826] Malaysia adds that the agricultural markets are global in nature and that it is generally agreed that ILUC effects are not crop-specific, which, it argues, is confirmed in the European Union's rejection of the results of the economic studies modelling the effects of ILUC in the Status Report.[827]

7.539. The European Union reiterates that the measure uses the share of expansion into land with high-carbon stock as a proxy of ILUC risk. It points out in this regard that different biofuel feedstocks are produced on land with varying carbon content and have different yields, impacting their overall levels of GHG emissions.[828] The degree of ILUC risk will thus vary from one feedstock to another as the share of production area expansion into land with high-carbon stock varies for each of them.[829] The European Union adds that differential ILUC effects are confirmed by the results of studies examined as part of the Impact Assessment for the ILUC Directive.[830]

7.540. The Panel considers that the difficulties in quantifying ILUC-related GHG-emissions for each feedstock with precision do not in and of themselves preclude the possibility that the degree of ILUC risk may vary from one feedstock to another. As observed by the Panel in this Report, quantifying ILUC-related GHG emissions and estimating the *risk* of ILUC and related GHG emissions are different issues that raise different sets of questions and cannot be approached from the same methodological

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[825] Appellate Body Reports, *EC – Seal Products*, para. 5.299. The Panel notes that this finding by the Appellate Body concern the *chapeau* of Article XX of the GATT 1994. As explained earlier, both the *chapeau* of Article XX and sixth Recital to the TBT Agreement share textual similarities, including a reference to the "arbitrary or unjustifiable discrimination between countries where the same conditions prevail". The Panel considers the Appellate Body's interpretation of the *chapeau* of Article XX to be relevant to the Panel's interpretation and application of Article 2.1.

[826] Malaysia's first written submission, para. 580.

[827] Malaysia's first written submission, paras. 580 and 610.

[828] European Union's first written submission, paras. 417-430.

[829] European Union's first written submission, paras. 417-418 and 428.

[830] European Union's first written submission, para. 418, fn 287.

perspective. Indeed, evidence submitted by the parties indicates that ILUC-related GHG emissions factors have been studied on a crop-by-crop basis.[831] The Impact Assessment prepared for the ILUC Directive confirms that "models tend to allocate different (indirect) land-use change emissions to different feedstocks".[832] Therefore, the fact that upon adoption of the ILUC Directive in 2015 the European Union decided not to differentiate at that time between different feedstocks based on the levels of their ILUC-related GHG emissions does not now preclude it from attributing different degrees of ILUC risk on a feedstock-by-feedstock basis.[833] For the same reasons, the Panel is unconvinced that it is generally agreed that effects of ILUC are not crop-specific. Such an assertion does not find support in the evidence submitted by the parties.[834]

7.541. Moreover, the Panel recalls that the measure seeks to estimate the degree of ILUC risk considered as a feedstock's pressure on existing agricultural land as a result of increased demand. This pressure is, in turn, estimated through the share of expansion into land with high-carbon stock. As evidenced in the Annex to the Delegated Regulation, different food and feed crops present different shares of expansion into such type of land, suggesting different levels of pressure on the existing agricultural land as a result of an increased demand. As noted by the European Union, these differences can be associated with the carbon content of the land on which expansion occurred, as well as the crop's yield, both of which are captured in the high ILUC-risk formula. Since these factors vary from one feedstock to another, they result in different levels of ILUC risk, as determined through the formula.

7.542. In light of the foregoing, the Panel finds that the evidence submitted by the parties provides a reasonable basis for distinguishing between different biofuel feedstocks based on their respective degrees of ILUC risk estimated on the basis of the share of expansion into land with high-carbon stock.

The alleged protectionist motive of the measure

7.543. The Panel further considers relevant to the question whether the regulatory distinction at issue is legitimate Malaysia's arguments relating to the alleged protectionist motive of the measure.[835] According to Malaysia, this motive is reflected in the design and operation of the high ILUC-risk cap and phase-out, including the high ILUC-risk formula; the European Union's history of seeking to limit imports of palm oil-based biofuel, *inter alia* through trade defence measures; the measure's legislative history and the stated intentions of the European Parliament.[836]

7.544. The Panel observes that Malaysia's arguments pertaining to the design of the measure and in particular the high ILUC-risk formula are addressed throughout this and the following sections of this Report, and need not be repeated here. As regards Malaysia's arguments concerning the use of trade defence instruments against the imports of palm oil-based biofuel and the measure's legislative history, including statements by members of the European Parliament, the Panel has addressed them as part of its examination of the measure's objective under Article 2.2. The Panel has concluded that the evidence submitted in this regard, considered individually and together, does not support Malaysia's assertion that the measure has a protectionist motive. For the same reasons, the Panel does not consider the evidence on the record to show that the regulatory distinction at issue is *a priori* not legitimate.

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[831] Study Report (2017), (Exhibit EU-28), pp. 26-39. The very fact that the modelling studies relied on by both parties and analysed by the European Union in the Status Report consider ILUC effects on a crop-specific basis is, in the Panel's view, an indication that the risk of such effects vary across different crops. In fact, Malaysia seems to implicitly acknowledge that different crops can present different degrees of the risks of ILUC-related GHG emissions, insofar as it relies on the conclusions of these studies to argue that soybean has higher estimated levels of ILUC-related GHG emissions than oil palm. Malaysia's first written submission, para. 580.

[832] Impact Assessment (2012), (Exhibit EU-26), p. 85.

[833] As a result, ILUC was addressed in the ILUC Directive only through the 7% maximum share.

[834] See Malaysia's first written submission, para. 580. The Panel notes that Malaysia relies primarily on the results of modelling studies analysed in the Status Report and addressed by the Panel in this section of the Report.

[835] Malaysia's first written submission, para. 584.

[836] Malaysia's first written submission, para. 584.

Conclusion on the a priori legitimacy of the regulatory distinction based on high ILUC-risk

7.545. In light of the foregoing, the Panel disagrees with Malaysia's position that, conceptually, a regulatory distinction based on a feedstock's degree of ILUC risk cannot be *a priori* legitimate. The Panel has found that the evidence submitted by the parties provides a reasonable basis for relying on the share of a feedstock's production area expansion into land with high-carbon stock as a proxy of the risk of ILUC associated with production of a particular biofuel feedstock. Because the measure seeks to estimate the degree of risk of ILUC rather than to attribute quantities of ILUC-related GHG emissions to specific biofuel feedstocks, it is not necessary to establish a direct causal link between EU biofuel demand, displacement of non-biofuel agricultural production and the resulting land use change effects. The Panel thus finds that, on a conceptual level, the regulatory distinction based on a high degree of ILUC risk is *a priori* legitimate.

7.1.2.4.5.3 Application of the regulatory distinction at issue

7.546. The Panel now turns to Malaysia's arguments, which, in the Panel's view, relate to the manner in which the regulatory distinction at issue is applied in the high ILUC-risk cap and phase-out. These arguments focus on certain aspects of the design, structure and operation of the measure that could result in the regulatory distinction based on high ILUC-risk not being applied in an even-handed manner or being applied in a manner that constitutes arbitrary or unjustifiable discrimination. The Panel notes that some of these arguments are also raised to substantiate Malaysia's contention that the regulatory distinction at issue is not legitimate. The Panel recalls, however, that it is not bound by the presentation of the arguments by the parties and enjoys discretion in structuring its analysis.[837]

7.547. Malaysia takes issue with a number of assumptions for the high ILUC-risk formula, as well as the variables and sources of the data incorporated therein.[838] Malaysia refers in this regard to factual sections of its submissions, where it addresses the scientific underpinnings of the measure.[839] Malaysia also argues that the European Union has not disclosed the exact calculations and sources relied on to arrive at the values, which applied in the formula lead to the determination of palm oil as currently the only high ILUC-risk feedstock.[840]

7.548. The Panel agrees with Malaysia that the sources of certain assumptions and values incorporated in the formula are not easily discernible from the Delegated Regulation and its Annex, as well as other documents relevant to the adoption of the measure.[841] However, in response to a number of questions from the Panel, the European Union indicates the relevant sources and explains how data is used in the formula.[842] The Panel notes that Malaysia has had an opportunity to comment on those responses and to a large extent availed itself of this opportunity.

7.549. Malaysia raises overall a number of issues concerning the high ILUC-risk formula and the underlying data and assumptions. More specifically, Malaysia contests the use of a relative, as opposed to an absolute, share of a feedstock's production area expansion into land with high-carbon stock to estimate ILUC risk, and relying in this regard on historical data.[843] Malaysia also contests the calculation of the share of palm oil's expansion into forestland and peatland, as well as the

[837] The Panel is also of the view that the practical significance of a finding that a particular aspect of a measure is inconsistent with Article 2.1 would be the same regardless of whether it is viewed as being indicative of the absence of a legitimate regulatory distinction, or of that distinction being applied in a manner that constitutes arbitrary or unjustifiable discrimination.
[838] Malaysia's first written submission, para. 575.
[839] Malaysia's first written submission, para. 575.
[840] Malaysia's first written submission, para. 575.
[841] Primarily in Status Report (2019), (Exhibits EU-3, MYS-92); and Study Report (2017), (Exhibit EU-28).
[842] See, for example, European Union's responses to Panel questions No. 16, No. 23, No. 40, and No. 43.
[843] Malaysia's first written submission, paras. 442-452 and 581; and second written submission, paras. 149-154.

productivity factor.[844] Last but not least, Malaysia takes issue with the calculation of the significant expansion threshold.[845]

7.550. The Panel will address these arguments in more detail when dealing with specific aspects of the high ILUC-risk formula. At this stage, the Panel recalls more generally that its task in this dispute is not to attempt to resolve scientific debates on the basis of the evidence submitted by the parties. Rather, as explained in more detail above, the Panel has to determine whether considering the entirety of the evidence, there is a reasonable basis for the regulatory distinction and the manner in which it is applied in the high ILUC-risk cap and phase-out.[846] The Panel recalls that nothing in the TBT Agreement precludes WTO Members from regulating areas in respect of which scientific information is not readily available. Indeed, Article 2.2 recognizes Members' right to address regulatory risks upon consideration of, *inter alia*, "*available* scientific and technical information".

7.551. With this background, the Panel now turns to the aspects of the measure which, in its view, are relevant to the manner in which the regulatory distinction has been applied. The Panel recalls that the central element of the formula relates to the share of a feedstock's production area expansion into land with high-carbon stock, adjusted for the crop's productivity. This share is calculated as the sum of the share of expansion into forestland and into wetland.[847] Both forests and wetlands, especially peatland, are known to contain high volumes of CO_2, which are released to the atmosphere when forests and wetlands are cleared.[848] If the total share of expansion exceeds 10%, the feedstock is considered as high ILUC-risk biofuel feedstock. On this very general level of the formula, two elements thus impact the classification of a feedstock as high ILUC-risk: the methodology and data used to calculate the share of expansion into high-carbon stock land and the 10% "significant expansion threshold".

Relative share of expansion rate into land with high-carbon stock

7.552. As noted above, to estimate the degree of ILUC risk associated with producing a particular feedstock, the measure uses as proxy the share of expansion of the feedstock's production area into land with high-carbon stock. As the measure relies on the *share* of expansion of a feedstock's global production area, this element of the formula is expressed in relative terms. This means that the central indicator of the degree of ILUC risk is not the absolute expansion of a crop's production area but rather a portion of that expansion that has taken place on land with high-carbon stock, expressed in percentage points.

7.553. Malaysia submits that relying on the relative share of expansion of a feedstock's production area into land with high-carbon stock, rather than on the absolute expansion of such production, area skews the analysis. According to Malaysia, this methodology disadvantages biofuels made from feedstocks commercialized more recently, such as palm oil, as compared to biofuels made from crops that have already reached significant levels of global production.[849] In support of this contention, Malaysia relies on an expert report suggesting that the absolute area of expansion is a better indicator of ILUC-related environmental effects.[850] According to this report, for crops with a significant global production area even a relatively small expansion of that area is likely to result in substantial impacts on the environment, including through land use change.[851] Malaysia provides the example of soybean, which has increased its production area by 3183.5 kha in absolute terms, which is 3.5 times more than oil palm, yet the relative increase of the production area of the two crops is 3% and 4% respectively.[852]

7.554. The European Union submits that the measure is intended to capture the overall impact of further stimulating demand for the agricultural commodity in question, including both the absolute

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[844] Malaysia's first written submission, para. 119; second written submission, paras. 138-140 and 173-174; and responses to Panel questions No. 51, p. 24 and No. 52, pp. 25-28.

[845] Malaysia's first written submission, para. 442; and second written submission, para. 170.

[846] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.627.

[847] Article 3(b) of the Delegated Regulation.

[848] IPCC Report, "Climate Change and Land", (Exhibits EU-225, MYS-89), p. 20.

[849] Malaysia's first written submission, para. 581; and response to Panel question No. 47, pp. 19-20.

[850] Finkbeiner Expert Opinion, (Exhibit MYS-45), p. 18. The report states, *inter alia*, that "for climate change and the real world impact, it is not the relative effect that matters, it is the absolute effect as the absolute amount of land use change correlates with the associated GHG emissions".

[851] Finkbeiner Expert Opinion, (Exhibit MYS-45), p. 18.

[852] Finkbeiner Expert Opinion, (Exhibit MYS-45), p. 18.

and relative expansion.[853] In the European Union's view, a relative expansion is relevant because it is an indicator of demand.[854] The European Union explains that focusing on the relative share of expansion reflects the measure's objective to address the risk of ILUC-related GHG emissions associated with each additional unit of biofuel produced.[855] According to the European Union, the risk of ILUC associated with such additional demand is thus not a function of the total expansion of a crop, but rather of the portion of that expansion per unit of extra production of a feedstock that takes place on land with high-carbon stock.[856]

7.555. The Panel recalls that the high ILUC-risk cap and phase-out does not seek to estimate the quantities of GHG emissions resulting from land use change, but the risk of causing ILUC as a result of increasing demand for a particular biofuel feedstock. The European Union has thus opted for addressing ILUC-related GHG emissions by identifying crops with the highest likelihood of expanding into high-carbon stock land for an additional unit of biofuel produced.

7.556. Since each unit of additional biofuel consumed will lead to a corresponding additional unit of feedstock produced (adjusted for productivity), identifying which crop has a higher risk of leading to land use change will also help determine which crop would lead to higher absolute amounts of land use change *for the same increase in units of additional biofuel consumed*. This is the case regardless of the current size of the feedstock's global production area. Relying on the "relative" share of expansion places the focus on the crop's propensity to expand into land with high-carbon stock, which is commensurate with the logic of the approach adopted in the measure. Malaysia's argument, and the conclusions of the expert report it relies on, appear thus to be based on an incorrect understanding of the operation of the measure. Therefore, the Panel observes that using a relative share of expansion into land with high-carbon stock is better suited to reflect the risk of ILUC related to a marginal increase in production of a given crop.

7.557. The Panel further observes that the measure takes into account the absolute expansion of the production area by requiring that the average annual expansion of the production area affects more than 100 000 hectares.[857] Therefore, the measure ensures that the share of expansion into land with high-carbon stock is considered only with respect to feedstocks presenting overall a sizeable expansion of the production area. The Panel notes that while Malaysia considers this threshold arbitrary, it does not substantiate this contention.[858] The Panel is thus not persuaded that there is anything arbitrary in the application of such a minimum threshold insofar as it allows the measure to focus on the most problematic biofuel feedstocks that could lead to land use change. In sum, the evidence submitted by the parties provides a reasonable basis for estimating the degree of ILUC risk based on the relative share of expansion into land with high-carbon stock.

Reliance on past data

7.558. In the preceding section, the Panel has discussed two elements of the formula conditioning classification of a feedstock as high ILUC risk. The first is the average annual expansion rate of a feedstock's production area, which has to exceed 1% and affect more than 100 000 hectares in order to be considered whether the feedstock can be associated with a high degree of ILUC risk.[859] The second is the share of that expansion into land with high-carbon stock, which is the proxy of the degree of ILUC risk.[860] Both of these values are estimated with respect to a 2008-2016 reference period.

7.559. Malaysia criticizes the reliance on data relating to this reference period and earlier, which it calls "historical". Malaysia argues that relying on such past data ignores recent trends and developments regarding the protection of forestland and wetland. According to Malaysia, these developments suggest that the forest area in Malaysia has been recently increasing.[861] Malaysia adds that using past data disregards the efforts of palm oil-producing countries to tame the

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[853] European Union's response to Panel question No. 122, para. 669.
[854] European Union's response to Panel question No. 122, paras. 671-672.
[855] European Union's response to Panel question No. 122, para. 671.
[856] European Union's response to Panel question No. 122, para. 672.
[857] Article 3(a) of the Delegated Regulation.
[858] Malaysia's first written submission, para. 442.
[859] Article 3(a) of the Delegated Regulation.
[860] Article 3(b) of the Delegated Regulation.
[861] Malaysia's first written submission, paras. 93 and 257.

expansion of oil palm plantations and reduce LUC-related GHG emissions more generally.[862] In Malaysia's view, the selection of the 2008-2016 reference period puts in focus oil palm, which expanded more rapidly during that period of time, while ignoring high expansion rates of production areas of other biofuel feedstocks recorded earlier in the past.[863]

7.560. The European Union submits that it is reasonable from a regulatory point of view to base forecasts about future developments on trends observed over a recent time period.[864] The European Union contends that it relied on the data available at the time of preparing the Delegated Regulation and the Status Report and the cut-off dates were aligned with the introduction of the protection of land with high-carbon stock in RED I and the tabling of the European Commission's proposal for RED II.[865]

7.561. The Panel notes the European Union's explanation that the beginning of the reference period corresponds with the introduction of the sustainability and GHG emissions saving criteria intended to protect land with high-carbon stock.[866] Following the entry into force of these criteria, which focus on DLUC-related effects, EU biofuel demand was expected to be met entirely by production coming from crops grown on existing agricultural land.[867] This has fuelled concerns about ILUC and its impact on the environment.[868] Malaysia does not appear to be contesting this rationale for choosing 2008 as the beginning of the reference period.

7.562. Rather, Malaysia argues that the reference period coincided with the expansion of oil palm, whereas other food and feed crops had reached the peak of their expansion earlier. However, Malaysia does not provide evidence concerning such peaks of expansion. In particular, Malaysia does not provide data on the expansion of the production area into land with high-carbon stock for other biofuel feedstocks coinciding with such peaks, or explain whether such data is available. As a result, the Panel is not in a position to assess whether relying on pre-2008 data would lead to a different high-ILUC risk classification of various food and feed crop-based biofuels. Moreover, the Panel considers that this argument contradicts Malaysia's position that the reference period should reflect the most recent developments allegedly indicating declining deforestation rates in Malaysia.[869] In the Panel's view, relying on up-to-date data is of paramount importance for accurately assessing risks related to current and future trends.

7.563. This brings the Panel to Malaysia's argument that the European Union has ignored the most recent developments relevant to estimating the share of palm oil's production area expansion into land with high-carbon stock and, by implication, the degree of ILUC risk. In this regard, Malaysia refers to the international commitments and internal policies aimed at limiting deforestation.[870] The Panel acknowledges the importance of local efforts aimed at protecting the environment. The Panel notes that the effects of such policies would be reflected in the data on the expansion into land with high-carbon stock. This, in turn, raises the question whether the European Union should have relied on more recent evidence pertaining to expansion rates of biofuel feedstock's production areas.

7.564. The Panel notes that the Delegated Regulation and the Status Report, which contain the relevant requirements, data and assumptions resulting in the classification of palm oil as the only high ILUC-risk feedstock, were adopted in early 2019. Therefore, as regards the adoption of the high ILUC-risk cap and phase-out, the Panel considers as relevant data and scientific studies available not only during the 2008-2016 period but also past the 2016 cut-off date until the adoption of the Delegated Regulation.

7.565. With respect to the latter period, the parties produce as evidence two studies analysing deforestation rates in palm oil-producing countries, as well as a 2020-2029 FAO Agricultural

[862] Malaysia's second written submission, para. 159.
[863] Malaysia's first written submission, para. 58; second written submission, para. 155.
[864] European Union's response to Panel question No. 33, para. 174.
[865] European Union's response to Panel question No. 58, para. 359.
[866] The Status Report states that the 2008 year was chosen "to ensure policy coherence with the cut-off dates for the protection of highly biodiverse land and land with high carbon stock set out in Article 29 of the Directive." (Status Report (2019), (Exhibit EU-3), p. 6).
[867] ILUC Directive, (Exhibits MYS-168), p. 2; and Status Report (2019), (Exhibit EU-3), p. 4.
[868] ILUC Directive, (Exhibit MYS-168), Recital 5, p. 2.
[869] Malaysia's first written submission, para. 58.
[870] Malaysia's first written submission, paras. 277-294.

Outlook.[871] The Panel notes that this evidence relates to deforestation rates more generally and does not provide information on expansion into land with high-carbon stock on a crop-by-crop basis. As a result, this evidence does not allow for a comparison with the data relied on by the European Union. It does not therefore corroborate Malaysia's assertion that the rate of oil palm's expansion into land with high-carbon stock was lower than it would appear from the measure at issue.[872] The Panel further notes that a 2021 study submitted by the European Union suggests that the expansion rate of oil palm into forestland in Indonesia had hardly changed between 2001 and 2019.[873] The Panel therefore considers that the evidence submitted by the parties does not put in question the data relied on by the European Union with regard to the 2008-2016 reference period.

7.566. However, the Panel stresses the importance of grounding the high ILUC-risk determination in the most recent available data to ensure a balanced and coherent application of the measure in its current design. The share of feedstock's production area expansion into land with high-carbon stock is a central element in the high ILUC-risk formula and one of the most significant factors that can impact the classification of a biofuel feedstock as high ILUC risk.[874] A balanced and coherent operation of the high ILUC-risk cap and phase-out is therefore premised on the accuracy of the data on expansion into land with high-carbon stock. This is all the more true given that the measure uses information on past trends to address current and future concerns. These trends may be subject to dynamic changes driven by market forces and the regulatory landscape, among other factors. The Panel considers particularly relevant in this context the efforts by Malaysia aimed at limiting the expansion of oil palm plantations, including into land with high-carbon stock, and deforestation more generally. It is therefore of paramount importance that the underlying data, as well as the related estimates and assumptions, are regularly reviewed to take due account of changes in the relevant circumstances.

7.567. Regular reviews of, and updates to, the underlying data seem also pertinent in light of the relatively short timeframe for the implementation of the high ILUC-risk cap and phase-out. To recall, the measure aims at excluding biofuels made from high ILUC-risk feedstocks from the eligibility to count towards the renewable energy targets by 2030 at the latest. In light of this timeline, an even-handed application of the measure would require a regular review of the data until that date and beyond.[875]

7.568. Moreover, the Panel notes that reviewing the data on expansion into land with high-carbon stock allows accounting for possible substitution effects between different biofuel feedstocks. The Panel notes in this regard Malaysia's argument that phasing out palm oil as biofuel feedstock could

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[871] M. Weisse and E.D. Goldman, "The World Lost a Belgium-sized Area of Primary Rainforests Last Year", (Exhibit IDN-25), "Oilseeds and oilseed products" OECD-FAO Agricultural Outlook 2021-2030 (agri-outlook.org), p. 7, (Exhibit EU-227); D.L.A. Gaveau et al., "Rise and fall of forest loss and industrial plantations in Borneo (2000–2017)", Conservation Letters, Vol. 12:3 (2018), 1, (Exhibit EU-254). The Panel's analysis of this evidence is limited to the question whether it supports Malaysia's contention regarding the alleged lower rates of deforestation not being taken into account in the measure. The Panel will address the data relied on to calculate the share of palm oil's production area expansion into land with high-carbon stock is addressed in the next section of this Report.

[872] See European Union's response to Panel question No. 50, paras. 309-315.

[873] A 2021 study submitted by the European Union suggests that the share of oil palm's expansion into forestland in Indonesia peaked in 2016 and started slowing down in 2017-2019. However, the study concludes that the fall in the expansion of oil palm plantations in Indonesia is not related to the "the common drivers described for forest transitions" and that "there is no guarantee that the low levels of conversion seen in 2017-2019 will remain". (Gaveau D. & co., Slowing deforestation in Indonesia follows declining oil palm expansion and lower oil prices, Research Square, 15 January 2021, (Exhibit EU-157), p. 8.) In addition, the study does not seem to address the expansion of oil palm into peatland. The Panel notes that this study is specific to the situation in Indonesia. The Panel recalls, however, that the share of a production area expansion is determined for the feedstock as a whole, irrespective of where the expansion occurs. The Panel remains mindful of this consideration when analysing other evidence concerning expansion of oil palm into land with high-carbon stock land in Malaysia and/or Indonesia.

[874] The Panel notes that it is much less likely that other elements of the high ILUC-risk formula, such as the productivity factor or the significant expansion threshold evolve significantly within a relatively short period of time.

[875] In the context of its findings under Article 2.4, the Panel observed that Article 2.4 is "not a static obligation and that there is an ongoing obligation to reassess technical regulations in light of new international standards that are adopted or revised", and that the obligation in Article 2.3 of the TBT Agreement contextually supports that view (referring to Panel Report, *EC – Sardines*, para. 7.81). The Panel considers that the same considerations inform the assessment of a technical regulation under Article 2.1.

lead to substitution by biofuels made from other biofuel feedstocks.[876] An increased demand for such feedstocks, combined with lower productivity rates of the crops used to make them, will, in Malaysia's view, lead to further expansion of the production area reducing the effectiveness of the measure. While the evidence before the Panel suggests that excluding a particular biofuel from the eligibility to count towards the renewable energy targets may lead to some gradual substitution by other eligible biofuels, the extent of such substitution effects is difficult to predict.[877] If such substitution effects were to occur, they could indeed propel the production area expansion into land with high-carbon stock for feedstocks which would benefit from a shift of demand away from palm oil, potentially leading to an increase in their degree of ILUC risk. As noted by Malaysia[878], a periodical review of the data on the share of expansion into land with high-carbon stock could in principle capture LUC effects of a potential substitution of palm oil-based biofuel by other food and feed crop-based biofuels.

7.569. The European Union itself emphasizes the importance of a regular review of the available information in the absence of more recent data and points out that such a review mechanism is incorporated in Article 7 of the Delegated Regulation.[879] This provision requires the European Commission to review "all relevant aspects of the report on feedstock expansion", including the data on feedstock production area expansion and the low ILUC-risk certification criteria.[880] It thus appears to be of central importance to ensuring that the high ILUC-risk formula incorporates the most recent available data.[881] Malaysia does not question the scope of this review provision. It submits, however, that the review provided for in Article 7 has not been conducted and it is uncertain whether it would be carried out on a regular basis.[882]

7.570. Pursuant to Article 7 of the Delegated Regulation, the first review of the data on expansion into land with high-carbon stock was to be concluded by 30 June 2021. It is uncontested between the parties that this review had not taken place by the time the parties filed their last substantive submissions.[883] This means that the high ILUC-risk cap and phase-out was operating in 2022, and likely beyond, on the basis of data covering the 2008-2016 period, which had not been updated. During that time, new data may have become available that might have required adjustments to the operation of the measure and its application to any specific crop. Although the European Union contends that the delay was due to the COVID-19 pandemic, which affected many activity areas of the European Commission, it does not provide any specific arguments on how it affected the feasibility of reviewing the data underlying the high ILUC risk determination.[884] The Panel appreciates the difficulties that may arise in reviewing complex scientific information, especially in times of a global public health emergency. However, a general reference to the COVID-19 pandemic is insufficient to justify a delay in the review of data that is still ongoing at the time of drafting this report. This is all the more true, given that the European Union itself considered that the review could and should have been completed by 30 June 2021.[885]

7.571. Therefore, insofar as the review of data used as basis for the classification of feedstock(s) as high ILUC-risk is not undertaken in a regular and timely manner, the measure cannot be said to be applied in an even-handed manner. This is because the situation relevant to the assessment of the share of expansion into land with high-carbon stock may have changed since the determination was made on the basis of the 2008-2016 reference period. This finding of the Panel should not be

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[876] Malaysia's first written submission, para. 123; and response to Panel question No. 54, pp. 28-31.

[877] R. Delzeit, T. Heimann, F. Schünemann and M. Söder, "Who benefits really from phasing out palm oil-based biodiesel in the EU", Kiel Working Paper No. 2203, Kiel Institute for the World Economy, December 2021, (Exhibit IDN-2), p. 11. See also above section concerning the substitutability of palm oil-, rapeseed oil-, and soybean oil-based biofuels.

[878] Malaysia's response to Panel question No. 54, pp. 31-32.

[879] European Union's first written submission, para. 106; and second written submission, para. 36.

[880] The full text of Article 7 of the Delegated Regulation is quoted in para. 2.55 above.

[881] The Panel notes that Article 26(2) subpara. 5 of RED II provides for a review of the low ILUC-risk certification criteria and the criteria for determining the high ILUC-risk feedstocks. This review seems, however, to be of a more general nature, while the review under Article 7 of the Delegated Regulation appears to be focusing on expansion into land with high-carbon stock, which is at the centre of the European Union's arguments.

[882] Malaysia's second written submission, para. 184; response to Panel question No. 54, p. 31.

[883] European Union's response to Panel question No. 56, para. 348.

[884] European Union's response to Panel question No. 57, para. 352.

[885] The Panel is unpersuaded by the European Union's argument that the provision indicates an "indicative deadline", given its normative language. European Union's response to Panel question No. 56, para. 347.

understood as requiring the measure to be continuously updated to take account of any relevant new data sources that becomes available and that might change the measure's accuracy in determining high-ILUC risks and, consequently, its even-handedness. Rather, the regulatory design of the measure, with its heavy reliance on data and assumptions reflecting past events in order to address current and future risks requires the European Union to verify on a regular and timely basis whether the data supports the high ILUC-risk classification. Finally, the Panel notes that while its findings regarding the review of data take into account developments taking place after panel establishment, both parties, in particular the European Union, relied on such developments to support their respective positions.[886]

7.572. The Panel therefore finds that the European Union has applied the high ILUC-risk cap and phase-out inconsistently with Article 2.1 of the TBT Agreement by failing to conduct a timely review of the data used to determine which biofuels are high ILUC risk, as this results in arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

Calculation of the share of expansion rate into land with high-carbon stock

7.573. The Panel further notes that Malaysia raises arguments contesting certain specific values and assumptions used to calculate the share of palm oil's production area expansion into land with high-carbon stock, as well as their sources. These arguments concern the method of calculation of the share of expansion into forestland and peatland, as well as the productivity factor.[887] All these factors are incorporated in the high ILUC-risk formula, as described in the descriptive part of this Report. More specifically, the productivity-adjusted share of a feedstock's production area expansion into land with high-carbon stock reflects the feedstock's propensity to cause LUC effects, including ILUC. As noted above, the formula considers as land with high-carbon stock two main types of land: forests and wetland, in particular peatland. Therefore, the share of a feedstock's production area expansion into land with high-carbon stock is the sum of expansion into forestland and into peatland. In addition, to take account of a particularly significant volume of carbon contained in peatland, the formula includes a peatland multiplier. The share of a feedstock's production area expansion into peatland is thus multiplied by 2.6 before being summed with the expansion into forestland. Finally, the overall share of expansion into land with high-carbon stock is adjusted for the crop's productivity, as explained in more detail further below.

7.574. Insofar as Malaysia's arguments contest the data that serves as the basis for the calculation of these values, the Panel recalls its finding above regarding the absence of a timely review of the data on the share of expansion into land with high-carbon stock, which implies that the data in question might have required revisions. Nevertheless, the Panel considers that addressing arguments of the parties relating to the nature of such data and their use in the high ILUC-risk formula is appropriate in the circumstances of this dispute. Assessing these arguments is relevant to the question whether the regulatory distinction has been applied in an even-handed manner and is therefore necessary to assist the DSB in making recommendations and providing rulings in these proceedings. The Panel is also of the view that such findings will be relevant for the implementation of the recommendations and rulings of the DSB.

7.575. Starting with the calculation of the share of palm oil's production area expansion into forests and peatland Malaysia's contests the methodology followed by the European Union and the underlying data. To recall, this share has been estimated at 45% for expansion into forests and 23% for the share of expansion into wetland, including peatland.[888] The Panel has reviewed the arguments and evidence adduced by the parties in relation to this criticism, in particular the data relied on for the calculation of the respective values and their sources.[889] The Panel considers that data relied on

[886] See section 7.1.1 above, setting out preliminary considerations. The Panel notes that the European Union in particular reiterates on multiple occasions that the review provision ensures that newly available data will be duly taken into account in the high ILUC-risk formula.

[887] Malaysia's first written submission, paras. 443-450; second written submission, paras. 147-149 and 174; and responses to Panel questions No. 95, pp. 63-64.

[888] The share of expansion into peatland is further multiplied by 2.6 to account for the high-carbon content of peat, before summing up with the share of expansion into forestland.

[889] Basiron, Y and Yew F.K., "Land use impacts of the livestock and oil palm industries", Journal of Oil Palm, Environment & Health 2015, (Exhibit MYS-163)); Status Report (2019), (Exhibits EU-3, MYS-92); M. Weisse and E.D. Goldman, "The World Lost a Belgium-sized Area of Primary Rainforests Last Year", (Exhibit IDN-25); D.L.A. Gaveau et al., "Rise and fall of forest loss and industrial plantations in Borneo (2000–2017)",

by the European Union come from "qualified and respected" sources, which do not lack the "necessary scientific and methodological rigour to be considered reputable science". Nor does the record evidence show that the European Union used such studies and the data contained therein in a manner that is not "objective and coherent".

7.576. Moreover, Malaysia takes issue with the European Union's calculation of the productivity factor. The high ILUC-risk formula contains a productivity factor in the denominator to adjust the share of production area expansion into land with high-carbon stock for the productivity of the crop used as biofuel feedstock. The productivity factor reflects the differences in the amount of energy that could be obtained from a given quantity of feedstock and production area. This adjustment allows making an appropriate comparison of the shares of expansion into land with high-carbon stock of crops with different productivity levels. Otherwise, less productive crops used as biofuel feedstocks could be considered as presenting the same level of ILUC-risk as more productive crops for which the same share of expansion has been calculated. However, such less productive crops would need to expand into more area than more productive crops to produce the same additional unit of biofuel. Different productivity factors are thus calculated for each crop by adjusting the average yields with the respective share of area harvested and with the energy content for the main product as well as by-products associated with the same crop.[890]

7.577. Malaysia essentially challenges the European Union's methodology of comparing yields of different crops to calculate their respective productivity factors. Malaysia relies on the data comparing oil yields of different food and feed crops to argue that the productivity of oil palm is much higher than is reflected in the high ILUC-risk formula.[891]

7.578. The European Union contests the productivity figures presented by Malaysia as relying on oil yields only and leaving out other relevant co- and by-products.[892] The European Union contends that accounting for main products and economically used by-products reflects the fact that the demand for certain crops is driven by all co-products rather than only oil.[893] The European Union explains this by referring to the example of soybean production, which is driven in the largest part by demand for soybean meal rather than oil.[894]

7.579. The Panel recalls that the purpose of incorporating the productivity factor in the high ILUC-risk formula is to ensure that the comparison of different crops' shares of expansion into land with high-carbon stock takes account of the fact that some crops have higher productivity levels than others. This requires that where crops yield multiple co- or by-products, their inclusion in the determination of the energy content needs to be conducted in a consistent manner across all relevant crops.

Conservation Letters, Vol. 12:3 (2018), 1, (Exhibit EU-254); White Paper Nr. 17 by J. Miettinen et al., "Historical Analysis and Projection of Oil Palm Plantation Expansion on Peatland in Southeast Asia" (International Council on Clean Transportation, 2012), (Exhibit EU-12); J. Miettinen, C. Shi, and S.C. Liew, "Land Cover Distribution in the Peatlands of Peninsular Malaysia, Sumatra, and Borneo in 2015 with Changes since 1990", Global Ecology and Conversation, Vol. 6 (2016), 67, (Exhibit EU-11); K.G. Austin et al., "Shifting patterns of palm oil driven deforestation in Indonesia and implications for zero-deforestation commitments", Land Use Policy, Vol. 69 (2017), 416, (Exhibit EU-231); J. Xu et al., "PEATMAP: Refining estimates of global peatland distribution based on a meta-analysis", Catena, Vol. 160 (2018), 134, (Exhibit EU-123); Jukka Miettinen et al, From carbon sink to carbon source: extensive peat oxidation in insular Southeast Asia since 1990, Environ. Res. Lett., 12 024014, 2017, (Exhibit EU-251); Hooijer, A., Page, S., Jauhiainen, J., Lee, W. A., Lu, X. X., Idris, A., and Anshari, G.: Subsidence and carbon loss in drained tropical peatlands, Biogeosciences, 9, pp. 1053–1071, (Exhibit EU-250); Page, S. E., Morrison, R., Malins, C., Hooijer, A., Rieley, J. O., and Jauhiainen, J.: Review of peat surface greenhouse gas emissions from oil palm plantations in Southeast Asia (ICCT White Paper 15), International Council on Clean Transportation, Washington, 2011, (Exhibit EU-249); Couwenberg, J., Dommain, R. and Joosten, H., Global Change Biology (2009) Greenhouse gas fluxes from tropical peatlands in South East Asia. doi: 10.1111/j.1365-2486.2009.02016, (Exhibit EU-253); Vijay V., Pimm S.L., Jenkins C.N., Smith S.J., The Impacts of Oil Palm on Recent Deforestation and Biodiversity Loss, Plos One, 27 July 2016, (Exhibit MYS-104).

[890] European Union's response to Panel question No. 40, paras. 246-256.

[891] Malaysia's first written submission, para. 83; response to Panel question No. 41, pp. 15-16.

[892] European Union's response to Panel question No. 9, para. 19.

[893] European Union's response to Panel question No. 41, paras. 284-285.

[894] European Union's response to Panel question No. 41, paras. 284-285.The European Union points out that soybean oil accounts for 40% of the value of soybeans.

7.580. The Panel further recalls that the high ILUC-risk formula does not differentiate between the drivers of expansion. As a result, it is impossible to identify a specific share of expansion that results from increased demand for biofuels in the European Union. Rather, this parameter of the formula applies to the crop as a whole. It thus seems reasonable that the productivity adjustment factor found in the denominator of the formula equally relates to the crop as a whole. This is all the more relevant given that expansion of some food and feed crops is driven by the demand for co-products other than oil.

7.581. Taking the example of soybean, the Panel notes that the demand is driven primarily by the demand for soybean meal (approximately 60%, according to European Union) and to a lesser extent by soybean oil (40%, according to the European Union).[895] Ignoring this fact would, in the Panel's view, skew the analysis by accounting for different drivers of demand in the nominator of the high ILUC-risk formula (the global share of production area expansion of a crop as a whole) and different drivers in the denominator of the formula (productivity measured as oil yield only). The Panel thus finds inapposite Malaysia's position that oil palm should have been attributed a much higher productivity factor based on the comparison of different crops' oil yields. Therefore, the evidence submitted by the parties provides a reasonable basis for the European Union to consider all relevant co- and by-products in the determination of the productivity factor.

7.582. In light of the foregoing, and bearing in mind the Panel's conclusion regarding the absence of timely review of the data, the Panel finds that the evidence submitted by the parties provides a reasonable basis for the European Union's methodology of calculating the share of expansion of feedstock's production area into land with high-carbon stock, including the shares of expansion into forestland and wetland, the peat multiplier and the productivity factor. The Panel further notes that even if it were to accept some or many of the alternative values proposed by Malaysia, the outcome of the application of the measure would remain the same, meaning that palm oil would remain the only biofuel feedstock classified as high ILUC risk.

Significant share of expansion threshold

7.583. Pursuant to Article 3 of the Delegated Regulation, a biofuel feedstock is considered high ILUC-risk if its share of expansion into land with high-carbon stock, adjusted for productivity, exceeds 10%.[896] This value of 10% has been calculated through a number of steps, which on their own could constitute a separate formula. These steps essentially consist in comparing carbon emissions savings from replacing fossil fuels with biofuels, feedstock's energy content and average net loss of carbon stock from land use change.[897] The resulting value of approximately 14% indicates the estimated share of a biofuel feedstock production area expansion into land with high-carbon stock at which LUC-related emissions will negate the direct GHG savings resulting from fossil fuel replacement.[898] To this figure of 14% a discount factor of 30% is further applied, based on the precautionary principle, "to guarantee both that biofuels achieve net sizable GHG emission savings and that biodiversity loss associated to ILUC is minimized".[899] The application of the significant expansion threshold thus seeks to ensure that the GHG emissions savings achieved by replacing fossil fuels with biofuels are not negated by the ILUC-related GHG emissions.

7.584. Malaysia contests the methodology leading to the calculation of the significant expansion threshold.[900] In its submissions, the European Union explains in detail the methodology it has followed to arrive at the significant expansion threshold.[901] The European Union points out in this regard that it has made conservative assumptions, which could underestimate the net carbon loss value for oil palm.[902]

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[895] European Union's response to Panel question No. 41, para. 285. These approximate values provided by the European Union are not contested as such by Malaysia.

[896] Article 3(b) of the Delegated Regulation.

[897] Status Report (2019), (Exhibits EU-3, MYS-92), p. 14. European Union's response to Panel question No. 43, paras. 293-297.

[898] Status Report (2019), (Exhibits EU-3, MYS-92), p. 14. European Union's response to Panel question No. 43, para. 293.

[899] Status Report (2019), (Exhibits EU-3, MYS-92), p. 13. European Union's response to Panel question No. 43, para. 293

[900] Malaysia's first written submission, para. 442.

[901] European Union's response to Panel question No. 43, paras. 293-297.

[902] European Union's response to Panel question No. 10, para. 23.

7.585. The Panel has reviewed the evidence submitted by the parties in relation to the calculation of the significant expansion threshold, including the available source data, assumptions and methodology.[903] This evidence provides, in the Panel's view, a reasonable basis for arriving at the threshold value of 14%, beyond which the average net carbon stock loss from expansion into land with high-carbon stock is likely to cancel out any emission saving from replacing fossil fuels with biofuels. In particular, the Panel notes that the evidence and arguments put forward by Malaysia do not undermine the European Union's calculation or the underlying data and assumptions.

7.586. Regarding the 30% discount factor, the Panel notes that it serves the purpose of ensuring that the use of biofuels delivers sizeable GHG emissions savings that are not cancelled out by ILUC-related GHG emissions associated with EU biofuel demand. The Panel is mindful that given the complexity of estimating the significant expansion threshold and the lack of readily available data for some of its elements, the value of 14% is an estimate. The Panel understands that in light of these uncertainties, the European Union chooses to err on the side of caution and has applied the 30% discount factor to ensure that the measure is effective for its purpose. The Panel notes in this regard that nothing in the TBT Agreement prevents WTO Members from protection against regulatory risks at the level they consider appropriate. The TBT Agreement recognizes this right of WTO Members in its preamble:

> [N]o country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, *at the levels it considers appropriate*.[904]

7.587. The Panel further notes that the European Union's efforts to ensure that the use of biofuels delivers sizeable GHG emissions savings that are not cancelled out by ILUC-related GHG emissions associated with EU biofuel demand is a corollary of the measure's objective to "limit the risk of ILUC-related GHG emissions associated with food and feed crop-based biofuels".

7.588. The Panel thus sees nothing in the application of the 30% discount factor that would result in arbitrary or unjustifiable discrimination or otherwise the measure not being applied in an even-handed manner. More specifically, the Panel observes that, if anything, the application of the discount factor makes it more likely for other biofuel feedstocks to exceed the significant expansion threshold, should the share of their production area expansion into land with high-carbon stock increase in the future.[905] The Panel recalls in this regard that the high ILUC-risk formula estimates palm oil's share of expansion into land with high-carbon stock, adjusted for productivity, at 41.92%. Therefore, the application of the 30% discount factor does not in any event impact the classification of palm oil as a high ILUC-risk feedstock.

7.589. In light of the foregoing, the Panel considers that the evidence submitted by the parties provides a reasonable basis for the application of the significant expansion threshold of 10%, including the 30% discount factor.

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[903] European Union's response to Panel question No. 43, paras. 293-297. Status Report (2019), (Exhibits EU-3, MYS-92), pp. 13-14; Gaveau, D.L.A., Sheil, D., Husnayaen, Salim, M.A., Arjasakusuma, S., Ancrenaz, M., Pacheco, P., Meijaard, E., 2016. Rapid conversions and avoided deforestation: examining four decades of industrial plantation expansion in Borneo. Nature - Scientific Reports 6, 32017, (Exhibit EU-232; N. Khasanah et al., "Aboveground carbon stocks in oil palm plantations and the threshold for carbon-neutral vegetation conversion on mineral soils", Cogent Environmental Science, Vol. 1:1 (2015), 1, (Exhibit EU-221); White Paper Nr. 17 by J. Miettinen et al., "Historical Analysis and Projection of Oil Palm Plantation Expansion on Peatland in Southeast Asia" (International Council on Clean Transportation, 2012), (Exhibit EU-12); K.G. Austin et al., "Shifting patterns of palm oil driven deforestation in Indonesia and implications for zero-deforestation commitments", Land Use Policy, Vol. 69 (2017), 416, (Exhibit EU-231); IPCC, Refinement to the 2006 IPCC Guidelines for National Greenhouse Gas Inventories (2019), Volume 1: General Guidance and Reporting, Chapter 8. Reporting Guidance and Tables, considered in May 2019 during the IPCC's 49th Session and adopted/accepted on 12 May 2019, (Exhibit IDN-20); and Guillaume, T., Kotowska, M.M., Hertel, D. et al. Carbon costs and benefits of Indonesian rainforest conversion to plantations. Nat Commun 9, 2388 (2018), (Exhibit EU-222).

[904] Recital 6 to the Preamble of the TBT Agreement. (emphasis added)

[905] The Panel notes that the share of production area expansion into land with high-carbon stock of the three biofuel feedstocks with the highest estimated degree of ILUC-risk is currently estimated at 8% (soybean), 5% (sugar cane), and 4% (maze). Annex to the Delegated Regulation.

The low ILUC risk criteria

7.590. As noted above, Article 26(2) of RED II contains an exemption from the high ILUC-risk cap and phase-out for individual consignments of biofuels certified as low ILUC risk. Insofar as this exemption mitigates the detrimental impact of the high ILUC-risk cap and phase-out on palm oil-based biofuel, it is relevant to the Panel's assessment whether the regulatory distinction at issue is applied in an even-handed manner. This is consistent with the Panel's approach outlined in the preliminary considerations section of this Report discussing the relationship between the high ILUC-risk cap and phase-out and the low ILUC-risk certification that the potential for low ILUC-risk certification is relevant to the assessment of whether the high ILUC-risk cap and phase-out is consistent with Article 2.1.

7.591. With these considerations in mind, the Panel will now assess whether the aspects of the low ILUC-risk certification criteria criticized by Malaysia are indicative of the high ILUC-risk cap and phase-out not being applied in an even-handed manner.

Overview of the low ILUC-risk criteria

7.592. As explained above, the low ILUC-risk criteria are laid down in two sets of requirements.[906]

7.593. First, in order to qualify for low ILUC-risk certification, biofuel has to comply with the sustainability and GHG emissions savings criteria and it has to be made from an "additional feedstock".[907] "Additional feedstock" is defined as the additional amount of a food and feed crop produced in a clearly delineated area compared to the dynamic yield baseline that is the direct result of applying a so-called "additionality measure".[908] This means that only those yields obtained from productivity improvements exceeding the increases that would already be achieved in a business-as-usual scenario are eligible for low ILUC-risk certification.[909]

7.594. Second, the additional yields submitted for low ILUC-risk certification should further be obtained only through a limited category of measures "as a further guarantee of the positive effects of low ILUC-risk certification".[910] These categories of measures are set out in Article 5(a) of the Delegated Regulation:

i. they become financially attractive or face no barrier preventing their implementation only because the biofuels produced from the additional feedstock can be counted towards the renewable energy targets (the parties refer to this criterion as "financial additionality");

ii. they allow for cultivation of food and feed crops on abandoned land or severely degraded land; or

iii. they are applied by small holders.

7.595. The Delegated Regulation further stipulates that the additional feedstock can only be certified as low ILUC-risk within 10 years of the adoption of the additionality measure.

7.596. The Panel recalls that in the context of Malaysia's claim under Article 2.1, its task is to assess whether any aspect of the low ILUC-risk criteria results in the regulatory distinction based on high ILUC-risk not being applied in an even-handed manner. The alleged impracticability of the low ILUC-

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[906] Articles 4 and 5 of the Delegated Regulation. For further details and texts of these provisions, see descriptive part of this Report.

[907] Article 5 of the Delegated Regulation. Subpara. (c) further stipulates that evidence identifying the additional feedstock has to be duly collected and thoroughly documented.

[908] Article 2(6) of the Delegated Regulation. The Delegated Regulation further defines "additionality measures" as "any improvement of agricultural practices leading, in a sustainable manner, to an increase in yields of food and feed crops on land that is already used for the cultivation of food and feed crops; and any action that enables the cultivation of food and feed crops on unused land, including abandoned land, for the production of biofuels, bioliquids and biomass fuels". Article 2(5) of the Delegated Regulation.

[909] Recital 13 to the Delegated Regulation. See also recital 81, para. 2 to RED II.

[910] Recital 14 to the Delegated Regulation.

risk criteria could provide such an indication if it resulted in a discrimination of palm oil-based biofuel that could not be explained by the measure's objective.

7.597. The Panel notes that Malaysia makes a general assertion that the low ILUC-risk criteria are impracticable and are prohibitively complex.[911] In this regard, Malaysia argues that: (a) there is an absence of detailed rules concerning the criteria and the process, thus preventing certification[912]; (b) limiting low ILUC-risk certification to the "additional feedstock" disadvantages highly-efficient crops and is difficult to estimate for perennial crops[913] and the amount of additional feedstock from a yield increase is uncertain and difficult to predict due to a variety of factors, including weather[914]; (c) the "financial additionality" pathway is unlikely to attract investment from farmers due to the difficulties in demonstrating there is no business case for undertaking productivity-improving measures other than for the prospects of selling the product as biofuel feedstock for the EU market, as well as the uncertainty of such prospects[915]; (d) the notions of abandoned and severely degraded land are not clearly defined in the Delegated Regulation and seem overly restrictive[916]; (e) the category of smallholders is defined too narrowly and imposes significant evidentiary requirements[917]; and (f) other evidentiary requirements are unduly burdensome, in particular limiting the availability of low ILUC-risk certification to 10 years from the adoption of the additionality measure for perennial crops.[918]

7.598. The European Union contests that low ILUC-risk certification is impracticable and submits that the requirements in the mechanism are formulated neutrally and apply to all feedstocks.[919] In this regard, it argues that: (a) with regard to the alleged absence of sufficient detail in the certification criteria, there is no need for certification prior to entry into force of the phase-out aspect of the measure in 2023[920]; and, in any event, the detailed rules governing the application of the additionality pathways will be set out in implementing rules soon to be adopted and that certification is already possible through voluntary schemes[921]; (b) the concept of "additionality", as used in the Delegated Regulation, is designed to avoid exacerbating existing rates of expansion into high-carbon stock land related to displacement effects[922]; (c) the "financial additionality" pathway further ensures that measures taken by farmers or producers go beyond the business-as-usual scenario, by excluding those that are sufficiently financially attractive and which would have been implemented regardless of the low ILUC-risk certification scheme[923]; (d) it has not been demonstrated that the cost of converting abandoned or severely degraded land would be prohibitive[924]; (e) the term "smallholder" was defined in the legislation by reference to the characteristics of farmers producing all types of feedstocks and not only palm oil[925]; and (f) the 10-year period of eligibility was chosen on the basis that the criteria would apply to any perennial or annual crop and it was not devised specifically for the lifecycle of oil palm[926], and, in any event, the 10-year period is sufficiently long for the benefits of the additionality measures to materialize, including for crops that take up to a few years to become productive or to reach their productivity peak.[927] The Panel will address these arguments in turn.

[911] Malaysia's first written submission, paras. 460 and 568.
[912] Malaysia's first written submission, para. 771; and response to Panel question No. 64, p. 40.
[913] Malaysia's first written submission, paras. 471-473.
[914] Malaysia's response to the Panel question No. 61, pp. 36-37.
[915] Malaysia's first written submission, paras. 467 and 767; and second written submission, para. 178.
[916] Malaysia's first written submission, para. 768; and second written submission, para. 179.
[917] Malaysia's first written submission, paras. 769-770.
[918] Malaysia's first written submission, paras. 767-770.
[919] European Union's first written submission, para. 153.
[920] European Union's first written submission, para. 154; and response to Panel question No. 92, para. 482.
[921] European Union's first written submission, paras. 154, 841 and 1072; and response to Panel questions No. 61, paras. 393-394, No. 62, paras. 396-397, and No. 63. paras. 398-407.
[922] European Union's first written submission, para. 142.
[923] European Union's first written submission, para. 155.
[924] European Union's first written submission, para. 156.
[925] European Union's first written submission, para. 157. The European Union adds that that smallholders have the option of a group certification and that the financial additionality criterion does not apply to smallholders due to their prevailing economic profile.
[926] European Union's first written submission, para. 149.
[927] European Union's first written submission, paras. 149-150.

The additionality requirement and the related evidentiary requirements

7.599. Starting with the concept of additionality, as used in the low ILUC-risk criteria, it is based on the premise that, given the non-diminishing demand for food, any additional demand for biofuel feedstocks creates the risk of displacing non-fuel agricultural production. This is due to food and biofuel feedstock production competing for agricultural land, the availability of which is limited. The Status Report explains in this regard that:

> Producing biofuels from … additional feedstock will not cause ILUC because that feedstock is not in competition with food and feed production and displacements effects are avoided.
>
> …
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> Average increases in productivity are still not sufficient to avoid all risks of displacement effects, though, because agricultural productivity is constantly improving while the concept of additionality, which is at the heart of the low ILUC certification, requires taking measures going beyond business as usual.[928]

7.600. It follows that even ordinary productivity improvements within the business-as-usual scenario do not guarantee that displacement effects related to increased biofuel demand can be avoided. The Panel observes that the concept of additionality is thus rationally related to the measure's objective of limiting the risk of ILUC-related GHG emissions associated with feed and food crop-based biofuels.

7.601. Malaysia points to the difficulties in the record-keeping requirements concerning the average yield during the three years preceding the adoption of the additionality measure.[929] The European Union submits that Malaysia has not shown that the rules establish "unsurmountable burdens" for farmers or are prohibitively complex.[930]

7.602. The Panel notes that Article 4(2) of the Delegated Regulation contains a general requirement to present evidence of the average yield over three years preceding application of the additionality measure. This requirement is commensurate with the calculation method of the dynamic yield baseline which concerns three years immediately preceding the application of the additionality measure.[931] Therefore, as the concept of additionality as reflected in the design of the low ILUC-risk criteria does not result in arbitrary or unjustifiable discrimination, then the same is true for the requirement in Article 4(2).

7.603. The Panel notes, however, that certain elements of the additionality criterion remain vague and ambiguous to such an extent that the Panel has serious doubts about the feasibility of low ILUC-risk certification under such conditions. More specifically, it is not clear from the Delegated Regulation how certain elements pivotal to determining the dynamic yield baseline should be established for different feedstocks, including palm oil. In particular, it is unclear how the average yield increase or the lifetime yield curves should be determined. Considering that the notion of dynamic yield baseline is central to the determination of the additional feedstock that can be certified as low ILUC risk, it would appear that no crop could be certified without further clarifying these and potentially other related concepts as well as the specific methodology used for quantifying them.

7.604. Moreover, it is not clear what type of evidence would be required to demonstrate the average yield over the three-year period preceding the application of the additionality measure. The Panel notes the European Union's acknowledgement that detailed rules on the additionality criterion and the evidentiary requirements are elaborated in an implementing act.[932] This, in the Panel's view,

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[928] Status Report (2019), (Exhibits EU-3, MYS-92), p. 16.
[929] Malaysia's first written submission, para. 770.
[930] European Union's first written submission, paras. 153-154.
[931] Article 2(7) of the Delegated Regulation.
[932] European Union's first written submission, para. 154.

confirms that the additionality criterion and the evidentiary requirements as reflected in the Delegated Regulation are overly vague and ambiguous, as well as incomplete.[933]

The financial additionality pathway

7.605. The Panel now turns to the first of the three additionality pathways that can be used to obtain the additional feedstock qualifying for low ILUC-risk certification, which the parties refer to as "financial additionality".

7.606. The financial additionality pathway requires that productivity-improving measures qualifying for low ILUC-risk certification would not have been taken in a business-as-usual scenario but for the financial incentive relating to the prospect of selling the feedstock on the EU biofuel market.[934] This, in turn, assumes the existence of a premium on a crop sold for the EU market as low ILUC-risk-certified feedstock, compared to that same crop sold as, e.g. food.[935] This premium is expected to render profitable productivity-improving measures that are otherwise financially not attractive, or which present significant barriers of a non-financial nature (e.g. the lack of skills or technology). The rationale for this approach rests on the premise that if such measures were financially attractive regardless of the product's use, then food and biofuel demand would compete for the additional yield and displacement effects could not be avoided.

7.607. The Panel notes that Malaysia considers the existence of any premium on a crop used as biofuel feedstock uncertain and depending exclusively on access to the EU biofuel market.[936] Indeed, it is not entirely clear that such premium could be guaranteed on a market for an agricultural commodity, including used as a biofuel feedstock. As pointed out by Malaysia, and corroborated by evidence, a feedstock's price may vary from one year to another due to weather events or market fluctuations.[937] As a result, farmers, who frequently operate on thin margins, may be unwilling to take the financial risk linked to investing in additionality measures without the return on such investment being sufficiently certain.[938] The evidence thus confirms that the financial additionality criterion is narrowly tailored and, as a result, may be very difficult to meet.

7.608. The narrow scope of an exemption alone is not, however, sufficient to demonstrate arbitrary or unjustifiable discrimination, or more generally that the measure is not applied in an even-handed manner. If one accepts that production of a biofuel feedstock can lead to displacement effects insofar as it competes with food and feed production, and given the non-diminishing global demand for food and feed, then the risk of ILUC does not seem to be mitigated even with respect to the additional yield, if that yield was not produced solely to benefit from the premium related to selling it on the EU biofuel market. In other words, the low ILUC-risk criteria require a link between the additional yield and the premium on the EU biofuel market, which in the case of financial additionality is ensured by the premium on biofuel feedstock. In sum, the Panel finds that there is a reasonable basis for the European Union to rely on the concept of financial additionality in the low ILUC-risk criteria.

7.609. The Panel notes, however, that certain aspects of this pathway are overly vague and ambiguous to such an extent that the Panel has serious doubts whether the financial additionality pathway, as reflected in the Delegated Regulation, could effectively be used for the purposes of low ILUC-risk certification. It is not clear from the Delegated Regulation how the relevant authorities will apply the financial attractiveness test and assess non-financial barriers. The very basis for determining that the additionality measure fulfils the financial additionality requirements is thus unclear. The European Union also acknowledges that "the evidential requirements for [the financial attractiveness and barrier analysis tests] are left open in the Delegated Regulation and will be further

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[933] Malaysia has not presented any arguments on the substantive consistency of those detailed rules with the TBT Agreement or the GATT 1994. In the absence of any such arguments and taking account that the measure was not in existence at the time of the panel's establishment, none of the Panel's findings in this Report should be taken as implying any view on the substantive consistency of those detailed rules with the European Union's obligations under the TBT Agreement, or with the European Union's obligations under the GATT 1994.

[934] Status Report (2019), (Exhibits EU-3, MYS-92), pp. 16-17.

[935] European Union's comments on Malaysia's response to Panel question No. 61, para. 120.

[936] Malaysia's response to Panel question No. 61, pp. 36-40.

[937] Low ILUC-risk certification: Pilot report and recommendations Malaysia, Oil palm yield increase, February 2021, (Exhibit MYS-233), pp. 4-6.

[938] Low ILUC-risk certification: Pilot report and recommendations Malaysia, Oil palm yield increase, February 2021, (Exhibit MYS-233), p. 11.

developed in the implementing rules".[939] This, in the Panel's view, casts serious doubts on the feasibility of using this pathway to certify biofuel as low ILUC-risk (and assuming that the additionality criterion was operational in the first place), as reflected in the Delegated Regulation.

The abandoned or severely degraded land pathway

7.610. Pursuant to Article 5(1)(a)(ii) of the Delegated Regulation, a consignment of biofuel can be certified as low ILUC risk, if the additional feedstock was cultivated on abandoned or severely degraded land. As noted in the Status Report, with respect to projects using such land, "additionality can be assumed … as this situation of the land already reflects the existence of barriers that are preventing cultivation".[940]

7.611. The underlying rationale for the abandoned or severely degraded land pathway is thus similar to the financial additionality pathway and similar considerations apply *mutatis mutandis*. More specifically, cultivating crops on such types of land present obstacles of financial and non-financial nature, which prevent farmers from using that land for growing crops under the business-as-usual scenario. A premium related to selling crops as biofuel feedstocks on the EU market could, however, provide for an additional incentive that would compensate for the cost of converting abandoned or severely degraded land into productive agricultural land.

7.612. The Panel agrees with the European Union that the same assumption cannot be made with respect to other types of land with low-carbon stock, which, as Malaysia argues, should have been included in the second additionality pathway.[941] The Panel understands that the high ILUC-risk formula already takes into account production on low-carbon stock land as part of the determination of the share of expansion into *high-carbon stock* land. If the feedstock's production area expands into *low*-carbon stock land, then it lowers the share of expansion into high-carbon stock land, and thus the feedstock's degree of ILUC risk.

7.613. Furthermore, producing biofuel feedstocks on land other than abandoned or severely degraded does not present barriers that could be compensated only by the premium associated with EU biofuel market. Excluding such types of land from low ILUC-risk criteria seems thus commensurate with the objective of avoiding displacement effects between biofuel and non-biofuel agricultural production. As long as displacement effects between biofuel and non-biofuel agricultural production cannot be avoided, the high risk of ILUC is not mitigated. Therefore, the conceptual design of the abandoned or severely degraded land pathway is not reflective of the regulatory distinction not being applied in an even-handed manner.

7.614. However, the Panel notes that, as argued by Malaysia[942], certain elements of this pathway are expressed in terms that are overly vague and ambiguous, raising serious doubts whether the abandoned and severely degraded land pathway can effectively be used for the purposes of the certification. For example, it is not clear what circumstances would qualify as "biophysical or socioeconomic constraints" due to which cultivation of crops had been stopped on abandoned land. The Panel notes that the European Union appears to acknowledge the vague and ambiguous nature of the specific requirements of the abandoned and severely degraded land pathway insofar as it confirms that details governing its application will be set out in implementing rules to be adopted.[943] It is thus unclear how the second additionality pathway would operate given the overly vague and ambiguous formulation of some of its central concepts.

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[939] European Union's first written submission, para. 155.

[940] Status Report (2019), (Exhibits EU-3, MYS-92), p. 18. This is further confirmed by Recital 15 to the Delegated Regulation:

> [I]t is appropriate not to apply the financial additionality criterion to the additional feedstock cultivated on abandoned or severely degraded land or by independent small farm holders. This would in fact amount to an unreasonable administrative burden in light of the significant potential for productivity improvements and the barriers faced to finance the necessary investments.

[941] Malaysia's first written submission, para. 768.

[942] Malaysia's first written submission, para. 768.

[943] European Union's first written submission, para. 154.

The smallholder pathway

7.615. The last of the three additionality pathways concerns small farm holders, who cultivate agricultural products on relatively small areas of land. The Delegated Regulation defines smallholders as:

> [F]armers who conduct independently an agricultural activity on a holding with an agricultural area of less than 2 hectares for which they hold ownership, tenure rights or any equivalent title granting them control over land, and who are not employed by a company, except for a cooperative of which they are members with other small holders, provided that such a cooperative is not controlled by a third party.[944]

7.616. The primary rationale for including the smallholder pathway in the low ILUC-risk certification criteria is the lack of "the administrative capacity and knowledge [of small farm holders] to conduct an in-depth [financial additionality] assessments while evidently facing barriers that hinder the implementation of productivity-increasing measures".[945] This pathway thus seems to be an expression of a balance struck in the EU legislation to allow productivity increases with a limited risk of displacement effects, which could be foregone if smallholder farmers were required to demonstrate financial additionality.[946] At the same time, small farm holders can certify as low ILUC-risk only the feedstock additional to what would be produced under a business-as-usual scenario. This is meant to ensure a relatively low risk of displacement effects potentially caused by producing additional feedstock by smallholders. Therefore, the approach appears to be consistent with the overall design of *low* ILUC-risk certification, which is concerned with mitigating rather than eliminating the risk of ILUC.

7.617. The Panel notes Malaysia's argument that the smallholder pathway is excessively narrow, as the definition of a "small holder" is limited to farmers cultivating less than two hectares. According to Malaysia such producers do not have the capacity to avail themselves of the certification due to the complexity of its requirements.[947]

7.618. The Panel observes that the definition of a "small holder" incorporated in the Delegated Regulation is based on a study, which has found that an estimated 84% of the world's farms are managed by smallholders cultivating less than 2 hectares of land.[948] A significant number of farmers around the world could thus in principle avail themselves of the smallholder pathway. The Panel further notes that such category of farmers constitutes nearly 40% of the total number of "independent smallholders in Malaysia, i.e. farmers holding less than 40.46 hectares".[949] Although Malaysia argues that the Delegated Regulation does not take into account the definitions of a small farm holder in the feedstock-producing countries[950], the complainant has not shown, and the Panel does not consider, that, in the circumstances of this dispute, a definition based on a global average is arbitrary.

7.619. The Panel notes that the facts of this case are different from those that gave rise to the finding of violation in *EC – Seal Products*, where the "indigenous community exception" was found to be *de facto* available only to Inuit hunts in Greenland and not in Canada.[951] The evidence submitted by the parties provides no indication that the definition of a "small holder" disadvantages production of biofuels in Malaysia, as compared to other countries.

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[944] Article 2(9) of the Delegated Regulation.

[945] Status Report (2019), (Exhibits EU-3, MYS-92), p. 18.

[946] The Delegated Regulation recognizes that applying the financial additionality criterion to small farm holders "[w]ould in fact amount to an unreasonable administrative burden in light of the significant potential for productivity improvements and the barriers faced to finance the necessary investments". Recital 15 to the Delegated Regulation.

[947] Malaysia's first written submission, paras. 269 and 769-770.

[948] Status Report (2019), (Exhibits EU-3, MYS-92), p. 18.

[949] Malaysia's first written submission, para. 267. ISEAS Perspective, Serina Rahman, Malaysian Independent Oil Palm Smallholders and their Struggle to Survive 2020, (Exhibit MYS-152), p. 5.

[950] Malaysia's first written submission, paras. 265-269.

[951] As discussed above, the wording of sixth Recital to the TBT Agreement is similar to that of the *chapeau* of the GATT Article XX. (Appellate Body Reports, *EC – Seal Products*, para. 5.310.)

The 10-year limit on eligibility for low ILUC-risk certification

7.620. The Panel recalls that pursuant to the low ILUC-risk certification criteria, any additional feedstock is eligible for low ILUC-risk certification for a maximum of 10 years from the adoption of the additionality measure.[952] Limiting the eligibility of yield obtained through a particular additionality measure to 10 years is meant to ensure that productivity improvements exceed the general productivity increase under a business-as-usual scenario over time.

7.621. Malaysia submits that such a time limit is unjustified and disadvantages palm oil producers because of the time it takes for an oil palm to bear fruit and achieve maturity.[953] This is because oil palm has an average lifespan of 25 years and starts bearing fruits at around four years with the maximum yield potential normally reached between the age of 7 and 16.[954] According to Malaysia, this problem is particularly acute for feedstock made from crop grown on abandoned or severely degraded land, which requires additional time to convert it into arable land.[955]

7.622. The European Union argues that the 10-year limit on the eligibility for low ILUC-risk certification is justified because with time additionality measures become part of standard baseline practices.[956] The European Union maintains that, in any event, this period is sufficiently long for the benefits of additionality measures to materialize.[957]

7.623. In the Panel's view, the evidence submitted by the parties provides a reasonable basis for imposing a time limit on the eligibility of a yield obtained through application of a specific additionality measure for low ILUC-risk certification. Such a limit seems justified by the increasing global food demand and general improvements in agricultural practices over time.[958] This means that the additional incentive related to selling feedstock on the EU biofuel market gradually disappears with time and displacement effects between biofuel and non-biofuel production cannot be avoided with respect to that yield.

7.624. Nevertheless, the Panel considers that the 10-year limit, even if in principle justified, could still disadvantage certain types of biofuel feedstocks compared to others. The types of feedstocks that could potentially be subject to low ILUC-risk certification are made from annual and perennial crops. Annual crops terminate their lifecycle within a year and are replanted after harvest for the following season. Perennial crops, by contrast, do not need to be replanted after harvest and grow back or continue growing. Of the eight food and feed crops used as biofuel feedstocks listed in the Annex to the Delegated Regulation, and thus subject to the high ILUC-risk formula (and, therefore, potentially also to low ILUC-risk certification), only oil palm is a perennial crop. Due to their nature, annual crops are more frequently subject to productivity-improving additionality measures than perennial crops, thus increasing their opportunities to benefit from low ILUC-risk certification within the 10-year period.[959]

7.625. The Panel notes the European Union's argument that the 10-year limit would be applicable to any perennial or annual crop and that, in the European Union's view, it is sufficiently long for the benefits of low ILUC-risk certification to manifest.[960] However, the European Union fails to explain why, for example, extending the eligibility period by the time necessary for perennial crops to start bearing fruits or achieve maturity would be difficult to reconcile with the objective of the measure. The disadvantage for feedstocks made from perennial crops in terms of benefitting from low ILUC-risk certification do not seem to be explained by the measure's objective. This indicates that the regulatory distinction at issue is applied in a manner that constitutes arbitrary and unjustifiable

[952] Article 5(1)(b) of the Delegated Regulation.
[953] Malaysia's response to Panel question No. 61, pp. 36-37.
[954] T. Mielke, "World Markets for Vegetable Oils: Status and Prospects", in M. Kaltschmitt (ed.), Energy from Organic Minerals (Biomass), 2019, (Exhibit MYS-19), p. 264.
[955] Malaysia's first written submission, para. 768.
[956] European Union's first written submission, para. 149.
[957] European Union's first written submission, para. 149.
[958] Status Report (2019), (Exhibits EU-3, MYS-92), p. 16.
[959] Malaysia notes in this regard that:

> With regard to annual crops, growers can take advantage of new seeds every new growing season. By contrast, the yield potential for perennial crops (e.g. oil palm), with a lifespan of up to several decades, is fixed for each planting cycle.

(Malaysia's first written submission, para. 471.)

[960] European Union's first written submission, para. 149.

discrimination. This is all the more so, as currently the only perennial crop on the list of eight is subject to the high ILUC-risk cap and phase-out and thus could potentially benefit from low ILUC-risk certification. The Panel notes in this regard that in response to a question from the Panel, the European Union explains that a newly adopted legislation foresees a possibility of delaying the start of the 10-year period by for up to two years for "operational additionality measures" and for up to five years for replanting.[961]

7.626. Therefore, the 10-year limit on the eligibility for low ILUC-risk certification disadvantages perennial crops in a manner that constitutes arbitrary and unjustifiable discrimination.

Summary of findings on low ILUC-risk criteria and temporal issues

7.627. The Panel has found that, apart from the 10-year limit on the eligibility for low ILUC-risk certification, the conceptual design of the low ILUC-risk criteria does not result in the regulatory distinction being applied in a manner constituting arbitrary or unjustifiable discrimination or otherwise not being applied in an even-handed manner. As for the 10-year eligibility limit, the Panel has found that it disadvantages perennial crops, such as oil palm, in a manner that constitutes arbitrary and unjustifiable discrimination.

7.628. Moreover, the Panel has found that in the preceding sections of its analysis that several of the low ILUC-risk criteria are formulated in overly vague and ambiguous terms, which cast serious doubts as to whether these criteria could have been effectively used when the high ILUC-risk cap and phase-out became operational.

7.629. The Panel notes the European Union's acknowledgement that the provisions of the Delegated Regulation concerning low ILUC-risk criteria are incomplete and that they would be complemented with detailed rules to be adopted in the Implementing Regulation.[962] The Panel further notes that the Implementing Regulation referred to by the European Union was submitted as Exhibit EU-329 at a late stage of the proceedings. The substantive arguments of the parties do not address the contents of the Implementing Regulation. The Panel therefore is not ruling on the design of the low ILUC-risk criteria as complemented or modified in the Implementing Regulation.

7.630. The Panel observes, however, that the act contains very detailed disciplines concerning evidentiary requirements[963], detailed rules for demonstrating additionality, including determining specific aspects of the dynamic yield baseline[964], eligibility for low ILUC-risk certification of production on unused, abandoned or severely degraded land.[965] This, in the Panel's view, confirms that the low ILUC-risk criteria, as reflected in the Delegated Regulation, were not operational and did not allow for certification of palm oil-based biofuel, prior to the adoption of the Implementing Regulation.

7.631. The Panel further notes the European Union's argument that the low ILUC-risk certification could be carried out prior to the adoption of detailed rules on low ILUC-risk criteria through voluntary certification schemes.[966] The Panel is not convinced by this argument, given that, as explained in more detail in the section addressing Malaysia's claims under Article 5 of the TBT Agreement, there is no evidence that voluntary schemes for low ILUC-risk certification were operational at least until the European Commission's decision to approve three such schemes in June 2022.

7.632. The Panel is further unconvinced by the European Union's argument that there is no need for low ILUC-risk certification prior to December 2023, when the phase-out element of the measure becomes operational. This argument of the European Union presupposes that the low ILUC-risk certification is relevant only to the phase-out and not also to the cap. This assertion is contradicted

[961] European Union's comments on Malaysia's response to Panel question No. 61, para. 113.
[962] European Union's first written submission, paras. 154.
[963] Article 24 of the Implementing Regulation.
[964] Articles 25 and 27 of the Implementing Regulation.
[965] Article 26 of the Implementing Regulation. Annex VIII further lays down the minimum requirements on the process and method for certifying low ILUC-risk biomass, relating to the content of the application, assessing additionality on the basis of the financial attractiveness and barriers test, guidelines on setting the dynamic yield baseline for annual and perennial crops. Commission Implementing Regulation (EU) 2022/996, (Exhibit EU-329), pp. 40-49.
[966] European Union's first written submission, paras. 841 and 1072; and responses to Panel questions No. 60, para. 392; No. 62 para. 397; and No. 92, paras. 479-480.

by the text of Article 26(2) of RED II, where the exemption for biofuels made from feedstocks certified as low ILUC-risk immediately follows the description of the cap:

> 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 the first subparagraph of 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 shall not exceed the level of consumption of such fuels in that Member State in 2019, *unless they are certified to be low indirect land-use change- risk biofuels, bioliquids or biomass fuels pursuant to this paragraph.*[967]

7.633. Recital 12 to the Delegated Regulation also suggests that the exemption applies to the cap and the phase-out alike:

> Certified low ILUC-risk biofuels, bioliquids and biomass fuels should be exempted from *the limit and the gradual reduction* set for high ILUC-risk biofuels, bioliquids and biomass fuels produced from food and feed crops, provided that they meet the relevant sustainability and greenhouse gas emissions saving criteria laid down in Article 29 of [RED II][968]

7.634. The exemption thus necessarily applies to the cap and to the phase-out, which is essentially the cap that is gradually reduced to 0 by the end of 2030, at the latest. There can therefore be no doubt that certifying consignments of a biofuel as low ILUC-risk becomes relevant not with the entry into force of the phase-out aspect of the measure, but as soon as the high ILUC-risk cap became operational. In addition, the Panel notes that several EU member States have accelerated the gradual phase-out of palm oil-based biofuel from eligibility to count towards renewable energy targets.[969]

Conclusion on the application of the regulatory distinction at issue

7.635. In sum, the Panel finds that the regulatory distinction based on high ILUC-risk is not applied in the high ILUC-risk cap and phase-out in an even-handed manner because (i) the European Union has failed to conduct a timely review of the data used as a basis for the determination whether a crop is high ILUC-risk; (ii) the additionality criterion as well as the financial additionality and the abandoned or severely degraded land pathways are formulated in overly vague and ambiguous terms which do not provide for an effective opportunity to certify specific consignments of palm oil-based biofuel as low ILUC-risk; and (iii) the design of the 10-year time limit for low ILUC-risk certification is a further deficiency in the design and implementation of the low ILUC-risk criteria as it unjustifiably disadvantages biofuels made from perennial crops, currently only from oil palm, as regards commercial opportunities linked to the EU biofuel market. Therefore, the regulatory distinction drawn by the high ILUC-risk cap and phase-out cannot be said to stem exclusively from a legitimate regulatory distinction.

7.1.2.4.6 Conclusion on Article 2.1

7.636. The European Union has administered the high ILUC-risk cap and phase-out inconsistently with Article 2.1 of the TBT Agreement by failing 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, which results in arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

7.637. One panelist has reached a different conclusion, as set out in section 7.4 of this Report.

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[967] Article 26(2) of RED II. (emphasis added)

[968] Recital 12 to the Delegated Regulation. (emphasis added)

[969] This appears to be the case, among other EU member States, of Austria, France, Germany, Malta, etc. (Exhibit IDN-1, pp. 7, 26, 31, 37).

7.1.2.5 Article 2.5 (first sentence) – Explanation of justification for technical regulation

7.1.2.5.1 Introduction

7.638. Having addressed the claims under the substantive obligations in Articles 2.4, 2.2 and 2.1 of the TBT Agreement, the Panel now turns to Malaysia's claim that the European Union failed to comply with the procedural obligation in the first sentence of Article 2.5 of the TBT Agreement.

7.639. Malaysia submits[970] that the European Union has violated Article 2.5 by failing to explain the justification for preparing, adopting or applying the 7% maximum share and the high ILUC-risk cap and phase-out in terms of Articles 2.2 to 2.4 of the TBT Agreement. More specifically, Malaysia argues with reference to the elements of Article 2.5, that the 7% maximum share and the high ILUC-risk cap and phase-out have a "significant effect" on the trade of Malaysia with the European Union, and that Malaysia, as well as other WTO Members, repeatedly requested an explanation of the justification of the measures in the TBT Committee. However, in responding to these repeated requests from Malaysia and other WTO Members, the European Union has not gone further than stating that the measures are not technical regulations.

7.640. The European Union submits[971] that the Panel should reject the claims under Article 2.5. The European Union does not dispute that Malaysia made requests for an explanation of the justification of the 7% maximum share and the high ILUC-risk cap and phase-out within the meaning of the first sentence of Article 2.5. However, the European Union states that it "is not accepted" that the measures "have a significant effect on trade", and that in any event the European Union has "explained the justification" for the measures on multiple occasions in multiple fora.

7.1.2.5.2 Legal standard

7.641. The first sentence of Article 2.5 sets forth the obligation that:

> A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4.

7.642. This obligation in the first sentence of Article 2.5 has only been the subject of a claim of inconsistency in one prior case, namely *US – Clove Cigarettes*.[972] In the present dispute both parties present their respective understandings of the applicable legal standard with reference to that case.

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[970] Malaysia's first written submission, paras. 710-722; second written submission, paras. 263-267; and responses to the Panel's questions, pp. 87-88.

[971] European Union's first written submission, paras. 1002-1008; second written submission, paras. 167-170; and responses to the Panel's questions, paras. 730-742. The European Union also argues that the challenged measures are not technical regulations within the meaning of Annex 1.1, and are therefore not subject to any substantive or procedural obligations in the TBT Agreement.

[972] In *EC – Sardines*, the Appellate Body referred to the first sentence of Article 2.5 as context for its views on the legal standard for the allocation of the burden of proof for a claim under Article 2.4. In that case, the complainant had argued that it rested on the respondent to explain the reasons why it had not used the international standard at issue (i.e. its lack of "appropriateness"), and to "spell out" the legitimate objective of the technical regulation. The Panel reasoned that this had to be so because these issues "involve[] considerations which are properly the province of the Member adopting or applying a technical regulation" and not the complaining party. The Appellate Body disagreed and stated that:

> The *TBT Agreement* affords a complainant adequate opportunities to obtain information about the objectives of technical regulations or the specific considerations that may be relevant to the assessment of their appropriateness. A complainant may obtain relevant information about a technical regulation from a respondent under Article 2.5 of the *TBT Agreement*, which establishes a *compulsory* mechanism requiring the supplying of information by the regulating Member. (Appellate Body Report, *EC – Sardines*, para. 277. (emphasis original))

7.643. To establish a violation of the first sentence of Article 2.5, it must be shown that the Member in question is preparing, adopting or applying a technical regulation and that the following three elements[973] are satisfied:

a. the measure "may have a significant effect on trade of other Members";

b. there is a "request of another Member"; and

c. the Member in question is to "explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4" of Article 2.

7.644. These elements are cumulative, and thus each must be satisfied to establish an inconsistency with the first sentence of Article 2.5.

7.645. The Panel will elaborate further on the elements of the legal standard in Article 2.5 as necessary in the course of its assessment of the issues in dispute.

7.1.2.5.3 "may have a significant effect on trade of other Members"

7.646. The procedural obligation in the first sentence of Article 2.5 applies only to those technical regulations "which may have a significant effect on trade of other Members".

7.647. The Panel notes that the procedural obligations in Article 2.9 and Article 5.6, which concern the publication, notification and commenting procedure for technical regulations and conformity assessment procedures respectively, are also subject to the same triggering condition (as is the set of parallel procedural obligations in Annex B(5) to the SPS Agreement). In its analysis below, therefore, the Panel will draw on relevant guidance regarding these provisions. Furthermore, the Panel's conclusion and reasoning in this section of the Report apply *mutatis mutandis* to this element of Malaysia's claims under Articles 2.9 and 5.6.

7.648. Malaysia argues that the 7% maximum share and the high ILUC-risk cap and phase-out not only might have, but do in fact have, a "significant effect" on Malaysia's trade with the European Union. Malaysia argues that the measures at issue, namely the 7% maximum share and the high ILUC-risk cap and phase-out, amount to a *de facto* ban on the importation of palm oil-based biofuel and palm oil for use as a biofuel feedstock from Malaysia.[974]

7.649. The European Union responds by stating that it "is not accepted" that the measures identified "have a significant effect on the trade of other Members". The European Union states that the "alleged trade-restrictiveness" of these measures "is precisely one of the matters that Malaysia must demonstrate", and that "[t]his has been addressed in response to the claims under Article 2.1 and Article 2.2 of the TBT Agreement".[975]

7.650. The Panel notes that each party's arguments on the question of whether the measures have "a significant effect on the trade of other Members" for the purposes of Article 2.5 incorporate by reference (or otherwise reiterate) its arguments on whether the measures are "trade-restrictive" within the meaning of Article 2.2 and/or have a "detrimental impact" on imports for the purposes of Article 2.1. The Panel sees no reason to proceed any differently and proceeds on the understanding that its findings on whether a given measure is "trade-restrictive" under Article 2.2 and/or have a "detrimental impact" on imports under Article 2.1 would in principle be highly relevant to, if not determinative of, the question of whether the same measure "may have a significant effect on the trade of other Members" within the meaning of Article 2.5.

7.651. The Panel has already found, in the context of its assessment of Malaysia's claim under Article 2.2, that the measures are "trade-restrictive" on the grounds that they have, by design, a "limiting effect on trade" in biofuels made from food and feed crops (as regards the 7% maximum share) and palm oil-based biofuels (as regards the high ILUC-risk cap and phase-out). The Panel has also found, in the context of its assessment of Malaysia's claim under Article 2.1, that the high

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[973] Panel Report, *US – Clove Cigarettes*, para. 7.449.
[974] Malaysia's first written submission, paras. 714-716; Malaysia's second written submission, para. 264.
[975] European Union's first written submission, para. 1005.

ILUC-risk cap and phase-out has a "detrimental impact" on imported palm oil-based biofuels. The Panel sees no need to repeat the same reasoning that led to those findings in this section.

7.652. The Panel considers that it follows from its earlier findings under Articles 2.2 and 2.1 that the 7% maximum share and the high ILUC-risk cap and phase-out are in principle measures that "may have a significant effect on the trade of other Members". As elaborated below, there is nothing in the ordinary meaning of these terms, in the prior interpretations of panels interpreting and applying that condition, that would suggest otherwise.

7.653. First, the Panel considers that the words "may have" must be given their ordinary meaning in the context of the phrase "may have a significant effect on trade of other Members". As the panel in *US – Clove Cigarettes* observed when interpreting and applying this condition in the context of Article 2.9 of the TBT Agreement:

> [This] condition for the applicability of Article 2.9 is that the technical regulation "*may* have a significant effect on trade of other Members" as opposed to "will have a significant effect" or "has a significant effect". "May" is used to express a possibility as opposed to a certainty.[[897]] We therefore interpret these terms to mean that Article 2.9 of the *TBT Agreement* does not require proving actual trade effects. Rather, this condition encompasses situations in which a technical regulation *may* have a significant effect on trade of other Members.[976]
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> [897] Oxford English Dictionary Online, accessed on 30 April 2011. See also Shorter Oxford English Dictionary, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 1725, defining "may" to mean, among other things, "have the possibility, opportunity, or suitable conditions to; be likely to"; Webster's Online Dictionary, accessed on 30 April 2011, defining "may" to mean, among other things, "used to indicate possibility or probability".

7.654. Second, the Panel agrees with prior panels that the ordinary meaning to be given to the term "significant" in this context is "sufficiently great or important to be worthy of attention; noteworthy"[977], and a "significant effect" may thus be understood as encompassing "all non *de minimis* effects on trade" or at least those that are "substantial and noteworthy".[978] This would certainly include an outright prohibition on the importation or sale of specified products, which was the circumstance in several prior disputes[979], but there is nothing in the terms of this triggering condition that somehow limits it to "the most restrictive measure a Member could take with respect to trade".[980]

7.655. Third, the terms "trade of other Members" may be understood as referring to the trade of other Members either individually or collectively. As already discussed in the context of its assessment of the claim under Article 2.2, the panel in *Australia – Plain Packaging* concluded that there was no basis to accept the respondent's argument that the effects of a technical regulation on international trade, and specifically the existence and extent of a "trade-restrictive" effect for the purposes of Article 2.2, should be assessed only on the basis of the effect of the measure on trade of *all* WTO Members, in all products that are the subject of the technical regulation.[981] The Panel considers it useful to highlight here that, in the course of its analysis under Article 2.2, the panel in

[976] Panel Report, *US – Clove Cigarettes*, para. 7.529 and fn 897. (emphasis original)

[977] Panel Report, *US – Clove Cigarettes*, para. 7.530 (referring to relevant dictionary definitions, including Oxford English Dictionary (OED) Online, accessed on 30 April 2011). See also *Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. II, p. 2835, defining "significant" to mean, among other things, "[i]mportant, notable; consequential"; *Webster's Online Dictionary*, accessed on 30 April 2011, defining "significant" to mean, among other things, "of a noticeably or measurably large amount"); and Panel Report, *India – Agricultural Products*, para. 7.773 (referring to OED Online).

[978] Panel Report, *US – Clove Cigarettes*, para. 7.530.

[979] Panel Reports, *US – Clove Cigarettes*, para. 7.530; and *India – Agricultural Products*, para. 7.773.

[980] Panel Report, *India – Agricultural Products*, para. 7.773.

[981] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1078. The Panel considered that the adoption of that interpretation "would have the effect that a WTO Member could have no recourse to Article 2.2 of the TBT Agreement in respect of a particular product in which its trade were being restricted, in the event that the trade of (an)other Member(s) increased", and that "following Australia's logic, in order to succeed in a claim under Article 2.2, a Member would in all cases need to establish the existence of a limiting effect not only in respect of its own exports, but in respect of the entirety of exports from all Members." (ibid.)

Australia – Plain Packaging found useful guidance in the relevant TBT Committee Recommendation[982] interpreting the terms "may have a significant effect on trade of other Members" in the context of Article 2.9 and stated:

> The TBT Committee Recommendation suggests that the concept of "significant effect on trade of other Members", under Article 2.9, may be understood to refer to *inter alia*, the effect on trade in a specific product, group of products or products in general and *the effect on trade between two or more Members*. Furthermore, when assessing the significance of these effects on trade, Members are invited to consider the value or other importance of imports in respect of the importing and/or exporting Members concerned, *whether from other Members individually or collectively*. We consider that this interpretation confirms our observation … that the "trade-restrictiveness" of a technical regulation need not be assessed only on the basis of the effect of the measure on trade between *all* WTO Members, in *all products* that are the subject of the technical regulation.[983]

7.656. Finally, the Panel sees nothing in that TBT Committee Recommendation that would call into question the conclusion that the 7% maximum share and the high ILUC-risk cap and phase-out are measures that "may have a significant effect on the trade of other Members". The Panel notes that the TBT Committee Recommendation in question provides that:

i. for the purposes of Articles 2.9 and 5.6, the concept of "significant effect on trade of other Members" may refer to the effect on trade:

   – of one technical regulation or procedure for assessment of conformity only, or of various technical regulations or procedures for assessment of conformity in combination;

   – in a specific product, group of products or products in general; and

   – between two or more Members.

ii. when assessing the significance of the effect on trade of technical regulations, the Member concerned should take into consideration such elements as:

   – the value or other importance of imports in respect of the importing and/or exporting Members concerned, whether from other Members individually or collectively,

   – the potential growth of such imports, and

   – difficulties for producers in other Members to comply with the proposed technical regulations.

iii. the concept of a significant effect on trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant.

7.657. In light of the foregoing, the Panel finds that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations that "may have a significant effect on the trade of other Members".

[982] TBT Committee, Secretariat Note, "Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995", WTO Document G/TBT/1/Rev.12 (21 January 2015), Section 4.3.1.1, p. 20 (entitled "Significant effect on trade of other Members").

[983] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1088.

7.1.2.5.4 "upon the request of another Member"

7.658. The procedural obligation in the first sentence of Article 2.5 to explain the justification for a technical regulation in terms of the provisions of paragraphs 2 to 4 applies only "upon request of another Member".

7.659. Malaysia argues that, Malaysia and other Members repeatedly requested the European Union to explain the justification for the technical regulations at issue at multiple TBT Committee meetings beginning from the second half of 2018, during the European Union's legislative process for RED II and the Delegated Regulation. In its first written submission[984], Malaysia summarizes and sets out selected passages from statements that it made at the TBT Committee meetings held in November 2018 (regarding the proposed amendment to RED I); March 2019 (following the release of the Delegated Regulation proposal); June 2019 (regarding the Delegated Regulation); November 2019 (reiterating its concerns); and May 2020 (reiterating its concerns). According to Malaysia, these statements to the TBT Committee qualify as the relevant "requests" for an explanation of the justification of the measures triggering the procedural obligation in the first sentence of Article 2.5.

7.660. The European Union does not dispute that Malaysia made "requests" for an explanation of the justification of the 7% maximum share and the high ILUC-risk cap and phase-out within the meaning of the first sentence of Article 2.5. In this regard, the Panel notes that the European Union has presented no arguments on this element of the claim under the first sentence of Article 2.5. Furthermore, the European Union states, in response to a question from the Panel, that it "accepts that the statements referenced by Malaysia in paragraphs 364 to 369 of its first written submission constitute 'requests' for an explanation of the justification within the meaning of the first sentence of Article 2.5 of the TBT Agreement".[985]

7.661. The Panel considers that, as part of its assessment of whether Malaysia has made a *prima facie* case of inconsistency under Article 2.5, the Panel may give some weight to the fact that the European Union does not contest that there was a "request" within the meaning of Article 2.5. However, the absence of refutation from the European Union does not absolve the Panel from conducting an independent assessment[986] of whether Malaysia made "requests" for an explanation of the justification of the 7% maximum share and the high ILUC-risk cap and phase-out within the meaning of the first sentence of Article 2.5. The Panel has reviewed the various statements to the TBT Committee referenced by Malaysia and considers that there may be grounds to doubt whether Malaysia's statements to the TBT Committee can be characterized, in form or in substance, as a "request" for the European Union to "explain the justification" of the technical regulations "in terms of the provisions of paragraphs 2 to 4". The Panel's reasons are as follows.

7.662. The Panel first observes that none of the statements invoke or otherwise expressly refer to Article 2.5. Furthermore, none of the questions directed at the European Union in these statements are formulated in terms of a "request" for an "explanation of the justification" of the 7% maximum share and the high ILUC-risk cap and phase-out, let alone an explanation of the justification "in terms of the provisions of paragraphs 2 to 4" of Article 2.

7.663. In addition, the principal focus of Malaysia's statements, including its related questions to the European Union, is alleged *discrimination* against palm oil-based biofuels that would be relevant to Article 2.1, not the obligations in paragraphs 2 to 4 of Article 2. While Malaysia's first written submission highlights selected elements of these statements that set out assertions that the impugned measures are more trade-restrictive than necessary, and not consistent with "international standards", it remains the case that the principal focus of these statements relates to alleged *discrimination* under Article 2.1. To that extent, this does not suggest that Malaysia was seeking an explanation of the justification in terms of the provisions of Articles 2.2, 2.3, or 2.4.

7.664. Finally, Malaysia's statements made to the TBT Committee are generally in the nature of *arguments* or *statements of concern*, not requests to explain how the measure was justified, let alone a request to explain how the measure was justified in terms of the provisions of Articles 2.2, 2.3 or 2.4. Indeed, the Panel's review of Malaysia's statements lead it to conclude that each is essentially in the nature of an extended *refutation* of the European Union's ILUC-related justification

[984] Malaysia's first written submission, paras. 363-366 and 718.
[985] European Union's response to Panel question No. 135, para. 732.
[986] See e.g. Panel Report, *US – Shrimp (Ecuador)*, paras. 7.9-7.11.

of its measures, not a request for the European Union to explain the relevant justification of the measures.

7.665. The circumstances of this case therefore present certain similarities to the circumstances in the only prior case in which a claim under Article 2.5 was considered, and rejected on the grounds that there was no "request" within the meaning of Article 2.5. In *US – Clove Cigarettes*, a set of 10 questions from Indonesia to the United States relating to the challenged technical regulation was found to be neither in form nor in substance a "request" within the meaning of Article 2.5, because the set of questions (a) made no mention of Article 2.5, (b) was not formulated in the terms used in Article 2.5, and (c) related to various issues regulated by provisions of the WTO covered agreements other than Articles 2.2, 2.3 and 2.4.[987]

7.666. The Panel recognizes that despite the apparent similarities with the circumstances *in US – Clove Cigarettes*, Malaysia's statements include multiple questions to the European Union, and that certain aspects of these questions reference or implicate either Article 2.2 or Article 2.4. In any event, the Panel does not consider it necessary to definitively rule on this issue, as it would not change the outcome of the Panel's assessment of the claim under Article 2.5.

7.1.2.5.5 "explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4" of Article 2

7.667. The Panel now considers, on the *arguendo* assumption that there was a "request" within the meaning of Article 2.5, whether the European Union discharged its obligation to "explain the justification" of the 7% maximum share and the high ILUC-risk cap and phase-out "in terms of the provisions of paragraphs 2 to 4" of Article 2.

7.668. Malaysia argues that, in responding to repeated requests from itself and other WTO Members for an explanation of the justification of the relevant measures, the European Union has not gone further than stating that the measures are not technical regulations.[988] Malaysia submits that Article 2.5 requires more, namely that "[t]he explanation of the justification of the measure at issue must be adequate to ensure that other Members understand those reasons and can assess the rationale behind the measure at issue."[989] Malaysia adds that the European Union does not cease to be subject to the obligation under Article 2.5 by simply arguing that the measures are not "technical regulations".[990]

7.669. The European Union responds that it has adequately explained the justification for the measures in terms of the provisions of paragraphs 2 to 4 of Article 2. In responses to questions from the Panel, it summarizes and sets out selected passages from: (a) letters or other materials (e.g. fact sheets) that EU officials provided to the complainants during this period in response to concerns raised; and (ii) the European Union's statements to the TBT Committee made in response to the concerns raised in that forum. It also refers to various meetings and consultations held at various points in time in other fora between relevant officials.[991] The European Union clarifies that it does not dispute that if a panel "were to find that a measure qualifies as a technical regulation, the obligation contained in the first sentence of Article 2.5 would apply despite the contrary position taken by the concerned Member".[992]

7.670. The Panel notes that the rationale behind the measures was explained as early as 2015, in the form of the ILUC Directive which amended RED I for the stated purpose of "address[ing] the impact of indirect land-use change given that current biofuels are mainly produced from crops grown

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[987] Panel Report, *US – Clove Cigarettes*, paras. 7.451-7.461. Malaysia argues that the panel's analysis in *US – Clove Cigarettes* supports the view that a request pursuant to Article 2.5 may be made implicitly. (Malaysia's first written submission, para. 717.)

[988] Malaysia's first written submission, para. 720 (referring to WTO TBT Committee, Minutes of the Meeting of 6-7 March 2019, G/TBT/M/77 (15 May 2019), para. 3.135; WTO TBT Committee, Minutes of the Meeting of 20-21 June 2018, G/TBT/M/75 (14 September 2018), para. 4.245; WTO TBT Committee, Minutes of the Meeting of 20-21 June 2019, G/TBT/M/78 (17 April 2018), para. 3.183; and WTO TBT Committee, Statement by the European Union to the Committee on Technical Barriers to Trade - 21 and 22 March 2018, G/TBT/W/474 (17 April 2018), para. 4.)

[989] Malaysia's first written submission, para. 719.

[990] Malaysia's first written submission, para. 721.

[991] European Union's response to Panel question Nos. 136 and 137, paras. 733-742.

[992] European Union's response to Panel question No. 134, para. 731.

on existing agricultural land".[993] The Panel recalls and hereby incorporates by reference the discussion at paragraphs 2.15 to 2.22 of this Report, which reference the ILUC Directive, the European Commission's 2016 proposal for a "recast" Directive to address ILUC, and the Study Report (2017) relating to ILUC.

7.671. Furthermore, in its statements to the TBT Committee on this matter dating at least as far back as June 2018, Malaysia itself has addressed the European Union's ILUC-related justification for the proposed (at the time) 7% maximum share and the high ILUC-risk cap and phase-out. Indeed, Malaysia and other Members raising concerns with the measures at the TBT Committee meetings have repeatedly demonstrated their familiarity with the ILUC-related studies done and commissioned by the European Commission, and specific issues arising in connection with the European Union's attempt to calculate GHG emissions associated with ILUC.[994] As already indicated further above, the Panel's review of Malaysia's statements leaves it with the impression that each is essentially in the nature of an extended *refutation* of the European Union's ILUC-related justification of its measures, not a request for the European Union to explain the relevant justification of the measures.

7.672. The Panel further recalls that the text of RED II itself, in particular Recitals 80 and 81, quite clearly explains the ILUC-related justification for the measures at issue. The Delegated Regulation reiterates that the measures are taken to address the issue of ILUC and begins with 16 recitals that explain the measures by reference to ILUC. The Panel has already reviewed these and other aspects of the regulatory framework in the context of identifying the specific "objective" of the 7% maximum share and the high ILUC-risk cap and phase-out in the context of Article 2.2. Indeed, in the context of its arguments under Article 2.2, Malaysia itself places considerable emphasis on the relevance of the recitals of RED II for the purposes of defining the specific objectives of the technical regulations at issue, and the Panel has already expressed its agreement with this approach to identifying the objective of the challenged measures.[995]

7.673. It is clear that Malaysia does not agree with the ILUC-related justification for the measures and does not consider that the measures are justified under the relevant provisions of the TBT Agreement. However, the procedural obligation in Article 2.5 is not an obligation to *justify* the measures to the satisfaction of the complainants or the wider membership – it is a procedural obligation to "explain the justification" so as to enable other Members to better assess, for themselves, whether the technical regulation is consistent with Articles 2.2, 2.3 and 2.4.

7.674. In the Panel's view, the only issue that remains in light of the clear explanations of the justification of the measures, which are already reflected in the text of the relevant legal instruments themselves, is whether these justifications serve to explain the justification of the technical regulations "in terms of the provisions of paragraphs 2 to 4" of Article 2. For the reasons that follow, the Panel does not see an adequate basis to fault the European Union in this regard.

7.675. First, the Panel considers that the explanation of the justification of the measures provided by the European Union (through the text of RED II itself and other relevant legal instruments) is directly relevant to identifying the "objective" of the measures within the meaning of Articles 2.2, 2.3 and 2.4. This is significant because each of the obligations in Articles 2.2, 2.3 and 2.4 is formulated by reference to a technical regulation's objective, making this the common denominator in "the provisions of paragraphs 2 to 4" of Article 2.

7.676. In addition to being the common denominator to these provisions, the explanation of a technical regulation's "objective" would appear to be central to understanding the reasons and rationale for the challenged measures, and ultimately its justification under paragraphs 2 to 4 of Article 2. The reason is that the identification of a technical regulation's objective serves as "the benchmark against which a panel must assess the degree of contribution made by a challenged

[993] ILUC Directive, (Exhibit MYS-168), Recital (4), p. 2.

[994] See e.g. WTO TBT Committee, Minutes of the Meeting of 20-21 June 2018, G/TBT/M/75 (14 September 2018), paras. 4.236-4.237 (Indonesia); Statement by Malaysia to the TBT Committee dated 5 July 2018, G/TBT/W/548, paras. 5-6.

[995] The Panel recalls and hereby also incorporates by reference the discussion at section 7.1.2.3.3 of this Report.

technical regulation, as well as by proposed alternative measures"[996] for the purposes of Article 2.2. It also constitutes a central point of reference for the obligations in Article 2.3[997] and Article 2.4.[998]

7.677. Accordingly, the Panel considers that a sufficiently clear explanation of a measure's "objective" by the regulating Member could plausibly qualify as a justification for a technical regulation "in terms of provisions of paragraphs 2 to 4". It bears repeating that in the context of its arguments under Article 2.2, Malaysia places considerable emphasis on the relevance of the recitals of RED II for the purposes of defining the specific objectives of the technical regulations at issue, and the Panel has already expressed its agreement with this approach.

7.678. Further, the Panel considers that any assessment of the adequacy of a regulating Member's "explanation of the justification" of a technical regulation "in terms of the provisions of paragraphs 2 to 4" of Article 2 will necessarily be informed by the nature of the "request" made by the complaining Member. This view stems from the fact that the provisions of Articles 2.2, 2.3 and 2.4 set out numerous distinct obligations, with each involving many distinct elements and analytical steps. This implies that the assessment of the adequacy of the form and content of a regulating Member's "explanation of the justification" of a technical regulation "in terms of the provisions of paragraphs 2 to 4" of Article 2 must necessarily be conducted on a case-by-case basis and will necessarily be informed by reference to the form and content of the request(s) that triggered the explanation. In this case, Malaysia's various statements to the TBT Committee did not specify in respect of which precise aspects of "the provisions of paragraphs 2 to 4", if any, an explanation of the justification of the measures was being requested. In these circumstances, it would lack even-handedness to subject the European Union to an asymmetrically strict and formalistic standard for assessing whether the justification it provided is formulated "in terms of the provisions of paragraphs 2 to 4" of Article 2.

7.679. The Panel has reviewed the letters or other materials (e.g. fact sheets) that EU officials provided to the complainants during this period, as well as the European Union's statements made in the TBT Committee, and considers that there may be grounds to doubt whether the various materials and statements would satisfy the obligation to "explain the justification" of the technical regulations at issue "in terms of the provisions of paragraphs 2 to 4".

7.680. The European Union's response to Malaysia's stated concerns is principally focused on disputing that the measures at issue are "technical regulations" and insisting that these measures do not "ban" or even "restrict" imports of palm oil or palm oil-based biofuel into the European Union. It is not clear that such considerations can be characterized as explanations of the justification of the measure, in terms of the provisions of paragraphs 2 to 4 of Article 2 or otherwise. The European Union's responses also include statements that could be characterized more as general descriptions of the basic features of the measures, rather than elements of justification.

7.681. The Panel does not consider it necessary to rule on whether the letters or other materials on record suffice to "explain the justification" for the purposes of Article 2.5. For the reasons stated above, the text of the relevant legal instruments clearly "explain the justification" for both the 7% maximum share and the high ILUC-risk cap and phase-out.

7.682. In light of the foregoing, the Panel finds that Malaysia has failed to establish that the European Union failed to "explain the justification" of the 7% maximum share and the high ILUC-risk cap and phase-out in terms of the provisions of paragraph 2 to 4 of Article 2.

7.1.2.5.6 Conclusion on Article 2.5

7.683. The Panel concludes that Malaysia has not established that the European Union has acted inconsistently with Article 2.5 of the TBT Agreement by failing to explain the justification for

[996] Appellate Body Reports, *US – COOL*, para. 387.

[997] Article 2.3 provides that technical regulations shall not be maintained if the circumstances or "objectives giving rise to their adoption" no longer exist or if the changed circumstances or "objectives" can be addressed in a less trade-restrictive manner.

[998] Article 2.4 provides that Members shall use relevant international standards as the basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the "legitimate objectives" pursued.

preparing, adopting or applying the 7% maximum share and the high ILUC-risk cap and phase-out in terms of Articles 2.2 to 2.4 of the TBT Agreement.

7.1.2.6 Article 2.8 – Requirements specified in terms of performance

7.1.2.6.1 Introduction

7.684. The Panel now turns to the claim under Article 2.8 of the TBT Agreement, regarding the obligation to specify technical regulations in terms of "performance" rather than "design or descriptive" characteristics wherever appropriate.

7.685. Malaysia submits[999] that the high ILUC-risk cap and phase-out of palm oil-based biofuel is based on an abstract and unsubstantiated high-ILUC risk concept instead of the "performance" of such biofuel and, therefore, is inconsistent with Article 2.8. More specifically, Malaysia contends that "high ILUC-risk" is a "descriptive" characteristic for which there is no scientific basis and does not relate to environmental performance. Furthermore, Malaysia argues that to identify biofuels which should not be counted towards EU renewable energy targets because of their negative environmental impact, the European Union could and should have based the technical regulations at issue on relevant ISO standards which would have enabled it to specify product requirements in terms of performance.

7.686. The European Union submits[1000] that Malaysia has not established that there is a violation of Article 2.8. More specifically, the European Union submits that Malaysia has not substantiated its position that ILUC-risk is unrelated to environmental performance. Finally, the European Union argues that Malaysia has not explained why the ISO standards should be used to address the European Union's legitimate policy concerns over the effects of ILUC when Malaysia itself recognized that those ISO standards do not currently encompass ILUC emissions.

7.1.2.6.2 Legal standard

7.687. Article 2.8 sets forth the obligation that:

> Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.

7.688. Article 2.8 has been interpreted and applied in one prior case, namely *US – Clove Cigarettes*, and both parties present their respective understandings of the applicable legal standard with reference to that case.

7.689. To establish an inconsistency with Article 2.8, a complainant must demonstrate that:

a. the technical regulation at issue specifies product requirements in terms of "design or descriptive characteristics" rather than in terms of "performance"; and

b. it is "appropriate" to specify those product requirements in terms of performance rather than design or descriptive characteristics.

7.690. The Panel will elaborate further on the elements of the legal standard in Article 2.8 as necessary in the course of its assessment of the issues in dispute.

7.1.2.6.3 Assessment by the Panel

7.691. The Panel first addresses whether the technical regulation at issue specifies product requirements in terms of design or descriptive characteristics rather than in terms of performance.

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[999] Malaysia's first written submission, paras. 723-729; second written submission, paras. 268-272; responses to the Panel's questions, p. 89-90; and comments on the European Union's responses to the Panel's questions, p. 243.

[1000] European Union's first written submission, paras. 1009-1021; second written submission, paras. 171-176; and responses to the Panel's questions, paras. 743-749.

7.692. As established in section 7.1.2.1 above, the high ILUC-risk cap and phase-out is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement. The Panel has concluded that it sets out a "product characteristic" of biofuel, namely that of being produced from a particular feedstock that has been identified to be high ILUC risk, and based on that product characteristic, provides for specific rules on the extent to which that biofuel may be counted towards EU renewable energy targets.

7.693. The Panel understands the term "product requirements" in Article 2.8 to refer to the "product characteristics" laid down in a technical regulation and sees no disagreement between the parties on this point. Thus, what Malaysia must demonstrate is that the above product characteristic, namely being produced from a particular feedstock that has been identified to be high ILUC risk, is a product characteristic that has been specified in terms of "design or descriptive" characteristics rather than in terms of "performance". In this regard, the Panel notes, and sees no problem in Malaysia focusing specifically on a feedstock's classification as high ILUC risk as part of the above product requirement, for the purposes of this claim.

7.694. Malaysia submits that high ILUC-risk is an abstract and unsubstantiated concept for which there is no scientific basis and which does not relate to environmental performance.[1001] The European Union submits that Malaysia has not substantiated its position that ILUC-risk is unrelated to "environmental performance".[1002]

7.695. The Panel sees two issues with Malaysia's arguments that individually and collectively raise the question whether Malaysia has made a *prima facie* case.[1003] The first issue is that Malaysia's arguments under Article 2.8 seem to merely repeat points made under other claims without properly developing or substantiating them for the purposes of this claim. [1004] In particular, Malaysia does not explain why the alleged lack of a scientific basis or the alleged unrelatedness to what it terms "environmental performance" makes the product requirement one that is specified in terms of "design or descriptive" characteristics. The Panel notes in this regard that it is not a panel's task, but that of the complainant, to relate alleged facts to legal arguments that support a claim of inconsistency.[1005]

7.696. The second issue is Malaysia's reliance on the concept of "environmental performance" – a concept which it does not explain. The Panel assumes that this term refers to the effects, i.e. the negative impact, of a given product on the environment. If so, the question may arise whether this falls within the meaning of "performance" intended in Article 2.8.

7.697. The Panel notes that, as Malaysia itself points out, the ordinary meaning of "performance", which the panel in *EC – Sardines* relied on in interpreting that term in Article 2.8, is "the operation or functioning, usually with regard to effectiveness".[1006] As that definition makes clear, "performance" is focused on the operation and functioning of the product itself. This is confirmed by the French and Spanish language versions of the treaty text, which translate "performance" respectively as "*propriétés d'emploi*" and "*propiedades de uso y empleo*".[1007] In light of this meaning it may be questionable whether a product's "environmental performance", at least when it comes to indirect environmental effects as discussed here, qualifies as "performance" within the meaning of Article 2.8. However, assuming that it does, then the question arises why a high ILUC-risk classification (as opposed to the quantification of GHG emissions based on the LCA analysis that Malaysia proposes, as elaborated below) would not also qualify as "environmental performance". This, Malaysia has not explained.

7.698. The Panel considers it unnecessary to definitively rule on these issues, because in any event, even if Malaysia had demonstrated that high ILUC-risk is specified in terms of "design or descriptive"

[1001] Malaysia's first written submission, paras. 723 and 726; and second written submission, para. 270.
[1002] European Union's first written submission, para. 1019; and second written submission, para. 176.
[1003] A *prima facie* case is one which in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case. (Appellate Body Report, *US – Wool Shirts and Blouses*, p.14.)
[1004] See also European Union's first written submission, para. 1019.
[1005] Appellate Body Report, *US – Gambling*, para. 140.
[1006] Malaysia's first written submission, para. 725 (referring to Panel Report, *EC – Sardines*, para. 7.81).
[1007] In *US – Clove Cigarettes*, the panel also understood "performance" to be an issue of "function" and in this context referred to the French and Spanish translations of "performance" in Article 2.8. (Panel Report, *US – Clove Cigarettes*, para. 7.493 and fn 863.)

characteristics rather than in terms of "performance", it would still have had to demonstrate that it is *appropriate* to specify the product requirement in terms of performance rather than design or descriptive characteristics. For the reasons that follow, the Panel concludes that Malaysia has not done so.

7.699. Malaysia bases its argument in this regard on the existence of the four ISO standards discussed in section 7.1.2.2 above. These standards, as discussed above, provide for an LCA-based quantification of GHG emissions of biofuels, from which they explicitly exclude ILUC effects. Malaysia submits that the European Union could and should have based the technical regulations at issue on relevant ISO standards which would have enabled it to specify product requirements in terms of performance. Malaysia considers the four ISO standards to be of relevance in providing content and context to the concept of "wherever appropriate" in the present case.[1008] However, Malaysia also takes the view that its claim of inconsistency with Article 2.8 would survive even if the four ISO standards "were not deemed to qualify the 'appropriateness' of technical measures in this context".[1009] The European Union submits that the respective ISO standards are irrelevant, inappropriate and ineffective for the fulfilment of legitimate objectives pursued by the challenged measures and that, therefore, Malaysia's claim falls.[1010]

7.700. The Panel notes that it has already examined whether the measures should have been based on the four ISO standards in the context of Malaysia's claim under Article 2.4. The Panel recalls that Article 2.4 contains the obligation to use relevant international standards as a basis for technical regulations, and that this obligation is found in the TBT Agreement. The obligation in Article 2.8 is different from Article 2.4, as it is about specifying product characteristics in terms of performance where appropriate. The term "appropriate" in that context has been understood to mean "suitable, proper, or fitting".[1011]

7.701. While Article 2.8 is not about international standards *per se*, the Panel accepts that a complainant may establish a *prima facie* case under Article 2.8 by referring to relevant international standards as an argument for, and evidence of, why it is appropriate to specify a particular product characteristic in terms of performance. This is what the Panel understands Malaysia to have done. While there may be other ways to establish "appropriateness", Malaysia has not made any other arguments in this regard.

7.702. In the context of Article 2.4, however, the Panel found that the four ISO standards are not relevant under Article 2.4 because they do not address what is being addressed by the measures at issue, namely the taking into account of ILUC.[1012] ILUC – and more specifically high ILUC-risk – is also at issue here as (part of) the "product requirement" that allegedly was not specified in terms of "performance" and that according to Malaysia should have been. Given that the four standards do not address the taking into account of ILUC, they cannot say why it is appropriate – or, for that matter, how - to specify high ILUC-risk in terms of "performance". In fact, rather than targeting *how* ILUC is to be specified, the Panel understands Malaysia's argument to ultimately target eliminating ILUC altogether as a product requirement precisely on the grounds that the ISO standards do not address it. In Article 2.8, however, the issue is not whether a given "product requirement" should *exist at all*, but only *how* it should be specified.

7.703. Malaysia's reliance on the four ISO standards is therefore misplaced, as the ISO standards do not address ILUC, and for this reason are not pertinent to whether it is appropriate to specify high ILUC-risk in terms of performance (where it is allegedly not specified in such terms). As noted above, Malaysia has not presented any other argument on this issue.

7.1.2.6.4 Conclusion on Article 2.8

7.704. The Panel concludes that Malaysia has not established that the high ILUC-risk cap and phase-out is inconsistent with the obligation in Article 2.8 of the TBT Agreement to whenever appropriate

[1008] Malaysia's response to Panel question No. 138, p. 89.
[1009] Malaysia's response to Panel question No. 138, p. 90.
[1010] European Union's response to Panel question No. 138, para. 748.
[1011] Panel Report, *US – Clove Cigarettes*, para. 7.489 (referring to Appellate Body Report, *EC – Sardines*, para. 285).
[1012] See para.7.186 above.

specify technical regulations in terms of performance rather than design or descriptive characteristics.

7.1.2.7 Articles 2.9.2 and 2.9.4 – Proposed technical regulations

7.1.2.7.1 Introduction

7.705. The Panel now turns to the claims under Article 2.9 of the TBT Agreement, which include the distinct transparency obligations in Article 2.9.2 and Article 2.9.4. The Panel addresses these claims together given the relationship between these provisions and the manner in which the parties have developed their arguments in this case.

7.706. Malaysia submits[1013] that the European Union violates Articles 2.9.2 and 2.9.4 by failing to (i) notify proposals of RED II and the Delegated Regulation and (ii) organize a meaningful commenting process in respect of the proposals for RED II and the Delegated Regulation. More specifically, Malaysia submits that: (i) the *chapeau* conditions in Article 2.9 are met; (ii) there was no notification of the proposed RED II and Delegated Regulation in the TBT Information Management System (TBT IMS) contrary to Article 2.9.2; and (iii) because there was no notification of the proposed measures, there could be no meaningful commenting process pursuant to Article 2.9.4. Further, the length of the informal feedback process for the Delegated Regulation was deficient because it would not have been sufficient for WTO Members to make comments, and for the European Union to discuss them and take into account any comments and discussions in its process.

7.707. The European Union submits[1014] that it was not required to fulfil the procedural requirements in Articles 2.9.2 and 2.9.4 because the measures at issue are not technical regulations and that Malaysia has not otherwise demonstrated a violation of these provisions. The European Union states that "in factual terms", it acknowledges that there was no notification pursuant to Article 2.9.2 and no formal commenting process pursuant to Article 2.9.4.[1015] The European Union refers to extensive "stakeholder consultations" held during the preparation of the legislative proposals but makes no comment on the nature and extent of the "commenting process".[1016]

7.1.2.7.2 Legal standard

7.708. Article 2.9 sets forth several separate transparency obligations in relation to proposed technical regulations:

> 2.9 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:
>
> 2.9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;
>
> 2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;

[1013] Malaysia's first written submission, paras. 730-738; and second written submission, paras. 273-274.
[1014] European Union's first written submission, paras. 1022-1028; and second written submission, paras. 177-178.
[1015] European Union's first written submission, para. 1024.
[1016] European Union's first written submission, para. 1026; and second written submission, para. 178 (referring to Exhibit EU-13).

> 2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;
>
> 2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

7.709. Article 2.9 has been interpreted and applied in one prior case, *US – Clove Cigarettes*, and both parties present their respective understandings of the applicable legal standard with reference to that case.

7.710. The Panel will elaborate further on the elements of the legal standard in Article 2.9 as necessary in the course of its assessment of the issues in dispute.

7.1.2.7.3 *Chapeau* of Article 2.9

7.711. The obligations under Article 2.9 apply in respect of a technical regulation when the two conditions of the *chapeau* of Article 2.9 are met, namely:

a. a relevant international standard does not exist, or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards; and

b. the proposed technical regulation may have a significant effect on trade of other Members.

7.712. With respect to the first condition, Malaysia argues that the high ILUC-risk cap and phase-out is not in accordance with relevant international standards. Malaysia argues in the alternative that no relevant international standards exist. With respect to the 7% maximum share, Malaysia argues that there is no relevant international standard.[1017]

7.713. The European Union argues that the 7% maximum share and the high ILUC-risk cap and phase-out are not technical regulations, such that the procedural obligations in Article 2.9 do not apply.[1018] Beyond this, the European Union does not specifically respond to Malaysia's argument with respect to the first condition.

7.714. The Panel recalls its finding, made above in the context of addressing Malaysia's claim under Article 2.4 of the TBT Agreement, that there are no relevant international standards for the 7% maximum share and the high ILUC-risk cap and phase-out. Accordingly, the first condition of the *chapeau* is satisfied.

7.715. As to the second condition in the *chapeau*, Malaysia contends that the technical regulations at issue have a significant effect on Malaysia's trade with the European Union.[1019]

7.716. The European Union does not specifically respond to Malaysia's argument on this condition.

7.717. The Panel recalls its finding, made above in the context of addressing Malaysia's claim under Article 2.5 of the TBT Agreement, that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations that "may have a significant effect on the trade of other Members" for the purposes of Articles 2.5 and 2.9 of the TBT Agreement.

7.718. On that basis, the Panel finds that the conditions of the *chapeau* of Article 2.9 are satisfied.

[1017] Malaysia's first written submission, para. 735.
[1018] See European Union's first written submission, para. 1023.
[1019] Malaysia's first written submission, para. 735.

7.1.2.7.4 Article 2.9.2 – notification of proposed technical regulations

7.719. The Panel recalls that "transparency is a cornerstone of the TBT Agreement"[1020], and Article 2.9.2 is "at the core of the TBT Agreement's transparency provisions: the very purpose of the notification is to provide opportunity for comment before the proposed measure enters into force, when there is time for changes to be made before 'it is too late'".[1021]

7.720. More specifically, Article 2.9.2 requires that Members "notify other Members through the Secretariat" of the products to be covered by a proposed technical regulation, with a brief indication of its objective and rationale. Notification under Article 2.9.2 must occur at a multilateral level to the WTO Secretariat, e.g. through what is now the "ePing SPS&TBT Platform" (and previously, the TBT IMS).[1022] That the same information is otherwise publicly available is insufficient to discharge this obligation. Moreover, notification is not tied to another Member's request.[1023] The notification obligation applies at an "early appropriate stage", when amendments can still be introduced and comments can be taken into account; therefore the technical regulation(s) at issue cannot have been enacted or adopted prior to notification.[1024]

7.721. Malaysia argues that the RED II and Delegated Regulation proposals were not notified to the WTO Secretariat via the TBT IMS.[1025] The European Union acknowledges that "in factual terms", there was no notification pursuant to Article 2.9.2.[1026]

7.722. The Panel concludes that, absent any notification of the RED II and Delegated Regulation proposals (which set out the high ILUC-risk cap and phase-out and the 7% maximum share)[1027], confirmed by Malaysia's search of the TBT IMS and the European Union's own statement, the European Union failed to comply with its obligations under Article 2.9.2 of the TBT Agreement.

7.1.2.7.5 Article 2.9.4 – commenting process for proposed technical regulations

7.723. Article 2.9.4 requires, with respect to proposed technical regulations, that Members allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account. The wording of Article 2.9.4 indicates that this obligation is to provide an opportunity for comments and discussion, and for taking such comments and discussions into account at the domestic level.

7.724. Article 2.9.4 has not been addressed in any prior WTO dispute. However, the TBT Committee has at various intervals provided guidance with respect to time-limits for the presentation of comments on notified technical regulations under Article 2.9.4.

7.725. In 2000 and 2003, the TBT Committee agreed: (i) that the normal time-limit for comments on notifications should be 60 days. Any Member able to provide a time-limit beyond 60 days, such as 90 days, is encouraged to do so and should indicate this in the notification[1028]; and (ii) in order to improve the ability of developing country Members to comment on notifications, and consistent with the principle of special and differential treatment, developed country Members are encouraged to provide more than a 60-day commenting period.[1029]

[1020] https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm.

[1021] Panel Report, *US – Clove Cigarettes*, para. 7.536.

[1022] The TBT IMS has now been replaced by the ePing SPS&TBT Platform. See https://eping.wto.org/; https://www.wto.org/english/tratop_e/tbt_e/tbt_notifications_e.htm.

[1023] Panel Report, *US – Clove Cigarettes*, paras. 7.535, and 7.540-7.541.

[1024] Panel Report, *US – Clove Cigarettes*, paras. 7.536. The Panel notes that the circumstances of this dispute are not (and are not argued to be) those in Article 2.10, whereby Members are exempt from the obligations under Article 2.9 under certain circumstances.

[1025] Malaysia's first written submission, para. 736.

[1026] European Union's first written submission, para. 1024.

[1027] See the Panel's description of the high ILUC-risk cap and phase-out and 7% maximum share in section 2.3 of this Report.

[1028] TBT Committee, Second triennial review of the operation and implementation of the TBT Agreement, G/TBT/9, 13 November 2000 (G/TBT/9), para. 13 and Annex 3, p. 22.

[1029] TBT Committee, third triennial review of the operation and implementation of the TBT Agreement G/TBT/13, 11 November 2003 (G/TBT/13), para. 26.

7.726. In 2009, the TBT Committee agreed[1030]: (i) to recall its earlier recommendation that the normal time-limit for the presentation of comments should be at least 60 days, and its encouragement to Members to provide, whenever possible, a time-limit beyond 60 days, such as 90 days; (ii) to recall that developed country Members are encouraged to provide more than a 60-day commenting period, to improve the ability of developing country Members to make comments on notifications consistent with the principle of special and differential treatment; and (iii) to reiterate that an insufficient period of time for presentation of comments on proposed technical regulations and conformity assessment procedures may prevent Members from adequately exercising their right to submit comments.[1031]

7.727. Malaysia argues that there was no meaningful commenting process because of the lack of notification under Article 2.9.2.[1032] Malaysia further argues that the European Union failed to discharge its obligations by organizing an informal feedback process during which citizens and stakeholders could submit comments on the proposed Delegated Regulation using an electronic platform; the process was limited to inviting the public (i.e. including WTO Members) to fill in a comments section on a webpage.[1033] Malaysia notes that the feedback period ran from 8 February 2019 to 8 March 2019, and the Delegated Regulation was adopted on 13 March 2019.[1034] The European Union therefore, in Malaysia's view, failed to organize a meaningful commenting process on the proposal for the Delegated Regulation.[1035]

7.728. The European Union responds that it was not required to fulfil the procedural requirements in Article 2.9.4 because the measures at issue are not technical regulations, but acknowledges that "in factual terms", no notification pursuant to Article 2.9.2 was made and no formal commenting process pursuant to Article 2.9.4 was organised.[1036] The European Union also refers to "extensive stakeholder consultations" during the "preparation of the legislative proposals", including a 12-week public consultation, a stakeholder workshop on 5 February 2016, a stakeholder conference on 12 May 2016 with "third countries", a dedicated discussion at the Electricity Regulatory Forum in Florence, and "numerous bilateral discussions"[1037], but does not comment on the nature and extent of the commenting process.[1038]

7.729. The Panel notes that Article 2.9.4 concerns a commenting period for proposed technical regulations. The sequence of obligations in Articles 2.9.2 (multilateral notification of a complete draft technical regulation) and 2.9.4 (the commenting process foreshadowed in Article 2.9.2) indicates that such a commenting period should take place after a complete draft technical regulation has been notified and before that draft is adopted and published pursuant to Article 2.11 of the TBT Agreement. This stems from the fact that the obligation to notify in Article 2.9.2 is concerned with and impacts the obligation to provide for a commenting period under Article 2.9.4. Thus, not notifying a draft technical regulation at an early stage, in the manner required by Article 2.9.2, impacts a Member's ability to discharge its obligations under Article 2.9.4.[1039]

7.730. Moreover, even if a commenting period had started at a reasonably early stage (absent any notification under Article 2.9.2), in the present case it is undisputed that there was only a one-month

[1030] TBT Committee, Fifth triennial review of the operation and implementation of the TBT Agreement, G/TBT/26, 13 November 2009 (G/TBT/26), paras. 39-40.

[1031] The Panel notes that the same guidance applies *mutatis mutandis* to the obligation in Article 5.6.4, which concerns the equivalent commenting process for proposed conformity assessment procedures.

[1032] Malaysia's second written submission, para. 274 (referring to European Union's first written submission, para. 1024).

[1033] Malaysia's second written submission, para. 274 (referring to European Union's first written submission, para. 1024).

[1034] Malaysia's first written submission, para. 737.

[1035] Malaysia's first written submission, para. 737 (referring to Draft Delegated Regulation, (Exhibit MYS-50)).

[1036] European Union's first written submission, paras. 1023, 1024, and 1028; and second written submission, para. 177.

[1037] European Union's first written submission, para. 1026; and second written submission, para. 178 (referring to European Commission, Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast), COM(2016) 767 final (30 November 2016), (Exhibit EU-13), p.11).

[1038] European Union's first written submission, para. 1026.

[1039] See also Panel Report, *India – Agricultural Products*, where the panel followed similar reasoning in assessing a claim under Annex B(5)(d) of the SPS Agreement, which contains an almost identical notification obligation to that under Article 2.9.4. (ibid., para. 7.795.)

feedback period. This is short of the recommended *minimum* 60-day commenting period. Further, having only four days to process comments or hold discussions falls short of the period foreseen to give effect to the obligations under Article 2.9.4. This is notwithstanding the current TBT Committee recommendations that developing country Members be given a period greater than 60 days under Article 2.9.4.[1040]

7.731. These factors taken together, and the European Union's statement that "in factual terms" it acknowledges that no publication, formal notification or organization of a commenting procedure for the purposes of Article 2.9.4 has taken place, establish a violation of Article 2.9.4.

7.1.2.7.6 Conclusion on Articles 2.9.2 and 2.9.4

7.732. The Panel concludes that the European Union has acted inconsistently with Article 2.9.2 by failing to notify the proposed 7% maximum share and the proposed high ILUC-risk cap and phase-out measures.

7.733. The Panel finds that the European Union acted inconsistently with Article 2.9.4 by having failed to organize a commenting process in respect of the proposed 7% maximum share and the proposed high ILUC-risk cap and phase-out measures in accordance with the requirements of that provision.

7.1.3 Claims under Article 5 of the TBT Agreement

7.1.3.1 Annex 1.3 – Existence of a "conformity assessment procedure"

7.1.3.1.1 Introduction

7.734. The Panel now turns to the claims under Article 5 of the TBT Agreement. The Panel begins with the threshold issue of whether the provisions relating to low ILUC-risk certification qualify as a "conformity assessment procedure" within the meaning of Annex 1.3 of the TBT Agreement. The Panel then considers whether the remaining conditions for the applicability of Article 5 are present.

7.735. Malaysia submits[1041] that the provisions relating to low ILUC-risk certification qualify as a "conformity assessment procedure" within the meaning of Annex 1.3. More specifically, Malaysia argues that Articles 4 to 6 of the Delegated Regulation impose general conditions or cumulative requirements on the certification of low ILUC-risk biofuels, which in turn determine whether such biofuels are eligible to count towards renewable energy targets within the 7% maximum share without any limitation imposed by the cap and phase-out. Malaysia clarifies that, while Articles 4 and 5 of the Delegated Regulation lay down the criteria for certifying high ILUC-risk biofuel as low ILUC-risk biofuel, Article 6 refers to the need to submit reliable information, to arrange for independent auditing and proof of auditing.[1042]

7.736. The European Union submits[1043] that the EU Biofuels regime is not a conformity assessment procedure, and that the provisions relating to low ILUC-risk certification do not qualify as a conformity assessment procedure, in particular because there are no underlying technical regulations with which to assess conformity. The European Union also argues that Malaysia has not adequately articulated what the alleged conformity assessment procedure is, as distinct from the alleged technical regulation with which it seeks to establish compliance; in this connection, the European Union argues that Malaysia cannot rely on the same provisions as amounting to both a technical regulation and conformity assessment procedure.[1044]

[1040] G/TBT/26, paras. 39-40.

[1041] Malaysia's first written submission, paras. 739-744; second written submission, paras. 277-281; and responses to the Panel's questions, pp. 90-93.

[1042] Malaysia's first written submission, para. 742.

[1043] European Union's first written submission, paras. 1029-1035; second written submission, paras. 179-180; responses to the Panel's questions, paras. 750-756; and comments on Malaysia's responses to the Panel's questions, paras. 243-273.

[1044] European Union's first written submission, paras. 1033-1034; and second written submission, para. 180.

7.1.3.1.2 Legal standard

7.737. As indicated in its title, Article 5 applies to "conformity assessment procedures". Article 1.2 provides that "for the purposes of this Agreement the meaning of the terms given in Annex 1 applies." Annex 1.3 defines "conformity assessment procedures" as:

> Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

7.738. The *Explanatory note* to Annex 1.3 states:

> Conformity assessment procedures include, *inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.

7.739. The definition of "conformity assessment procedures" in Annex 1.3 has been interpreted and applied in prior cases[1045], to which both parties refer when presenting their respective understandings of the applicable legal standard for assessing this definition. While the parties' arguments reflect their divergent views on how findings in prior cases are relevant to the facts of this dispute, there appears to be no fundamental disagreement between the parties on the elements of that standard as described below.

7.740. The following components are discernible from Annex 1.3 and its *Explanatory note:*

a. "any procedure", including, *inter alia*, "procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations";

b. which is "used directly or indirectly" to "determine" that relevant "requirements in technical regulations… are fulfilled".

7.741. In other words, Annex 1.3 indicates that whether a measure amounts to a conformity assessment procedure depends on its nature and purpose. With respect to its *nature*, the TBT Agreement defines conformity assessment procedures very broadly since "any" procedure is in principle covered, though specific examples are identified. With respect to its *purpose*, the procedure must be one designed with the specific function of being used directly or indirectly to determine that relevant requirements in a technical regulation or a standard are fulfilled.[1046]

7.742. The definition in Annex 1.3 distinguishes "conformity assessment procedures" from the "relevant requirements in technical regulations or standards" with which they serve to establish compliance. While a single measure or document may contain both a technical regulation and a conformity assessment procedure, they are distinct concepts; one establishes conformity with the requirements of the other.[1047] In other words, a conformity assessment procedure is separate from, but also dependent on, the existence of an underlying technical regulation containing the "requirements" with which the procedure was designed to determine conformity.

7.743. The Panel will elaborate further on the elements of the legal standard in Annex 1.3 as necessary in the course of its assessment of the issues in dispute.

[1045] Appellate Body Report, *Russia – Railway Equipment*, paras. 5.119-5.120; Panel Reports, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.511 -7.513; and *Russia – Railway Equipment*, paras. 7.240-7.241 and 7.249. See also Panel Reports*, EC – Seal Products*, paras. 7.506-7.507 and 7.510.

[1046] The function of a conformity assessment procedure is to ensure that the underlying technical regulations or standards are complied with. This is also confirmed by the language of Article 5.1.2 of the TBT Agreement, which requires that conformity assessment procedures not be more strict or applied more strictly than is necessary to "give the importing Member adequate confidence that products conform with the applicable technical regulations or standards". (Appellate Body Report, *Russia – Railway Equipment*, fn 338.)

[1047] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.511-7.513.

7.1.3.1.3 "any procedure"

7.744. Malaysia refers to Articles 4 to 6 of the Delegated Regulation, both in its identification of a low ILUC-risk certification measure alleged to be a conformity assessment procedure and the substance of its claims under Article 5. The Panel first considers the meaning of the term "procedure" in Annex 1.3, before assessing whether the provisions identified as low ILUC-risk certification amount to "any procedure" within the meaning of Annex 1.3. In doing so, the Panel will identify the measure considered by Malaysia to be the alleged conformity assessment procedure before examining whether and to what extent it is a "procedure" under Annex 1.3.

7.745. The term "procedure" is not defined in Annex 1.3.[1048] However, Annex 1.3 expressly identifies examples of relevant procedures, i.e. sampling, testing, inspection, verification, registration, accreditation and approval procedures.[1049] While ISO/IEC Guide 2:1991 (the definitions of which apply to the TBT Agreement when not in conflict with those in Annex 1[1050]) does not define "procedure", subsequent ISO/IEC instruments do. In particular, ISO/IEC 17000:2004 (Conformity Assessment – vocabulary and general principles) sets out terminology and definitions related to conformity assessment procedures[1051], including a definition of "procedure". The Panel notes that this definition does not seem to conflict with either Annex 1 or ISO/IEC Guide 2:1991. While not discussed by the parties, these definitions are relevant to the Panel's assessment of whether Malaysia identified a measure that is a conformity assessment procedure.[1052]

7.746. In ISO/IEC 17000:2004, a "procedure" is defined as a "specified way to carry out an activity or a process". The notion of "procedure" is therefore very broad, given that the carrying out of an activity or process can be specified in many ways. Annex 1.3 refers to "any" procedure, and the list of examples in the *Explanatory note* to Annex 1.3 is non-exhaustive. These factors suggest that the term "procedure" has a broad scope, with respect to the *form* a procedure might take. Moreover, the list in the *Explanatory note* provides further guidance on the types of relevant procedures, based on their *function*.

7.747. The Panel now turns to consider whether the provisions identified as low ILUC-risk certification amount to "any procedure" within the meaning of Annex 1.3.

7.748. The Panel understands that, while Malaysia's position is not free of ambiguity, it ultimately identifies a low ILUC-risk certification procedure, as set out in Article 6 of the Delegated Regulation, as the measure it argues is a conformity assessment procedure and subject to the disciplines in Article 5 of the TBT Agreement.

7.749. Malaysia makes several references to the notion of "certification" and "certifying" in its panel request. In particular, paragraphs 32(vii)-(xi) detailing Malaysia's claims under Article 5 indicate that it is low ILUC-risk *certification* that is alleged to be a conformity assessment *procedure.* Malaysia ties low ILUC-risk certification to the high ILUC-risk cap and phase-out measures, stating that high

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[1048] The TBT Agreement sets out the following hierarchical order of definitions: (i) the specific definitions in Annex 1 apply and prevail over any other conflicting ones in other instruments (Article 1.2, Annex 1.1 and Annex 1.2); followed by (ii) any definitions in the sixth edition of the ISO/IEC Guide 2:1991 (*General Terms and Their Definitions Concerning Standardization and Related Activities*) that do not conflict with those in Annex 1 (Appellate Body Report, *US – Tuna II (Mexico)*, paras. 184, 353-354); and finally (iii) any further definitions by the "UN system" or "international standardizing bodies" that neither conflict with those in Annex 1 nor ISO/IEC Guide 2:1991 (See Article 1.1; and e.g. Appellate Body Reports, *US – Tuna II (Mexico)*, paras. 184, 353-354, and fn 702 to para. 353; and *EC – Sardines*, paras. 224-225). The Panel considers that any non-conflicting definitions in subsequent editions of ISO/IEC Guide 2:1991, or other relevant separate ISO/IEC definitions, would fall under the third group.

[1049] This list is non-exhaustive, exemplified by the use of the terms "include" and "*inter alia*" in the *Explanatory note*.

[1050] Annex 1 provides that the terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in the TBT Agreement, have the same meaning as given in the definitions in the said Guide, subject to the definitions of certain terms set forth in Annex 1.

[1051] See ISO/IEC 17000:2004 (*Conformity Assessment - vocabulary and general principles*), para. 4.3. The Panel notes that ISO/IEC Guide 2:1991 was replaced in 1996 and 2004. In 2004, when the last and current version (ISO/IEC Guide 2:2004 (8th edition)), all sections related to conformity assessment procedures were deleted.

[1052] Prior panels and the Appellate Body also relied on certain ISO/IEC definitions not discussed by the parties. See e.g. Appellate Body Report, *US – Tuna II (Mexico)*, paras. 353-362.

ILUC-risk biofuels are subject to certain limits "unless they are certified to be 'low ILUC-risk' fuels".[1053] Malaysia also refers to "criteria for certification" such as Article 4 of the Delegated Regulation, which suggests that certification assesses compliance with those criteria. However, Malaysia does not point to a specific legislative provision containing a certification procedure, instead referring, generally, to the Delegated Regulation as a relevant legal instrument.[1054] Moreover, Malaysia does not neatly distinguish between criteria for accessing certification and the certification process itself. Nevertheless, the Panel considers that, read as a whole, Malaysia's panel request explains "low ILUC-risk certification" as a conformity assessment procedure which assesses compliance with the substantive criteria in Article 4 of the Delegated Regulation, and links the (non)operation of the low ILUC-risk certification with high ILUC-risk cap and phase-out.

7.750. The Panel notes that the identification of a low ILUC-risk certification *procedure* as set out in Article 6 of the Delegated Regulation is confirmed in Malaysia's further written submissions[1055]:

a. While Malaysia submits that "Articles 4 to 6 of the Delegated Regulation provide the specific rules for low ILUC-risk certification"[1056] and that "low ILUC-risk certification" is "set out in Articles 4 to 6 of the Delegated Regulation"[1057], Malaysia also explains that Article 3 of the Delegated Regulation sets out cumulative criteria for determining what is a high ILUC-risk biofuel, Articles 4 and 5 set out "criteria that must be met to certify biofuel made from high ILUC feedstock, as low ILUC-risk"[1058], and that Article 6 of the Delegated Regulation sets out the "need to submit reliable information, to arrange for independent auditing and proof of auditing, and to comply with Article 30 of the RED II".[1059]

b. Malaysia refers to low ILUC-risk certification as "a procedure used, indirectly, to determine whether biofuels fulfil the requirements to be subject to the high ILUC-risk cap and phase out" and "a procedure used to determine whether biofuels fulfil the requirements to 'escape' from the high ILUC-risk cap and phase out".[1060]

7.751. The Panel observes that by these statements, Malaysia does not clearly distinguish between *criteria* for obtaining low ILUC-risk certification and the *procedure* for low ILUC-risk certification itself, as Malaysia refers to "Articles 4 to 6 of the Delegated Regulation" without further distinction as to the role of each provision.[1061] However, the Panel considers that while Malaysia's approach to identifying a *procedure* is overinclusive by referring to Articles 4 to 6 taken together as providing for a low ILUC-risk certification measure, some of the provisions it refers to actually concern the low ILUC-risk certification *procedure*, in particular, Article 6 of the Delegated Regulation. Articles 26(2) and 30 of RED II (also referred to by Malaysia) also point to the existence of a certification *procedure.*[1062] The Panel therefore limits its subsequent analysis to the provisions constituting the low ILUC-risk certification *procedure*, in particular, Article 6 of the Delegated Regulation.

7.752. The Panel notes that certain aspects of Malaysia's claims under Article 5 concern not only the low ILUC-risk certification procedure, but also the low ILUC-risk criteria. As discussed above[1063], insofar as Malaysia's arguments concern the low ILUC-risk *criteria*, they are addressed under Article 2, together with the Panel's assessment of the high ILUC-risk cap and phase-out.

7.753. The Panel further notes that despite the European Union's arguments that Malaysia does not identify a measure that could be a conformity assessment procedure that is distinct from the

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[1053] Malaysia's panel request, para. 12.

[1054] Malaysia's panel request, paras. 13 and 17.

[1055] Malaysia's first written submission, paras. 488, 739 and 741.

[1056] Malaysia's first written submission, paras. 463 and 743; and second written submission, para. 277.

[1057] Malaysia's first written submission, para. 739; and second written submission, para. 25.

[1058] Malaysia's first written submission, para. 742.

[1059] Malaysia's first written submission, para. 742.

[1060] Malaysia's first written submission, para. 743; and second written submission, para. 281.

[1061] This description also illustrates the basis on which the European Union considers that Malaysia has not made clear which aspect it challenges as the conformity assessment procedure (and which it challenges as a technical regulation). See e.g. European Union's first written submission, paras. 1033-1034; second written submission, para. 180; response to Panel questions No. 139, para. 750 and No. 142, paras. 753-756; and comments on Malaysia's response to Panel question Nos. 139-142.

[1062] Malaysia's first written submission, paras. 463, and 742-743.

[1063] See paras. 7.27-7.40 above.

technical regulations at issue, the European Union also dedicates a portion of its written submissions to low ILUC-risk certification, referring to it as a "certification process" or "certification scheme".[1064]

7.754. Having identified the alleged conformity assessment procedure as the low ILUC-risk certification procedure detailed in Article 6 of the Delegated Regulation, the Panel now turns to consider whether this amounts to "any procedure" within the meaning of Annex 1.3. In this respect, the Panel refers to section 2.3.3 of this Report, which sets out the relevant legal provisions concerning low ILUC-risk certification.

7.755. Low ILUC-risk certification is referred to in Article 26(2) of RED II, as well as Recitals 17 and 18 of RED II. As described by Malaysia, the criteria for certification are detailed in Articles 4 and 5 of the Delegated Regulation, while Article 6 addresses "Auditing and verification requirements for certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels". Article 30 of RED II (in particular Article 30(8)), which is referred to in Article 6(3) of the Delegated Regulation, provides further detail on "implementing acts" to be adopted by the Commission to ensure compliance with the provisions on "low or high direct and indirect land-use change-risk biofuels".

7.756. In the course of these proceedings, the European Union provided some information about further implementation of the low ILUC-risk certification criteria and procedure, while for the most part, acknowledging that implementing acts in the form of guidelines on the certification of low ILUC-risk biofuels had yet to be adopted.[1065] These guidelines were eventually adopted in June 2022.[1066]

7.757. The information presented by the parties to the Panel shows that:

a. On 29 June 2021, a draft implementing act on "rules to verify sustainability and greenhouse gas emissions saving criteria and low indirect land-use change-risk criteria" was published for stakeholders' feedback.[1067] The European Union informed the Panel that the detailed criteria for certification would be set out in an implementing act.[1068]

b. On 3 February 2022, the RED II Committee on the Sustainability of Biofuels, Bioliquids and Biomass Fuels gave a positive opinion on the decisions to recognize 13 voluntary schemes and indicated that the Commission would soon adopt decisions recognizing them. Three of these voluntary schemes also cover low-ILUC risk certification.[1069]The Commission adopted its decisions on 8 April 2022.[1070]

c. As of 25 April 2022, the European Commission had received five more applications for recognition of voluntary certification schemes; positive technical assessments had been made for three of them.[1071]

d. Further detailed rules on low ILUC-risk certification were adopted on 14 June 2022[1072] and published on 27 June 2022 ("Commission Implementing Regulation (EU) 2022/996 of 14

[1064] European Union's first written submission, paras. 188 and 561.

[1065] With respect to the further implementation of the low ILUC-risk certification criteria and procedure, the Panel refers to section 7.1.1 of this report, which outlines the steps and timeline for implementation that the European Commission was required to take pursuant to RED II and the Delegated Regulation. European Union's first written submission, paras. 1070-1071.

[1066] European Union's response to Panel question No. 61, para. 394.

[1067] European Union's first written submission, paras. 1070 and 1240 (referring to Draft Commission Implementing Regulation, (Exhibit EU-161)).

[1068] See e.g. European Union's first written submission, para. 1070.

[1069] European Union's first written submission, para. 187 (referring to Webpage from the European Commission's (DG Energy) website: Voluntary schemes, (Exhibit EU-213), p. 3).

[1070] European Union's response to Panel question No. 60, para. 392 and fn 145 to para. 392 (referring to Commission Implementing Decisions on Voluntary Schemes, (Exhibit EU-219)).

[1071] European Union's response to Panel question No. 61, para. 393 (referring to DG Energy Voluntary schemes (accessed on 25 April 2022), (Exhibit EU-259)).

[1072] European Union's response to Panel question No., 61, para. 394; DG Energy Voluntary schemes (accessed on 25 April 2022), (Exhibit EU-259).

June 2022 on rules to verify sustainability and greenhouse gas emissions saving criteria and low indirect land-use change-risk criteria ").[1073]

7.758. Notably, the European Union stated that the "implementing act on the certification guidelines will provide further information on the methodology for the auditing of the application of the criteria set in the Delegated Regulation".[1074]

7.759. The Panel now turns to consider whether these provisions amount to "any procedure" within the meaning of Annex 1.3.

7.760. By their express terms, Articles 4 to 6 of the Delegated Regulation concern low ILUC-risk "certification". Articles 4 and 5 set out the requirements and criteria for certification, while Article 6 details *how* to demonstrate that the requirements for certification are met. Articles 4 and 5 indicate that there is a general requirement for "certification", and Article 6 provides for "[a]uditing" and "verification" requirements for certification of low ILUC-risk biofuels. The "[a]uditing and verification requirements for certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels" identified in Article 6 are expressly intended to serve as a means of verifying that "all requirements" set out in Articles 4 and 5 have been "duly fulfilled"[1075] and to "verify"[1076] and "demonstrate"[1077] compliance with them.

7.761. While "verification"[1078] is one of the examples of specific procedures listed in the *Explanatory note* to Annex 1.3, "certification" and "auditing" are not mentioned in Annex 1.3 or ISO/IEC Guide 2:1991. "Audit" is defined in ISO/IEC 17000:2004 as the "systematic, independent, documented process for obtaining records, statements of fact or other relevant information and assessing them objectively to determine the extent to which specified requirements are fulfilled".[1079] "Certification" is also defined in ISO/IEC 17000:2004 as a "third-party *attestation* related to products, processes, systems or persons".[1080] An "attestation" is the "issue of a statement, based on a decision following review, that fulfilment of specified requirements has been demonstrated".[1081]

7.762. The foregoing definitions suggest that the references to "verification" (listed in Annex 1.3), "certification" and "auditing" (while not listed in Annex 1.3, appear comparable as they point to verification processes), can be seen as referring to a "procedure" of the type covered under the definition in Annex 1.3. These appear to be precisely the types of evaluations, verifications and assurances of conformity that the *Explanatory note* to Annex 1.3 identifies as constitutive of a conformity assessment procedure. Moreover, these procedures, as detailed in the Delegated Regulation appear to be consistent with the definitions of "verification", "auditing" and "certification" provided above.

7.763. In sum, the Panel finds that Malaysia has established that the procedure for verifying whether biofuels meet the requirements for low ILUC-risk certification, the key features of which are detailed in Article 6 of the Delegated Regulation, is a "procedure" of the type falling within the meaning of this term under Annex 1.3 to the TBT Agreement.

7.764. The Panel considers that the fact that at the time of the Panel's establishment, this certification procedure may still have been "incomplete" insofar as not all relevant implementing actions had yet been taken by the European Union, does not detract from the fact that a procedure

[1073] European Union's comments on Malaysia's response to Panel question No. 61, para. 108 (referring to Commission Implementing Regulation (EU) 2022/996, (Exhibit EU-329)).
[1074] European Union's first written submission, para. 1071.
[1075] Article 6.1(a) of the Delegated Regulation.
[1076] Article 6.2 of the Delegated Regulation.
[1077] Article 6.3 of the Delegated Regulation.
[1078] "Verification" is mentioned in Annex 1.3 and defined in ISO/IEC Guide 2:1991 as the "[c]onfirmation, by examination of evidence, that a product, process or service fulfils specified requirements."
[1079] ISO/IEC 17000:2004, 4.4.
[1080] ISO/IEC 17000:2004, 5.5.
[1081] ISO/IEC 17000:2004, 5.2.

of the type covered under Annex 1.3 is referred to in Article 26(2) of RED II, the key features of which are set out in Article 6 of the Delegated Regulation.[1082]

7.1.3.1.4 "used, directly or indirectly, to determine that relevant requirements in technical regulations are fulfilled"

7.765. Having established that the provisions setting out a low ILUC-risk certification procedure amount to "any procedure", the Panel turns to consider the *purpose* or use of that procedure. Annex 1.3 covers conformity assessment procedures that serve to determine compliance with "requirements of technical regulations or standards" "directly or indirectly". In other words, a procedure is a conformity assessment procedure if it is used for the purpose of (i) directly or indirectly (ii) determining the fulfilment of "relevant requirements" (iii) contained in a technical regulation or standard.

7.766. The term "*relevant requirements*" (of technical regulations or standards) is not elaborated on or explained further in Annex 1.3. The dictionary meaning of "relevant" is "[b]earing on or connected with the matter in hand; closely relating to the subject or point at issue; pertinent to a specified thing".[1083] "Requirement" means "a condition which must be complied with".[1084] The term "relevant requirements" in Annex 1.3 thus suggests that a conformity assessment procedure needs to be related to the subject-matter of the conditions of the technical regulation which need to be complied with. This interpretation supports a view that a procedure could be a conformity assessment procedure under Annex 1.3 even if it serves to establish fulfilment of only *some* of the requirements in a technical regulation or a standard (and by implication, not all requirements in a technical regulation will always need to be verified through a conformity assessment procedure).[1085]

7.767. The relationship between the procedure and the "relevant requirements" of a technical regulation (or standard) is qualified by the terms "directly" "or" "indirectly". Annex 1.3 does not define or explain further what types of situations might constitute "direct" or "indirect" use of a procedure. According to the ordinary meaning of the term, "directly" means "in a direct manner or way", and "without the intervention of a medium or agent; immediately; by a direct process or mode".[1086] "Indirectly" is defined as "in an indirect way or manner; not directly", "not in a straight line or with a straight course; circuitously: obliquely" and "by indirect action, means, connection, agency, or instrumentality; through some intervening person or thing; mediately".[1087] In the context of Annex 1.3, the terms "directly" and "indirectly" are used to characterize the connection between the use that is made of a procedure and the determination that relevant requirements in a technical regulation are fulfilled.

7.768. That a procedure may constitute a conformity assessment procedure where it serves to determine compliance with requirements "directly or indirectly" suggests an intention to cover a broad range of modalities through which a procedure might be used in relation to a technical regulation. Accordingly, the Panel considers that a conformity assessment procedure may be understood as including a range of situations not limited to the most immediate type of connection

[1082] See also section 7.1.1 of this Report. The Panel also notes, in this respect, that Article 1.6 of the TBT Agreement states that "[a]ll references in this Agreement to technical regulations, standards and *conformity assessment procedures* shall be construed to include any amendments thereto and any additions to the rules or the product coverage thereof, except amendments and additions of an insignificant nature." (emphasis added)

[1083] Oxford English Dictionary online, definition of "relevant" (https://www.oed.com/view/Entry/161893?redirectedFrom=relevant#eid) (accessed on 21 September 2023).

[1084] Oxford English Dictionary online, definition of "requirement" (https://www.oed.com/view/Entry/163260?redirectedFrom=requirement#eid) (accessed on 21 September 2023).

[1085] The Panel notes, as discussed above in the context of the claim under Article 2.8 of the TBT Agreement, that the term "product requirement", as used in that provision, is understood to mean "product characteristics". The Panel considers that the deliberate use of the word "relevant" instead of "product" here also serves as a distinguishing factor, indicating that "relevant requirements" is broader, and not coterminous with, "product requirements" or "product characteristics".

[1086] Oxford English Dictionary online, definition of "directly" (https://www.oed.com/view/Entry/53307?redirectedFrom=directly#eid) (accessed on 21 September 2023).

[1087] Oxford English Dictionary online, definition of "indirectly" (https://www.oed.com/view/Entry/94534?redirectedFrom=indirectly#eid) (accessed on 21 September 2023).

where the procedure "directly" ascertains whether certain requirements of a technical regulation (or a standard) are met.

7.769. The Panel now turns to consider whether Malaysia has demonstrated that the low ILUC-risk certification procedure is used, "directly or indirectly" to determine whether "relevant requirements" of a "technical regulation" are fulfilled.[1088]

7.770. Malaysia submits that low ILUC-risk certification is linked to the technical regulations laid down in Article 26 of RED II, namely the 7% maximum share and the high ILUC-risk cap and phase-out.[1089] According to Malaysia, low ILUC-risk certification serves to establish that a consignment of palm oil-based biofuel is low ILUC-risk and therefore complies with the exemption and is not subject to the high ILUC-risk cap and phase-out.[1090] Specifically, Malaysia refers to low ILUC-risk certification as "a procedure used, *indirectly*, to determine whether biofuels fulfil *the requirements to be subject to the high ILUC-risk cap and phase out*".[1091] Malaysia also refers to the use of low ILUC-risk certification as relevant for a biofuel's eligibility to count towards renewable energy targets.[1092] The Panel understands Malaysia to refer to the eligibility of high ILUC-risk biofuels to count towards the renewable energy consumption targets (i.e. to not be subject to the high ILUC-risk cap and phase-out and be counted within the 7% maximum share without any limitation imposed by the cap and phase-out).

7.771. Based on the above, the Panel understands Malaysia to identify the "relevant requirements" as those that serve to determine low ILUC-risk status, as contained in Articles 4 and 5 of the Delegated Regulation.[1093] The Panel further understands Malaysia to identify the relevant "technical regulation" as the high ILUC-risk cap and phase-out. Moreover, the Panel understands Malaysia to argue that low ILUC-risk certification is used to establish the compliance of consignments of high ILUC-risk biofuels with the low ILUC-risk limited exemption to the cap and phase-out, thereby affecting their eligibility to contribute to renewable energy targets.

7.772. The Panel notes that the European Union describes low ILUC-risk certification in terms similar to Malaysia.[1094] For example, in the European Union's words, low ILUC-risk biofuels "are not subject to the phase-out provisions in Article 26(2) of RED II… [a]s the certification process is applicable to fuels produced from feedstock which is designated as 'high ILUC-risk', under the EU legislative regime, biofuel produced from palm oil production can be certified as low ILUC-risk".[1095]

7.773. This points to a common understanding between the parties as to how low ILUC-risk certification operates, and its relationship with low ILUC-risk classification and the high ILUC-risk

[1088] The Panel recalls its description of low ILUC-risk certification in section 2.3.3 of this Report, which also sets out the text of Articles 4 to 6 of the Delegated Regulation. The Panel also refers to its discussions on low ILUC-risk certification and its place within the EU Biofuels regime in section 7.1.1 of this Report.

[1089] Malaysia's panel request, para. 12; and first written submission, paras. 280, 387 and 742-743.

[1090] Malaysia's panel request, paras. 12, 17 and fn 20 to para. 17; first written submission, para. 743; and second written submission, para. 281.

[1091] Malaysia's first written submission, para. 743; second written submission, para. 281; and response to Panel question No. 141. (emphasis added)

[1092] Malaysia's first written submission, paras. 387, 393, and 742.

[1093] Malaysia states that the high ILUC-risk cap and phase-out are the relevant technical regulations and refers to an "indirect link" between low ILUC-risk certification procedure and the high ILUC-risk cap and phase-out. (Malaysia's first written submission, para. 743; second written submission, para. 280; response to Panel question No. 141). The Panel notes that, in response to questions from the Panel, Malaysia noted that the technical regulation that is directly relevant is the exemption from the high ILUC-risk cap and phase-out, which the Panel understands to mean the low ILUC-risk certification criteria. (Malaysia's response to Panel question No. 141). The European Union takes issue with the apparently shifting basis of Malaysia's claim. The Panel disagrees with the European Union's assertion that Malaysia is shifting the basis of its claim, as it has consistently referred to what it considers to be the "indirectly relevant" technical regulation, drawing on the language of Annex 1.3. Moreover, the Panel does not consider that it was necessary for Malaysia to identify the "directly relevant" technical regulation in its panel request given the formulation of its claims under Article 5. As discussed above, the measure at issue that had to be identified was the low ILUC-risk certification procedure. Moreover, Malaysia's panel request identifies in its narrative all of the requisite links, e.g. between the low ILUC-risk certification procedure and low ILUC-risk criteria, and how these interact with the high ILUC-risk cap and phase-out, the 7% maximum share, and eligibility to count towards renewable energy targets.

[1094] Malaysia's first written submission, paras. 143-144.

[1095] Malaysia's first written submission, paras. 143-144.

cap and phase-out, and ultimately, the extent of the eligibility of the biofuel to be counted towards renewable energy targets.

7.774. The Panel therefore turns to consider whether the low ILUC-risk *certification procedure* can be said to "directly or indirectly" determine whether the low ILUC-risk *criteria* (i.e. the "relevant requirements" identified by Malaysia) are fulfilled. In this respect, the Panel refers to section 7.1.1 of this Report where it sets out the relationship between the 7% maximum share, the high ILUC-risk cap and phase-out, and low ILUC-risk certification.

7.775. Article 6(1)(a) of the Delegated Regulation states that low ILUC-risk certification is used to substantiate claims "that all requirements set out in Articles 4 and 5 have been duly fulfilled". Thus, the low ILUC-risk certification procedure clearly serves to determine whether the requirements of Article 4 and 5 of the Delegated Regulation have been fulfilled.

7.776. The Panel recalls its finding above that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations. The Panel further recalls its findings that the low ILUC-risk criteria must be taken into account in the assessment of the high ILUC-risk cap and phase-out.

7.777. Taking these technical regulations as a starting point, the factor that determines in the first instance whether they apply to a given biofuel is the determination of whether it is "high ILUC-risk", based on the criteria contained in Article 3 of the Delegated Regulation. The low ILUC-risk certification procedure verifies compliance with different criteria contained in Articles 4 and 5 of the Delegated Regulation, so that consignments of biofuels determined in the first instance to be high ILUC-risk may be exempted from the application of the high ILUC-risk cap and phase-out. Low ILUC-risk certification by definition results in certain consignments of high ILUC-risk biofuel not being treated as high ILUC-risk biofuel.

7.778. The Panel considers that it may thus be a matter of semantics whether the low ILUC-risk certification procedure has a "direct" or "indirect" connection to the high ILUC-risk cap and phase-out. It is clear that the low ILUC-risk certification procedure has a bearing on whether a consignment of biofuel is subject to the high ILUC-risk cap and phase-out, or is instead eligible to count towards renewable energy targets within the 7% maximum share without any limitation imposed by the cap and phase-out.

7.779. These factors indicate that the overarching purpose of the high ILUC-risk cap and phase-out and the low ILUC-risk criteria and certification is the same, i.e. to determine, in combination, the conditions of eligibility of conventional biofuels to count towards renewable energy targets. The low ILUC-risk criteria and certification procedure do not exist in isolation, but as elements on the path to determining the eligibility of a conventional biofuel to count towards renewable energy targets. While the immediate and "*direct*" purpose of the low ILUC-certification procedure is to establish that the biofuels at issue meet the criteria for low ILUC-risk certification (as set out in Articles 4 and 5 of the Delegated Regulation), *indirectly,* this is intended to determine whether biofuels are subject to the high ILUC-risk cap and phase-out, and as a result, the extent of their eligibility to count towards EU renewable energy targets.

7.780. The Panel therefore considers, that there is a sufficient relationship between these elements – the low ILUC-risk certification procedure, the low ILUC-risk criteria, the high ILUC-risk cap and phase-out, the 7% maximum share, and overall eligibility to count towards EU renewable energy targets – for the Panel to conclude that the low ILUC-risk certification procedure determines, directly or indirectly, whether relevant requirements in the technical regulations at issue (i.e. the high ILUC-risk cap and phase-out and 7% maximum share) are fulfilled.

7.1.3.1.5 Other requirements for the applicability of Article 5

7.781. Having established that the low ILUC-risk certification procedure is a conformity assessment procedure within the meaning of Annex 1.3, the Panel turns to consider the two remaining conditions which must be met for Article 5 to apply.

7.782. First, the low ILUC-risk certification procedure must be a conformity assessment procedure that is prepared, adopted or applied by a "central government body". As indicated in its title, Article 5 concerns obligations with respect to conformity assessment procedures by "Central Government

Bodies".[1096] Annex 1.6 defines "central government bodies" as including not only "[c]entral government, its ministries and departments" but also "any body subject to the control of the central government in respect of the activity in question". The *Explanatory note* to Annex 1.6 also clarifies that "[i]n the case of the European Communities the provisions governing central government bodies apply." Voluntary certification procedures established at EU member State level or by a private body would not fall within the scope of Article 5, but may be addressed by Articles 7 or 8 of the TBT Agreement.

7.783. The parties do not dispute that the European Union is a central government body for the purposes of Article 5, and do not raise arguments in this respect. Insofar as the low ILUC-risk procedure is established in provisions of RED II and the Delegated Regulation, both EU instruments, the low ILUC-risk certification appears to be a procedure by a central government body for the purposes of Annex 1.6 and Article 5. Insofar as certification schemes are subject to the control of the European Commission, Article 5 also applies, regardless of whether these schemes are run by national or non-government entities. The potential availability of voluntary certification schemes (or the fact that the establishment of such schemes is provided for in the measure) does not in the Panel's view detract from the fact that the low ILUC-risk certification procedure is a conformity assessment procedure falling within the scope of Article 5.

7.784. However, given the complexities introduced to the implementation of low ILUC-risk certification through an EU structure which mobilizes EU member States and private actors (e.g. through national and non-government certification schemes), including the possibility for purely private voluntary schemes to be part of the certification process, the Panel limits its analysis and conclusions of the claims under Article 5 to EU-level aspects of the low ILUC-risk certification procedure.[1097]

7.785. Second, according to the introductory sentence of Article 5.1, Article 5 applies in cases where a "positive assurance of conformity" with technical regulations (or standards) is "required". Article 5.1 has been interpreted by the panel in *Russia – Railway Equipment* as meaning that Article 5 only covers conformity assessment procedures that are "mandatory".[1098]

7.786. The Panel notes that in this dispute, the European Union submits that low ILUC-risk certification is "not mandatory" in the sense that nobody is required to apply for certification. The European Union recognizes, however, that low ILUC-risk certification becomes "binding" the moment an application is made, i.e. "in the event that a producer wishes to avail themselves of the scheme".[1099] The Panel considers that the ordinary meaning of the term "required", in the context of the introductory sentence of Article 5.1, covers situations in which an exporter wishes to avail itself of flexibilities and other exemptions.[1100] Accordingly, and in this sense, the Panel considers that a positive assurance of conformity is "required", i.e. is "mandatory", in order to obtain low ILUC-risk certification.

[1096] Appellate Body Report, *Russia – Railway Equipment*, para. 5.120; and Panel Report, *Russia – Railway Equipment*, para. 7.249. See also Annex 1.6 of the TBT Agreement and the *Explanatory note* to Annex 1.6.

[1097] The Panel notes, without making any further assessment in this dispute, that Article 8.2 of the TBT Agreement provides that "Members shall ensure that their central government bodies rely on conformity assessment procedures operated by non-governmental bodies only if these latter bodies comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures."

[1098] Panel Report, *Russia – Railway Equipment*, para. 7.249. This interpretation was not reviewed by the Appellate Body, which referred to the text of the introductory paragraph of Article 5.1 of the TBT Agreement without any further elaboration on the meaning of these terms, limiting the coverage and scope of measures captured by Article 5. (Appellate Body Report, *Russia – Railway Equipment*, para. 5.120).

[1099] European Union's first written submission, para. 594.

[1100] By way of illustration, the Panel notes that it is well established that in the context of Article III:4, the term "requirement" includes not only those obligations which an enterprise is "legally bound to carry out" or that apply "across the board", but also conditions that an enterprise voluntarily accepts "in order to obtain an advantage". (See e.g. Panel Report, *India – Autos*, paras. 7.174 and 7.190, 7.191.)

7.1.3.1.6 Conclusion with respect to Annex 1.3

7.787. The Panel finds that the low ILUC-risk certification procedure is a "conformity assessment procedure" within the meaning of Annex 1.3 to the TBT Agreement.

7.788. The Panel notes that the European Union reiterates its view that the low ILUC-risk certification procedure is not a "conformity assessment procedure" when responding to each of the claims made under Article 5. The Panel also appreciates that the way the European Union responds to certain of the claims under Article 5 is informed by its view that the low ILUC-risk certification procedure is not a conformity assessment procedure. However, having already addressed this issue at the outset, and with a view to avoiding repetition, the remainder of the Panel's findings proceed on the assumption that the low ILUC-risk certification procedure is a conformity assessment procedure within the meaning of Annex 1.3.

7.1.3.2 Article 5.1.1 – Non-discrimination

7.1.3.2.1 Introduction

7.789. Having concluded that the low ILUC-risk certification *procedure* qualifies as a "conformity assessment procedure" within the meaning of Annex 1.3, and is thus subject to the obligations in Article 5 of the TBT Agreement, the Panel now addresses the claims under Article 5.

7.790. Malaysia submits[1101] that the European Union violates Article 5.1.1 because the conformity assessment procedure for certifying palm oil biofuel as low ILUC-risk discriminates against Malaysian suppliers of palm oil-based biofuel. More specifically, Malaysia argues that the relevant like products are palm oil-based biofuel and other oil crop-based biofuel, and that suppliers of such biofuel are in a comparable situation.[1102] According to Malaysia, discrimination arises from the fact that unlike suppliers of palm oil-based biofuel, other oil crop-based biofuel suppliers do not need to access any conformity assessment procedure for their biofuel to be eligible to count towards EU renewable energy targets within the 7% maximum share.[1103]

7.791. The European Union submits that low ILUC-risk certification applies to high ILUC-risk biofuels, such that the scope of the assessment is not between producers of oil crop-based biofuels and palm oil-based biofuels.[1104] Moreover, the focus of the non-discrimination obligations is on the conditions for access to a procedure; here, all suppliers of high ILUC-risk biofuels have equal access to the certification mechanism.

7.1.3.2.2 Legal standard

7.792. Article 5.1.1, read in conjunction with the introductory clause in Article 5.1, sets forth the obligation that:

> 5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:
>
> > 5.1.1 conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment

[1101] Malaysia's first written submission, paras. 745-753; second written submission, paras. 282-287; and responses to the Panel's questions, pp. 94-96.

[1102] Malaysia's first written submission, paras. 748-749, and 752.

[1103] Malaysia's first written submission, para. 751; second written submission, para. 286.

[1104] European Union's first written submission, paras. 1050, 1052 and 1068. For the European Union's other arguments on Article 5.1.1 concerning the applicability of Article 5, see European Union's first written submission, paras. 1036-1061; second written submission, paras. 181-184; responses to the Panel's questions, paras. 757-762; and comments on Malaysia's responses to the Panel's questions, paras. 275-279.

activities undertaken at the site of facilities and to receive the mark of the system;

7.793. Article 5.1.1 has been interpreted and applied in one prior case, *Russia – Railway Equipment*, and both parties present their respective understandings of the applicable legal standard with reference to that case.

7.794. Based on the wording of Article 5.1.1, violations of this provision may arise from the preparation or adoption of a conformity assessment procedure, or from its application.[1105]

7.795. An importing Member acts inconsistently with the non-discrimination obligations in Article 5.1.1 in respect of a covered conformity assessment procedure if three elements are established[1106]:

a. The suppliers of another Member who have been granted less favourable access are suppliers of products that are like the products of domestic suppliers or suppliers from any other country who have been granted more favourable access;

b. the importing Member (through the preparation, adoption or application of a covered conformity assessment procedure) grants access for suppliers of products from another Member under "conditions less favourable" than those accorded to suppliers of domestic products or products from any other country; and

c. the importing Member grants access under conditions less favourable for suppliers of like products "in a comparable situation".

7.796. The Panel will elaborate further on the elements of the legal standard in Article 5.1.1 as necessary in the course of its assessment of the issues in dispute.

7.1.3.2.3 Assessment by the Panel

7.797. The Panel turns to consider whether Malaysia's claim concerns the granting of access to the low ILUC-risk certification procedure, to suppliers of like products in a comparable situation, under conditions no less favourable than those accorded to domestic or other third country suppliers. The Panel addresses these requirements together given the degree of interconnectedness between the meaning of these requirements and the parties' arguments. In doing so, the Panel sets out the legal standard and relevant arguments, followed by its assessment.

7.798. The second clause of Article 5.1.1 makes clear that the focus of the non-discrimination obligations in Article 5.1.1 is on the "*conditions for access* to a conformity assessment granted to suppliers".[1107] The Appellate Body in *Russia – Railway Equipment* explained that the focus is therefore on the "factors or circumstances under which the opportunity to benefit from conformity assessment is accorded to those suppliers".[1108] Whether conditions for access are no less favourable turns on whether the conditions for access to the conformity assessment procedure for suppliers of domestic or third-country products modify the conditions of competition to the detriment of suppliers of like imported products.[1109] The panel in *Russia – Railway Equipment* considered that this necessitates a "comparative analysis of the conditions of access granted to suppliers of products from the complaining Member, on the one hand, and suppliers of like domestic products, or of like products from any other country, on the other hand". Only if this assessment "reveals a difference in the access conditions granted to suppliers of the complaining Member", should a panel go on to consider whether that difference amounts to granting access under 'less favourable' conditions".[1110] In reaching this conclusion, the panel underscored that Article 5.1.1 "focuses on suppliers and their

[1105] Panel Report, *Russia – Railway Equipment*, para. 7.250.
[1106] Panel Report, *Russia – Railway Equipment*, para. 7.251.
[1107] Appellate Body Report, *Russia – Railway Equipment*, para. 5.123; and Panel Report, *Russia – Railway Equipment*, para. 7.257. Both the panel and Appellate Body drew on the ordinary meaning of "access" as well as the text of the second clause in Article 5.1.1 which states that access entails the "suppliers' right to an assessment of conformity under the rules of the procedure". (Ibid.).
[1108] Appellate Body Report, *Russia – Railway Equipment*, para. 5.123.
[1109] Appellate Body Report, *Russia – Railway Equipment*, para. 5.123.
[1110] Panel Report, *Russia – Railway Equipment*, para. 7.258.

conditions of access to a conformity assessment procedure" and "not the manner in which a Member treats imported products from another Member". Moreover, a "mere difference" in access conditions is not sufficient to establish a violation; that difference must modify the conditions of competition, or competitive opportunities, among relevant suppliers of like products to the detriment of suppliers of the complaining Member.[1111]

7.799. Further, the relevant treatment is that accorded to suppliers of like products in "a comparable situation".[1112] In assessing whether there is a comparable situation, relevant factors are those which have a bearing on the conditions for granting access (e.g. the rules of the conformity assessment procedure, nature of the products at issue, and the situation in a particular country or supplier), and the "ability of the regulating Member to ensure compliance with the requirements in the underlying technical regulation or standard". This analysis should be made on a case-by-case basis in light of the measure at issue and circumstances of the case.[1113]

7.800. Malaysia argues that the conditions for access to the low ILUC-risk certification procedure granted to suppliers of domestic or third-country products modify the conditions of competition to the detriment of suppliers of like Malaysian products in a comparable situation.[1114] Malaysia focuses on the treatment of suppliers of low ILUC-risk palm oil-based biofuel, and considers that the relevant like products are "oil palm crop-based biofuel" and "other oil crop-based biofuel".[1115] Further, Malaysia submits that all suppliers of oil palm crop-based biofuel and other oil crop-based biofuel are in a comparable situation.[1116] However, in response to questions from the Panel, Malaysia clarified that the relevant factor for determining the existence of a "comparable situation" and, therefore, granting a right to an assessment of conformity, is the alleged high ILUC-risk associated with the particular feedstock.[1117]

7.801. In substantiating its claim, Malaysia refers to the fact that suppliers of other oil crop-based biofuel do not need to access any conformity assessment procedure for their biofuel to be eligible to count towards renewable energy targets within the 7% maximum share without any limitation imposed by the cap and phase-out, i.e. there is "no certification requirement" for such biofuel.[1118]

7.802. The European Union submits that the low ILUC-risk certification procedure is not a conformity assessment procedure.[1119] The European Union alternatively submits that Article 5.1.1 does not apply as Malaysia's claim does not concern granting access under conditions less favourable to suppliers of like products of national or third-country origin in a comparable situation.[1120] Rather, the obligation in Article 5.1.1 applies where there are suppliers of like products which are subject to conformity assessment in the first place. The European Union explains that under the EU Biofuels Regime, low ILUC-risk certification applies to a subset of conventional biofuels ("those associated with a high ILUC-risk of expansion into areas of high-carbon stock"); "access" to the conformity assessment procedure is therefore only relevant to producers of biofuels produced from high ILUC-risk feedstock. At present, this means that low ILUC-risk certification is "only relevant to producers (and suppliers) of palm oil-based biofuel".[1121] Moreover, Article 5.1.1 focuses on the "conditions for access" to a conformity assessment procedure.[1122] In this case, all suppliers of palm oil-based biofuels, irrespective of their origin, have equal access to the low ILUC-risk certification mechanism.[1123]

[1111] Panel Report, *Russia – Railway Equipment*, para. 7.260.
[1112] Appellate Body Report, *Russia – Railway Equipment*, para. 5.124; and Panel Report, *Russia – Railway Equipment*, para. 7.283.
[1113] Appellate Body Report, *Russia – Railway Equipment* paras. 5.128 and 5.135. See also Panel Report, *Russia – Railway Equipment*, para. 7.283.
[1114] Malaysia's first written submission, para. 751.
[1115] Malaysia's first written submission, paras. 745-753; and second written submission, para. 283.
[1116] Malaysia's first written submission, para. 752; and second written submission, para. 287.
[1117] Malaysia's response to Panel question No. 144.
[1118] Malaysia's first written submission, para. 751; and second written submission, para. 286.
[1119] Malaysia's first written submission, paras. 1029-1035.
[1120] European Union's first written submission, paras. 1042-1061.
[1121] European Union's first written submission, para. 1050; and response to Panel question No. 143, para. 761.
[1122] European Union's first written submission, para. 1048.
[1123] European Union's first written submission, para. 1059.

7.803. In light of the requirements of Article 5.1.1, the Panel considers that Malaysia's claim under Article 5.1.1 does not concern the *granting of access* to a conformity assessment procedure to *suppliers of like products* who are *in a comparable situation*. At a general level, Malaysia's arguments concern the imposition of a certification requirement *per se* as distinct from conditions of *access to* the low ILUC-risk certification procedure. The Panel understands that the fundamental basis for this claim is the fact that palm oil-based biofuel is subject to low ILUC-risk certification, while other oil crop-based biofuels are not subject to low ILUC-risk certification.

7.804. The Panel agrees with the European Union that Article 5.1.1 concerns the *conditions of access* to a conformity assessment procedure with respect to the products which are actually subject to the conformity assessment procedure itself.[1124] The Panel's understanding is supported by the example provided in the second clause of Article 5.1.1 of what is meant by "access": i.e. that "access entails suppliers' right to an assessment of conformity under the rules of the procedure". In other words, the focus of the non-discrimination obligations in Article 5.1.1 is on the *conditions for access* to a conformity assessment procedure, being the "factors or circumstances under which the opportunity to benefit from conformity assessment is accorded to those suppliers".[1125] This is a distinct question from the identification of which products (and in turn, suppliers) are – or are not – subject to certification.

7.805. On the facts of this case, low ILUC-risk certification applies to all high ILUC-risk biofuels. The fact that currently only palm oil-based biofuel is designated as high ILUC-risk does not alter this understanding of the operation of low ILUC-risk certification. There is thus no difference in treatment with respect to access among the products to which certification applies. The group of relevant products is high ILUC-risk biofuels; any such biofuel has the "right" of access to a conformity assessment procedure and there is no question of less favourable treatment.

7.806. The Panel's analysis is supported by the meaning of suppliers of like products "in a comparable situation". In light of the measures at issue, the Panel considers that the relevant factor for determining the existence of "a comparable situation" and therefore granting a right to assessment of conformity, is the alleged high ILUC-risk associated with a particular feedstock. This is evident from the rules of the low ILUC-risk certification procedure, which is available only to high ILUC-risk feedstocks. The Panel notes that this is the view held by both Malaysia and the European Union.[1126] Moreover, if the requirement under Article 5.1.1. protects equal opportunity to be certified among products requiring certification, the situation is "comparable" only among suppliers of products that are equally subject to the certification procedure. The Panel therefore also agrees with the European Union that the universe of the like products of suppliers in "a comparable situation" is limited to those which are subject to the conformity assessment procedure, i.e. biofuels produced from high ILUC-risk feedstocks.

7.807. The Panel considers that Article 5.1.1 should not be interpreted in a manner that would allow a regulating Member to circumvent the non-discrimination obligations in Article 2.1 by adopting a technical regulation that applies to a group of like products on a non-discriminatory basis, and yet require a positive assurance of conformity with the relevant requirements of that technical regulation only for suppliers of a subset of those products. However, the Panel does not consider it necessary or appropriate to adopt an expansive interpretation of the obligation in Article 5.1.1 to prevent such a scenario from arising. Such a scenario would seem to involve a regulating Member discriminating among like products that are, in the words of Article 5.1.1, in "a comparable situation". In the Panel's view, the requirements set out in the text of Article 5.1.1 are sufficient to safeguard against such potential circumvention.

7.1.3.2.4 Conclusion on Article 5.1.1

7.808. The Panel concludes that Malaysia has failed to establish that the low ILUC-risk certification procedure is inconsistent with the obligation in Article 5.1.1 of the TBT Agreement to ensure that conformity assessment procedures grant access for suppliers of like products originating in the

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[1124] The Panel notes that this interpretation is also consistent with the findings made in *Russia – Railway Equipment.* (See e.g. Panel Report, *Russia – Railway Equipment*, para. 7.257; and Appellate Body Report, *Russia – Railway Equipment*, paras. 5.121, and 5.123-5.124.)

[1125] Appellate Body Report, *Russia – Railway Equipment*, para. 5.123.

[1126] European Union's second written submission, paras. 182-183; and comments on Malaysia's response to Panel question No. 144, para. 276. Malaysia's response to Panel question No. 144, p. 95.

territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country.

7.1.3.3 Article 5.1.2 – Unnecessary obstacles to international trade

7.1.3.3.1 Introduction

7.809. The Panel now turns to the claim under Article 5.1.2 of the TBT Agreement.

7.810. Malaysia submits[1127] that the European Union violates Article 5.1.2 by imposing a conformity assessment procedure for certifying palm oil-based biofuel as low ILUC-risk which creates unnecessary obstacles to international trade. More specifically, Malaysia argues that the low ILUC-risk certification procedure is (i) an unnecessary obstacle to international trade, and (ii) more strict (or applied more strictly) than necessary to give the European Union adequate confidence that products conform with the applicable technical regulations, taking account of the risks non-conformity would create.[1128] Malaysia explains that the European Union has created unnecessary obstacles to international trade by imposing a certification requirement without establishing how certification may be obtained and failing to explain the meaning of the low ILUC-risk criteria.[1129] In other words, by adopting a conformity assessment procedure while making it impossible to apply it, the European Union created an unnecessary obstacle to international trade.

7.811. The European Union submits that Malaysia does not take issue with the preparation, adoption or application of the future implementing rules for low ILUC-risk certification, but their current absence. For the European Union, this means that such claims "fall outside the scope" of Article 5.1.2.[1130] As to these future implementing rules, the European Union notes that it has taken steps to prepare these rules, and argues that such rules are not indispensable for carrying out low ILUC-risk certification, which could be conducted on the basis of national or voluntary schemes.[1131] The European Union further submits that the low ILUC-risk criteria in the Delegated Regulation are sufficiently detailed for certification to operate.[1132] Moreover, the European Union contends that it cannot be that any form of verification amounts to an obstacle to trade, especially before "the actual scope of the requirements" is fully defined.[1133]

7.1.3.3.2 Legal standard

7.812. Article 5.1.2, read in conjunction with the introductory clause in Article 5.1, sets forth the obligation that:

> 5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:
>
> …
>
> 5.1.2 conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, inter alia, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products

[1127] Malaysia's first written submission, paras. 754-800; second written submission, paras. 288-295; and responses to the Panel's questions, pp. 36-43, and 96-101.

[1128] Malaysia's first written submission, paras. 765-770; and second written submission, paras. 291-292.

[1129] Malaysia's first written submission, para. 771; and second written submission, para. 292.

[1130] European Union's first written submission, paras. 1067-1068; second written submission, para. 189; and responses to the Panel's questions, para. 770. For the European Union's other arguments concerning the applicability of the TBT Agreement, see European Union's first written submission, paras. 1062-1077; second written submission, paras. 185-189; and responses to the Panel's questions, paras. 768-778.

[1131] European Union's first written submission, paras. 1071-1075; and second written submission, paras. 186-187. See also European Union's responses to the Panel's questions, paras. 771-774, 776 and 778.

[1132] European Union's second written submission, para. 185.

[1133] European Union's first written submission, para. 1074; second written submission, para. 189; and responses to the Panel's questions, para. 775.

conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.

7.813. Article 5.1.2 has been interpreted and applied in prior cases, and both parties present their respective understandings of the applicable legal standard with reference to those cases.

7.814. Article 5.1.2 addresses the necessity of a conformity assessment procedure by a central government body. The particular meaning of "necessity" in this context is informed by Article 5.1.2 itself. The first sentence of Article 5.1.2, referring to "unnecessary obstacles to international trade", sets out a general obligation. The second sentence, referring to the strictness or strict application of a conformity assessment procedure, is an example ("*inter alia*") of the general obligation.[1134]

7.815. The Panel will elaborate further on the elements of the legal standard in Article 5.1.2 as necessary in the course of its assessment of the issues in dispute.

7.1.3.3.3 Preparation, adoption or application of a conformity assessment procedure

7.816. At the outset, the Panel considers whether Malaysia's claim concerns the "preparation, adoption or application" of a conformity assessment procedure under Article 5.1 and therefore falls within the scope of Article 5.1.2.

7.817. The Panel understands Malaysia to argue that the European Union created an unnecessary obstacle to international trade by adopting the low ILUC-risk certification procedure, which despite an active certification requirement for high ILUC-risk biofuels to be eligible to count towards renewable energy consumption targets[1135], is impossible to use. The Panel understands Malaysia to argue that this is so, because this procedure, as set out in Article 6 of the Delegated Regulation, is incomplete owing to a lack of detail, which, as Malaysia claims and the European Union admits, is to be provided by certain implementing rules.

7.818. The Panel understands the European Union to admit that the implementing regulations will provide the missing detail, but to argue that insofar as Malaysia's claim is directed at the TBT-consistency of those implementing regulations themselves the claim is "hypothetical and premature". As a consequence, the European Union argues that this claim falls "outside the scope" of Article 5.1.2.[1136]

7.819. The Panel recalls that Article 5.1.2 applies to the "preparation, adoption and application" of conformity assessment procedures. The Panel considers that the terms "prepared, adopted or applied" mean that what occurs across the spectrum of preparation, adoption and application of a conformity assessment procedure (i.e. its regulatory lifecycle[1137]), is captured by Article 5.1.2. Thus, the Panel considers that Article 5.1.2 applies where certain elements of a conformity assessment procedure have been adopted while others have not yet been adopted, and e.g. remain in a preparatory phase. Therefore, a conformity assessment procedure which suffers from a partial absence of detailed rules or incompleteness falls within the preparation and adoption of conformity assessment procedures, and within scope of Article 5.1.2.

[1134] Appellate Body Report, *Russia – Railway Equipment*, paras. 5.182-5.183.

[1135] The Panel refers to its discussion of the temporal scope of issues arising from the ongoing implementation of RED II and the Delegated Regulation in section 7.1.1 of this Report, and in particular the entry into force of the requirements imposed by the high ILUC-risk cap and phase-out.

[1136] Throughout the dispute, the European Union refers to a number of developments with respect to the implementation of the low ILUC-risk certification procedure, including the publishing of draft implementing regulations, the recognition of several voluntary schemes (some of which offer low ILUC-risk certification) and the adoption and publication of the Implementing Regulation. The European Union also states variously that the low ILUC-risk certification procedure need only be in place by the end of 2023, when the high ILUC-risk "phase-out" element enters into force, and that it was not required to act before 30 June 2021. (European Union's first written submission, paras. 1070 and 1072-1075, referring to Excerpt from RSB website, "RSB Low ILUC Risk Biomass Module", (Exhibit EU-169), and Excerpt from UPM website, "All UPM BioVerno products are certified" (accessed on 26 November 2021), (Exhibit EU-170); second written submission, paras. 186-187, and 189; and response to Panel question No. 145.)

[1137] See TBT Handbook (WTO Secretariat, 2021), Fig. 10 ("Applying GRP to the lifecycle of a TBT measure: an illustration"), p. 47. Available at: https://www.wto.org/english/res_e/booksp_e/tbt3rd_e.pdf.

7.820. The Panel understands that this interpretation of Article 5.1.2 is in keeping with the findings of the panel in *EC – Seal Products*. In that case, the conformity assessment procedure was found to not be capable of allowing trade in conforming products to occur on the date of its entry into force and therefore posed an unnecessary obstacle to international trade.[1138] Further, the panel in *EC – Seal Products* found that the obligation in Article 5.1.2 applies to third-party accreditation, as part of a conformity assessment procedure.[1139]

7.821. On that basis, the Panel considers that Malaysia's claim that an incomplete conformity assessment procedure (including its impact on third-party accreditation i.e. voluntary schemes) might cause an unnecessary obstacle to international trade falls within the scope of Article 5.1.2. This claim, which is based on the low ILUC-risk certification procedure as set out in Article 6 of the Delegated Regulation, falls within the spectrum of steps constituting the preparation and adoption of a conformity assessment procedure. This is notwithstanding the fact that the low ILUC-risk certification procedure also anticipates that certain elements will be devised or come into force in the future. The Panel therefore disagrees with the European Union's argument that this claim is hypothetical, premature, and falls outside the scope of Article 5.1.2. Rather, this claim concerns the low ILUC-risk certification procedure, as set out in Article 6 of the Delegated Regulation.[1140]

7.822. At the same time, the Panel considers that Article 5.1.2 only captures obstacles to trade arising from the conformity assessment procedure *itself*, and not obstacles to trade arising from the *substantive criteria* in the underlying technical regulation or standard with which a procedure assesses compliance. In this regard, the Panel understands Malaysia to challenge not only aspects relating to the low ILUC-risk certification *procedure* but also the low ILUC-risk *criteria*, including the obstacles it identifies with respect to each of the additionality pathways, as the relevant "obstacles" under Article 5.1.2. In particular, the Panel understands Malaysia to argue that the low ILUC-risk *criteria* are impracticable (also because they are incomplete and otherwise inadequate) and that low ILUC-risk certification is consequently unavailable.

7.823. Having identified the scope of Article 5.1.2 as referring to the preparation, adoption or application of a conformity assessment *procedure*, the Panel considers that Article 5.1.2, by its wording and in its context of Article 5, targets aspects of the procedure. This is distinct from the "relevant requirements"[1141] in the technical regulation (or standard) with which a procedure assesses conformity. The Panel therefore finds that its task under this claim is limited to assessing whether the preparation, adoption [or application] of the low ILUC-risk certification *procedure* itself (and not the underlying low ILUC-risk *criteria*) is consistent with the European Union's obligations under Article 5.1.2. Insofar as Malaysia's arguments concern the low ILUC-risk criteria, they are addressed under Article 2.1 together with the Panel's assessment of the high ILUC-risk cap and phase-out.

7.1.3.3.4 Unnecessary obstacle to international trade

7.824. Having found that Malaysia's claim with respect to the low ILUC-risk certification *procedure* falls within the scope of Article 5.1.2, the Panel turns to consider whether Malaysia has substantiated its claim that by adopting an "incomplete" conformity assessment procedure (as set out in Article 6 of the Delegated Regulation), the European Union has created an *obstacle* to trade.

7.825. The Panel recalls that in *EC – Seal Products*, the conformity assessment procedure at issue was not capable of allowing trade in conforming products to occur on the date of its entry into force. Similarly, in this instance, a conformity assessment procedure which is not capable of allowing trade in conforming products to occur on the date of its entry into force, or at least the date of entry into force of the underlying requirement to use a conformity assessment procedure, is capable of being an obstacle to international trade.[1142] Therefore, if the low ILUC-risk certification procedure as set out in Article 6 of the Delegated Regulation, in the absence of implementing regulations, is not capable of allowing trade in conforming products to occur at the date of entry into force of the low

[1138] Panel Reports, *EC – Seal Products*, para. 7.528.
[1139] Panel Reports, *EC – Seal Products*, para. 7.524.
[1140] In this respect, the Panel refers to section 7.1.1 of this Report and its discussion there of its jurisdiction and ability to take into account developments that occurred subsequent to panel establishment.
[1141] TBT Agreement, Annex 1.3.
[1142] In this respect, the Panel refers to its findings above in section 7.1.1 of this Report on the relationship between the 7% maximum share, high ILUC-risk cap and phase-out, and their effect on trade under Articles 2.1 and 2.5 of the TBT Agreement. The Panel also refers to its findings under Article 5.6 which consider the effect on trade of the low ILUC-risk certification procedure.

ILUC-risk certification requirement, such a procedure would be capable of being an "obstacle" to trade. As is also the case in Article 2.2, being an "obstacle" to international trade does not, alone, render a procedure inconsistent with Article 5.1.2. Instead, such an inconsistency is only limited to conformity assessment procedures that create obstacles that are, in addition, "unnecessary".[1143]

7.826. The Panel considers that, based on the evidence before it, certain detailed rules are missing from the low ILUC-risk certification procedure as set out in Article 6 of the Delegated Regulation. Recital 18 in the preamble to the Delegated Regulation and Article 30(8) of RED II both anticipate such further rules to be stipulated in implementing acts. In support of this, the Panel refers to the European Commission's implementation obligations and the progress made in this area.[1144] In these proceedings, the European Union acknowledged that it had not yet adopted the required implementing rules.[1145] In addition, the European Commission acknowledges that decisions recognizing certification schemes state they are to be reassessed once the Implementing Regulation is adopted and enters into force.[1146] This, in the Panel's view, highlights the importance of detailed implementing rules for conducting low ILUC-risk certification.

7.827. The Panel next considers whether the incomplete low ILUC-risk certification procedure (as set out in Article 6 of the Delegated Regulation) has, in light of its relationship with the high ILUC-risk cap and phase-out, created an *unnecessary* obstacle to international trade within the meaning of Article 5.1.2.[1147] The Panel recalls that in *EC – Seal Products*, a conformity assessment procedure that could not be used at all (putting aside the role of voluntary schemes) was found to be an unnecessary obstacle to international trade.

7.828. The Panel understands Malaysia to argue that the absence of detailed rules on the low ILUC-risk certification procedure as set out in Article 6 of the Delegated Regulation prevents there from being any certification whatsoever; this is because without such detailed rules, it is impossible to design a national or voluntary certification scheme. According to Malaysia, this means that the European Commission cannot recognize such schemes and that, as a result, economic operators cannot apply for certification (e.g. by collecting necessary financial and agricultural data, which need to span at least three years of operation). Ultimately, Malaysia argues, no low ILUC-risk certified biofuel is able to be used to meet renewable energy consumption targets, because certification is the only means by which palm oil-based biofuel (at present the only high ILUC-risk biofuel) is exempted from the high ILUC-risk cap and phase-out.

7.829. The Panel recalls the following facts:

a. the high ILUC-risk cap and phase-out, which gave rise to the need for low ILUC-risk certification, came into force in 2019;

b. the implementation deadline for EU member States was 30 June 2021;

c. the European Union recognized some voluntary certification schemes in April 2022; and

d. the Implementing Regulation was adopted, published and entered into force in June 2022.

[1143] As the Appellate Body observed with respect to Article 2.2, the context of Article 2.2 "suggests that 'obstacles to international trade' may be permitted insofar as they are not found to be 'unnecessary', that is, 'more trade-restrictive than necessary to fulfil a legitimate objective'[, and this in turn] supports a reading that Article 2.1 does not operate to prohibit *a priori* any obstacle to international trade." (Appellate Body Report, *US – Clove Cigarettes*, para. 171). See also Appellate Body Reports, *US – Tuna II (Mexico)*, para. 319; and *Indonesia – Import Licensing Regimes*, para. 5.49. The Panel considers that this same reasoning applies to Article 5.1.2.

[1144] See section 7.1.1 of this Report.

[1145] European Union's first written submission, paras. 1070 and 1074; second written submission, para. 185; and response to Panel question No. 150, para. 778. The Panel recalls that the Implementing Regulation was adopted on 14 June 2022. (European Union's comment on Malaysia's response to Panel question No. 61, para. 108 (referring to Commission Implementing Regulation (EU) 2022/996, (Exhibit EU- 329)).)

[1146] European Union's response to Panel question No. 150, paras. 776-777 (referring to Commission Implementing Decisions on Voluntary Schemes, (Exhibit EU-219)).

[1147] On the relationship between these measures, see section 7.1.1 of this Report.

7.830. The Panel notes that the high ILUC-risk cap and phase-out and the low ILUC-risk criteria and certification procedure have been in force since 10 June 2019.[1148] Although EU member States did not have to incorporate these requirements into their national laws until 30 June 2021, they were not precluded from doing so.[1149] It was therefore not possible to make use of low ILUC-risk certification (as set out in Article 6 of the Delegated Regulation) in situations where such certification was mandated over a three-year period. Even if one were to take 30 June 2021 (i.e. the date for transposition of the high ILUC-risk cap across all EU member States) as the date when low ILUC-risk certification became relevant, it would not have been possible to complete the process for designing a certification scheme, having that scheme recognized by the European Union, and actually applying and obtaining certification.

7.831. The Panel considers that these circumstances are even more significant given that low ILUC-risk certification, whether through the designated authorities of EU member States or through voluntary schemes, is the *only* means by which consignments of a high ILUC-risk biofuel may benefit from an exemption to the high ILUC-risk cap and phase-out. Given that the low ILUC-risk certification procedure was non-operational, there were simply no means by which low ILUC-risk certification could be granted.

7.832. The Panel observes that while there are a limited number of certification schemes (~13) that have been approved, and a small number of these (~3) concerned low ILUC-risk certification, the Panel does not consider this to demonstrate that the low ILUC-risk certification procedure was available or workable from the date of entry into force (or latest implementation) of the low ILUC-risk certification requirement. Further, the examples provided by the European Union of low ILUC-risk certification do not concern palm oil, but "crude tall oil" (notably not an oil crop-based biofuel) and "brassica carinata oil" (an oil seed crop). There is no evidence at least as presented in these proceedings, that these oils fall into the only category of biofuels that necessitate low ILUC-risk certification, i.e. high ILUC-risk biofuels (which, to date, is limited to palm oil). Rather, this evidence confirms, if anything, that certification of consignments of palm oil-based biofuel was not possible prior to April 2022 (with the approval of the first certification schemes) and only then, on a provisional basis.[1150]

7.833. The Panel has some sympathy with the fact that designing and setting up a certification scheme is itself a timely and costly exercise. This is all the more so, when such design and operation needs to be revised following the late publishing of legislation, at an additional cost to the scheme organizers and users. Therefore, the Panel does not consider that the option to design (at the risk of doing so incorrectly) a voluntary certification scheme based on the framework provided by Article 6 of the Delegated Regulation, which explicitly acknowledges missing detailed rules, would have been a reasonable course of action to expect. The level of detail added by the published Implementing Regulation further demonstrates this point.[1151]

7.834. The Panel does not consider it necessary to consider whether there are one or more less trade-restrictive alternative measures to establish that deficiencies in the implementation of the low ILUC-risk procedure have created unnecessary obstacles to international trade. The Panel recalls that the claim in *EC – Seal Products* was also based on the first sentence of Article 5.1.2, and that

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[1148] Despite initially insisting that certification only becomes necessary in 2023 with the entry into force of the "phase-out", the European Union itself clarifies that the "cap" introduced a need for certification for low ILUC-risk biofuels, if they are to be eligible to count towards renewable energy targets beyond the limitations imposed by the high ILUC-risk cap and phase-out. See e.g. European Union's response to Panel question No. 20, para. 118 and No. 116, para. 799.

[1149] The Panel notes that this deadline for implementation did not in theory or practice prevent earlier EU member State implementation, and this is not contested by the parties. For example, Austria introduced the cap on high ILUC-risk biofuels as of 1 January 2021 and a complete phase-out as of 1 July 2021, i.e. much earlier that the 2023-2030 period in RED II. (See Indonesia's third-party submission, para. 43 (referring to Examples of EU member States' measures restricting oil palm crop-based biofuel, (Exhibit IDN-1)). See also Malaysia's first written submission, para. 399.)

[1150] The Panel notes that the European Commission Decisions approving voluntary certification schemes referred to above stipulate expressly that their approval will be revised once detailed implementing rules (i.e. the Implementing Regulations) come into effect. See Commission Implementing Decisions on Voluntary Schemes, (Exhibit EU-219).

[1151] The European Union itself refers to a number of areas where operational detail was added to the low ILUC-risk criteria through the Implementing Regulation following e.g. a pilot study, indicating that important details were missing prior to the Implementing Regulation. (See European Union's comments on Malaysia's response to Panel question No. 61.)

panel did not consider alternative measures in finding that a conformity assessment procedure that was not capable of allowing trade in conforming products to occur, despite the entry into force of the EU Seal Regime, created an unnecessary obstacle to international trade.[1152] The Panel observes that this approach is also entirely consistent with the approach followed in the context of necessity tests under Article 2.2 of the TBT Agreement and Article XX of the GATT 1994.[1153] Therefore, the Panel does not consider it necessary to address the parties' arguments concerning alternative measures under Article 5.1.2 any further.

7.1.3.3.5 Strictness and strict application of low ILUC-risk certification

7.835. Malaysia also argues that low ILUC-risk certification is more strict or applied more strictly than necessary, to give the European Union adequate confidence that products conform with the applicable technical regulations, taking account of the risks non-conformity would create.[1154] The Panel understands that this argument also turns on the argument that the European Union requires certification in order to benefit from the limited low ILUC-risk exception but makes it impossible to obtain certification, given the absence of further detailed rules with respect to the low ILUC-risk certification.[1155] Malaysia makes further submissions with respect to the objective of this measure, its trade-restrictiveness and presents a range of alternative measures.

7.836. Malaysia essentially argues that the same aspects of low ILUC-risk certification (as set out in Article 6 of the Delegated Regulation) considered under the first sentence of Article 5.1.2 also illustrate a violation of the second sentence of Article 5.1.2. The Panel recalls that Article 5.1.2 addresses the "necessity" of a measure, the particular meaning of which is informed by Article 5.1.2 itself. The first sentence of Article 5.1.2, referring to unnecessary obstacles to international trade, sets out a general obligation, whereas the second sentence, referring to the strictness or strict application of a conformity assessment procedure, is an example of the general obligation. This is clear from the wording "this means, *inter alia*".[1156] Therefore, a complainant need not show that a measure is both an unnecessary obstacle to international trade *and* that it is more strict than necessary or applied more strictly than necessary. Further, while the strictness or strict application of a conformity assessment procedure may amount to an unnecessary obstacle to international trade, these are not the only ways of demonstrating that there is an unnecessary obstacle to international trade under Article 5.1.2.

7.837. The Panel has found above that Malaysia has demonstrated that a lack of completeness surrounding the low ILUC-risk certification procedure as set out in Article 6 of the Delegated Regulation meant that it could not be used as an exemption to the high ILUC-risk cap and phase-out as intended, and there is therefore an unnecessary obstacle to international trade. Thus, it is not necessary for the Panel to make further findings with respect to the second sentence of Article 5.1.2 in order to resolve this dispute, especially as the claim under the second sentence of Article 5.1.2 is based on the same alleged deficiencies of low ILUC-risk certification.

7.1.3.3.6 Conclusion on Article 5.1.2

7.838. The Panel finds that the low ILUC-risk certification procedure, as set out in Article 6 of the Delegated Regulation, is inconsistent with Article 5.1.2 of the TBT Agreement since deficiencies in the implementation of the low ILUC-risk procedure have created unnecessary obstacles to international trade.

[1152] Panel Reports, *EC – Seal Products*, paras. 7.527-7.528.

[1153] In the context of Article XX of the GATT 1994, panels may conduct a threshold inquiry to assess whether the challenged measure is designed to protect the interest in the subparagraph invoked. Where a panel finds that a measure is incapable of meeting the stated objective, the analysis need not go further to determine whether this measure is "necessary" to protect this objective, let alone whether there are one or more less trade-restrictive alternative measures. (See e.g. Appellate Body Report, *Colombia – Textiles*, para. 5.68.) In the context of the necessity test under Article XX and Article 2.2, a panel need not continue with a comparison of the measure against the proposed alternative measures if the measure "makes *no* contribution to the achievement of the legitimate objective". (Appellate Body Report, *US – Tuna II (Mexico)*, fn 647 to para. 322.)

[1154] See e.g. Malaysia's first written submission, paras. 755 and 765-772.

[1155] Malaysia's first written submission, para. 771.

[1156] Appellate Body Report, *Russia – Railway Equipment*, para. 5.182-5.183; and Panel Report, *Russia – Railway Equipment*, para. 7.413.

7.1.3.4 Article 5.2.1 – As expeditiously as possible

7.1.3.4.1 Introduction

7.839. The Panel now turns to the claim under Article 5.2.1 of the TBT Agreement.

7.840. Malaysia submits[1157] that the European Union violates Article 5.2.1 by failing to ensure that the detailed implementing rules required to undertake and complete the low ILUC-risk certification procedure are made available as expeditiously as possible. More specifically, Malaysia argues that due to the European Union's failure to adopt implementing rules providing for the necessary elements that enable certification to be obtained, it is impossible for any certification scheme to be designed and gain approval, and for producers to start preparing for certification by collecting financial and agricultural data, such that it has been impossible to undertake or complete expeditiously, any low ILUC-risk certification.[1158]

7.841. The European Union submits[1159] that there is no violation of Article 5.2.1. While the European Union acknowledges that in factual terms it has not adopted detailed implementing rules on certification[1160], it maintains that the adoption of such rules is not indispensable to carrying out certification.[1161]

7.1.3.4.2 Legal standard

7.842. Article 5.2.1, read in conjunction with the introductory clause in Article 5.2, sets forth the obligation that:

> 5.2 When implementing the provisions of paragraph 1, Members shall ensure that:
>
>> 5.2.1 conformity assessment procedures are undertaken and completed as expeditiously as possible and in a no less favourable order for products originating in the territories of other Members than for like domestic products[.]

7.843. Article 5.2.1 has been interpreted and applied in one prior case, *EU – Seal Products*, and both parties present their respective understandings of the applicable legal standard with reference to that case.

7.844. To establish a violation of Article 5.2.1, the following elements must be established[1162]:

a. the regulating Member is implementing the provisions of Article 5.1; and

b. the regulating Member has failed to ensure that conformity assessment procedures are "undertaken and completed" "as expeditiously as possible"; or

c. the regulating Member has undertaken and completed conformity assessment procedures in a "less favourable order" for products originating in the territories of other Members than for like domestic products.

7.845. Article 5.2.1 therefore contains two separate obligations for Members implementing the provisions of Article 5.1. A violation can be established if a Member either (i) fails to ensure that conformity assessment procedures are undertaken and completed as expeditiously as possible; or (ii) undertakes or completes conformity assessment procedures in a less favourable order for

[1157] Malaysia's first written submission, paras. 801-807; second written submission, para. 296.
[1158] Malaysia's first written submission, para. 805.
[1159] European Union's first written submission, paras. 1078-1084; second written submission, paras. 185-191.
[1160] European Union's first written submission, para. 1081.
[1161] European Union's first written submission, para. 1081.
[1162] Panel Reports, *EC – Seal Products*, para. 7.556.

products of foreign vs domestic origin. The Panel understands that Malaysia's claim is based on the first obligation ("as expeditiously as possible") only.

7.846. The Panel will elaborate further on the elements of the legal standard in Article 5.2.1 as necessary in the course of its assessment of the issues in dispute.

7.1.3.4.3 Assessment by the Panel

7.847. The Panel considers that Malaysia's claim under Article 5.2.1 turns on the moment at which the obligation in this provision can be said to apply.

7.848. The Panel understands that Malaysia's claim is premised on an interpretation of Article 5.2.1 that suggests there is a violation in circumstances where, owing to incomplete rules governing a certification procedure, certification cannot occur.[1163] The Panel notes Malaysia's explanation that, without clearly defined conditions governing the certification procedure, certification schemes cannot be designed, recognized and used to provide certification, despite there being a certification requirement in force.[1164] The Panel understands that it is on this basis that Malaysia contends that the European Union fails to ensure that the low ILUC-risk certification procedure is "undertaken and completed" "as expeditiously as possible". The Panel therefore understands the relevant interpretative question to be whether an "incomplete" certification procedure, which in Malaysia's view, cannot be undertaken at all, engages the obligation in Article 5.2.1.

7.849. As a matter of interpretation, Malaysia submits that Article 5.2.1 applies to all aspects of a conformity assessment procedure, including individual applications for certification as well as applications for accreditation to carry out conformity assessment procedures, in keeping with the illustrative list of conformity assessment procedures in the *Explanatory note* to Annex 1.3.[1165] Malaysia further submits that, while the obligation in Article 5.2.1 is engaged where an individual application has been received, it should not be confined to such cases.[1166]

7.850. The European Union responds that it does not engage with Malaysia's submissions on the nature and extent of the obligations under Article 5.2.1 and makes no concession as to their validity.[1167] Nevertheless, the European Union submits that Article 5.2.1 presupposes the low ILUC-risk certification schemes are already in operation, which at the time of its second written submission, are "currently not".[1168]

7.851. The Panel observes that the text of the introductory clause of Article 5.2 indicates that Article 5.2.1 applies to Members "[w]hen implementing the provisions of paragraph 1" (i.e. Article 5.1). The Panel recalls that the provisions of Article 5.1 concern the "preparation, adoption and application" of a conformity assessment procedure. This, in turn, could be taken to mean that the act of "implementing" under Article 5.2 might concern not just the "application" of a conformity assessment procedure, but also its "preparation" and "adoption". However, the Panel considers that because Article 5.2.1 contains an obligation to ensure that "procedures are undertaken and completed" as expeditiously as possible, this implies that the conformity assessment procedures already exist and that Article 5.2.1 is only concerned with their application and imminent completion.

7.852. This reading is supported by the panel's analysis in *EC – Seal Products.* That panel also considered the point in time at which the obligation to "undertake and complete" a conformity assessment procedure is triggered during the implementation process of a conformity assessment procedure. The panel considered that the obligation in Article 5.2.1 is "limited to the application of a CAP".[1169] The panel also referred to Annex C(1)(a) of the SPS Agreement, which refers to undertaking and completing approval procedures without "undue delay", and recalled that in the

[1163] Malaysia's first written submission, para. 805. The Panel does not consider any arguments concerning the low ILUC-risk *criteria*, given the Panel's finding that these do not form part of the low ILUC-risk certification procedure, which is the measure at issue alleged to be a conformity assessment procedure. (See the Panel's findings in the context of Annex 1.3 above.)

[1164] Malaysia's first written submission, para. 805.

[1165] Malaysia's first written submission, para. 804. See section 7.1.3.1 of this Report for the full illustrative list in the *Explanatory note* to Annex 1.3.

[1166] See Malaysia's first written submission, paras. 804-805.

[1167] European Union's first written submission, para. 1080.

[1168] European Union's second written submission, para. 190.

[1169] Panel Reports, *EC – Seal Products*, para. 7.558.

context of the SPS Agreement, the panel in *EC – Approval and Marketing of Biotech Products* concluded that the obligation "covers all stages of approval procedures and should be taken as meaning that, *once an application has been received*, approval procedures must be started and then carried out from beginning to end".[1170] The panel in *EC – Seal Products* concluded that the obligation in Article 5.2.1 likewise applies to the implementation of a conformity assessment procedure "from the moment when an application for recognition has been received and through the completion of the process".[1171]

7.853. The Panel recalls Malaysia's argument that the lack of detailed rules governing the certification procedure (as set out in Article 6 of the Delegated Regulation) means that the procedure cannot even begin owing to an inability to design certification schemes in the first place, such that a certification scheme is in both theory and practice inoperable. A certification scheme, on this view, is incapable of operating, regardless of whether the relevant application is one for accreditation or conformity. The Panel understands Malaysia to argue that it follows, as a consequence of this inoperability, that the regulating Member fails to ensure that the conformity assessment procedures are undertaken and completed as expeditiously as possible.

7.854. The Panel considers that Malaysia's understanding would require it to go beyond the interpretation of Article 5.2.1 set out above. The wording of Article 5.2.1 limits, by its reference to the implementation of the application of conformity assessment procedures, its scope to a subset of conformity assessment procedures: i.e. only those which are themselves capable of application (i.e. can be "undertaken" and "completed"). In the Panel's view, there does not necessarily have to be "full implementation" of a conformity assessment procedure, provided such procedures are capable of being applied, and provided that pursuant to those procedures, individual applications can be "undertaken" and "completed".

7.855. The Panel is not suggesting that the scope of the obligation in Article 5.2.1 is limited to individual applications.[1172] Nor does the Panel exclude the possibility of an as such claim in circumstances where there are elements of a conformity assessment procedure which, by their terms, prevent relevant authorities from undertaking and completing them as expeditiously as possible. The Panel considers however that, in all cases, Article 5.2.1 is, in principle, only applicable where there are conformity assessment procedures that are capable of being applied, pursuant to which individual applications can be undertaken and completed.

7.856. The Panel considers that Malaysia's claim is effectively that the European Union has failed to "undertake and complete" the adoption of *a functional conformity assessment procedure* "as expeditiously as possible". For the reasons set out above, such a contention, even if correct, falls outside the scope of the obligation in Article 5.2.1.[1173]

7.1.3.4.4 Conclusion on Article 5.2.1

7.857. The Panel concludes that Malaysia has failed to establish that the European Union has acted inconsistently with the obligation in Article 5.2.1 of the TBT Agreement to ensure that conformity assessment procedures are undertaken and completed as expeditiously as possible.

7.1.3.5 Articles 5.6.1, 5.6.2 and 5.6.4 – Proposed conformity assessment procedures

7.1.3.5.1 Introduction

7.858. The Panel now turns to the claims under Article 5.6 of the TBT Agreement, which include the distinct transparency obligations in Articles 5.6.1, 5.6.2 and 5.6.4. The Panel addresses these claims

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[1170] Panel Reports, *EC – Seal Products*, para. 7.562 (referring to Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1494 (emphasis added)).

[1171] Panel Reports, *EC – Seal Products*, para. 7.563.

[1172] The Panel notes in this respect that, unlike Article 5.1.2, Article 5.2.2 contains terms which relate to individual applications (e.g. "*the* applicant", "*the* application", "*each* conformity assessment procedure"). See e.g. Panel Report, *Russia – Railway Equipment*, paras. 7.553-7.565, 7.783, 7.588-7.590, 7.794, 7.797, and 7.800-7.801.

[1173] For that reason, the Panel does not consider it necessary to address the European Union's additional arguments that the detailed implementing regulations are not indispensable for carrying out certification; and the arguments concerning the lack of requests for recognition of voluntary schemes.

together given the relationship between these provisions and the manner in which the parties have developed their arguments in this case.

7.859. Malaysia submits[1174] that the European Union violates these separate obligations in Article 5.6. More specifically, Malaysia claims that the European Union violates (i) Article 5.6.1, by failing to publish a notice at an early appropriate stage that it proposes to introduce a particular conformity assessment procedure, in such a manner as to enable interested parties in Malaysia and other WTO Members to become acquainted with it; (ii) Article 5.6.2, by failing to notify proposals of RED II and the Delegated Regulation; and (iii) Article 5.6.4, by having failed to organize a meaningful commenting process in respect of the proposal for RED II and that for the Delegated Regulation.

7.860. The European Union submits[1175] that it is not subject to the procedural requirements in Article 5.6 because low ILUC-risk certification is not a conformity assessment procedure. The European Union does not respond to Malaysia's submissions on the nature and extent of the obligations under Article 5.6. Instead, it considers that, because the measures complained of will not take effect until December 2023 and detailed implementing rules have yet to be adopted, Malaysia's claims are "hypothetical and premature".

7.1.3.5.2 Legal standard

7.861. Article 5.6 sets forth several separate transparency obligations in relation to proposed conformity assessment procedures:

> 5.6 Whenever a relevant guide or recommendation issued by an international standardizing body does not exist or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardizing bodies, and if the conformity assessment procedure may have a significant effect on trade of other Members, Members shall:
>
> > 5.6.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular conformity assessment procedure;
> >
> > 5.6.2 notify other Members through the Secretariat of the products to be covered by the proposed conformity assessment procedure, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
> >
> > 5.6.3 upon request, provide to other Members particulars or copies of the proposed procedure and, whenever possible, identify the parts which in substance deviate from relevant guides or recommendations issued by international standardizing bodies;
> >
> > 5.6.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

7.862. Article 5.6 has not been interpreted or applied in prior cases. However, the obligations therein regarding proposed conformity assessment procedures mirror those found in Article 2.9 of the TBT Agreement (concerning proposed technical regulations) and there appears to be no fundamental disagreement between the parties on the elements of that standard as described below.

7.863. The Panel will elaborate further on the elements of the legal standard in Articles 5.6.1, 5.6.2 and 5.6.4 as necessary in the course of its assessment of the issues in dispute.

[1174] Malaysia's first written submission, paras. 808-823; second written submission, paras. 297-299.
[1175] European Union's first written submission, paras. 1085-1089; second written submission, paras. 192-193.

7.1.3.5.3 *Chapeau* of Article 5.6

7.864. The obligations under Article 5.6 apply in respect of a conformity assessment procedure when the two conditions of the *chapeau* of Article 5.6 are met, namely:

a. a relevant guide or recommendation issued by an international standardizing body does not exist, or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardizing bodies; and

b. the proposed conformity assessment procedure may have a significant effect on trade of other Members.

7.865. As to the first condition of the *chapeau*, Malaysia argues that the low ILUC-risk certification procedure is non-compliant with a relevant guide or recommendation, namely ISO/IEC 17007:2010. According to Malaysia, this is because the European Union failed to adopt and/or make publicly available all the relevant elements of this procedure, such that certification schemes are unable to be designed and applications for conformity assessment cannot be made.[1176]

7.866. The Panel understands that ISO/IEC 17007:2010, entitled "*Conformity assessment – Guidance for drafting normative documents suitable for use for conformity assessment*", is relevant to all conformity assessment procedures.[1177] ISO/IEC 17007:2010 lays down several principles as guidance for preparing conformity assessment procedures.

7.867. According to principle 2, *all interested parties* such as a *manufacturer, supplier, user or purchaser* of a product or an independent body, *must be able to assess the conformity of products* with the relevant specifications based on a written document. According to principle 4, the requirements for the objects of conformity assessment, and the requirements for the conformity assessment activities, should be specified in a *clear and unambiguous manner*, with sufficient detail to ensure that conformity assessment results will be comparable and reproducible. Moreover, paragraph 5.2.2 states that specified requirements should be written so that they are *clear, direct and precise and will result in accurate and uniform interpretation*, so that parties making use of the normative documents are able to derive from the contents of the normative document a common understanding of its meaning and intent. Paragraph 5.2.9 further states that specified requirements should be stated *unambiguously using wording that is objective, logical, valid and specific*.

7.868. The European Union states that low ILUC-risk certification is not a conformity assessment procedure, such that it is not subject to the procedural requirements in Article 5.6.[1178] Beyond this, it does not specifically respond to Malaysia's contention that ISO/IEC 17007:2010 is a "relevant guide or recommendation" within the meaning of the *chapeau* of Article 5.6, and that the low ILUC-risk certification procedure is not "in accordance with" the principles above.

7.869. The Panel recalls its finding above that the low ILUC-risk certification procedure as set out in Article 6 of the Delegated Regulation, in the absence of detailed rules which the European Union admits are to follow in implementing regulations, is incomplete and non-functional. The Panel also recalls its findings with respect to Article 2.1, that certain elements of the low ILUC-risk criteria are not sufficiently defined. Accordingly, the Panel is satisfied that the principles of ISO/IEC 17007:2010

[1176] Malaysia's first written submission, para. 816 (referring to ISO/IEC 17007:2010, (Exhibit MYS-52), paras. 4.3, 4.5, and 5.2.2).

[1177] The Panel notes that Clause 1 ("Scope") of ISO/IEC 17007:2010 does not appear to limit the guidance in this document to certain types of conformity assessment procedures. While Clause 4.4 ("Principle 3: functional approach to conformity assessment") acknowledges that each of the various kinds of users of conformity assessment has specific needs, and as a result, there is much variety in the way conformity assessment is performed, all types of conformity assessment follow the same general approach, characterized by the functions listed above.

[1178] European Union's first written submission, para. 1086; second written submission, para. 192.

set out above have not been complied with, and thus, the low ILUC-risk certification procedure is not "in accordance with" it.[1179]

7.870. With respect to the second condition of the *chapeau*, the Panel recalls its earlier finding, in the context of the claim under Article 2.5, that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations that "may have a significant effect on the trade of other Members" for the purposes of Articles 2.5 and 2.9.

7.871. Although that reasoning focuses on the 7% maximum share and the high ILUC-risk cap and phase-out, the Panel considers that its reasoning also leads to the conclusion that the low ILUC-risk certification procedure may by extension have a significant effect on trade of other Members. This is because the high ILUC-risk cap and phase-out is connected with the low ILUC-risk certification procedure, which the Panel has found above to directly or indirectly determine whether "relevant requirements" in that technical regulation are fulfilled.[1180] Thus, the low ILUC-risk certification procedure has an impact on whether the high ILUC-risk cap and phase-out applies to certain consignments of high ILUC-risk biofuel. To the extent that the possibility of low ILUC-risk certification mitigates the effect of the high ILUC-risk cap and phase-out on the trade of other Members, it qualifies as a conformity assessment procedure that "may have a significant effect on trade of other Members".

7.872. On that basis, the Panel considers that the conditions in the *chapeau* of Article 5.6 are satisfied.

7.1.3.5.4 Article 5.6.1 – notification of an intention to regulate

7.873. Article 5.6.1 requires notification of an intention to regulate at domestic level by means of a proposed conformity assessment procedure. This obligation precedes, temporally, the obligation in Article 5.6.2 to notify multilaterally to the WTO Secretariat a draft conformity assessment procedure and the subsequent obligation in Article 5.6.4 to provide for a commenting process before the adoption of a proposed conformity assessment procedure.

7.874. Malaysia notes that the European Union first published a notice on the draft Delegated Regulation, which sets out the proposed low ILUC-risk certification procedure, on 8 February 2019, and that the Delegated Regulation was adopted on 13 March 2019. According to Malaysia, any notice published on 8 February 2019 was not at an early stage of the process leading to the adoption of the Delegated Regulation and low ILUC-risk certification procedure.[1181] The European Union states that "in factual terms", there was a commenting procedure between 8 February 2019 and 8 March 2019, and refers to an expert workshop held on 19 November 2018 and a stakeholder meeting held on 5 March 2019.[1182]

7.875. While the European Union refers, under Articles 2.9.4 and 5.6, to various consultations, conferences, workshops and bilateral discussions which pre-date the publication of the full draft measure, it does not argue that it published a notice, that the particular conformity assessment procedure was identified, or that it was identified in a manner as to enable interested parties in other Members to become acquainted with it. Having found that the procedural requirements in Article 5.6 apply, the Panel therefore considers that there is a violation of Article 5.6.1.

[1179] The Panel notes the obligation in Article 5.6.3 of the TBT Agreement that Members shall whenever possible, identify the parts of a proposed conformity assessment procedure which in substance deviate from relevant guides and recommendations. The Panel does not understand Article 5.6.3 to qualify the requirement in the *chapeau* to necessarily require a respondent Member to have made its own assessment that a proposed conformity assessment procedure deviates from a relevant guide or recommendation.

[1180] The Panel refers to the relationship between the measures at issue, set out in sections 7.1.1 and 7.1.3.1 of this Report.

[1181] Malaysia's first written submission, para. 820 (referring to Draft Delegated Regulation, (Exhibit MYS-50)).

[1182] European Union's first written submission, para. 1087; second written submission, para. 193 (referring to Draft Delegated Regulation, (Exhibit MYS-50), p. 2).

7.1.3.5.5 Article 5.6.2 – notification to the WTO Secretariat

7.876. The Panel considers that Article 5.6.2 (together with Article 2.9.2) is "at the core of the TBT Agreement's transparency provisions: the very purpose of the notification is to provide opportunity for comment before the proposed measure enters into force, when there is time for changes to be made before 'it is too late'".[1183]

7.877. More specifically, Article 5.6.2 requires Members to notify other Members through the WTO Secretariat of proposed conformity assessment procedures, at an early appropriate stage, when amendments can still be introduced and comments taken into account. This obligation runs parallel to that in Article 2.9.2, and should apply regardless of whether another Member has requested notification and whether any information regarding the draft conformity assessment procedure was otherwise publicly available.[1184]

7.878. The Panel notes that, as pointed out by Malaysia, the RED II and Delegated Regulation proposals (the Delegated Regulation containing the proposed low ILUC-risk certification procedure), were not notified to the WTO Secretariat, evidenced by a search of the TBT IMS for notifications.[1185] On that basis, the Panel finds there is a violation of Article 5.6.2.

7.1.3.5.6 Article 5.6.4 – commenting process

7.879. Article 5.6.4 requires Members to allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account when finalizing proposed conformity assessment procedures. As noted above, Article 5.6.4 contains an equivalent obligation to the commenting process for proposed technical regulations under Article 2.9.4. The Panel recalls the TBT Committee guidance[1186] on time-limits for the presentation of comments on notified conformity assessment procedures and considers these factors to be relevant here: (i) the normal time limit for the presentation of comments should be at least 60 days, but Members are encouraged to provide, whenever possible, a time-limit beyond 60 days, such as 90 days; (ii) developed country Members are encouraged to provide more than a 60-day comment period, to improve the ability of developing country Members to make comments on notifications consistent with the principle of special and differential treatment; and (iii) an insufficient period of time for presentation of comments on proposed conformity assessment procedures may prevent Members from adequately exercising their right to submit comments.

7.880. Malaysia's arguments largely mirror those made under Article 2.9.4, given that it is the draft Delegated Regulation that contained the proposed low ILUC-risk certification procedure.[1187] Malaysia also argues that the informal feedback process for the proposed Delegated Regulation, by its timeframe was insufficient to discharge the European Union's obligations under Article 5.6.4. Given the timeframe of the feedback window and adoption of the Delegated Regulation, there was not enough time to read comments, identify Members' comments, consider whether there were any requests for a discussion, to hold discussions, or to take into account written comments between 9 and 12 March 2019. The European Union responds that in factual terms, it organized a four week feedback period between 8 February 2019 and 8 March 2019.[1188]

7.881. The Panel agrees with Malaysia's argument that there was no meaningful commenting process as envisaged by Article 5.6.4. One month for feedback is short of the recommended minimum 60-day comment period, and four days to process comments or hold discussions seems too short to give effect to the obligations under Article 5.6.4. On this basis, together with the European Union's statement that in factual terms, no organization of a commenting procedure for

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[1183] Panel Report, *US – Clove Cigarettes*, para. 7.536.

[1184] Panel Report, *US – Clove Cigarettes*, paras. 7.535 and 7.540-7.541.

[1185] Malaysia's first written submission, para. 821.

[1186] Committee on Technical Barriers to Trade, Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4, G/TBT/26, paras. 39-40.

[1187] On Article 5.6.4, see Malaysia's first written submission, para. 822.

[1188] European Union's second written submission, para. 193 (referring to Draft Delegated Regulation, (Exhibit MYS-50); and Malaysian Palm Oil Council (MPOC), Comments on EC Commission Delegated Regulation (EU Ref Ares (2019)762855-08/02/2019), (Exhibit MYS-40)).

the purposes of Article 5.6.4 has yet taken place, the Panel considers that the European Union failed to comply with its obligations under Article 5.6.4.[1189]

7.1.3.5.7 Conclusion on Articles 5.6.1, 5.6.2 and 5.6.4

7.882. The Panel concludes that the European Union has acted inconsistently with Article 5.6.1 of the TBT Agreement by failing to publish a notice of the proposed low ILUC-risk certification procedure at an early appropriate stage in such a manner as to enable interested parties in Malaysia and other WTO Members to become acquainted with it.

7.883. The Panel concludes that the European Union has acted inconsistently with Article 5.6.2 of the TBT Agreement by failing to notify the proposed low ILUC-risk certification procedure.

7.884. The Panel concludes that the European Union has acted inconsistently with Article 5.6.4 of the TBT Agreement by having failed to organize a commenting process in respect of the proposed low ILUC-risk certification procedure in accordance with the requirements of that provision.

7.1.3.6 Article 5.8 – Publication of adopted conformity assessment procedures

7.1.3.6.1 Introduction

7.885. The Panel now turns to the claim under Article 5.8 of the TBT Agreement.

7.886. Malaysia submits[1190] that the European Union violates Article 5.8 by failing to promptly publish or otherwise make available the conformity assessment procedure for certifying oil palm crop-based biofuel as low ILUC risk. More specifically, Malaysia contends that, while some elements of the conformity assessment procedure have been published (i.e. Article 26 of RED II and Articles 4 to 6 of the Delegated Regulation), other elements (e.g. the detailed rules on low ILUC-risk certification in any anticipated implementing regulations) have not been published or made available within the meaning of Article 5.8.[1191] Malaysia also points to the European Union's factual concession that it has not yet adopted, published or made available, detailed implementing rules on low ILUC-risk certification, and notes that the low ILUC-risk certification requirement has been effective from 10 June 2019.[1192] Malaysia considers that this absence of detail means it is not possible to design national or voluntary schemes.[1193]

7.887. The European Union submits[1194] that Malaysia has not established a violation of Article 5.8. More specifically, the European Union argues that low ILUC-risk certification cannot properly be characterized as a conformity assessment procedure and so was "not subject to the procedural requirements" under the TBT Agreement.[1195] For that reason, the European Union does not engage with Malaysia's submissions on the "nature and extent" of the obligations under Article 5.8, but also does not concede their validity.[1196] However, "in factual terms", the European Union "acknowledges that it has not yet published or made available" the low ILUC-risk certification procedure for the

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[1189] The Panel also considers that its reasoning, that the obligation to notify in Article 2.9.2 is concerned with and impacts the obligation to provide for a commenting period under Article 2.9.4, applies *mutatis mutandis* in this context. In this respect, see also Panel Report, *India – Agricultural Products*, para. 7.795, where the panel referred to Annex B5(a), B5(b) and B5(d) to the SPS Agreement, which contain obligations similar to Articles 5.6.1, 5.6.2, and 5.6.4.

[1190] Malaysia's first written submission, paras. 824-827; second written submission, paras. 301-303; and comments on the European Union's responses to the Panel's questions, p. 261-262.

[1191] Malaysia's first written submission, paras. 826-827 (referring to Recital 18 of the Delegated Regulation; Status Report, p. 1; and Contract notice by the European Commission, Belgium – Brussels: Support for the implementation of the Provisions on ILUC Set out in the Renewable Energy Directive, 2019/S 131-320816, OJ/S S131 and the Call for Tenders by the European Commission, Support for the Implementation of the Provisions on ILUC Set out in the Renewable Energy Directive, N° ENER/C2/2018-462, (Exhibit MYS-51)).

[1192] Malaysia's first written submission, para. 826; second written submission, paras. 301-303. Malaysia makes some submissions on "ripeness" for bringing a claim (also with respect to Article 5.8). See Malaysia's comments on the European Union's response to Panel question No. 155 and No. 156.

[1193] Malaysia's first written submission, para. 826.

[1194] European Union's first written submission, paras. 1091-1095; second written submission, paras. 194-195; and responses to the Panel's questions, paras. 801-802.

[1195] European Union's first written submission, para. 1091; second written submission, para. 194.

[1196] European Union's first written submission, para. 1093.

purposes of Article 5.8.[1197] The European Union also states that the "measures" complained of do not take effect "until December 2023" and that it has not adopted the detailed implementing rules, such that Malaysia's claims are "hypothetical and premature".[1198] The European Union adds that Article 5.8 only applies upon "adoption" of conformity assessment procedures, and that, since the implementing regulation has not yet been adopted, the obligation to "publish/make available is not yet applicable".[1199] The European Union also states that in any event, it "published a draft implementing regulation" well in advance of the adoption of any implementing regulations.[1200]

7.1.3.6.2 Legal standard

7.888. Article 5.8 sets forth the obligation that:

> Members shall ensure that all conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

7.889. Article 5.8 has not been interpreted or applied in prior cases. However, the obligation mirrors to some extent the more general obligation relating to the publication of trade regulations set out in Article X:1 of the GATT 1994, and there appears to be no fundamental disagreement between the parties on the elements of that standard as described below.[1201]

7.890. The language of Article 5.8 indicates the following elements must be present to establish a violation of Article 5.8:

a. the conformity assessment procedure at issue has been adopted; and

b. the conformity assessment procedure has not been "published promptly" or "otherwise made available", in "such a manner as to enable interested parties in other Members to become acquainted with them".

7.891. The Panel will elaborate further on the elements of the legal standard in Article 5.8 as necessary in the course of its assessment of the issues in dispute.

7.1.3.6.3 Assessment by the Panel

7.892. The Panel has found above that Malaysia has established a violation of Article 5.1.2 on grounds that the low ILUC-risk certification procedure, as set out in Article 6 of the Delegated Regulation, lacks detailed rules allowing low ILUC-risk certification to take place.[1202] These detailed rules are now found in the Implementing Regulation adopted on 14 June 2022 and published on 27 June 2022.[1203]

7.893. Malaysia asserts that although the low ILUC-risk certification procedure as set out in Article 6 of the Delegated Regulation was published promptly, its publication in the absence of detailed rules for its implementation did not enable interested parties to become sufficiently acquainted with it. According to Malaysia, this is because they are unable to design certification schemes, gain approval, and start preparing for certification.[1204]

7.894. As the Panel noted above, Article 5.8 contains a similar obligation to Article X:1 of the GATT 1994. Prior panels, when interpreting Article X:1, considered that Article X:1 seeks to ensure that due process is accorded to traders, by placing them in a position where they can understand

[1197] European Union's first written submission, para. 1092.
[1198] European Union's first written submission, para. 1094.
[1199] European Union's response to Panel question No. 156, paras. 801-802.
[1200] European Union's response to Panel question No. 156, para. 802.
[1201] Article 5.8 also mirrors to some extent the obligation in Annex B(1) of the SPS Agreement, which requires Members to ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them. See Appellate Body Report, *Korea – Radionuclides*, paras. 5.153-5.157.
[1202] See section 7.1.3.3 of this Report.
[1203] See Commission Implementing Regulation (EU) 2022/996, (Exhibit EU-329).
[1204] Malaysia's first written submission, paras. 826-827.

the requirements to which their products will be subject, and take necessary preparatory steps.[1205] Article X:1 thus seeks to ensure that traders will not have to face measures that they could not be aware of because such measures were published late or because they were not yet published.[1206] Like Article 5.8, Article X:1 also refers to publication "in such a manner as to enable governments and traders to become acquainted with it". Prior panels have interpreted this to concern the medium, content and quality of a publication, which must be sufficient to give power to or supply governments and traders with knowledge of the particular measures that is adequate, so that they may become familiar with them, or known to them in more or less a complete way.[1207] Publication of a draft measure[1208] and the failure to publish a "final" measure[1209] are likely to be insufficient to satisfy Article X:1. Other panels have referred to the need to become acquainted with the "exact nature" of a right accorded by a measure.[1210]

7.895. Similarly, in the context of Annex B(1) of the SPS Agreement, the Appellate Body understood publication so as "to enable" interested Members "to become acquainted with" as giving interested Members the means to become familiar with an adopted SPS regulation, by being, for example, accessible and containing sufficient information.[1211]

7.896. The Panel understands Malaysia not to take issue with the publication of the low ILUC-risk certification procedure as set out in RED II and the Delegated Regulation. Rather, the Panel understands Malaysia to take issue with the fact that the low ILUC-risk certification procedure, as set out in Article 6 of the Delegated Regulation, is published without setting out the detailed rules on certification, which the European Union admits is to be provided by certain implementing rules.[1212] The Panel turns to consider whether the absence of these detailed rules can be said to affect the quality of publication, such that interested parties were not able to become acquainted with the "exact nature" of the right accorded by the measure.

7.897. The Panel notes that while Article 5.8 has similarities with Article X:1, the obligation under Article 5.8 falls to be considered within the context of all of the obligations under Article 5 of the TBT Agreement. The Panel understands that claims concerning the incomplete nature of a conformity assessment procedure may, as in this case, be appropriately addressed under Article 5.1.2. Subsequent obligations in Article 5 specifically deal with "complete" or "adopted" conformity assessment procedures. For example, the Panel has found that Article 5.2.1 concerns conformity assessment procedures that are functional, or in other words, sufficiently complete as to be capable of being applied.[1213]

7.898. The Panel considers that Article 5.8 also falls within this group of obligations. It targets the availability of individual iterations of a conformity assessment procedure. Once each iteration has been adopted, it is subject to the obligations in Article 5.8. This avoids a situation where a regulating Member could argue that its conformity assessment procedure is incomplete or not final, and that it need only publish its procedure once all elements are complete or final, in the sense that there will be no future iterations of the procedure. Conversely, it may be impracticable and burdensome to require Members to include all possible details in a single iteration of a conformity assessment procedure, or to otherwise consider a Member in violation of Article 5.8 for amending an existing conformity assessment procedure where it could not have published the amended rules at the time it initially adopted the procedure. For that reason, the Panel does not consider that a lack of detail

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[1205] Panel Reports, *EC – Selected Customs Matters*, para. 7.107; and *EC – IT Products*, para. 7.1015.

[1206] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.65.

[1207] Panel Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.83; and *EC – IT Products*, para. 7.1086.

[1208] Panel Reports, *EC – IT Products*, paras. 7.1082 and 7.1084.

[1209] Panel Reports, *China – Raw Materials*, paras. 7.806-7.807. The final measure in this dispute was a decision not to authorize an export quota.

[1210] In *Thailand – Cigarettes (Philippines),* the panel upheld a claim regarding a failure to sufficiently publish general rules on the right to the release of guarantees deposited by importers for excise and other internal taxes. While Thailand, through its legislation and notices of assessment given to importers, had made general statements that "in essence, guarantees are to be refunded", these did not clearly indicate a "definite right" to the release of guarantees, such that importers were not able to become acquainted with the "exact nature" of the right they had. (Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.860.)

[1211] Appellate Body Report, *Korea – Radionuclides*, paras. 5.154, 5.147, 5.151, 5.189, and 6.8.

[1212] Malaysia's first written submission, paras. 826-827.

[1213] See section 7.1.3.4 of this Report.

in a conformity assessment procedure, which is reflected in the publication of that procedure, results in a consequential inconsistency with Article 5.8.[1214]

7.899. Second, in this instance, the Panel considers that the conformity assessment procedure was in fact published in RED II and the Delegated Regulation and is sufficiently clear to acquaint interested parties with the "exact nature" of their right to conformity assessment procedure. While the contours of certain requirements could be more definite, the nature of the right is clear as is. Article 6 refers to a certification procedure for high ILUC-risk biofuels to be certified as low ILUC risk, and it is clear that this is the only way for consignments of such biofuels to be exempted from the high ILUC-risk cap and phase-out.[1215]

7.1.3.6.4 Conclusion on Article 5.8

7.900. The Panel finds that Malaysia has not established that the European Union acted inconsistently with the obligation in Article 5.8 of the TBT Agreement to ensure that conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

7.1.4 Claims under Article 12 of the TBT Agreement

7.1.4.1 Introduction

7.901. Having addressed the claims under Article 2 and Article 5, the Panel now turns to Malaysia's claims under Article 12 of the TBT Agreement, entitled "Special and Differential Treatment of Developing Country Members". More specifically, Malaysia has raised claims under two provisions: Article 12.1 and Article 12.3. In the course of the proceedings, however, Malaysia clarified that it relies on Article 12.1 not as the basis for any separate claim, but as relevant context to inform its claim under Article 12.3.

7.902. The Panel notes that Article 12.1 requires a demonstration that the Member concerned has failed to provide the "differential and more favourable treatment" to developing country Members that is required under other provisions of Article 12, or through relevant provisions of other Articles of the TBT Agreement. Accordingly, the Panel first addresses the claim under Article 12.3, and then turns to Article 12.1 in light of its findings under Article 12.3.

7.1.4.2 Article 12.3 – Taking account of special needs

7.1.4.2.1 Introduction

7.903. Malaysia submits[1216] that the European Union violated Article 12.3 by failing to take into account the circumstances specific to developing countries[1217] when preparing the technical regulations and the conformity assessment procedure at issue. More specifically, Malaysia argues that it is a developing country Member, and that it has "special development, financial and trade needs" affected by the measures at issue. Malaysia argues that the European Union has failed to "take account of" those needs, in a manner that has resulted in unnecessary obstacles to exports from developing countries such as Malaysia.

[1214] The Panel's analysis is limited to the publication obligation in Article 5.8.

[1215] See e.g. sections 7.1.1 and 7.1.3.3 of this Report.

[1216] Malaysia's first written submission, paras. 828-885; second written submission, paras. 304-319; opening statement at the meeting of the Panel, paras. 51-52; responses to the Panel's questions, pp. 106-109; and comments on the European Union's responses to the Panel's questions, pp. 265-274.

[1217] Malaysia first written submission, paras. 488 (last bullet), 828-829, 885, and 1216 (12th bullet); second written submission, para. 532 (12th bullet). The Panel understands Malaysia's references to the European Union's failure to take into account "the circumstances specific to developing countries" to be a paraphrasing of the terms of Article 12.3, which refer to the "special development, financial and trade needs of developing country Members".

7.904. The European Union submits[1218] that the Panel should reject Malaysia's claims under Article 12.3. More specifically, while the European Union does not dispute that Malaysia is a developing country Member or that it has "special development, financial and trade needs" in relation to palm oil, the European Union disputes that those needs are affected by the measures at issue. It further disputes that Malaysia has demonstrated that the European Union failed to "take account of" those special needs.

7.1.4.2.2 Legal standard

7.905. Article 12.3 sets forth the obligation that:

> Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

7.906. Article 12.3 has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.907. For the purposes of the present dispute, in order to establish a violation of Article 12.3, it must be established that the European Union is preparing, adopting or applying a technical regulation and conformity assessment procedure, and that the following three elements[1219] are satisfied:

a. Malaysia is a "developing country Member";

b. Malaysia has "special development, financial and trade needs" related to the measures at issue; and

c. the European Union has failed to "take account of" those needs.

7.908. The panels in *US – Clove Cigarettes* and *US – COOL* both considered the meaning and function of the final clause in Article 12.3 ("with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members"). Those panels concluded that this language merely serves the purpose of clarifying *how* and *why* the Member preparing or applying the technical regulation or conformity assessment procedure should "take account of" these special needs.[1220] As expressed by the panel in *US – COOL*, the final part of Article 12.3 "specifies the objective to be achieved by the obligation contained in the operational part".[1221]

7.909. In the present dispute, Malaysia and the European Union both agree that the focus under Article 12.3 is on whether a Member has failed to "take account of" the special development, financial, and trade needs of developing country Members.[1222] The Panel sees no reason to disagree, and considers that the final clause simply suggests that the failure to take account of the special development, financial and trade needs of developing country Members *may result* in that the specific measure at issue creates unnecessary obstacles to exports from developing country Members.

7.910. The Panel will elaborate further on the elements of the legal standard in Article 12.3 as necessary in the course of its assessment of the issues in dispute.

[1218] European Union's first written submission, paras. 1097-1127; second written submission, paras. 196-204; responses to the Panel's questions, paras. 803-826; and comments on Malaysia's responses to the Panel's questions, paras. 292-299.

[1219] See Panel Report, *US – Clove Cigarettes*, para. 7.620.

[1220] See Panel Reports, *US – Clove Cigarettes*, paras. 7.614-7.619; and *US – COOL*, paras. 7.754-7.766.

[1221] Panel Reports, *US – COOL*, para. 7.783.

[1222] Malaysia's first written submission, paras. 779-880; European Union's response to Panel question No. 157, paras. 805-806.

7.1.4.2.3 "developing country Members"

7.911. The obligation in Article 12.3 applies only in respect of the special development, financial and trade needs of "developing country Members".

7.912. In *US – Clove Cigarettes*, the complaining Member (Indonesia) indicated that it was a developing country and noted that the World Bank classified it as a developing country and that its status as a developing country Member of the WTO was recognized in a previous panel proceeding. The panel considered these facts, together with the fact that the responding Member did not contest the point, to be "more than sufficient to conclude" that the complaining Member was a "developing country Member".[1223]

7.913. In this case, Malaysia identifies several bases for the conclusion that it is a developing country Member, including that: (a) according to the World Economic Situation and Prospects (WESP) dataset, it is considered to be a developing economy in the Asian region; (b) the United Nations Conference on Trade and Development (UNCTAD) lists it as a developing country; (c) its status as a developing country has never been contested in the framework of the WTO; and (d) in the framework of the WTO Trade Policy Review, reference is made to Malaysia as a developing country.[1224]

7.914. The European Union states that it does not challenge Malaysia's status as a developing country for the purpose of applying WTO law.[1225]

7.915. The Panel is of the view that the foregoing is more than sufficient to conclude that Malaysia is a "developing country Member", and accordingly finds that the first element under Article 12.3 is satisfied.

7.1.4.2.4 "special development, financial and trade needs"

7.916. The obligation in Article 12.3 applies only where there are "special development, financial and trade needs" of developing country Members.

7.917. The panel in *US – Clove Cigarettes* considered that "[w]hatever the exact meaning of the terms 'special development, financial and trade needs'", Indonesia had satisfied the requirement of being a developing country that had "'special development, financial and trade needs' affected by the ban on clove cigarettes".[1226] The panel reached that conclusion on the grounds that Indonesia had explained the importance of clove cigarettes to its economy and its people: clove cigarettes have been produced in Indonesia for over a century; approximately 6 million Indonesians were employed directly or indirectly in the manufacture of cigarettes and the growing of tobacco; and the cigarette industry, including clove, accounted for approximately 1.66% of Indonesia's total GDP.[1227] That panel added, after setting out the above considerations, that "[i]t is also not in dispute that, as a result of the ban, U.S. imports of clove cigarettes produced in Indonesia have declined from approximately $15 million in 2008 to zero in 2010."[1228]

7.918. In the present case, Malaysia submits that the challenged technical regulations and the conformity assessment procedure "have significant effects on"[1229] the development, financial and trade needs of Malaysia. Malaysia relies on data demonstrating the importance of its palm oil industry, and the importance of exports to the EU market, to substantiate this point.[1230] Among other things, Malaysia indicates that its palm oil industry employs as many as 3 million people, corresponding to around 10% of the country's population. It notes that the palm oil industry made

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[1223] Panel Report, *US – Clove Cigarettes*, paras. 7.621-7.624.

[1224] Malaysia's first written submission, para. 835 (referring to United Nations, World Economic Situation and Prospects 2021, Statistical Annex, (United Nations, 2021), Table C "Developing economies by region", (Exhibit MYS-53), p. 126; UNCTADSTAT, Development status groups and composition: Developing economies, (Exhibit MYS-54); and WTO Trade Policy Review for Malaysia, 2017, WT/TPR/S/366).

[1225] European Union's first written submission, para. 1104.

[1226] Panel Report, *US – Clove Cigarettes*, para. 7.628.

[1227] Panel Report, *US – Clove Cigarettes*, paras. 7.627-7.629.

[1228] Panel Report, *US – Clove Cigarettes*, paras. 7.627-7.629.

[1229] Malaysia's first written submission, para. 838.

[1230] Malaysia's first written submission, paras. 838-856.

up 2.7% of its GDP. It explains that smallholder plantations account for around 28% of its oil palm production area.

7.919. The European Union acknowledges Malaysia's detailed submissions concerning the importance of the palm oil sector to the Malaysian economy and indicates that it does not dispute that Malaysia produces and exports palm oil and that the cultivation of oil palm has an increasing impact on the agricultural sector. However, the European Union argues that Malaysia has not established that the effect of the measures in RED II would affect its "development, financial and trade needs", even were it accepted that they could affect the level of exports of palm oil-based biofuels to the European Union (*quod non*). In this connection, the European Union takes issue with certain of Malaysia's assertions regarding the anticipated effects of the measures at issue, noting that Malaysia itself argues that the market for palm oil is significant and exports are not solely to the European Union nor is palm oil exported exclusively for use to produce biofuels.

7.920. The Panel observes that Malaysia's submissions regarding the second element under Article 12.3 not only address its special development, financial and trade needs in respect of palm oil, but also argue that the challenged technical regulations and the conformity assessment procedures "have significant effects on" those needs. The Panel further notes that the European Union's arguments contesting this element appear to be directed not at the question of whether Malaysia has demonstrated that it has "special development, financial and trade needs" in respect of palm oil, which is something the European Union appears not to contest, but rather to the question of whether the measures at issue have significant *effects* on those needs.

7.921. The Panel recalls that in *US – Clove Cigarettes*, the second element of the legal test under Article 12.3 was formulated in terms calling for a demonstration that the complaining Member has special development, financial and trade needs "that are affected by the measures at issue".[1231] In the Panel's view, however, the relevant question at this juncture of the analysis under Article 12.3 is simply whether Malaysia has demonstrated that it has special development, financial and trade needs that are relevant from the perspective of the measures at issue. Such needs may be relevant from the perspective of the measures if, for example, those needs are linked to trade in one or more product(s) that are regulated by the measures at issue – and in that sense may be referred to as special needs affected by the measures at issue.[1232] In other words, the Panel considers that Article 12.3 simply requires that there be a nexus between the measures and the special development, financial and trade needs of developing country Members.

7.922. The Panel notes that the text of Article 12.3 does not call for an assessment of the trade effects of the challenged measures, or of whether, and if so how, the measures at issue otherwise impact the special needs of developing country Members identified. Indeed, the Panel notes that Malaysia employs a similar formulation when it concludes that it has special financial and trade needs "that are closely linked to trade in palm oil and oil palm crop-based biofuel" that must be taken into account by the European Union.[1233]

7.923. The Panel considers that Malaysia's detailed submissions concerning the importance of the palm oil sector to the Malaysian economy make clear that it has "special development, financial and trade needs" related to trade in palm oil and palm oil-based biofuel. Panels in previous cases have proceeded on the premise that a measure may implicate the special needs of developing country

[1231] Panel Report, *US – Clove Cigarettes*, para. 7.620. (emphasis added)

[1232] Indeed, the panel in *US – Clove Cigarettes* appeared to focus its analysis of this element of the standard on whether the complaining Member in that case had established that it had "special development, financial and trade needs" in respect of the product at issue, not on whether, and if so how, the measure at issue affected those "needs". (See Panel Report, *US – Clove Cigarettes*, para. 7.620.) In *US – Clove Cigarettes*, the panel found that Indonesia had explained the importance of clove cigarettes to its economy and its people. (Panel Report, *US – Clove Cigarettes*, paras. 7.627-7.629.) The panel in *US – COOL* did not separately consider or address the issue of what Mexico's "special development, financial or trade needs" were. The panel in *US – Animals*, which addressed a similar provision in the SPS Agreement (Article 10.1), stated that "[w]ith regard to the phrase 'special needs of developing country Members', … the provision is written broadly so as to encompass both the needs of developing country Members generally, and the needs of a particular developing country Member". That panel considered that it "may be that a product is so central to the economy of a developing country that its special need could be precisely that the approval procedures need priority consideration". (Panel Report, *US – Animals*, paras. 7.692 and 7.702.)

[1233] Malaysia's first written submission, paras. 848 and 856.

Members insofar as the products affected are of particular export interest[1234] to one or more developing country Members.[1235] The Panel does not understand the European Union to argue otherwise, and the Panel sees no reason to disagree in light of the detailed explanations provided by Malaysia in its first written submission.

7.924. However, assuming *arguendo* that consideration of the extent to which the measures at issue have an effect on Malaysia's trade in palm oil and palm oil-based biofuel is germane to the assessment of whether Malaysia has demonstrated that it has relevant "special development, financial and trade needs" related to trade in palm oil and palm oil-based biofuel, the Panel finds that any such condition is also fulfilled. The Panel recalls its earlier findings in the context of its assessment of the claims under Articles 2.2, 2.1, 2.5 and 2.9. In those contexts, it found that: (a) the measures are "trade-restrictive" within the meaning of Article 2.2 on the grounds that they have, by design, a "limiting effect on trade" in crop-based biofuels (as regards the 7% maximum share) and palm oil-based biofuels (as regards the high ILUC-risk cap and phase-out); (b) that the high ILUC-risk cap and phase-out has a "detrimental impact" on imported palm oil-based biofuels for the purposes of Article 2.1; and (c) the 7% maximum share and the high ILUC-risk cap and phase-out are measures that may have a significant effect on the trade of other Members within the meaning of Articles 2.5 and 2.9.[1236]

7.925. The Panel finds that Malaysia has demonstrated that it has relevant "special development, financial and trade needs" related to trade in palm oil and palm oil-based biofuel.

7.1.4.2.5 "take account of"

7.926. The obligation in Article 12.3 is to "take account of" the special development, financial and trade needs of developing country Members.

7.927. In *US – Clove Cigarettes*, Indonesia argued that the United States disregarded its repeated concerns about the effect the US ban on flavoured cigarettes would have on Indonesia's trade and development. The panel explained that the evidence before it consisted of a series of letters between key figures in the Indonesian and US Governments. After reviewing these letters, the panel concluded that Indonesia was able to communicate its concerns to key figures in the US Government on multiple occasions, over a period of several years, and that Indonesia's concerns were subsequently raised on a number of occasions, by key officials within the US Government. The panel concluded that the exchanges among key US officials referencing Indonesia's concerns showed that the United States "actively took account of" Indonesia's concerns.[1237]

7.928. In *US – COOL*, Mexico argued that the United States acted inconsistently with Article 12.3 by not having given Mexico an opportunity to comment on the preparation of the COOL measure, and by ignoring Mexico's comments and the impact that it knew the COOL measure would have on Mexican exports. The panel found that Mexico did not substantiate those assertions, and that in fact the United States actively reached out to discuss the development of the COOL measure with Mexico on several occasions in the context of stakeholder consultations. It also found that Mexico had submitted comments, and that US officials had indicated that such input would be taken into account. Furthermore, the panel found that the United States actually introduced certain modifications to certain elements of the COOL measure in response to concerns expressed by Mexico, namely by softening certain record-keeping requirements and by introducing the commingling flexibility in part

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[1234] The Panel notes in this respect that, consistent with the notion that the focus is simply on products of trade *interest* and not on trade *effects*, Article 10.6 of the TBT Agreement states that the WTO Secretariat "shall, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Members […] and *draw the attention of developing country Members* to any notifications relating to *products of particular interest* to them." (emphasis added)

[1235] In *EC – Approval and Marketing of Biotech Products*, the panel's assessment under Article 10.1 of the SPS Agreement appeared to accept Argentina's argument that it had "special needs" by virtue of the fact that some of the products affected by the European Communities' general moratorium on approvals were "of particular export interest to Argentina as a major developing country". (Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1619.)

[1236] The Panel notes that in the context of these other claims, the European Union similarly argued that a decrease in EU biofuel demand for palm oil from Malaysia may be compensated by an increase in exports of palm oil or palm oil-based biofuels to other markets such as India or China and also exports to the European Union for uses other than biofuel production.

[1237] Panel Report, *US – Clove Cigarettes*, paras. 7.635-7.645.

in response to Mexico's comments. On that basis, the panel found that Mexico failed to establish that the United States did not "take account of" its special needs.[1238] Further, in *US – COOL*, the panel concluded that the obligation to "take account of" the special needs of developing country Members requires "active and meaningful consideration" of those needs.[1239]

7.929. In this case, Malaysia emphasizes that Article 12.3 requires active and meaningful consideration[1240] of the needs of developing country Members and submits that prior panels have been too undemanding[1241] in their interpretation of Article 12.3. Malaysia argues that the following establishes that the European Union did not take account of the special needs of developing country Members: (a) the European Union was well aware of Malaysia's special needs which were raised in multiple fora including multiple statements to the TBT Committee[1242]; (b) there is no mention of the needs of developing countries in the measures at issue or related documents (the explanatory memorandum to the initial proposal for RED II, RED II itself, the impact assessment for RED II, the Delegated Regulation, and the Status Report (2019))[1243], and the provisions on independent smallholders in the Delegated Regulation are merely a theoretical option[1244]; and (c) the European Union failed to carry out an impact assessment when adopting the Delegated Regulation, contrary to EU law.[1245]

7.930. The European Union argues that the obligation to "take account of" the needs of developing country Members means "merely to give active and meaningful consideration".[1246] For the European Union, this means that this obligation is met if the developing country communicated its concerns, including in the context of a public consultation, and then if, in response, the regulating Member: (a) discussed these concerns, either internally or in exchanges or consultations with the developing country; or (b) responded to these concerns in the context of the measure's rule-making process.[1247]

7.931. With respect to the measures at issue in this case, and based on its articulation of what the obligation to "take account of" means, the European Union argues that: (a) it duly responded to the correspondence from Malaysia's officials on multiple occasions, and these exchanges (and the bilateral discussions they reference) are evidence that the concerns were taken into account[1248]; (b) while WTO case law does not impose an obligation of result or require that the respective Member must agree with or accept those needs[1249], a provision on smallholders was introduced in the Delegated Regulation[1250]; and (c) conducting an impact assessment for the Delegated Regulation would have reflected nothing more than the expression of a best practice for law-making procedures in the European Union, and in any event the impact assessment for RED II examined a number of relevant issues including impacts on third countries and describes the breadth and depth of the public consultation that preceded the proposal.[1251]

7.932. The Panel notes that the parties' arguments under Article 12.3 turn on the applicable legal and evidentiary standard for assessing whether the special development, financial and trade needs of developing country Members were "take[n] account of".

7.933. According to the European Union, *US – Clove Cigarettes* and *US – COOL* confirm its view that the obligation to "take account of" the needs of developing country Members means "merely to give active and meaningful consideration"[1252], and confirm the European Union's view that this standard is met if the developing country Member communicated its concerns, including in the

[1238] Panel Reports, *US – COOL*, paras. 7.789-7.800.
[1239] Panel Reports, *US – COOL*, para. 7.786.
[1240] Malaysia's first written submission, paras. 858 and 877 (quoting Panel Reports, *US – COOL*, para. 7.786). See also Malaysia's second written submission, paras. 308-311 and 314.
[1241] Malaysia's first written submission, paras. 874-875.
[1242] Malaysia's first written submission, paras. 870-872; second written submission, para. 310.
[1243] Malaysia's first written submission, paras. 868-869 and 873.
[1244] Malaysia's comments on the European Union's response to Panel question No. 163, at p. 274.
[1245] Malaysia's first written submission, paras. 863-867; second written submission, para. 315.
[1246] European Union's second written submission, para. 196.
[1247] European Union's first written submission, paras. 1112.
[1248] European Union's first written submission, para. 1115; second written submission, paras. 198-204; and response to Panel question No. 160, paras. 816-817.
[1249] European Union's first written submission, paras. 1111 and 1125.
[1250] European Union's response to Panel question No. 163, paras. 825-826.
[1251] European Union's first written submission, paras. 1116-1122.
[1252] European Union's second written submission, para. 196.

context of a public consultation, and if the Member discussed these concerns, either internally or in exchanges or consultations with the developing country Member, or it responded to the concerns of the developing country Member in the context of the measure's rule-making process.[1253]

7.934. Malaysia maintains that "the panels in *US – Clove Cigarettes* and *US – COOL* were too undemanding in their interpretation of Article 12.3 of the TBT Agreement with respect to the obligations linked to the 'special development, financial and trade needs of developing country Members.'" More specifically, Malaysia considers that "the commitment under Article 12.3 of the TBT Agreement cannot be interpreted merely as a 'procedural requirement' that, on the basis of the panel's finding in *US – COOL*, does not even need to 'document specifically in their legislative process and rule-making process how they actively considered the special development, financial and trade needs of developing country Members'."[1254]

7.935. The Panel will make several related observations before turning to the facts of this case. First, two prior panels have ruled on claims under Article 12.3, i.e. *US – COOL* and *US – Clove Cigarettes*, and two other panels have ruled on claims under the parallel obligation in Article 10.1 of the SPS Agreement, namely *EC – Approval and Marketing of Biotech Products* and *US – Animals*. In each of those prior cases, the panels gave the terms "take account of" their ordinary meaning, which is to "consider along with other factors before reaching a decision"[1255], and considered that the obligation to "take account of" the special needs of developing country Members does not prescribe any particular result.[1256] All of these panels confirmed that the burden of proof is on a complaining Member to establish that the regulating Member did not take account of such needs.[1257]

7.936. Second, both parties agree that Article 12.3 requires "active and meaningful consideration" of the special needs of developing country Members, but they do not agree on what that legal and evidentiary standard entails. Both parties have presented arguments that merit careful consideration in this respect. With a view to ensuring a thorough and careful analysis of Malaysia's claim under Article 12.3, the Panel posed several questions to the parties inviting further elaboration of their views on the meaning and scope of the obligation. The Panel considers that the parties' arguments confirm that it may be difficult to identify precisely, in the abstract, a legal and evidentiary benchmark to assess whether the regulating Member complied with its obligation to take account of the special needs of developing country Members under Article 12.3.

7.937. Third, an assessment of whether a regulating Member has failed to "take account of" the special needs of developing country Members will generally require a panel to reach a conclusion based on circumstantial evidence and inferences, rather than direct evidence. By way of elaboration, requiring a complainant to adduce direct evidence – i.e. in the form of letters or other documents in which a regulating Member would expressly state that it refused to consider the needs of developing country Members when preparing a technical regulation – would entail a potentially insurmountable burden of proof.[1258] Previous panels have likewise been reluctant to impose on a regulating Member a duty to provide direct evidence – i.e. to document in their legislative process and rule-making process – of how they actively considered the special development, financial and trade needs of a developing country Member.[1259] The Panel considers that requiring such direct evidence of a

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[1253] European Union's first written submission, paras. 1112.

[1254] Malaysia's first written submission, para. 875 (quoting Panel Reports, *US – COOL*, para. 7.787).

[1255] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1620; *US – Clove Cigarettes*, paras. 7.632-7.634; *US – COOL*, paras. 7.779-7.781; and *US – Animals*, para. 7.694.

[1256] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1620; *US – Clove Cigarettes*, paras. 7.632-7.634 and 7.646; *US – COOL*, paras. 7.776 and 7.781; and *US – Animals*, para. 7.694.

[1257] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1622; *US – Clove Cigarettes*, para. 7.634; and *US – Animals*, paras. 7.695-7.700.

[1258] See e.g. Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1625; *US – Clove Cigarettes*, fn 1022; and *US – Animals*, para. 7.698.

[1259] See Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1621 ("[t]he fact that there is no indication that between June 1999 and August 2003 the European Communities accorded Argentina special and differential treatment – e.g. by approving the marketing of biotech products exported from Argentina – does not in and of itself constitute prima facie evidence that the European Communities has failed to 'take account' of Argentina's needs."); *US – COOL*, para. 7.787 (finding no requirement to "to document specifically in their legislative process and rule-making process how they actively considered the special development, financial and trade needs of developing country Members"); *US – Clove Cigarettes*, paras. 7.596-7.597 and 7.645 (finding that an exchange of letters showed that the United States "actively took account of"

regulating Member would not be consistent with the text of the obligation or with the normal allocation of the burden of proof, and disagrees with Malaysia's argument that prior panels have been "too undemanding" in this respect.

7.938. Fourth, while there is nothing unusual about a panel making findings on the basis of inferences that are reasonably drawn from circumstantial rather than direct evidence[1260], the typical circumstances giving rise to a claim of inconsistency under Article 12.3, and the typical forms of circumstantial evidence available, make it difficult to conclusively eliminate opposing inferences that may be reasonably drawn from the same facts. When a regulating Member is made aware that a proposed technical regulation or conformity assessment procedure is apt to have an adverse impact on the special needs of developing country Members, and ultimately no modifications are made to the measure to avoid or substantially mitigate those impacts despite those concerns having been communicated, one inference that might be drawn is that the regulating Member did not take account of the special needs of developing country Members contrary to the requirements of Article 12.3. However, without more, it is equally plausible to draw the reasonable inference that the regulating Member did take account of those special needs, as required by Article 12.3, and simply decided to not make any such modification to the measure.

7.939. The Panel considers that in such circumstances, which may be expected to be the typical circumstances when claims of inconsistency under Article 12.3 are raised, a relevant consideration that must inform what inference should most reasonably be drawn is the nature of the modifications to the measure that the regulating Member would have had to introduce to accommodate the special needs of developing country Members. Where a regulating Member is made aware that a proposed technical regulation or conformity assessment procedure is apt to have an adverse impact on the special needs of developing country Members, and the regulating Member could modify the proposed measure to accommodate those concerns without undermining the measure's contribution to its objective or its chosen level of protection, then the absence of any such modifications may, all things being equal, strengthen the inference that those special needs were not taken into account. In contrast, when it is not apparent how the regulating Member could modify the proposed measure to address those concerns without undermining the measure's contribution to its objective or its chosen level of protection, this would weaken the inference that the special needs were not taken into account, and suggest instead that "in weighing and balancing the various interests at stake,"[1261] the regulating Member decided to give priority to the competing objectives of the measures.[1262]

7.940. Turning to the facts of this case, in the various communications to EU officials that Malaysia refers the Panel to, its officials repeatedly communicated their view that the proposed EU measures relating to palm oil-based biofuels were fundamentally discriminatory and in violation of WTO obligations, and made clear that the desired outcome was for the European Union to not move forward with the proposed cap and phase-out of palm oil-based biofuels. It is not apparent how the

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Indonesia's concerns and did not separately address Indonesia's argument that the US "cannot point to anywhere in the Act or its legislative history where the Congress even said the word 'developing country'"); and *US – Animals*, paras. 6.45-6.47, and 7.697-7.698 (rejecting Argentina's argument that compliance with the obligation to "consider" particular factors in the context of an injury determination requires an importing Member to document how it did so, and the same approach should be followed under Article 10.1 of the SPS Agreement. The panel rejected this argument, noting that the Anti-Dumping and SCM Agreements have very specific obligations with respect to publication and documentation of decisions and it was thus not appropriate to transplant that interpretation to the context of Article 10.1).

[1260] In *Canada – Aircraft*, the Appellate Body observed that "panels routinely draw inferences from the facts placed on the record. The inferences drawn may be inferences of fact: that is, from fact A and fact B, it is reasonable to infer the existence of fact C. […] The facts must, of course, rationally support the inferences made, but inferences may be drawn whether or not the facts already on the record deserve the qualification of a *prima facie* case. The drawing of inferences is, in other words, an inherent and unavoidable aspect of a panel's basic task of finding and characterizing the facts making up a dispute." (Appellate Body Report, *Canada – Aircraft*, para. 198.) In *US – Continued Zeroing*, the Appellate Body reiterated that "a panel may have a sufficient basis to reach an affirmative finding regarding a particular fact or claim on the basis of inferences that can be reasonably drawn from circumstantial rather than direct evidence." (Appellate Body Report, *US – Continued Zeroing*, para. 357.)

[1261] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1621; *US – COOL*, paras. 7.780-7.781; and *US – Animals*, para. 7.703.

[1262] Similarly, even in circumstances where the modification of a measure to accommodate the special needs of developing country Member could in principle be effected without undermining the objective of the measure, depending on the circumstances, such modification could result in *de facto* or *de jure* discrimination with respect to like products from Members other than those whose special needs were taken into account.

European Union could have modified the proposed measures to address those concerns without the complete withdrawal of the measures at issue. The Panel notes its finding, in the context of Article 2.2, that none of the alternative measures proposed by Malaysia would have made an equivalent contribution to the objective of limiting ILUC-related GHG emissions associated with the production of biofuels from food and feed crops.[1263]

7.941. Insofar as the only clear way to have accommodated Malaysia's concerns would have entailed the complete withdrawal of the measures at issue, the absence of any modification of this kind does not imply that the European Union failed to take account of the special needs of developing country Members. It suggests instead that "in weighing and balancing the various interests at stake,"[1264] the European Union decided to give priority to the competing objectives of the measures.

7.942. This inference is only strengthened by the European Union's express acknowledgement of Malaysia's concerns on multiple occasions, in terms that suggest they were weighed and balanced against other interests.

7.943. In its second written submission, the European Union explains that various letters from the Prime Minister of Malaysia and other senior members of the Malaysian Government prompted the following responses from several EU institutions[1265]:

a. A letter from the President of the European Commission addressed to the Prime Minister of Malaysia, dated 14 May 2019, explaining that "[i]n the discussion process, stakeholders have raised legitimate concerns on the possible negative implications of palm oil production, if not produced sustainably, such as deforestation and biodiversity loss, as well as greenhouse gas emissions especially coming from plantations on peatland. The Commission appreciates the importance of the palm oil sector as a source of economic growth and employment in producing countries and is concerned about the situation of small holders. The Commission is determined to pursue a balanced approach on this complex issue and it believes that the retained definitions of small holders and unused land meet this objective."

b. A letter from the European Commissioner for Climate Action and Energy addressed to Malaysia's EU Ambassador, dated 26 July 2018, explaining that "[t]he Commission is fully aware about the complexity of this issue and the need to find a balanced approach. We appreciate the importance of the palm oil sector as a source of growth and employment in your countries, including for smallholders. At the same time, we have a common interest in addressing possible negative environmental and social impacts that the production of palm oil can have by ensuring that it happens in a sustainable manner."

c. A letter sent by the Director General of the Directorate-General Environment, Education, Transport and Energy of the Council of the European Union addressed to several Ambassadors, including from Malaysia and Indonesia, dated 11 April 2018, specifying that "[t]he European Union is aware of the importance of the palm oil sector for Palm Oil

[1263] The Panel notes that in the context of its claim under Article 12.3, Malaysia suggests that the European Union's failure to take account of the special needs of developing countries is also reflected in the European Union "not having considered, nor adopted, one of the many reasonably available alternative measures" and cross-references its arguments under Article 2.2. (Malaysia's first written submission, para. 867.) In this connection, Malaysia submits that "simply engaging in communications and considering the inputs received, without 'active and meaningful consideration' of the 'special development, financial and trade needs' of developing country Members, must not be considered sufficient and cannot be regarded as a responsible attitude when trying to avoid or minimise trade effects and trade restrictions, especially if less trade-restrictive and reasonably available alternatives are being suggested by affected developing country Members, as Malaysia did. Throughout the EU's legislative process to adopt the measures at issue, Malaysia underlined that alternative, less trade-restrictive, options existed." (Malaysia's second written submission, para. 311.) The Panel refers to its findings under Article 2.2, which already address the alternative measures identified by Malaysia.

[1264] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1621; *US – COOL*, paras. 7.780-7.781; and *US – Animals*, para. 7.703.

[1265] European Union's second written submission, paras. 200-203 (referring to President Juncker's reply of 14 May 2019 to a letter from PM Mahathir to President Juncker on the RED II Delegated Act, (Exhibit EU-172); Letter of European Commissioner for Climate Action and Energy of 26 July 2018, (Exhibit EU-174); and Letter by the Director General of the Directorate-General Environment, Education, Transport and Energy of the Council of the European Union of 11 April 2018, (Exhibit MYS-36).

> Producing Countries and for many of its farmers, and is giving this due consideration. … As regards the ongoing legislative process for the revision of the Renewable Energy Directive, I understand your concerns over an amendment by the European Parliament which proposes not to count palm oil based biofuel towards the EU's future renewable energy target. … In line with the proposal with the European Commission, any distinguishing of different types of conventional biofuels should be based – in the Council's view – on objective and transparent criteria to measure their environmentally sustainable production."

7.944. The Panel has also considered Malaysia's argument that there is no mention of the needs of developing countries in the measures at issue or related documents (the explanatory memorandum to the initial proposal for RED II, RED II itself, the impact assessment for RED II, the Delegated Regulation, and the Status Report (2019)), and that the provisions on independent smallholders in the Delegated Regulation are merely a theoretical option.

7.945. The Panel does not consider that the absence of any reference to the special needs of developing country Members in the text of the measure *itself* would support an inference that the European Union did not take account of the special needs of developing country Members. The Panel recalls that in *EC – Approval and Marketing of Biotech* Products and *US – COOL*, the panels considered that:

> [T]he absence of a reference to developing country needs in the text of the EC approval legislation does not demonstrate that that legislation itself fails to take account of these needs, or that the European Communities is precluded from taking account, or has not taken account, of these needs when applying that legislation.[1266]

7.946. In any event, it appears that the smallholder pathway was introduced in the Delegated Regulation in light of the concerns raised during the legislative process. Many of the letters from EU officials quoted above expressly acknowledge the situation of smallholders. The Delegated Regulation states, in its Recital 15, that "it is appropriate not to apply the financial additionality criterion to the additional feedstock cultivated on abandoned or severely degraded land or by independent small farm holders. This would in fact amount to an unreasonable administrative burden in light of the significant potential for productivity improvements and the barriers faced to finance the necessary investments." The European Union explains that the smallholder pathway was introduced at least in part in light of concerns raised by developing countries.[1267]

7.947. The Panel is unable to agree with Malaysia's argument that the provisions on independent smallholders in the Delegated Regulation are merely a theoretical option and, for that reason, cannot qualify as evidence that the European Union met its obligation to "take account of" the special needs of developing country Members with respect to the situation of independent smallholders. Rather, in the Panel's view, the inherently narrow scope of the smallholder pathway reasonably supports the inference that the European Union considered that administrative simplification for smallholders cannot come at the expense of jeopardizing the objective the measures seek to achieve.

7.948. Nor is the Panel persuaded by Malaysia's argument that the European Union's decision to not conduct an impact assessment for the Delegated Regulation is necessarily relevant to whether it complied with its obligation to "take account of" the special needs of developing country Members. Malaysia has not demonstrated that any such impact assessment would have been a central mechanism, let alone the exclusive mechanism, for the European Union to have taken account of the special development, financial and trade needs of developing country Members. Indeed, Malaysia argues that the impact assessment conducted for RED II and other related documents contains no mention of the comments received from developing countries and only vague references to impacts on third countries.[1268]

7.949. The Panel considers that the exchange of letters referred to above confirms that formal impact assessments for RED II and the Delegated Regulation were not, and would not have been, the exclusive mechanisms through which the European Union could have taken account of the

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[1266] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1623, cited in Panel Reports, *US – COOL*, paras. 7.787.

[1267] European Union's response to Panel question No. 163, paras. 825-826.

[1268] Malaysia's first written submission, para. 868.

concerns raised by Malaysia. The Panel notes that the parties have engaged in a robust exchange of arguments on the relevance or probative value of certain references to third countries contained in the impact assessment conducted for RED II and other related documents. In the absence of any argument that the impact assessment would have been the exclusive mechanism for the European Union to take account of the special needs of developing country Members, the Panel does not consider it necessary to consider them further.

7.950. The Panel has considered the relevance of the obligation in Article 2.9.4 of the TBT Agreement to the interpretation and application of the obligation in Article 12.3, and the parties have developed arguments on this issue in response to questions from the Panel. For reasons set out earlier in this Report, the Panel has concluded that the European Union acted inconsistently with the obligation in Article 2.9.4 to "allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account". The Panel considers that the scope of the obligation in Article 12.3 is different from the scope of the obligation in Article 2.9.4, and that it does not follow from its finding of inconsistency with Article 2.9.4 that Malaysia has demonstrated that the European Union acted inconsistently with its obligation to take account of the special needs of developing countries in the preparation of the technical regulations and the conformity assessment procedure at issue.

7.951. Before concluding, the Panel observes that although the obligation in Article 12.3 requires a regulating Member to take account of the special needs of developing countries in both the initial preparation and subsequent application of technical regulations and conformity assessment procedures, Malaysia's arguments under Article 12.3 are directed to the *preparation* of the measures at issue. In the absence of any arguments from Malaysia specifically directed at the European Union failing to take account of the special needs of developing countries in the *application* of the measures at issue, the Panel considers it appropriate to confine the scope of its assessment under Article 12.3 accordingly.

7.952. Based on its review of the evidence and the arguments of the parties, the Panel concludes that the more reasonable inference to be drawn from the facts is that the European Union gave active and meaningful consideration to the special needs of developing country Members identified by Malaysia and ultimately accorded more weight to the objective pursued through the measures at issue. The Panel therefore finds that Malaysia has failed to demonstrate that the European Union acted inconsistently with Article 12.3 by failing to take account of the special development, financial and trade needs of developing country Members in its preparation of the measures at issue.

7.1.4.3 Article 12.1 – General obligation

7.953. In its first written submission, Malaysia stated that "[w]ith respect to its claims under Article 12.1 of the TBT Agreement, Malaysia intends to establish that the EU has failed to provide differential and more favourable treatment to Malaysia."[1269] Malaysia further argued that "in light of the literal and teleological meaning of Article 12.1 of the TBT Agreement ("shall provide differential and more favourable treatment") … any measures adopted by WTO Members, which affect the special development, financial and trade needs of developing country Members, must result in special and differential treatment, the EU has fallen short of this obligation."[1270] However, in response to a question from the Panel, Malaysia subsequently explained that while its "challenge under Article 12.3 of the TBT Agreement is further informed by the obligations under Article 12.1 of the TBT Agreement", it "does not make a separate, individual claim under Article 12.1 of the TBT Agreement" but merely "underlines the relevance of Article 12.1 in the context of its Article 12.3 claim".[1271]

7.954. The Panel understands that Malaysia does not make any separate claim under Article 12.1, but that Malaysia still considers that Article 12.1 establishes a general and unqualified obligation to accord "differential and more favourable treatment to developing country Members" that informs other provisions of Article 12, such as Article 12.3.

7.955. Article 12.1 sets forth the obligation that:

[1269] Malaysia's first written submission, para. 833.
[1270] Malaysia's first written submission, para. 884.
[1271] Malaysia's response to Panel question No. 158.

> Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.

7.956. It follows from the terms of Article 12.1 that a finding of inconsistency with that provision requires a demonstration that the Member concerned has failed to provide the differential and more favourable treatment to developing country Members that is required under other provisions of Article 12, or through relevant provisions of other Articles of the TBT Agreement.[1272] Article 12.1 does not establish a self-standing or unqualified obligation to provide "differential and more favourable treatment to developing country Members". Rather, as the panel in *EC – Approval and Marketing of Biotech Products* stated, "Article 12.1 is relevant whenever there is a violation of one of the other provisions of Article 12, such as Articles 12.2, 12.3 or 12.7."[1273]

7.957. The Panel therefore is unable to agree with Malaysia to the extent that its arguments referencing Article 12.1 are to be construed as implying that this provision sets forth a general and unqualified obligation to provide "differential and more favourable treatment to developing country Members".

7.1.4.4 Conclusion on Article 12

7.958. The Panel concludes that Malaysia has failed to establish that the European Union has acted inconsistently with Article 12.3 of the TBT Agreement, as informed by Article 12.1 of the TBT Agreement.

7.1.5 Claims under GATT 1994

7.1.5.1 Article XI:1 – Restrictions on importation

7.1.5.1.1 Introduction

7.959. Having addressed the claims under the TBT Agreement, the Panel now turns to the claims against the EU measures under the GATT 1994. The Panel addresses the claim under Article XI:1 first, and then proceeds to address the claims under Articles III:4, I:1, and X:3(a) of the GATT 1994, in that order, for reasons already set out in the Panel's discussion of its order of analysis.

7.960. Malaysia submits[1274] that the European Union violates Article XI:1 because the high ILUC-risk cap and phase-out and low ILUC-risk certification make effective quantitative prohibitions or restrictions on imports of palm oil-based biofuel and palm oil. More specifically, as regards the relationship between Article XI:1 and Article III:4, Malaysia argues that these measures affect the opportunities for importation of palm oil-based biofuel and palm oil into the European Union as well as the competitive opportunities on the domestic market and that, therefore, both Article XI:1 and Article III:4 are applicable. In terms of the measure's limiting effects on trade, Malaysia refers to its arguments under Article 2.2 of the TBT Agreement. Furthermore, Malaysia notes that low ILUC-risk certification is neither effective nor practicable, and therefore has a negligible impact on the trade-

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[1272] The TBT Agreement contains numerous provisions on special and differential treatment. While most such provisions are indeed contained in Article 12, there are various others providing for such treatment in the TBT Agreement. These include, for instance, Article 11 (several provisions on technical assistance), Articles 2.12 and 5.9 (special attention to producers in developing countries when allowing a "reasonable interval" between the publication and entry into effect of technical regulations or conformity assessment procedures) or Article 15.4 (TBT Agreement Triennial Reviews, or any amendments to the Agreement, should be undertaken without prejudice to the provisions of Article 12).

[1273] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.47, subpara. 77. In *US – COOL*, which is the only prior dispute to involve a finding under Article 12.1, Mexico submitted a consequential claim of violation under Article 12.1, arguing that the challenged measure's inconsistency with Article 12.3 also resulted in its inconsistency with Article 12.1. After rejecting Mexico's claim under Article 12.3, the panel rejected Mexico's consequential claim under Article 12.1. (Panel Reports, *US – COOL*, paras. 7.744 and 7.802-803.)

[1274] Malaysia's first written submission, paras. 940-958; second written submission, paras. 118-126; responses to the Panel's questions, pp. 109-116; and comments on the European Union's responses to the Panel's questions, pp. 247-285.

restrictive effect of the high ILUC-risk cap and phase-out, and has its own limiting effect on importation.

7.961. The European Union submits[1275] that only measures that directly affect importation itself fall within the scope of Article XI and that Malaysia has not demonstrated that this is the case here. The European Union submits that Malaysia, for the purposes of this claim, has simply recast the same arguments and factual circumstances it has put forward under Article III, and has neither challenged different aspects of the measure nor shown specific circumstances that would warrant the application of both Article XI:1 and Article III:4. For the European Union, any hypothetical effects on importation are the consequence of a purely internal event, i.e. a supposed decrease in domestic demand for that product. Furthermore, the European Union points out that palm oil is imported for different purposes and that importation is not restricted in any way. With regard to low ILUC-risk certification, the European Union considers that it is a measure that favours producers of a high ILUC-risk crop, and as such incapable of negatively affecting imports.

7.1.5.1.2 Legal standard

7.962. Article XI is entitled "General Elimination of Quantitative Restrictions". Article XI:1 sets forth the obligation that:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member.

7.963. Article XI:1 thus requires that Members do not institute or maintain "prohibitions or restrictions … on the importation" of any product in their territory. Article XI:1 has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.964. In fact, these understandings differ widely and lie at the heart of Malaysia's claim. The Panel will therefore elaborate further on this below.

7.1.5.1.3 Assessment by the Panel

7.965. The high ILUC-risk cap and phase-out is, as is clear from the Panel's assessment of Malaysia's claims under Articles 2.1 and 2.2 of the TBT Agreement, a measure that has trade-restrictive effects. The Panel recalls its finding under Article 2.2, that the high ILUC-risk cap and phase-out is a measure that, by design, has a "limiting effect on trade" in palm oil-based biofuel. In the context of Article 2.1, the Panel found that this measure has a detrimental impact on imported palm oil-based biofuel as compared to the group of domestic like products.[1276]

7.966. The parties' disagreement essentially turns on whether these trade-restrictive effects suffice to bring the measure under Article XI:1. In this regard the parties have different understandings of the terms "restrictions … on the importation" in Article XI:1. For Malaysia, these terms refer to "limiting effects on importation" and therefore bring within the scope of Article XI any measure that may have such effects. For the European Union, these terms qualify the measures falling within the scope of Article XI as those directly limiting importation itself.

7.967. The Panel also understands the parties to disagree about the relationship between Article XI:1 and Article III:4. The third parties have also offered different views on this issue. The Panel considers that this relationship becomes relevant only if a measure appears to fall within the scope

[1275] European Union's first written submission, paras. 1187-1210; second written submission, paras. 250-253; responses to the Panel's questions, paras. 827-871; and comments on Malaysia's responses to the Panel's questions, paras. 300-312.

[1276] The Panel notes that it reaches a similar finding further below, in the context of assessing the claims under Articles III:4 and I:1, in respect of both palm oi-based biofuel and palm oil.

of both provisions. In other words, that relationship only matters where both provisions appear to apply to the same measure based on their respective terms.[1277]

7.968. The first question for the Panel is therefore whether the high ILUC-risk cap and phase-out falls within the scope of Article XI:1. This, in turn, is linked to the interpretation of the terms "restrictions… on the importation" in Article XI:1. Several factors support the European Union's interpretation that the terms "restrictions on the importation" qualify the measures falling within the scope of Article XI as being those directly limiting importation itself. First, the Panel observes that Article XI:1 refers to "restrictions … *on* the *importation*" of any product. The ordinary meaning of the term "on" ("with regard to", "in connection with" or "in relation to"[1278]) suggests that the obligation in Article XI:1 is not meant to cover restrictions merely *affecting* the importation of products. Similarly, the ordinary meaning of the term "importation" ("the action or practice of importing a commodity, merchandise, goods, etc."[1279]) suggests that the obligation in Article XI:1 is not meant to cover any restrictions on (let alone those *merely affecting*) for instance, "products imported from the territory of" another Member. The object of the obligation in Article XI:1 is the action of importing a good.

7.969. Second, the Panel considers that this interpretation is supported by analysing the term "restriction" in the context of Article XI:1. As noted by prior panels and the Appellate Body, "restriction" means "something that restricts a person or thing; a limitation on action; a limiting condition or regulation".[1280] This definition describes an act ("limitation" "condition", "regulation") (as distinct from an effect) and, therefore, a measure. This reading is confirmed by the phrase "other than duties, taxes or other charges". As Malaysia rightly points out, these are the only measures expressly identified as not covered by Article XI:1 which makes for a broad scope of the "restrictions" that are covered by Article XI:1.[1281] However, it also confirms that restrictions are measures, just as these duties, taxes and other charges are. Finally, it is "restrictions", together with "prohibitions", that "shall [not] be instituted or maintained". This phrase, by its two verbs in passive form, also denotes an act rather than the result or effect of such act.[1282] The term "restriction", therefore, clearly designates a measure.

7.970. This said, the above definition of the term "restriction" not only describes an act ("condition", "regulation") but also qualifies that act as one that is "limiting". The Appellate Body therefore concluded that "restriction" has to be understood "generally, as something that has a limiting

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[1277] The Panel understands Japan to hold a similar view when stating the following:

> [W]hether a measure falls within the scope of a particular provision of the GATT 1994 should be primarily determined through interpretation of the text of that provision in the context of the facts presented in a particular dispute.
>
> There may be instances in which the plain reading of the language of respective articles appears to suggest that the scope of application of two or more articles overlaps. In some of these instances, it might become necessary, as required in settling a specific dispute, to contemplate on the exclusivity of application of these articles in order to avoid contradictory consequences.

(Japan's third-party response to Panel question No. 3, para. 7. Other third parties also highlight the difference in scope between Article XI and Article III. See Brazil's third-party response to Panel question No. 3, para. 11; Colombia's third-party response to Panel question No. 3.)

[1278] Panel Reports, *India -Autos*, paras. 7.257, 7.261; *Colombia – Ports of Entry*, para. 7.227; and *Brazil – Retreaded Tyres*, para. 7.371.

[1279] More specifically, the relevant definition reads in full "The action or practice of importing a commodity, merchandise, goods, etc., from another country or territory for use or resale in the domestic market; an instance of this." (Oxford English Dictionary online, definition of "importation" (https://www.oed.com/dictionary/importation_n?tab=meaning_and_use#875896) (accessed on 21 September 2023).)

[1280] Appellate Body Reports, *China – Raw* Materials, para. 319; and *China – Rare Earths*, para. 5.91, see also Oxford English Dictionary online, definition of "restriction" (https://www.oed.com/dictionary/restriction_n?tab=meaning_and_use#25718816) (accessed on 21 September 2023).

[1281] Malaysia's first written submission, para. 945.

[1282] "Institute" means "to set up, establish, found, ordain; to introduce, bring into use or practice", see Oxford English Dictionary online, definition of "institute" (https://www.oed.com/dictionary/institute_v?tab=meaning_and_use#382143) (accessed on 21 September 2023); "maintain" means " to uphold, back up, stand by", see Oxford English Dictionary online, definition of "maintain" (https://www.oed.com/dictionary/maintain_v?tab=meaning_and_use#38643862) (accessed on 21 September 2023).

effect".[1283] The term "restriction" thus not only designates a measure, but it also qualifies that measure by describing its effect. Like past panels and the parties in this proceeding, this Panel has a broad understanding of what such limiting effects may be and how they can be demonstrated.[1284] Indeed, the Panel does not see a material difference between demonstrating such limiting effects in Article XI and demonstrating trade-restrictiveness, e.g. under Article 2.2 of the TBT Agreement. However, and importantly, the Panel considers that any such limiting effects only become relevant, if and where the measure at issue has been shown to be a measure "on the importation" of a product.

7.971. Thus, the Panel considers that the term "restriction" contains two different elements that must be established, for a measure to fall within the scope of Article XI:1: there must be a *measure* "on" importation, and that measure must have *limiting effects* on the importation of one or more products. Indeed, a measure may well regulate importation without having any limiting effect[1285] and there may well be limiting effects on trade without there being any measure "on" importation.[1286] In either case, there is no "restriction … on the importation" within the meaning of Article XI:1.

7.972. The Panel finds confirmation in prior cases, that the terms "restrictions … on the importation" require that a *measure* applies on or in relation to the action of importation, in addition to having trade-limiting effects. These cases include those that Malaysia refers to as supporting its own interpretation. The measures at issue in these cases, which were found to fall within the scope of Article XI:1, all concerned measures in relation to the action of importation. Some of these measures were directly related to the process of importation itself in that they were linked to or part of a licensing process.[1287] Other measures concerned the action of importing in a more direct, physical sense.[1288] As Malaysia rightly points out some past cases concerned *de jure* measures, while others concerned *de facto* measures, such as the measure considered (but not found to be in violation) in *Argentina – Hides and Leather,* which provided for the presence of representatives of the domestic

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[1283] Appellate Body Reports, *China – Raw* Materials, para. 319; and *China – Rare Earths*, para. 5.91, fn 548.

[1284] As summarized by the panel in *Colombia – Ports of Entry*:

> Thus, as evidenced above, a number of GATT and WTO panels have recognized the applicability of Article XI:1 to measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly, all of which have implications on the competitive situation of an importer. Moreover, it appears that findings in each of these cases were based on the design of the measure and its potential to adversely affect importation, as opposed to a standalone analysis of the actual impact of the measure on trade flows.

(Panel Report, *Colombia – Ports of Entry*, para. 7.240.)

[1285] See for example the Appellate Body's discussion on import formalities and requirements within the meaning of Article VIII of the GATT 1994 in *Argentina – Import Measures*:

> In our view, not every burden associated with an import formality or requirement will entail inconsistency with Article XI:1 of the GATT 1994. Instead, only those that have a limiting effect on the importation of products will do so.

(Ibid., para. 5.243.)

[1286] The Panel notes that the measure at issue in *Australia – Plain Packaging* may serve as an example. It was found to have trade-restrictive effects within the meaning of Article 2.2. However, the complainants did not challenge the measure under Article XI:1. (Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1255.)

[1287] For example, in *India – Autos* a trade balancing condition contained in a Memorandum of Understanding that manufacturers of automobiles were required to sign in order to obtain an import licence, directly determined the amount of imports allowed into the country. (Panel Report, *India – Autos*, paras. 2.4-2.5.) Similarly, in *Argentina – Import Measures*, companies were not allowed to import unless they achieved a trade balance or an export surplus through a limited number of specific actions. (Panel Report, *Argentina – Import Measures*, para. 6.121.) Other cases involving similar import licensing measures include *India – Quantitative Restrictions* (import licensing and other measures); *Indonesia – Import Licensing Regimes* (import licensing); *Indonesia – Chicken* (import licensing); *China – Raw Materials* (export licensing); *Colombia – Textiles (Article 21. 5 – Panama)* (specific bond requirement).

[1288] For example, in *Colombia – Ports of Entry* the measures at issue concerned physical access to certain ports of entry. (Panel Report, *Colombia – Ports of Entry*, paras. 7.219-7.223.) Another example is the dispute *EU – Energy Package* where the panel considered certain restrictions on services for gas pipelines to be in the nature of restrictions on importation. The panel argued as follows:

> We consider that due to the fixed nature of pipeline infrastructure and the necessity for natural gas transported by pipeline to flow along predetermined paths and to be imported through a limited number of fixed entry points, an arrangement conditioning access to the transport capacity of such fixed infrastructure with a demonstrable and sufficiently direct link to an entry point for that product into the market of the importing Member may have an effect on the importation of the product in question. (Panel Report, *EU – Energy Package*, para. 7.994.)

tanning industry in the process of exportation of hides and leathers.[1289] Finally, in some cases, panels have had to explore whether the measure at issue concerned the action of "importation" itself rather than an already imported product. In *Brazil – Retreaded Tyres*, for example, the panel decided that certain fines (including fines on marketing and transport), because they served the purposes of penalizing the act of importing and thus enforced an import ban, were restrictions on "importation".[1290]

7.973. Turning to the facts of this case, the Panel observes that, based on its understanding that Article XI:1 merely requires the showing of limiting effects on importation, Malaysia has not demonstrated that the measure is applied on or in relation to importation with regard to either the high ILUC-risk cap and phase-out itself or the low ILUC-risk certification procedure.[1291] In fact, the evidence before the Panel shows that the high ILUC-risk cap and phase-out is not applied on or in relation to importation, but rather in relation to renewable energy targets that EU member States are required to reach in their consumption, regardless of the origin of the various types of fuel they consume. Malaysia has therefore failed to demonstrate that there is a "restriction … on the importation" within the meaning of Article XI:1.

7.974. The Panel recalls that it must first consider whether a measure falls within the scope of both Article XI:1 and Article III:4, before addressing any questions as to the relationship between these two provisions. As Malaysia has not demonstrated that the high ILUC-risk cap and phase-out and low ILUC-risk certification procedure fall within the scope of Article XI:1, the Panel does not go on to consider the relationship between Article XI:1 and Article III:4.

7.1.5.1.4 Conclusion on Article XI:1

7.975. Malaysia has not established that the high ILUC-risk cap and phase-out or the low ILUC-risk certification procedure is inconsistent with the obligation in Article XI:1 of the GATT 1994 to not institute or maintain any prohibitions or restrictions on the importation of any product of the territory of another Member.

7.1.5.2 Article III:4 – National treatment

7.1.5.2.1 Introduction

7.976. The Panel now turns to the claim under Article III:4 of the GATT 1994.

7.977. Malaysia submits[1292] that the European Union violates Article III:4 of the GATT 1994 because the high ILUC-risk cap and phase-out and low ILUC-risk certification discriminates between palm oil and palm oil-based biofuel originating in Malaysia on the one hand and like products of EU origin on the other hand. More specifically, Malaysia argues that the measure at issue is a law, regulation or a requirement falling within the scope of Article III:4 that caps and ultimately phases-out the eligibility of palm oil-based biofuels for counting towards EU renewable energy targets. Malaysia contends that because there is essentially no market for biofuels that are not eligible to count towards the EU renewable energy targets, the measure limits and eventually eliminates the competitive opportunities for palm oil-based biofuel on the EU market, as compared to rapeseed oil- and soybean oil-based biofuel, which remain eligible. According to Malaysia, this in turn limits and

[1289] Panel Report, *Argentina – Hides and Leather*, para. 11.22.

[1290] Panel Report, *Brazil – Retreaded Tyres*, para. 7.372. Other cases that can be said to belong in this category are those concerning state trading enterprises. In *Korea – Various Measures on Beef*, the panel stated that:

> Based on the panel findings in the Canada - Marketing Agencies (1988) case, the Panel considers that to the extent that LPMO fully controls both the importation and distribution of its 30 per cent share of Korean beef quota, the distinction normally made in the GATT between restrictions affecting the importation of products (i.e. border measures) and restrictions affecting imported products (i.e. internal measures) loses much of its significance.

(Panel Report, Korea – Various Measures on Beef, para. 766.)

[1291] The Panel recalls that in its assessment of the high ILUC-risk cap and phase out it takes account of the low ILUC-risk criteria. Therefore, the Panel considers Malaysia's separate challenge of low ILUC-risk certification as relating to the low ILUC-risk certification procedure, see para. 7.40above.

[1292] Malaysia's first written submission, paras. 921-939; second written submission, paras. 330-342; responses to the Panel's questions, pp. 46-60; and comments on the European Union's responses to Panel's questions, pp. 155-174.

eliminates the demand for palm oil on the EU market for biofuel feedstocks, which is not the case for rapeseed oil or soybean oil. In addition, Malaysia claims less favourable treatment on the grounds that Malaysian suppliers of palm oil-based biofuel are subject to low ILUC-risk certification while EU suppliers of like biofuels are not.

7.978. The European Union contests[1293] that the high ILUC-risk cap and phase-out falls within the scope of Article III:4 and that it discriminates against palm oil-based biofuel and/or palm oil. More specifically, the European Union disputes the characterization of the measure essentially as a market access condition and submits that Malaysia has failed to discharge the burden of proof that the measure affects the internal sale of a product. According to the European Union, Malaysia has not demonstrated the causal link between the eligibility to count towards the renewable energy targets and market access for palm oil and palm oil-based biofuel. The European Union further argues that Malaysia has unduly limited the less favourable treatment analysis to a few selected like products and that the measure treats palm oil and palm oil-based biofuel in the same manner irrespective of where it is produced.

7.979. In their arguments, both parties thus raise a number of issues that are the same or similar to those addressed in the section concerning Malaysia's claim under Article 2.1 of the TBT Agreement. More specifically, the parties refer back to or repeat the arguments they make with respect to the like products and national treatment components of the analysis under Article 2.1. Where relevant, the Panel thus relies on and refers back to the findings it has already made with respect to that claim.

7.1.5.2.2 Legal standard

7.980. Article III of the GATT 1994 is entitled "National Treatment on Internal Taxation and Regulation". Article III:4 sets forth the obligation that:

> The products of the territory of any Member imported into the territory of any other Member 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. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

7.981. Article III:4 has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.982. Based on the text of the provision, panels and the Appellate Body have explained the three elements of a violation of Article III:4 as follows[1294]:

a. the imported and domestic products at issue are "like products";

b. the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and

c. the imported products are accorded "less favourable" treatment than that accorded to like domestic products.

7.983. The Panel will elaborate further on the elements of the legal standard in Article III:4 as necessary in the course of its assessment of the issues in dispute.

7.984. The Panel notes that Malaysia makes its claim under Article III:4 with respect to the treatment of both palm oil-based biofuel and palm oil used as biofuel feedstock. The Panel will

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[1293] European Union's first written submission, paras. 1140-1186; second written submission, paras. 234-249; responses to the Panel's questions, paras. 429-431 and 437-483; and comments on Malaysia's responses to the Panel's questions, paras. 184-210.

[1294] Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.

therefore first address the parties' arguments with respect to each of these two types of products in turn.

7.1.5.2.3 Palm oil-, rapeseed oil-, and soybean oil-based biofuels

7.1.5.2.3.1 Like products

7.985. The Panel recognizes that the scope of the non-discrimination obligation in Article III:4 and in Article 2.1 of the TBT Agreement is different; while the national treatment obligation features in both provisions, the MFN obligation is contained only in the latter. The Panel is also mindful that the very concept of like products is not identical across different provisions of WTO agreements.[1295] These differences notwithstanding, panels and the Appellate Body have highlighted important parallels that exist between the non-discrimination obligations contained in Articles 2.1 and III:4.[1296]

7.986. In particular, the likeness analysis in each of these provisions is "fundamentally, a determination about the nature and extent of a competitive relationship between and among products".[1297] To that end, and similarly to the assessment under Article 2.1, panels and the Appellate Body have regarded the four likeness criteria outlined in the Working Party Report on Border Tax Adjustments as a helpful analytical tool in determining whether products are like for the purposes of Article III.[1298] Therefore, in assessing whether the imported and domestic products are like, the Panel will rely on the general principles set out in the Panel's findings under Article 2.1, unless further considerations follow from the nature of the obligation in Article III:4 or the relevant factual circumstances.

7.987. With respect to biofuels, Malaysia refers back to the arguments and evidence submitted in support of the claim under Article 2.1 of the TBT Agreement.[1299] The European Union, for its part, reiterates that by failing to properly identify the universe of like products, Malaysia has failed to make the case that the products are like[1300] and otherwise refers back to the arguments concerning the likeness of palm oil-, rapeseed oil- and soybean oil-based biofuel under Article 2.1.[1301]

7.988. Given the overlap in the arguments the parties make with respect to the likeness of palm oil-, rapeseed oil-, and soybean oil-based biofuel, the Panel does not see anything that would lead it, in the circumstances of this case, to a different conclusion about the likeness of these three products than that reached under Article 2.1 of the TBT Agreement. Therefore, on the basis of the findings made in the context of Article 2.1 above, the Panel concludes that, for the purposes of its analysis under Article III:4, palm oil-, rapeseed oil- and soybean oil-based biofuels are like products.

7.1.5.2.3.2 The scope of application of Article III:4

7.989. Malaysia submits that the high ILUC-risk cap and phase-out and low ILUC-risk certification are laws, regulations or requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of palm oil-based biofuel.[1302] Malaysia relies on its arguments concerning the impact of the high ILUC-risk cap and phase-out on market opportunities for palm oil-based biofuel and argues that Article III:4 covers not only mandatory measures, but also those that impact decisions of private parties with regard to the sale, offering for sale, purchase and use of a product.[1303]

[1295] Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 21; and *EC – Seal Products*, para. 5.81.
[1296] Appellate Body Reports, *EC – Seal Products*, para. 5.82 and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.278.
[1297] Appellate Body Report, *EC – Asbestos*, para. 99.
[1298] Appellate Body Report, *EC – Asbestos*, para. 101.
[1299] Malaysia's first written submission, para. 927.
[1300] European Union's first written submission, paras. 1158-1163.
[1301] European Union's first written submission, para. 1143.
[1302] Malaysia's first written submission, paras. 924-925; second written submission, paras. 333-334.
[1303] Malaysia's first written submission, paras. 924-925.

7.990. The European Union does not dispute that the measures are a law or a regulation.[1304] However, it contests that the high ILUC-risk cap and phase-out "affects" internal sales, offering for sale of products, as it does not impose market access conditions.[1305]

7.991. The Panel recalls that the term "affecting" in Article III:4 has been found to express a link between certain types of government actions and "specific transactions, activities and uses relating to products in the marketplace".[1306] It has also been interpreted broadly, extending beyond the meaning of "regulating" or "governing" sales or offering for sale of products.[1307] Accordingly, Article III:4 covers not only laws and regulation which directly govern the conditions of sale or purchase but also those which might adversely modify the conditions of competition between domestic and imported products.[1308] To that end, the effects of a measure on those who sell, purchase, transport, distribute, or use the products are not beyond scrutiny under Article III:4.[1309] Applying these principles, past panels found governmental measures providing incentives to purchase or offer for sale certain products over others to fall within the ambit of Article III:4.[1310]

7.992. Article 26(2) of RED II does not impose an exact fuel mix on EU member States or fuel producers. However, it specifically limits and gradually excludes from consideration for the purposes of meeting the renewable energy targets those biofuels that are made from high ILUC-risk feedstocks. All EU member States thus must take the high ILUC-risk cap and phase-out into account in designing any domestic "incentives for market players to use certain biofuels", as the European Union itself acknowledges, to meet their national contribution targets. In that sense, the measure affects the competitive opportunities for biofuels. In light of these considerations, the Panel finds that the high ILUC-risk cap and phase-out is a measure "affecting" the sale, offering for sale, purchase, transportation, distribution, or use of palm oil-based biofuel and falls within the scope of Article III:4.

7.993. The Panel recalls that Malaysia submits that low ILUC-risk certification limits and eventually excludes, in its own right, the possibility for imported palm oil-based biofuel to be counted towards EU renewable energy targets. In the Panel's view, Malaysia's claim does not distinguish between the ILUC-risk certification criteria or the certification procedure. To the extent that Malaysia argues that it is the *criteria* for low ILUC-risk certification contained in Articles 4 and 5 of the Delegated Regulation that accord less favourable treatment to palm oil-based biofuel, these arguments are addressed by the Panel together with the high ILUC-risk cap and phase-out.[1311]

7.994. Insofar as Malaysia is challenging under Article III:4 the low ILUC-risk certification *procedure*, the Panel must first consider whether it is a "law, regulation or requirement" affecting the internal sale, offering for sale, purchase, transportation, distribution or use of biofuels.[1312] Elsewhere in its submissions, Malaysia argues that the European Union has devised a "prohibitively complex system for low ILUC-risk certification".[1313] Malaysia also contends that the certification procedure "arguably alters the conditions of competition … since currently all other feedstock do not require" such certification.[1314]

7.995. Panels and the Appellate Body have found that procedural and administrative requirements may fall within the scope of Article III:4, if they affect competitive opportunities in a given market.[1315] The Panel notes that the low ILUC-risk certification procedure is reflected in the provisions of the Delegated Regulation and as such constitutes a "law, regulation or requirement".

[1304] European Union's first written submission, para. 1154.
[1305] European Union's first written submission, para. 1156.
[1306] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 208.
[1307] Appellate Body Report, *EC – Bananas III*, para. 220 (fn omitted).
[1308] Panel Report, *Canada – Autos*, para. 10.80. See also Panel Report, *Argentina – Financial Services*, para. 7.1019-7.1023.
[1309] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 305.
[1310] See e.g. Panel Reports, *India – Autos*, paras. 7.195-7.198 and 7.307-7.309; and *China – Auto Parts*, para. 195.
[1311] Regarding the distinction between low ILUC-risk certification criteria and procedure, see section of this Report on preliminary considerations.
[1312] Malaysia's first written submission, paras. 924-925.
[1313] Malaysia's first written submission, para. 460.
[1314] Malaysia's first written submission, para. 476.
[1315] Appellate Body Reports, *China – Auto Parts*, para. 195; and Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.665.

The Panel further notes that any high ILUC-risk biofuel made from a yield meeting the low ILUC-risk criteria must undergo a certification procedure in order to become eligible to count towards the EU renewable energy targets outside of the limitations imposed by the high ILUC-risk cap and phase-out. The design of the certification procedure thus can impact the biofuel's eligibility to count towards the EU renewable energy targets. Therefore, and bearing in mind the Panel's findings regarding the link between the eligibility for the EU renewable energy targets and the opportunities on the EU biofuel market, the Panel considers that the low ILUC-risk certification procedure affects the sale, offering for sale, purchase, transportation, distribution or use of biofuels generally classified as high ILUC risk.

7.1.5.2.3.3 Treatment no less favourable

7.996. Article III:4 requires WTO Members to accord to the group of imported products treatment no less favourable than that accorded to the group of like domestic products.[1316] This obligation has been interpreted as requiring effective equality of competitive opportunities for imported and domestic products on the internal market.[1317] In order to establish an inconsistency with Article III:4, a complainant must therefore show that the measure modifies the conditions of competition to the detriment of imported products.[1318]

7.997. The legal standard for demonstrating that a measure fails to accord "treatment no less favourable" under Article III:4 is similar to that which applies under Article 2.1 of the TBT Agreement, insofar as both require a demonstration that the measure modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products. Indeed, as noted above[1319], there are important parallels in the scope and formulation of these two non-discrimination obligations[1320], with the main difference being that Article III:4 does not require a Panel to determine whether any detrimental impact on the imported product "stems exclusively from a legitimate regulatory distinction".[1321]

7.998. Mindful of these considerations, insofar as the parties rely on the same arguments that they make under Article 2.1 of the TBT Agreement for the purposes of establishing the existence of a "detrimental impact" under Article III:4, the Panel will refer back to the relevant findings made under that provision.

7.999. The Panel notes that with respect to biofuels, the parties essentially refer to or repeat the arguments they make with regard to the national treatment component of Malaysia's claim under Article 2.1.[1322] Given the overlap in the parties' arguments, the Panel does not see anything that would lead it, in the circumstances of this case, to a different conclusion regarding the "no less favourable treatment" of biofuels than that which it has already reached concerning the existence of a detrimental impact under Article 2.1. Therefore, for the reasons explained in its findings under Article 2.1, the Panel finds that the high ILUC-risk cap and phase-out accords less favourable treatment to palm oil-based biofuel imported from Malaysia, as compared to rapeseed oil- and soybean oil-based biofuel of EU origin.[1323]

7.1000. The Panel notes that Malaysia further argues that low ILUC-risk certification accords less favourable treatment to palm oil-based biofuel.[1324] The Panel recalls in this regard that the low ILUC-risk certification *criteria* are considered together with the high ILUC-risk cap and phase-out.[1325] As regards the low ILUC-risk certification *procedure*, Malaysia refers to the same arguments it makes in relation to its claim under Article 5.1.1 of the TBT Agreement and argues that "as a result of Article 3 of the Delegated Regulation, only oil palm crop-based biofuel is high ILUC-risk biofuel and

[1316] Appellate Body Report, *EC – Asbestos*, para. 100.
[1317] Appellate Body Reports, *Japan – Alcoholic Beverages*, p. 16; and *EC – Seal Products*, para. 5.101.
[1318] Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 128; and *Korea – Various Measures on Beef*, para. 137.
[1319] See para. 7.463 above.
[1320] Appellate Body Reports, *US – Clove Cigarettes*, para. 100; and *EC – Seal Products*, para. 5.122.
[1321] Appellate Body Reports, *EC – Seal Products*, para. 5.125.
[1322] Malaysia's first written submission, para. 936.
[1323] The European Union acknowledges that it produces domestically both rapeseed oil- and soybean oil-based biofuel. European Union's first written submission, para. 1172.
[1324] Malaysia's first written submission, para. 937.
[1325] See section of this Report on preliminary considerations.

therefore subject to low ILUC-risk certification."[1326] Malaysia adds that being subject to low ILUC-risk certification "distorts the conditions of competition to the detriment of the Malaysian suppliers".[1327]

7.1001. Article 3 of the Delegated Regulation is one of the central elements of the design of the high ILUC-risk cap and phase-out. It contains the formula which determines, on the basis of certain variables and assumptions, whether a particular feed and food crop is to be considered as a high ILUC-risk biofuel feedstock. As Malaysia itself appears to be arguing, it is the result of the application of this formula, and the high ILUC-risk cap and phase-out more generally, that requires suppliers of palm oil-based biofuel from Malaysia to undergo the certification procedure for the purposes of counting towards EU renewable energy targets outside of the limitations imposed by the high ILUC-risk cap and phase-out. In other words, the "detrimental impact" that Malaysia has identified in its claim stems not from low ILUC-risk certification, but from the high ILUC-risk cap and phase-out. As such, it is addressed together with the Panel's findings concerning the high ILUC-risk cap and phase-out. Malaysia has thus failed to establish that the low ILUC-risk certification procedure accords less favourable treatment to palm oil-based biofuel in its own right.

7.1.5.2.4 Biofuel feedstocks

7.1002. The Panel understands the essence of Malaysia's position to be that insofar as the high ILUC-risk cap and phase-out and low ILUC-risk certification procedure have a detrimental impact on palm oil-based biofuel, that detrimental impact necessarily extends to its feedstock (i.e. palm oil). The Panel notes that Malaysia's arguments concerning the alleged less favourable treatment of palm oil rest on the same premises as those relating to the treatment of palm oil-based biofuel. In these circumstances, the Panel must consider the practical value that any such findings would have for implementation, in light of its other findings relating to palm oil-based biofuel.

7.1003. The Panel sees no reason for making separate and additional findings under Article III:4 on whether the same aspects of the same measure that have been found to have a detrimental impact on imports of palm oil-based biofuel also have a detrimental impact on its feedstock (i.e. palm oil). The Panel recalls that, for the purposes of its claim under the national treatment and MFN obligations in Article 2.1 of the TBT Agreement, Malaysia focuses only on palm oil-based biofuels, and the Panel's findings are formulated accordingly. Malaysia has not explained how additional findings of a detrimental impact on the feedstock (i.e. palm oil) would have any practical value from the perspective of a possible appeal, from the perspective of implementation, or otherwise.

7.1004. The Panel notes that, because the alleged detrimental impact on the feedstock allegedly stems from the same aspects of the same measure that give rise to a detrimental impact on palm oil-based biofuels, it necessarily follows that any action taken to implement the findings in respect of discrimination in respect of palm oil-based biofuel would necessarily address any discrimination arising from the same aspects of the same measure in respect of the feedstock (i.e. palm oil). Thus, from the perspective of implementation, separate and additional findings regarding the feedstock (i.e. palm oil) would appear to be entirely redundant.[1328]

7.1005. Therefore, the Panel does not consider it necessary to make additional findings on the treatment of palm oil to secure a positive solution to this dispute or to assist the DSB in making the rulings and recommendations provided for in the covered agreements.

7.1.5.2.5 Conclusion on Article III:4

7.1006. The Panel finds that the high ILUC-risk cap and phase-out out is inconsistent with Article III:4 of the GATT 1994 because it accords less favourable treatment to palm oil-based biofuel from Malaysia than that accorded to like products of EU origin.

[1326] Malaysia's first written submission, para. 937; response to Panel question No. 91.

[1327] Malaysia's first written submission, para. 937.

[1328] Furthermore, the Panel does not consider that such additional findings on feedstocks would prejudge the level of nullification or impairment arising from the high ILUC-risk cap and phase-out beyond any level that would otherwise be found to exist.

7.1007. Insofar as Malaysia challenges the low ILUC-risk certification procedure as a separate measure under Article III:4 of the GATT 1994, it has not established any inconsistency with this obligation.

7.1.5.3 Article I:1 – Most-favoured nation treatment

7.1.5.3.1 Introduction

7.1008. The Panel now turns to the claim under Article I:1 of the GATT 1994.

7.1009. Malaysia submits[1329] that the European Union violates Article I:1 because the high ILUC-risk cap and phase-out and low ILUC-risk certification discriminate among palm oil and oil palm crop-based biofuel and like products originating in third countries. More specifically, Malaysia reiterates that palm oil-based biofuel is like rapeseed-oil based biofuel and soybean oil-based biofuel and that palm oil is like rapeseed oil and soybean oil used as biofuel feedstock. Malaysia contends that rapeseed oil-based biofuel and soybean oil-based biofuel, and, by extension, their feedstocks, benefit from commercial opportunities flowing from their eligibility to count towards EU renewable energy targets within the 7% maximum share. According to Malaysia, this advantage is not extended to palm oil-based biofuel and palm oil due to the high ILUC-risk cap and phase-out limiting and eventually excluding eligibility of palm oil-based biofuel to count towards the renewable energy consumption targets. Malaysia adds that producers of other oil crop-based biofuels are exempt from the obligation to certify their biofuels as low ILUC risk, which confers an advantage in itself.

7.1010. The European Union submits[1330] that Malaysia has failed to demonstrate that the high ILUC-risk cap and phase-out is inconsistent with Article I:1. More specifically, the European Union argues that Malaysia has failed to demonstrate its case on like products and contests that the high ILUC-risk cap and phase-out discriminates between palm oil and palm oil-based biofuel and like products, and that an advantage is conferred on the latter. The European Union refers in this regard to its submissions relating to Malaysia's claims under Article 2.1 of the TBT Agreement. The European Union also submits that low ILUC-risk certification treats all feed and food crop-based biofuels in an equivalent manner.

7.1011. In arguing their respective positions under Article I:1, the parties make the same or similar arguments to those made in the context of Malaysia's claims under Articles 2.1 and Article III:4. Therefore, where relevant, the Panel will refer to the findings it makes with respect to those two claims.

7.1.5.3.2 Legal standard

7.1012. Article I is entitled "General Most-Favoured Nation Treatment". Article I:1 sets forth the obligation that:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

7.1013. Article I:1 has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

[1329] Malaysia's first written submission, paras. 890-920; second written submission, paras. 322-329; responses to the Panel's questions, pp. 47-55 and 57-58; and comments on the European Union's responses to the Panel's questions, pp. 156-174.

[1330] European Union's first written submission, paras. 1129-1139; second written submission, paras. 201-233; responses to the Panel's questions, paras. 432-466 and 471-482; and comments on Malaysia's responses to the Panel's questions, paras. 184-198.

7.1014. Panels and the Appellate Body have found based on the text of Article I:1 that establishing a violation of Article I:1 requires showing the following elements[1331]:

a. the measure at issue falls within the scope of application of Article I:1;

b. the imported products at issue are "like products" within the meaning of Article I:1;

c. the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and

d. the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members.

7.1015. If a Member grants an advantage of any nature to any product imported from any country, it must accord such advantage "immediately and unconditionally" to any like imported product.[1332] The terms of the non-discrimination obligation in Article I:1 are formulated differently from Article III:4. Notwithstanding these differences, both provisions are concerned, fundamentally, with prohibiting discriminatory measures by requiring equality of competitive opportunities for like imported products from all Members (Article I:1) and for imported products and like domestic products (Article III:4).[1333]

7.1016. The Panel will elaborate further on the elements of the legal standard in Article I:1 as necessary in the course of its assessment of the issues in dispute.

7.1.5.3.3 The scope of Article I:1

7.1017. As reflected in the text of the provision, the MFN obligation in Article I:1 applies:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,*

7.1018. Malaysia argues that Article I:1 is applicable in the case at hand, because the high ILUC-risk cap and phase-out and low ILUC-risk certification fall within the scope of Article III:4.[1334] As such, they constitute a "matter referred to in paragraphs 2 and 4 of Article III".

7.1019. The Panel does not understand the European Union to be contesting the applicability of Article I:1.

7.1020. The Panel has previously found, in the context of its assessment under Article III:4, that the high ILUC-risk cap and phase-out is a "law, regulation or requirement affecting the sale, offering for sale, purchase, transportation, distribution, or use" of palm oil-based biofuel and palm oil.[1335] The Panel thus makes the consequential finding that the measure is a "matter referred to in paragraphs 2 and 4 of Article III" and as such falls within the ambit of Article I:1.

7.1021. The Panel notes that, as regards low ILUC-risk certification, the premise of Malaysia's argument is that the measure falls within the scope of Article III:4. As noted above[1336], Malaysia's claim does not distinguish between the low ILUC-risk certification criteria or the certification procedure. To the extent that Malaysia argues that it is the *criteria* for low ILUC-risk certification contained in Articles 4 and 5 of the Delegated Regulation that do not extend to palm oil and palm

[1331] Appellate Body Reports, *EC – Seal Products*, para. 5.86.

[1332] Appellate Body Reports, *EC – Seal Products*, para. 5.87; and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.277.

[1333] Appellate Body Reports, *EC – Seal Products*, para. 5.82; and *US – Tuna II (Mexico)*, para. 7.29, also in the context of Article 2.1 of the TBT Agreement; Panel Report, *EU – Energy Package*, para. 7.571.

[1334] Malaysia's first written submission, para. 895-896.

[1335] See section on the scope of application of Article III:4 above.

[1336] See section on the scope of application of Article III:4 above.

oil-based biofuel the advantage accorded to like products of other origins, these arguments are addressed by the Panel together with the high ILUC-risk cap and phase-out. Insofar as Malaysia is challenging under Article III:4 the low ILUC-risk certification *procedure*, the Panel recalls that it accepts that it is a "law, regulation or requirement affecting the sale, offering for sale, purchase, transportation, distribution, or use" of products. Therefore, the Panel makes the consequential finding that the low ILUC-risk certification procedure is also a "matter referred to in paragraphs 2 and 4 of Article III" and that it also therefore falls within the scope of Article I:1.

7.1022. As with Article III:4, Malaysia makes its claim under Article I:1 with respect to the treatment of both palm oil-based biofuel and palm oil used as biofuel feedstock. The Panel will therefore first address the parties' arguments with respect to each of these two types of products in turn.

7.1.5.3.4 Palm oil-, rapeseed oil- and soybean oil-based biofuels

7.1.5.3.4.1 Like products

7.1023. The Panel recognizes that the non-discrimination obligations in Articles I:1, III:4 and 2.1 differ in scope, and that the elements of the legal tests are not identical. The Panel is also mindful that the very concept of "like products" is not identical across different provisions.[1337] These differences notwithstanding, panels and the Appellate Body have highlighted important parallels between these obligations.[1338] In particular, the likeness analysis in each of these provisions is "fundamentally a determination about the nature and extent of a competitive relationship between and among products".[1339] To that end, and similarly to the assessment under Article 2.1 of the TBT Agreement, panels and the Appellate Body have regarded the four likeness criteria outlined in the Working Party Report on Border Tax Adjustments as a helpful analytical tool in determining whether products are like under Article I:1.[1340]

7.1024. The Panel notes that with respect to the likeness of palm oil-, rapeseed oil-, and soybean oil-based biofuel, Malaysia makes essentially the same arguments as those submitted in support of its claims under Article 2.1 and Article III:4.[1341] Given the overlap in the arguments the parties make with respect to the likeness of palm oil-, rapeseed oil-, and soybean oil-based biofuel the Panel does not see anything that would lead it, in the circumstances of this case, to a different conclusion regarding the likeness of these products compared with the conclusions already reached under Articles 2.1 and III:4. In that context, the Panel has found that PME, RME and SBME, as well as HVO made from palm oil, rapeseed oil and soybean oil have similar or the same properties, end-uses, and are considered highly substitutable by the relevant consumers. Therefore, on the basis of those findings, the Panel concludes that for the purposes of its analysis under Article I:1, palm oil-, rapeseed oil- and soybean oil-based biofuels are like products.

7.1.5.3.4.2 Advantage, favour, privilege, or immunity

7.1025. Malaysia contends that rapeseed oil- and soybean oil-based biofuel benefit from an advantage in the form of market access opportunities within the 7% maximum share.[1342] Malaysia also contends that an additional advantage consists in exempting the producers of rapeseed oil- and soybean oil-based biofuels from the obligation to certify biofuels as low ILUC risk.

7.1026. The European Union contests that any advantage is conferred on rapeseed oil- and soybean oil-based biofuels. The European Union relies in this regard on its arguments contesting the link between eligibility to count towards EU renewable energy targets and the demand for biofuels.[1343]

[1337] Appellate Body Reports, *EC – Seal Products*, paras. 5.81-5.82; and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.277.

[1338] Appellate Body Reports, *EC – Seal Products*, para. 5.82; and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.278.

[1339] Appellate Body Report, *EC – Asbestos*, para. 99.

[1340] Appellate Body Report, *EC – Asbestos*, para. 101.

[1341] Regarding biofuels, see Malaysia's first written submission, para. 908.

[1342] Malaysia's first written submission, para. 899.

[1343] European Union's first written submission, para. 1135; second written submission, paras. 226 and 228-229.

The European Union also argues that the measures at issue do not differentiate between palm oil-based biofuel imported from Malaysia and any other country.[1344]

7.1027. The Panel notes that the parties' arguments on the existence of an advantage for the purposes of Article I:1 essentially focus on an issue that the Panel has already addressed in several preceding sections, namely the link between eligibility to count towards EU renewable energy targets and the demand for biofuels. According to the European Union, Malaysia has not demonstrated that such a link exists or is sufficiently close to confer an advantage on rapeseed oil- and soybean oil-based biofuels.

7.1028. The Panel observes that the term "advantage" has been interpreted broadly and covers situations creating more favourable competitive opportunities or affecting the commercial relationship between products originating in different countries.[1345] Panels and the Appellate Body have considered as conferring an advantage not only those measures directly regulating access for products to a Member's market, but also those measures that create incentives for economic operators to choose certain imported products over others.[1346]

7.1029. The Panel has found that the demand for biofuels is mostly driven by EU renewable energy consumption targets and blending mandates. The Panel has also found that limiting or excluding a biofuel from eligibility to count towards these targets will reduce or virtually eliminate the demand for that biofuel on the EU market.[1347] Insofar as Article I:1 refers not to some advantage but to *any* advantage, it seeks to protect such competitive opportunities.[1348]

7.1030. The Panel further disagrees with the European Union that because the 7% maximum share does not require EU member States to include specific biofuels in the renewable energy mix, no "advantage" is conferred on rapeseed oil and soybean oil-based biofuels.[1349] It may well be that biofuels made from feedstocks other than rapeseed oil and soybean oil, or bioliquids or other gaseous fuels, will be used to achieve the 14% renewable energy target up to the 7% maximum share. The fact remains, however, that rapeseed oil- and soybean oil-based biofuels can be used to meet these renewable energy targets to an extent that palm oil-based biofuel cannot. This is precisely the type of "expectations of equal competitive opportunities" that Article I:1 seeks to protect for like imported products from all Members.[1350]

7.1031. Malaysia is thus not required to show the actual effects of the measure insofar as it has demonstrated that, based on the design and operation of the measure, it creates favourable competitive opportunities for some imported like products. This being said, there is evidence showing that food and feed crop-based biofuels accounted for approximately 60% of the renewable energy consumed in the transport sector in 2019.[1351] This is a sizeable part of the market presenting considerable commercial opportunities. The advantage conferred on rapeseed oil- and soybean oil-based biofuels is thus very real and not merely "hypothetical", as the European Union asserts.

7.1032. However, the Panel is unconvinced that an additional advantage is conferred on rapeseed oil- and soybean oil-based biofuels because they do not have to undergo the low ILUC-risk certification procedure.[1352] As noted above[1353], the advantage identified by Malaysia appears to be a corollary of the fact that rapeseed oil and soybean oil are not classified as high ILUC-risk feedstocks. Therefore, any such advantage cannot be considered as additional to the benefits

[1344] European Union's first written submission, para. 1135; second written submission, para. 227.

[1345] Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.239.

[1346] Panel Report, *EU – Energy Package*, para. 7.1312. See also Panel Reports, *US – Poultry (China)*, para. 7.415; *Colombia – Ports of Entry*, para. 7.341; and *Brazil – Taxation*, para. 7.1041.

[1347] See section addressing the existence of a detrimental impact of the high ILUC-risk cap and phase-out in the context of Malaysia's claim under Article 2.1.

[1348] Appellate Body Report, *Canada – Autos*, para. 79.

[1349] European Union's first written submission, para. 1135.

[1350] Panel Report, *Argentina – Hides and Leather*, para. 11.20; Appellate Body Reports, *EC – Seal Products*, para. 5.87.

[1351] Eurostat, Consumption of renewable energy in the transport sector in the EU-27 in 2011-2019, (Exhibit IDN-13).

[1352] Malaysia's first written submission, para. 900.

[1353] See paras. 7.1000-7.1001 above.

stemming from eligibility to count towards the EU renewable energy targets within the 7% maximum share.

7.1.5.3.4.3 Accorded immediately and unconditionally

7.1033. Malaysia argues that the advantage stemming from the eligibility to count towards the renewable energy targets is not extended to palm oil-based biofuel.[1354] Malaysia refers in this regard to the arguments concerning the design and operation of the high ILUC-risk cap and phase-out and in particular the commercial consequences of the exclusion of palm oil-based biofuel from the renewable energy targets.[1355]

7.1034. The European Union maintains that Article I:1 does not preclude WTO Members from attaching conditions to the conferral of an advantage.[1356] The European Union explains that in the case at hand, the condition attached to the advantage relates to the overall GHG emissions associated with the production of biofuel. These, according to the European Union, are different for palm oil-based biofuel on the one hand, and rapeseed oil- and soybean oil-based biofuel on the other hand.[1357]

7.1035. In the preceding sections, the Panel has found that the high ILUC-risk cap and phase-out limits and ultimately eliminates the eligibility of palm oil-based biofuel to count towards the renewable energy consumption targets.[1358] The Panel has further found that there is little to no demand for biofuels that are not eligible to count towards these targets as far as the EU biofuel market is concerned. The Panel has concluded on this basis that the high ILUC-risk cap and phase-out affects the competitive opportunities for palm oil-based biofuel on the EU biofuel market. It follows that, due to being subject to the high ILUC-risk cap and phase-out, palm oil-based biofuel imported from Malaysia cannot enjoy the same market opportunities as rapeseed oil- and soybean oil-based biofuels imported from other countries.

7.1036. It is true, as argued by the European Union, that Article I:1 does not preclude attaching certain conditions to granting an advantage.[1359] However, the Panel notes that Article I:1 "prohibits those conditions that have a detrimental impact on the competitive opportunities for like imported products from any Member".[1360] In the preceding sections, the Panel identified the classification of a biofuel feedstock as high ILUC risk, and the resulting application of the high ILUC-risk cap and phase-out, as the element giving rise to a detrimental impact against palm oil-based biofuel. This is precisely the type of condition that, when attached to an advantage, may have a detrimental impact on the competitive opportunities for like imported products from one or more Members.

7.1037. The Panel notes that the European Union adds that Article I:1 does not require WTO Members to extend an advantage which is subject to certain conditions to all Members in cases where their products do not meet those specified conditions.[1361] Therefore, according to the European Union, it is not required to extend an "advantage" to products which do not meet conditions imposed to reflect the European Union's policy objectives. Here, the Panel observes that in contrast to Article 2.1, and in line with Article III:4, the legal standard under Article I:1 does not entail any consideration of whether the detrimental impact of a measure on competitive opportunities for like imported products stems from a legitimate regulatory distinction.[1362] Such analysis is more appropriately conducted under Article XX, which the European Union has invoked in this dispute.

[1354] Malaysia's first written submission, para. 919.
[1355] Malaysia's first written submission, para. 919.
[1356] European Union's first written submission, para. 1137.
[1357] European Union's first written submission, paras. 1137-1138; response to Panel question No. 74, paras. 435-436.
[1358] See sections addressing the existence of a detrimental impact of the high ILUC-risk cap and phase-out in the context of Malaysia's claims under Articles 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.
[1359] Appellate Body Reports, *EC – Seal Products*, para. 5.88.
[1360] Appellate Body Reports, *EC – Seal Products*, para. 5.88.
[1361] European Union's first written submission, para. 1137.
[1362] Appellate Body Reports, *EC – Seal Products*, para. 5.90.

7.1.5.3.5 Biofuel feedstocks

7.1038. For the reasons explained above in the context of the claim under Article III:4, the Panel does not consider it necessary to make additional findings on the treatment of palm oil (as distinct from palm oil-based biofuel) to secure a positive solution to this dispute or to assist the DSB in making the rulings and recommendations provided for in the covered agreements.

7.1.5.3.6 Conclusion on Article I:1

7.1039. In light of the above, the Panel concludes that the high ILUC-risk cap and phase-out is inconsistent with Article I:1 of the GATT 1994 because it does not accord an advantage to palm oil-based biofuel from Malaysia that is accorded to like products imported from third countries.

7.1040. To the extent that Malaysia challenges the low ILUC-risk certification procedure as a separate measure under Article I:1 of the GATT 1994, it has not established that this procedure is inconsistent with this obligation.

7.1.5.4 Article X:3(a) – Reasonable and impartial administration

7.1.5.4.1 Introduction

7.1041. The Panel now turns to the claim under Article X:3(a) of the GATT 1994.

7.1042. Malaysia submits[1363] that the European Union violates Article X:3(a) because the high ILUC-risk cap and phase-out are based on/apply the concept of high ILUC risk, for which there is insufficient scientific support and which cannot be directly observed, measured or otherwise established[1364], and so cannot be applied or implemented in an impartial or reasonable manner. As regards low ILUC-risk certification, Malaysia submits that Articles 4 to 6 of the Delegated Regulation are premised on vaguely defined concepts without providing for the necessary elements that enable certification to be obtained. Malaysia explains that because the European Union failed to adopt implementing legislation providing for detailed rules that would allow products to be certified as low ILUC risk, no certification could take place, amounting to unreasonable administration.[1365]

7.1043. The European Union submits[1366] that the claim under Article X:3(a) falls outside the scope of Article X:3(a) because the Delegated Regulation does not administer RED II but creates substantive rules. More specifically, the European Union argues that the high ILUC-risk criteria and low ILUC-risk criteria are substantive matters not concerning the administration or putting into practical effect of RED II, and that in any event, the low ILUC-risk criteria in the Delegated Regulation provide sufficient elements for certification, and while implementing regulations are pending[1367] they are not indispensable to carrying out certification.

7.1.5.4.2 Legal standard

7.1044. Article X is entitled "Publication and Administration of Trade Regulations". Article X:3(a) sets forth the obligation that:

> Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

7.1045. Article X:3(a) has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases. While the parties' arguments reflect their divergent views on how findings in prior cases are relevant

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[1363] Malaysia's first written submission, paras. 959-971; second written submission, paras. 343-348; and responses to the Panel's questions, pp. 116-120.

[1364] Malaysia's first written submission, paras. 969 and 1216.

[1365] Malaysia's first written submission, paras. 970 and 1216.

[1366] European Union's first written submission, paras. 1211-1235; second written submission, paras. 254-256; and responses to the Panel's questions, paras. 872-892.

[1367] The Panel notes that the implementing regulations were adopted in June 2022.

to the facts of this dispute, there appears to be no fundamental disagreement between the parties on the elements of that standard as described below.

7.1046. In establishing a violation of Article X:3(a), a complainant is required to prove that the measure at issue:

a. administers, i.e. put into effect, a legal instrument of the type listed in Article X:1 of the GATT 1994; and

b. in a manner that is not uniform, impartial or reasonable.

7.1047. The Panel will elaborate further on the elements of the legal standard in Article X:3(a) as necessary in the course of its assessment of the issues in dispute.

7.1.5.4.3 Administering or putting into effect a legal instrument of the type listed in Article X:1

7.1048. First, the Panel considers whether the measures at issue administer or put into effect a legal instrument of the type listed in Article X:1. The instruments listed in Article X:1 include

> [l]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use.

7.1049. Malaysia's claim concerns the administration or putting into effect of RED II through the high ILUC-risk cap and phase-out, as well as the low ILUC-risk criteria and procedure. The Panel has found above that the high ILUC-risk cap and phase-out and the low ILUC-risk criteria and certification procedure, contained in RED II, are laws which affect the sale or offering for sale, purchase, transportation, distribution, or use of palm oil-based biofuels, and fall within the scope of Article III:4. Consistent with this finding, the Panel considers that the high ILUC-risk cap and phase-out, and the low ILUC-risk criteria and certification procedure, fall within the scope of Article X:1. Moreover, the Panel notes that it is not disputed by the parties, that the administration or putting into effect of RED II would fall within the scope of Article X:3(a). Rather, the European Union submits that the Delegated Regulation, which Malaysia challenges, does not administer RED II.

7.1050. Second, the Panel turns to consider whether the measures at issue "administer" or "put into effect" RED II.

7.1051. Malaysia argues that the Delegated Regulation administers RED II through the low ILUC-risk criteria and certification procedure, and through the high ILUC-risk cap and phase-out in its use of the ILUC concept. Malaysia refers to administration through "vaguely defined concepts" and without "detailed rules" that would allow certification pursuant to Articles 4 to 6 of the Delegated Regulation to take place, and administration through the "concept of ILUC".[1368] Malaysia points to certain implementing regulations, which based on the provisions RED II and the Delegated Regulation are to provide such missing details.

7.1052. The European Union argues that the Delegated Regulation, in particular the high ILUC-risk criteria and low ILUC-risk criteria, are substantive matters.[1369] The European Union also argues that the Delegated Regulation explains the criteria and provides sufficient elements for low ILUC-risk certification[1370], and that while the "intended" implementing regulations will provide further information, they are not indispensable to certification and the low ILUC-risk criteria in the Delegated

[1368] Malaysia's first written submission, para. 970; response to questions from the Panel, pp. 117-118.

[1369] European Union's first written submission, para. 1234; second written submission, para. 254; and response to questions from the Panel, paras. 872-876. See also European Union's first written submission, paras. 1218-1235.

[1370] The European Union notes that the Delegated Regulation defines necessary terms, being "oil crops", "unused land", "abandoned land", "severely degraded land", "additionality measure" and "additional feedstock". (European Union's response to questions from the Panel, paras. 883-892).

Regulation are sufficiently detailed for EU member States (and voluntary schemes) to proceed with certification.[1371]

7.1053. The Panel recalls that Article X:3(a) concerns the *administration* of the laws, regulations, decisions and rulings referred to in Article X:1 and alluded to in the title of Article X. Administration has been understood by the Appellate Body as meaning "putting into practical effect or applying" e.g. a legal instrument, as distinct from the "substantive content" of such laws, regulations, decisions and rulings.[1372] Prior cases offer some useful illustrations of what qualifies as "administration": (i) "a legal instrument that regulates the application or implementation" of another instrument[1373]; (ii) "any definition, guidelines or standards" (e.g. with respect to the term "operation capacity"[1374]); and (iii) "providing guidance on the meaning of specific requirements of a measure".[1375] The issue is therefore whether the relevant elements of the Delegated Regulation constitute administration of RED II or whether they create substantive rules.[1376]

7.1054. With respect to the low ILUC-risk criteria and certification procedure, the Panel notes that Malaysia's claim is not about the substantive provisions in the Delegated Regulation itself. Rather, this claim turns on the fact that low ILUC-risk certification, as set out in Articles 4 to 6 of the Delegated Regulation, lacks detailed rules (which the European Union admits are to follow in certain implementing regulations) that are necessary to put certain elements of the low ILUC-risk certification criteria and procedure into effect. The Panel notes that low ILUC-risk certification, as set out Articles 4 to 6 of the Delegated Regulation, is in turn to put into effect the exemption to the high ILUC-risk cap and phase-out set out in Article 26(2) of RED II.

7.1055. The Panel recalls that while in past cases, legal criteria/requirements themselves seem to have generally been considered to be "substantive" in nature, the absence of definitions or guidance on the meaning or means of satisfying criteria/requirements has been considered to be administrative in nature. Insofar as the European Union has failed to take timely steps to operationalize and put into effect the low ILUC-risk criteria and certification procedure, set out in Articles 4 to 6 of the Delegated Regulation, in a way that is necessary for certification to be obtained, that absence of detailed rules (e.g. to be contained in implementing regulations) relates to the allegedly deficient administration of RED II, not the criteria in the Delegated Regulation themselves.

7.1056. With respect to the high ILUC-risk cap and phase-out, the relevant provisions are substantive in nature. As found by the Panel above, they impose a cap and gradual phasing out of certain biofuels based on the application of the high ILUC-risk criteria. The concept of ILUC is also a substantive analytical concept that underpins this measure and its provisions. This is notwithstanding that any guidelines or further definitions concerning ILUC or the high ILUC-risk cap and phase-out might separately be considered to be administrative in nature, however, this is not addressed by the parties.[1377] For that reason, the Panel considers that Malaysia's claim with respect to the high ILUC-risk cap and phase-out falls outside the scope of Article X:3(a).

7.1.5.4.4 Manner of administration

7.1057. "Reasonable" has been understood in the context of Article X:3(a) in its ordinary sense, i.e. to mean "in accordance with reason", "not irrational or absurd", "proportionate", "sensible", and "within the limits of reason, not greatly less or more than might be thought likely or appropriate". Whether an act of administration can be considered reasonable within the meaning of Article X:3(a) entails a consideration of factual circumstances specific to each case such as the features of the administrative act at issue in light of its objective, cause or the rationale behind it.[1378]

[1371] European Union's first written submission, paras. 1240-1241; second written submission, para. 256.

[1372] Appellate Body Reports, *EC – Bananas III*, para. 200; and *EC – Poultry*, para. 115.

[1373] Appellate Body Report, *EC – Selected Customs Matters*, para. 200.

[1374] Panel Reports, *China – Raw Materials,* paras. 7.745-7.746.

[1375] Panel Reports, *US – COOL*, paras. 7.830, 7.833, and 7.840. In *US – COOL,* the panel found that the USDA "put into practical effect" the COOL measure by providing guidance on the labelling requirements such that the USDA guidelines constituted an act of administering the COOL measure. (Ibid.).

[1376] See e.g. Panel Report, *Argentina – Hides and Leather*, paras. 11.71-11.72.

[1377] See e.g. Malaysia's first written submission, para. 968.

[1378] Panel Reports, *US – COOL*, paras. 7.850-7.851; and *Thailand – Cigarettes (Philippines)*, paras. 7.919 and 7.951.

7.1058. Previous panels have found that the imposition of a legal requirement with which it is impossible to ensure compliance (e.g. because of uncertainty generated by legal requirements) amounts to unreasonable administration, inconsistent with Article X:3(a). In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, the panel found that the imposition on cigarette importers of a VAT notification requirement with which individual traders could not ensure compliance (because they did not have access to daily rates to be notified) amounted to an unreasonable administration of the Thai Revenue Code.[1379] In *China – Raw Materials*, the panel found that the "lack of any definition, guidelines or standards in how the 32 Local Departments in charge of Foreign Trade should apply the potentially critical operation capacity criterion constitutes relevant evidence in establishing unreasonable administration of the operation capacity criterion; the lack of any definition, guidelines or standards pose a very real risk that this criterion will be administered differently depending on which Local Department handles the quota application".[1380] In *US – COOL*, the panel found that a letter sent by the Secretary of Agriculture to industry representatives ("the Vilsack letter") in connection with a new rule governing labelling requirements led to "unreasonable" administration because of an apparent tension between the letter and the rule. That panel stated that the Vilsack letter "created uncertainties for industry regarding how to comply with the specific labelling requirements" contained in the "2009 Final Rule", and on that basis found a violation of the "reasonable" administration requirement.[1381]

7.1059. In this dispute, Malaysia argues that without the Implementing Regulation (adopted only in June 2022), it was impossible to design certification schemes or otherwise begin a low ILUC-risk certification process, as of the date of the entry into force of the Delegated Regulation (10 June 2019) and by the "date on which Member States must have fully implemented Article 26 of RED II" (30 June 2021).[1382] In other words, the Panel understands Malaysia to point to uncertainty surrounding the operation of a certification scheme rendering that scheme inoperable. The absence of certain implementing regulations that are necessary to put certain elements of the Delegated Regulation (i.e. the low ILUC-risk certification criteria and procedure) and, by implication, Article 26(2) of RED II, into effect is a situation that fits squarely within the type of situation found to be in violation of Article X:3(a) in the aforementioned prior disputes.

7.1060. The European Union's main point of rebuttal is that implementing regulations (or further detailed rules) are not "indispensable" to the functioning of low ILUC-risk certification such that there is no violation of Article X:3(a). As evidence of this, the European Union points to a number of voluntary schemes that have been recognized in early 2022 prior to the adoption of the Implementing Regulation. The Panel observes however that, as discussed in the context of claims under Article 5 of the TBT Agreement, some of these voluntary schemes do not concern oil crop-based biofuels and none concern high ILUC-risk biofuels. In particular, the European Union has not pointed to any examples of palm oil-based biofuel (the only biofuel currently considered to be made from a high ILUC-risk feedstock) being certified as low ILUC risk. Moreover, the European Commission decisions recognising certification schemes prior to the adoption of any implementing regulations expressly state that these decisions will be revised following the adoption of the Implementing Regulation. There is also evidence concerning the instigation and results of pilot projects to (test and ultimately revise) aspects of low ILUC-risk certification.

7.1061. The Panel therefore considers that the existence of voluntary schemes from April 2022 only indicates that some certification may have been possible from April 2022, but would have been subject to revision pending the introduction of further implementing rules. In addition, it is not clear how such schemes could operate, if some of the substantive criteria determining whether a crop is eligible for low ILUC-risk were not complete.

7.1062. On that basis, the Panel concludes that by (i) introducing a low ILUC-risk certification requirement (i.e. the criteria and procedure) together with the high ILUC-risk cap and phase out as of mid-2019, which was to be transposed by all EU member States by mid-2021 at the latest, and (ii) only publishing the promised detailed rules for operationalizing such a requirement in mid-2022

[1379] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.923.
[1380] Panel Reports, *China – Raw Materials*, para. 7.745.
[1381] Panel Reports, *US – COOL*, paras. 7.833-7.840.
[1382] Malaysia's first written submission, para. 970; response to questions from the Panel, pp. 119-120.

such that it is impossible to use[1383] due to uncertainty attaching to its criteria and process, there is a violation of Article X:3(a).

7.1063. Malaysia additionally argues that the European Union violates Article X:3(a) because the high ILUC-risk cap and phase-out is based on and applies the concept of ILUC, for which there is insufficient scientific support and which cannot be directly observed, measured or otherwise established. Malaysia simply states that because ILUC lacks a sufficient scientific basis, it cannot be applied impartially or reasonably.[1384]

7.1064. The Panel considers that this argument clearly relates to the "substance", not the "administration", of the high ILUC-risk cap and phase out in Article 26(2) of RED II. In any event, the Panel's conclusions on the same arguments made in the context of Articles 2.1 and 2.2 of the TBT Agreement are a basis for rejecting the reiteration of the same argument made here in the form of "impartial" or "unreasonable" administration.

7.1.5.4.5 Conclusion on Article X:3(a)

7.1065. The Panel concludes that the European Union has acted inconsistently with Article X:3(a) of the GATT 1994 by administering the high ILUC-risk cap and phase-out in Article 26 of RED II in a manner that is not reasonable, to the extent that deficiencies in the design and implementation of the low ILUC-risk criteria and procedure do not provide for the elements needed for palm oil-based biofuel to be certified as low ILUC risk.

7.1.5.5 Article XX – General exceptions

7.1.5.5.1 Introduction

7.1066. Having found that the high ILUC-risk cap and phase-out is inconsistent with Article III:4 and Article I:1, the Panel now proceeds to address the European Union's invocation of the general exceptions in Article XX.

7.1067. The European Union submits[1385] that the high ILUC-risk cap and phase-out is justified under Article XX(a) ("necessary to protect public morals"), Article XX (b) ("necessary to protect human, animal or plant life or health") and Article XX(g) ("relating to the conservation of exhaustible natural resources").

7.1068. Malaysia submits[1386] that the high ILUC-risk cap and phase-out is not justified under any of these exceptions.

7.1069. The Panel notes at the outset that the arguments presented by the parties under Article XX substantially overlap with the arguments presented by the parties in the context of Article 2.1 and Article 2.2 of the TBT Agreement. As elaborated further below, the Panel draws upon its findings under Article 2.1 and Article 2.2 for the purposes of making its findings under Article XX.

[1383] Malaysia has not presented any arguments on the substantive consistency of those detailed rules with the TBT Agreement or the GATT 1994. In the absence of any such arguments and taking account that the measure was not in existence at the time of the panel's establishment, none of the Panel's findings in this Report should be taken as implying any view on the substantive consistency of those detailed rules with the European Union's obligations under the TBT Agreement, or with the European Union's obligations under the GATT 1994.

[1384] Malaysia's first written submission, para. 969; response to Panel questions from the Panel, pp. 118-119.

[1385] European Union's first written submission, paras. 1243-1421; second written submission, paras. 257-281; opening statement at the meeting of the Panel, paras. 22-51, and 64-121; responses to the Panel's questions, paras. 893-974; and comments on Malaysia's responses to the Panel's second set of questions, paras. 313-315.

[1386] Malaysia's second written submission, paras. 29-55, 81-104, 187-209 and 210-239; opening statement at the meeting of the Panel, paras. 30-34, 55; responses to the Panel's questions, pp. 120-123; and comments on the European Union's responses to the Panel's questions, pp. 292-313.

7.1.5.5.2 Legal standard

7.1070. Article XX is entitled "General Exceptions". Article XX(a), (b) and (g), read in conjunction with the introductory clause (or "*chapeau*") read as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> …
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

7.1071. Article XX thus allows Members to justify measures that would otherwise be inconsistent with the GATT 1994. Article XX sets out a two-tier test: (i) the measure must fall under one of the listed exceptions in Article XX such as Article XX(b) (it is then provisionally justified); and (ii) the measure must be applied in a manner that satisfies the requirements of the *chapeau* of Article XX.[1387]

7.1072. Article XX(a), (b) and (g) have each been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standards with reference to prior cases.

7.1073. The Panel will elaborate further on the elements of the applicable legal standards in Article XX(a), (b) and (g) as necessary in the course of its assessment of the issues in dispute.

7.1.5.5.3 Article XX(g) – relating to the conservation of exhaustible natural resources

7.1074. In the context of addressing the consistency of the high ILUC-risk cap and phase-out under Article 2.2, the Panel has concluded that the objective of the high ILUC-risk cap and phase-out is to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels, and found that this is a "legitimate objective" within the meaning of Article 2.2. In reaching that conclusion, the Panel recalled the Appellate Body's view that "objectives recognized in the provisions of other covered agreements may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective under Article 2.2"[1388], and considered, for that purpose, whether the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels fell within the scope of the general exceptions in Article XX(g), (b) and (a).

7.1075. With respect to Article XX(g), the Panel observed that Article XX(g) covers measures directed at the "the preservation of the environment, especially of natural resources"[1389], and in past cases a broad range of policies have been found to fall within the scope of measures relating to the conservation of exhaustible natural resources. The Panel further recalled that the Appellate Body has held that 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"[1390] and has concluded that "exhaustible natural resources" covers both living and non-living exhaustible natural resources.[1391] Additionally, the Panel recalled that in past cases, measures taken to conserve

[1387] Appellate Body Reports, *US – Gasoline*, p. 22; and *Brazil – Retreaded Tyres*, para. 139.
[1388] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 313; and *US – COOL*, para. 370.
[1389] Appellate Body Reports, *China – Raw Materials*, para. 355.
[1390] Appellate Body Report, *US – Shrimp*, para. 129.
[1391] Appellate Body Report, *US – Shrimp*, para. 131

clean air[1392], sea turtles[1393], petroleum[1394], and various mineral resources[1395] have been found to be measures relating to the conservation of "exhaustible natural resources" under Article XX(g).

7.1076. Turning to the measures at issue, the Panel recalled that as set out in Recitals 80 and 81 of RED II, the high ILUC-risk cap and phase-out is 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, leading to "the extension of agricultural land into areas with high-carbon stock, such as forests, wetlands and peatland, causing additional greenhouse gas emissions".[1396] Thus, the measure seeks to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels, which would arise when the cultivation of crops for biofuels displaces traditional production of crops for food and feed purposes requiring the extension of agricultural land into areas with high-carbon stock, including forests, wetlands and peatland. The Panel concluded that the objective of the high ILUC-risk cap and phase-out therefore *prima facie* relates to the conservation of an "exhaustible natural resource", namely high-carbon stock land (forests, wetlands and peatland).[1397] On that basis, the Panel stated that it is satisfied that the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels *prima facie* falls within the scope of the objective of "the conservation of exhaustible natural resources" within the meaning of Article XX(g).

7.1077. The Panel proceeded to find, in light of its findings under Article 2.4, that the ISO standards referred to by Malaysia do not "exclude ILUC from being taken into account" in the context of measures seeking to regulate GHG emissions. The Panel further found that there exists a reasonable basis for the European Union to conclude that increasing demand for crop-based biofuels increases the risk of ILUC-related GHG emissions and explained that its assessment of that issue was in line with the approach followed under Article XX(b). The Panel further found that there is a sufficient nexus between the regulating Member and the activities being regulated, and based its analysis of that issue on prior cases under Article 2.2 and Article XX.

7.1078. The Panel did not specifically address, in the context of its analysis under Article 2.2, the issues of whether the high ILUC-risk cap and phase-out is a measure "relating to" the conservation of exhaustible natural resources that is "made effective in conjunction with restrictions on domestic production or consumption". The Panel now turns to these issues.

7.1079. In the context of Article XX(g), the Appellate Body has found that "for a measure to 'relate to' conservation in the sense of Article XX(g), there must be 'a close and genuine relationship of ends and means' between that measure and the conservation objective of the Member maintaining the measure."[1398] The Panel notes that a similar standard applies in relation to the assessment of whether a measure makes a "contribution" to its objective under the "necessity" test that applies under Article 2.2 and Article XX(b). In *Brazil – Retreaded Tyres*, the Appellate Body indicated that a "contribution" exists "when there is a genuine relationship of ends and means between the objective pursued and the measure at issue".[1399]

7.1080. In the context of its analysis of the "contribution" under Article 2.2, the Panel found that because the high ILUC-risk cap and phase-out has, by design, a limiting effect on EU demand for and consumption of those crop-based biofuels determined to be high ILUC risk, the measure is apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. In the course of its analysis, the Panel observed that a "contribution" exists "when there is a genuine relationship of ends and means between the objective pursued and the

[1392] Appellate Body Report, US – Gasoline, p. 14.

[1393] Appellate Body Report, *US – Shrimp*, para. 131.

[1394] Appellate Body Report, *US – Shrimp*, para. 128.

[1395] Appellate Body Report, *US – Shrimp*, para. 128; and Panel Reports, *China – Raw Materials*, para. 7.369.

[1396] Recital 80 of RED II.

[1397] Furthermore, in addition to high-carbon stock land being an exhaustible natural resource in and of itself, the Panel considered that measures taken to conserve high-carbon stock land, and thereby avoid the GHG emissions that would be released through their use, are related to the conservation of a wide range of exhaustible natural resources that are threatened by increased GHG emissions and climate change.

[1398] Appellate Body Reports, *China – Raw Materials*, para. 355.

[1399] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145. See also Panel Reports, *Brazil – Taxation*, para. 7.526; *EU – Energy Package*, para. 7.1360; *Colombia – Textiles*, para. 7.315; and *India – Solar Cells*, para. 7.361.

measure at issue"[1400], and stated that that is the case here. Accordingly, the Panel considers that the high ILUC-risk cap and phase-out is a measure "relating to" the conservation of exhaustible natural resources, notably high-carbon stock land (forests, wetlands, and peatland).

7.1081. The Panel considers that the high ILUC-risk cap and phase-out is "made effective in conjunction with restrictions on domestic production or consumption". The measure plainly meets this requirement as it, of itself, aims at and results in restricting EU demand for and consumption of crop-based biofuels classified as high ILUC-risk pursuant to the formula in Article 3 of the Delegated Regulation. By restricting EU demand for and consumption of such crop-based biofuels, the measure is aimed at ensuring that EU demand does not result in increased production of the crops used to produce such biofuels. The formula applies to all crop-based biofuels, with no differentiation between biofuels made from crops produced in the European Union and biofuels made from crops produced elsewhere. In addition, all crop-based biofuels are subject to the 7% maximum share, and this measure also applies to all crop-based biofuels, with no differentiation between biofuels made from crops produced in the European Union and biofuels made from crops produced elsewhere.

7.1082. For these reasons, the Panel concludes that the high ILUC-risk cap and phase-out is provisionally justified as a measure relating to the conservation of exhaustible natural resources that is made effective in conjunction with restrictions on domestic production or consumption within the meaning of Article XX(g).

7.1.5.5.4 Article XX(b) – necessary to protect human, animal or plant life or health

7.1083. In the context of its assessment under Article 2.2, the Panel noted that in past cases a broad range of policies have been found to fall within the scope of measures taken for the protection of human, animal and plant life or health. These include policies relating to the reduction of air pollution as a result of consumption of gasoline[1401], the reduction of risks arising from the accumulation of waste tyres[1402], and even the protection of monkeys in the wild.[1403]

7.1084. The Panel also noted that the objective of protecting human, animal or plant life and health is referred to as a legitimate objective in similar if not identical terms in Article XX(b)[1404], Article 2.2[1405], and the Preamble to the TBT Agreement.[1406] The Panel recalled that previous panels and the Appellate Body have stated that "few interests are more 'vital' and 'important' than protecting human beings from health risks, and protecting the environment is no less important."[1407]

7.1085. The Panel then recalled that as set out in Recitals 80 and 81 of RED II, the high ILUC-risk cap and phase-out has the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The Panel recalled that in *Brazil – Retreaded Tyres*, the Appellate Body suggested that "measures adopted in order to attenuate global warming and climate change" would fall within the scope of Article XX(b) in the context of providing guidance on how panels should assess certain "complex public health or environmental problems" under the necessity test in Article XX(b).[1408] The Panel further recalled that in *Brazil – Taxation*, the panel found that "the reduction of CO_2 emissions is one of the policies covered by subparagraph (b) of Article XX, given that it can fall within the range of policies that protect human life or health."[1409] The Panel indicated that it sees no reason to disagree, considering that global warming and climate change pose one of the greatest threats to life and health on the planet. On that basis, the Panel stated that the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels therefore *prima facie* relates to the protection of human, animal or plant life or health.

[1400] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 210.
[1401] Panel Report, *US – Gasoline*, para. 6.21.
[1402] Panel Reports, *China – Raw Materials*, para. 7.479 (referring to Panel Reports, *US – Gasoline*, para. 6.21; and *Brazil – Retreaded Tyres*, paras. 7.108 and 7.115).
[1403] Panel Report, *Brazil – Retreaded Tyres*, paras. 7.108 and 7.115.
[1404] Article XX(b) refers to measures necessary "to protect human, animal or plant life or health".
[1405] Article 2.2 refers to the "protection of human health or safety, animal or plant life or health".
[1406] The sixth recital of the Preamble to the TBT Agreement refers to "the protection of human, animal or plant life or health".
[1407] Panel Report, *Brazil – Retreaded Tyres*, para. 7.108. See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 179.
[1408] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[1409] Panel Reports, *Brazil – Taxation*, para. 7.880.

7.1086. The Panel proceeded to find, in light of its findings under Article 2.4, that the ISO standards referred to by Malaysia do not "exclude ILUC from being taken into account" in the context of measures seeking to regulate GHG emissions. The Panel further found that there exists a reasonable basis for the European Union to conclude that increasing demand for crop-based biofuels increases the risk of ILUC-related GHG emissions. In relation to that finding, the Panel specifically linked its approach to the legal standard under Article XX(b), and recalled that when assessing whether a measure is taken to protect human, animal or plant life or health under Article XX(b), prior panels have often commenced their analysis by determining the existence of the risk to human, animal or plant life or health (health risk) that the challenged measure aims to reduce.[1410] The Panel further found that there is a sufficient nexus between the regulating Member and the activities being regulated, and based its analysis of that issue on prior cases under Articles 2.2 and Article XX.

7.1087. In the context of its assessment under Article 2.2, the Panel then proceeded to evaluate the necessity of the high ILUC-risk cap and phase-out on the basis of the legal standard and analytical framework that applies equally under Article XX(b). The Panel preliminarily concluded that the high ILUC-risk cap and phase-out is necessary to fulfil the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels, on the grounds that it is apt to make a material contribution to the achievement of that objective and that this is the appropriate standard to apply having weighed and balanced its trade-restrictiveness and the risks that non-fulfilment of the objective would create. The Panel then found that none of the alternative measures put forward by Malaysia demonstrate that the high ILUC-risk cap and phase-out is more trade-restrictive than necessary to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels. On that basis, the Panel found that Malaysia has failed to establish that the high ILUC-risk cap and phase-out is inconsistent with the obligation in Article 2.2 of the TBT Agreement to ensure that technical regulations are not more trade-restrictive than necessary to fulfil a legitimate objective.

7.1088. The Panel's assessment under Article 2.2 applies *mutatis mutandis* to Article XX(b). Accordingly, the Panel concludes that the high ILUC-risk cap and phase-out is provisionally justified as a measure necessary to protect human, animal or plant life or health within the meaning of Article XX(b).

7.1.5.5.5 Article XX(a) – necessary to protect public morals

7.1089. In the context of its assessment under Article 2.2, the Panel explained that, for reasons already set out in the context of the Panel's identification of the objective of the measures at issue, the Panel is unpersuaded that there is any need to make an additional ruling on whether the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels would fall within the scope of the objective protecting EU "public morals".

7.1090. In this connection, the Panel observes that a finding on whether the high ILUC-risk cap and phase-out is additionally justified under Article XX(a) would have no impact on the outcome of the proceedings. If the Panel were to agree with the European Union that the same measure provisionally justified under Article XX(b) and (g) is also provisionally justified under Article XX(a), this would merely serve to establish an additional basis for the overall conclusion that the measure is provisionally justified under Article XX. Were the Panel to agree with Malaysia that the measure is not justified under Article XX(a), this would not alter the conclusion that the measure is provisionally justified under Article XX(b) and (g).

[1410] Panel Reports, *EC – Asbestos*, para. 8.170; *Brazil – Retreaded Tyres*, para. 7.42; *China – Rare Earths*, para. 7.156; *Brazil – Taxation*, para. 7.859; and *Indonesia – Chicken*, para. 7.209. For instance, in *EC – Asbestos*, the panel determined, as the first step in its analysis, whether chrysotile-asbestos posed a risk to human life or health. (Panel Report, *EC – Asbestos*, paras. 8.170, 8.182, and 8.185-8.194.) In *Brazil – Retreaded Tyres*, the panel assessed whether the accumulation of waste tyres posed risks to human, animal or plant life or health. (Panel Report, *Brazil – Retreaded Tyres*, paras. 7.42, and 7.53-7.93.) In *China – Rare Earths*, the panel found that the mining and production of rare earths, tungsten, and molybdenum have caused grave harm to the environment and to the life and health of humans, animals, and plants in China. (Panel Reports, *China – Rare Earths*, paras. 7.149-7.156.) In some other cases, including those where there was no dispute as to the existence of the risks that the measure allegedly aimed to address, prior panels have addressed this step of the analysis succinctly. (See Panel Reports, *US – Gasoline*, para. 6.21; and *EC – Tariff Preferences*, paras. 7.180 and 7.200.)

7.1091. The Panel sees no reason to follow a different approach in the context of Article XX. The Panel therefore finds that it is unnecessary to rule on whether the high ILUC-risk cap and phase-out is a measure necessary to protect public morals under Article XX(a).

7.1.5.5.6 *Chapeau* – arbitrary or unjustifiable discrimination between countries where the same conditions prevail

7.1092. Having concluded that the high ILUC-risk cap and phase-out is provisionally justified under Article XX(g) and Article XX(b), the Panel now turns to the *chapeau* of Article XX. For the reasons that follow, the Panel considers that, in the particular circumstances of this case, its findings under Article 2.1 of the TBT Agreement in connection with the "legitimate regulatory distinction" step of the analysis are equally relevant, and applicable, to the analysis under the *chapeau* of Article XX.

7.1093. The Appellate Body has observed that "there are important parallels"[1411] between the analyses under Article 2.1 and the *chapeau* of Article XX. In particular, the Appellate Body has noted that the concepts of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and of a "disguised restriction on trade" are found both in the *chapeau* of Article XX of the GATT 1994 and in the sixth Recital of the Preamble of the TBT Agreement, which the Appellate Body has recognized as providing relevant context for Article 2.1[1412]

7.1094. Furthermore, the Appellate Body has explained that "a regulatory distinction that is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination" cannot be considered "legitimate", and that "any detrimental impact stemming from such a distinction" will hence reflect discrimination prohibited under Article 2.1.[1413] In other words, in assessing whether any detrimental impact on imports stems from a "legitimate regulatory distinction" under Article 2.1, a panel may be guided by effectively the same standard that applies under the *chapeau* of Article XX, i.e. whether the measure is designed or applied "in a manner that constitutes a means of arbitrary or unjustifiable discrimination".

7.1095. The Panel understands that the assessment of whether any detrimental impact on imports under Article 2.1 stems exclusively from a "legitimate regulatory distinction" will not necessarily, or automatically, resolve the question of whether the measure at issue is applied consistently with the requirements of the *chapeau* of Article XX. The Panel also appreciates that where a panel seeks to rely on its findings under the "legitimate regulatory distinction" step of the analysis under Article 2.1 as a basis for its findings under the *chapeau* of Article XX, it is incumbent on a panel to provide an adequate explanation of why that is so.[1414]

7.1096. In the present case, the parties' arguments under the "legitimate regulatory distinction" step of the analysis under Article 2.1 are essentially the same as their arguments under the *chapeau* of Article XX, and the Panel's assessment under this step of the analysis in Article 2.1 is expressly formulated in terms of whether the measure is designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination. In these circumstances, the Panel sees nothing to be gained, and indeed significant potential for confusion, by repeating the same analysis that has already been presented in the context of Article 2.1 again in the context of the *chapeau* of Article XX.

7.1097. The Panel's assessment under the "legitimate regulatory distinction" step of the analysis in Article 2.1 thus applies *mutatis mutandis* to the *chapeau* of Article XX. Accordingly, the Panel concludes that the high ILUC-risk cap and phase-out has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail because the European Union 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.

[1411] Appellate Body Reports, *EC – Seal Products*, para. 5.310.

[1412] Appellate Body Reports, *US – Clove Cigarettes*, para. 173; and *US – Tuna II (Mexico)*, para. 213.

[1413] Appellate Body Reports, *EC – Seal Products,* fn 1543 to para. 5.311, referring to Appellate Body Reports, *US – COOL*, para. 271.

[1414] Appellate Body Reports, *EC – Seal Products*, para. 5.310.

7.1098. The Panel notes that certain of these same deficiencies have been found to give rise to a violation of the obligation in Article X:3(a), and the European Union has not argued that the inconsistency with Article X:3(a) is justified under Article XX.

7.1.5.5.7 Conclusion on Article XX

7.1099. The Panel finds that:

a. the high ILUC-risk cap and phase-out is a measure relating to the conservation of exhaustible natural resources that is made effective in conjunction with restrictions on domestic production or consumption within the meaning of Article XX(g);

b. the high ILUC-risk cap and phase-out is a measure necessary to protect human, animal or plant life or health within the meaning of Article XX(b);

c. it is unnecessary to rule on whether the high ILUC-risk cap and phase-out is a measure necessary to protect public morals under Article XX(a); and

d. the high ILUC-risk cap and phase-out has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail because the European Union 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.

7.1100. One panelist has reached a different conclusion, as set out in section 7.4 of this Report.

7.2 Claims in respect of the French measure

7.2.1 Preliminary considerations

7.2.1.1 Preliminary considerations relating to the definition of the French TIRIB measure

7.1101. As explained in section 2 of this Report, the specific French measure challenged by Malaysia concerns an annual tax, known as the TIRIB, payable by entities that release fuel for consumption within the territory of France.

7.1102. Malaysia refers in its panel request to this tax as "the French fuel tax".[1415] Malaysia challenges in particular the alleged tax reductions to the fuel tax for petrol and diesel that contain certain oil crop-based biofuels and the alleged exclusion of petrol and diesel that contain palm oil-based biofuel from the alleged tax reduction.[1416]

7.1103. In its first written submission, Malaysia further describes the "French fuel tax reduction" as a measure that reduces the tax on petrol and diesel fuels containing oil crop-based biofuels, but excludes from this reduction petrol and diesel fuels to the extent that they contain oil palm crop-based biofuel.[1417] Malaysia refers both in its panel request and in its written submissions to the "French measure at issue", describing it as "the exclusion of petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel, from the French fuel tax reduction".[1418]

7.1104. Thus, based on Malaysia's panel request, and as further elaborated in its subsequent submissions, the Panel understands that Malaysia has specifically focused its claims on what it refers to as the "exclusion of petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel, from the French fuel tax reduction".[1419]

[1415] Malaysia's panel request, WT/DS600/6, paras. 25 and 27.
[1416] Malaysia's panel request, WT/DS600/6, paras. 25, 26, and 28.
[1417] Malaysia's first written submission, para. 972.
[1418] Malaysia's first written submission, paras. 975 and 980; second written submission, paras. 349, 353, 359, and 406.
[1419] See, for example, Malaysia's first written submission, paras. 972-973.

7.1105. In its submissions, the European Union refers to the "TIRIB" when referring to what Malaysia refers to as the "French Fuel tax", and to the "TIRIB reduction" when referring to what Malaysia refers to as the "French fuel tax reduction".[1420]

7.1106. For the sake of clarity and consistency, the Panel will refer throughout its analysis to the "French TIRIB" when referring generally to the "TIRIB" or "French fuel tax", and to the "French TIRIB measure" when referring to the specific aspect of the French TIRIB that is at issue in this dispute, i.e. the "French fuel tax reduction" or "TIRIB reduction".

7.2.1.2 Order of analysis under the SCM Agreement and the GATT 1994

7.1107. Having defined the French measure at issue, the Panel now turns to the order of analysis in respect of the multiple legal claims that Malaysia has raised under the SCM Agreement and the GATT 1994.

7.1108. The Panel will first address the order of analysis between the SCM Agreement and the GATT 1994 and will then address the order of analysis among the multiple claims brought under those agreements. In structuring its order of analysis, the Panel has accorded due weight to the manner in which the parties themselves have presented their claims and defences.[1421]

7.1109. Malaysia has brought claims under Articles I:1 and III:2 of the GATT 1994 and under Articles 5 and 6 of the SCM Agreement. Malaysia has presented its claims under the GATT 1994 first, and then its claims under the SCM Agreement. The European Union does the same in its own submissions.

7.1110. The Panel notes that the disciplines of the SCM Agreement clearly deal with certain types of measures more specifically and in greater detail than certain corresponding provisions of the GATT 1994, such as those provisions of the GATT 1994 relating to countervailing duty investigations (Article VI) and subsidies (Article XVI). However, in this dispute the provisions of the GATT 1994 raised by Malaysia are the non-discrimination obligations in Articles I:1 and III:2. The Panel considers that there is no mandatory order of analysis between the provisions of the GATT 1994 and the provisions of the SCM Agreement which are at issue in this dispute.

7.1111. Therefore, the Panel will address the claims related to the French TIRIB measure in the order presented by Malaysia, and begin with the claims under the GATT 1994. If the Panel finds that any of Malaysia's claims is well founded, the Panel will proceed to address the European Union's defence under Article XX. The Panel will then address Malaysia's claims under the SCM Agreement.

7.1112. With respect to the claims under the GATT 1994, Malaysia has presented its claim under Article I:1 first, and then its claims under Article III:2. However, when conducting its analysis under Article I:1, Malaysia refers to its claims under Article III:2 for the purposes of demonstrating that the challenged measure falls within the scope of Article I:1. For this reason, the Panel considers it more appropriate to analyse Malaysia's claims under Article III:2 first, and then proceed to address Malaysia's claim under Article I:1.

7.1113. In respect of the claims under the SCM Agreement, the Panel begins by addressing whether the French TIRIB measure falls within the definition of a subsidy under Article 1 of the SCM Agreement. The Panel then addresses whether any subsidy found to exist is a specific subsidy within the meaning of Article 2. This is followed by the Panel's assessment of Malaysia's claims of serious prejudice under Articles 5(c), 6.3(a) and 6.3(c).

[1420] See, for example, European Union's first written submission, paras. 1449-1450.
[1421] See Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.

7.2.2 Claims under the GATT 1994

7.2.2.1 Article III:2, first sentence

7.2.2.1.1 Introduction

7.1114. The Panel now proceeds to address Malaysia's claim under Article III:2, first sentence of the GATT 1994.

7.1115. Malaysia submits[1422] that the exclusion of petrol and diesel fuels, to the extent that they contain palm oil-based biofuel, from the French TIRIB measure is inconsistent with Article III:2, first sentence, because France discriminates against such petrol and diesel fuels, and thus, indirectly against imported palm oil-based biofuel and its feedstock, while favouring petrol and diesel fuels that contain other like domestic oil crop-based biofuels, and thus, indirectly favouring other like domestic oil crop-based biofuels and their feedstocks of domestic origin. More specifically, Malaysia submits that: (i) the tax on petrol and diesel fuels, which results from the exclusion of such petrol and diesel fuels from the French TIRIB measure constitutes an internal tax; (ii) petrol and diesel fuels that contain imported palm oil-based biofuel are like petrol and diesel fuels that contain other domestic oil crop-based biofuels; and (iii) petrol and diesel fuels that contain imported palm oil-based biofuel are taxed in excess of petrol and diesel fuels that contain like domestic oil crop-based biofuels, and thus, imported palm oil-based biofuel and palm oil are indirectly taxed in excess of like domestic oil crop-based biofuels and their feedstocks of domestic origin.

7.1116. The European Union submits[1423] that Malaysia's claim under Article III:2, first sentence is groundless. More specifically, while the European Union does not dispute that the French TIRIB constitutes an internal tax, the European Union contends that Malaysia has not demonstrated that the relevant products are like within the meaning of Article III:2, first sentence. Furthermore, while the European Union does not contest that the exclusion of palm oil-based biofuel from the French TIRIB measure implies that fuels containing such biofuel, whether imported or domestically produced, may be taxed in excess of fuels containing other types of biofuels, whether imported or domestically produced, it contests that this tax differential is related to the origin of the product.

7.2.2.1.2 Legal standard

7.1117. Article III:2, first sentence states as follows:

> The products of the territory of any Member imported into the territory of any other Member shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

7.1118. Article III:2, first sentence has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.1119. Based on its text, a complainant must demonstrate the following elements to establish an inconsistency with Article III:2, first sentence:

a. that the measure is an internal tax or other internal charge applied, directly or indirectly, to products[1424];

b. that imported and domestic products are like products within the meaning of Article III:2, first sentence; and

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[1422] Malaysia's first written submission, paras. 1000-1027; second written submission, paras. 353-405, and 407-409.

[1423] European Union's first written submission, paras. 1457-1503; second written submission, paras. 293-294.

[1424] Appellate Body Reports, *China – Auto Parts*, para. 181.

c. that the imported products are taxed in excess of the domestic products.[1425]

7.1120. The Panel will elaborate further on the elements of the legal standard in Article III:2, first sentence as necessary in the course of its assessment of the issues in dispute.

7.2.2.1.3 Internal taxes applied, directly or indirectly, to products

7.1121. The Panel begins its analysis with the issue of whether the French TIRIB constitutes an internal tax applied, directly or indirectly, to products.

7.1122. Malaysia submits that the tax on petrol and diesel fuels containing palm oil-based biofuel, which results from the exclusion of such petrol and diesel fuels from the French TIRIB measure is an internal tax within the meaning of Article III:2, because it applies to petrol and diesel fuels incorporating eligible oil crop-based biofuel, and it becomes payable when the product is released for consumption in France.[1426]

7.1123. The European Union does not contest that the French TIRIB is an internal tax.[1427]

7.1124. Article III:2 concerns "internal taxes or other internal charges of any kind … applied, directly or indirectly, to … products". The Appellate Body has explained that what is important for determining if a measure is an "internal tax or other internal charge" is that the obligation to pay must accrue due to an internal event, such as the distribution, sale, use or transportation of the product.[1428] For the purposes of Article III:2, the tax must be "applied, directly or indirectly, to products". In this respect, the panel in *Mexico – Taxes on Soft Drinks* found that non-cane sugar sweeteners were indirectly subject to the soft-drink tax when they were used in the production of soft drinks and syrups.[1429]

7.1125. As explained in section 2 of this Report, the French TIRIB is an annual tax payable by entities that release fuel for consumption within the territory of France; and its applicable rate will vary depending on the incorporation of sources qualifying as renewable energy, which includes certain biofuels, into such fuel. The French TIRIB is therefore a tax that applies to products. It applies directly to fuel and indirectly to the biofuel incorporated into such fuel. The obligation to pay such tax is accrued due to the internal event of releasing the fuel for consumption in France. Thus, the French TIRIB is an internal tax applied, directly or indirectly, to products.

7.1126. The Panel therefore finds that the French TIRIB is an internal tax applied, directly or indirectly, to products, that falls within the scope of Article III:2. Consequently, the French TIRIB measure, as a feature of the French TIRIB, also falls within the scope of Article III:2.

7.2.2.1.4 Like products

7.1127. The Panel now proceeds to address the issue of whether the products at issue are like products within the meaning of Article III:2.

7.1128. Malaysia maintains that it has already demonstrated, in the context of its claims against the high ILUC-risk cap and phase-out, that palm oil-based biofuel and palm oil as a biofuel feedstock are like other oil crop-based biofuels and their respective biofuel feedstocks; and thus, that petrol and diesel fuels that contain palm oil-based biofuel are like petrol and diesel fuels that contain other oil crop-based biofuels. For Malaysia, it follows that petrol and diesel fuels that contain palm oil-based biofuel and petrol and diesel fuels that contain other oil crop-based biofuels are also in a sufficiently close competitive relationship to be considered like within the meaning of Article III:2, first sentence.[1430]

[1425] Appellate Body Report, *Canada – Periodicals*, pp. 22-23.
[1426] Malaysia's first written submission, paras. 1007 and 1011.
[1427] European Union's first written submission, para. 1463.
[1428] Appellate Body Reports, *China – Auto Parts*, para. 162.
[1429] Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.45.
[1430] Malaysia's first written submission, para. 1013.

7.1129. The European Union contends that Malaysia has not demonstrated that the relevant products are like within the meaning of Article III:2, first sentence.[1431]

7.1130. The Panel recalls that Malaysia has confirmed, in the context of its claims under Articles 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 with respect to the high ILUC-risk cap and phase-out, that the focus of its claims is the treatment of palm oil-based biofuel as compared to the treatment of rapeseed oil- and soybean oil-based biofuels. Because, with respect to the French TIRIB measure, Malaysia has explicitly referred to its arguments on like products put forward with respect to the high ILUC-risk cap and phase-out, the Panel will compare the same products. Thus, the Panel will compare palm oil-based biofuel with rapeseed oil and soybean oil-based biofuels as regards both FAME and HVO.

7.1131. The Panel notes that Malaysia compares petrol and diesel fuels that contain imported palm oil-based biofuel with petrol and diesel fuels that contain other domestic oil crop-based biofuels, and argues that those products are like within the meaning of Article III:2, first sentence. However, Article III:2, first sentence concerns the treatment of imported products as compared to the treatment of like domestic products. Therefore, the comparison for the purposes of the like products analysis must be between imported and domestic products and not between a domestic product containing an imported input and a domestic product containing a domestic input.[1432] Therefore, for the purposes of its analysis of like products, the Panel will compare palm oil-based biofuel with rapeseed oil and soybean oil-based biofuels, and not petrol and diesel fuels that contain imported palm oil-based biofuel with petrol and diesel fuels that contain other domestic oil crop-based biofuels.

7.1132. The Panel also notes that Malaysia makes the argument that palm oil as feedstock for biofuel production is like other oil-crop feedstocks for biofuel production within the meaning of Article III:2, first sentence; and that palm oil as biofuel feedstock is indirectly taxed in excess of other like oil-crop biofuel feedstocks of domestic origin. The Panel notes that Malaysia's argument with respect to palm oil as biofuel feedstock rests on the same premise of its argument that palm oil-based biofuel is indirectly taxed in excess of like domestic oil crop-based biofuels. In these circumstances, the Panel must consider the practical value that any findings with respect to palm oil as biofuel feedstock would have for implementation, in light of the findings relating to palm oil-based biofuel.

7.1133. The Panel sees no reason for making separate and additional findings under Article III:2, first sentence with respect to palm oil as biofuel feedstock, when such findings would rest on the same premise of the findings with respect to palm oil-based biofuel. Malaysia has not explained how additional findings with respect to palm oil as biofuel feedstock would have any practical value from the perspective of a possible appeal, implementation, or otherwise.

7.1134. The Panel notes that, because the alleged taxation in excess of palm oil as biofuel feedstock stems from the alleged taxation in excess of palm oil-based biofuel, it follows that any action taken to implement any findings of inconsistency with respect to taxation in excess of palm oil-based biofuel would necessarily address any taxation in excess of palm oil as biofuel feedstock. Thus, from the perspective of implementation, separate and additional findings regarding the palm oil as biofuel feedstock would appear to be entirely redundant.[1433]

7.1135. Therefore, the Panel does not consider it necessary to make additional findings with respect to palm oil as feedstock for biofuel production to secure a positive solution to this dispute or to assist the DSB in making the rulings and recommendations provided for in the covered agreements.

7.1136. The Appellate Body has explained that the scope of like products in the first sentence of Article III:2 must be construed narrowly, given the existence of the second sentence providing for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products, namely, directly competitive or substitutable products. The Appellate Body further explained that how narrowly the definition of like products in Article III:2,

[1431] European Union's first written submission, paras. 1464 and 1467.

[1432] Malaysia has not argued that there is taxation in excess with respect to imported petrol and diesel fuel and domestic petrol and diesel fuel, but between petrol and diesel fuels that contain imported palm oil-based biofuel and petrol and diesel fuels that contain other domestic oil crop-based biofuels.

[1433] Furthermore, the Panel does not consider that such additional findings on feedstocks would prejudge the level of nullification or impairment arising from the French TIRIB measure beyond any level that would otherwise be found to exist.

first sentence should be construed "is a matter that should be determined separately for each tax measure in each case".[1434]

7.1137. Panels and the Appellate Body have consistently explained that whether products are like within the meaning of Article III:2, first sentence must be determined on a case-by-case basis, by examining relevant factors, which include: (i) the products' physical characteristics (which may relate to its physical properties, nature and qualities); (ii) the products' end-uses in a given market; (iii) consumers' tastes and habits[1435]; and (iv) the tariff classification of the products.[1436] As the Appellate Body has cautioned, however, this approach for determining whether products are like will be most helpful if decision makers keep in mind how narrow the range of like products in Article III:2, first sentence is meant to be as opposed to the range of like products contemplated in some other provisions of the GATT 1994 and other covered agreements.[1437]

7.1138. The Panel recalls that the four criteria are neither exhaustive nor mutually exclusive, none of them necessarily has an overarching role, and they are rather analytical tools for organizing and assessing the evidence relevant for the analysis of like products.[1438] Moreover, a panel is to use these criteria to examine the nature and extent of a competitive relationship between and among imported and domestic products, which will depend on the market where these products compete.[1439]

7.1139. In order to conduct its analysis of like products under Article III:2, first sentence with respect to the French TIRIB measure, the Panel will rely on factual aspects of its analysis of like products under Articles 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 with respect to the high ILUC-risk cap and phase-out. The Panel will include in this section considerations with respect to the French market, and will reach a conclusion bearing in mind that the scope of like products under Article III:2, first sentence is narrower than the scope of like products under the provisions analysed with respect to the high ILUC-risk cap and phase-out.

7.2.2.1.4.1 Physical properties

7.1140. Regarding physical properties, Malaysia submits that biofuel produced from palm oil, rapeseed oil and soybean oil share similar basic physical and chemical characteristics.[1440]

7.1141. The European Union argues that biodiesel produced from palm oil, rapeseed oil and soybean oil have different properties, referring to the low-temperature operability expressed through the CFPP, which typically is +13°C for PME, -14°C for RME and -2°C for SBME. For the European Union, these differences are not minor or irrelevant, but are characteristics that define the extent to which SBME, PME and RME can be substituted to each other and hence the degree of competition that exists between them.[1441]

7.1142. As the Panel has already found, PME, RME and SBME share the same basic chemical composition of FAME, and a number of physical characteristics, including viscosity, density, and flash point, while not identical, are similar. The Panel recalls that the core differences that are in the focus of the parties' arguments relate to the cold flow properties, in particular the CFPP, as well as the iodine value and cetane number. For the purposes of the French measure, the parties refer mainly to the CFPP, which is relevant to the analysis of the end-uses and consumers' tastes and habits.

[1434] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20.
[1435] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20.
[1436] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 21-22.
[1437] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20.
[1438] Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 119 and 131.
[1439] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 168. The Appellate Body further stressed that the determination of likeness under Article III:2, first sentence is, fundamentally, a determination about the nature and extent of a competitive relationship between and among imported and domestic products. (Appellate Body Reports, *Philippines – Distilled Spirits*, para. 170.)
[1440] Malaysia's first written submission, para. 911.
[1441] European Union's first written submission, paras. 1470 and 1474.

7.2.2.1.4.2 End-uses

7.1143. With regard to end-uses, Malaysia maintains that all oil crop feedstocks have the same end-use which is for the production of oil crop-based biofuels. Malaysia submits that, even if the CFPP value for diesel fuel in France ranges between 0°C in the summer and -15°C in the winter, petrol and diesel fuels that contain palm oil-based biofuels can still be placed on the French market during a good portion of the year. For Malaysia, therefore, these fuels are competitive and perfectly substitutable with petrol and diesel fuels that contain other oil crop-based biofuels, such as biofuels made from rapeseed oil or soybean oil during the warm season.[1442]

7.1144. The European Union contends that the different properties of PME, SBME and RME have consequences for their end-uses. The European Union maintains that the CFPP for diesel fuel in France ranges between 0ºC in the summer and -15ºC in the winter, and that PME is often blended only up to 20% in FAME0 blends. For the European Union, the different standards required for diesel mix and biodiesels in France in the summer and the winter season have an effect on the amount of PME that can be used in biodiesel blends in France, which demonstrates that PME has a limited substitutability with other biofuels mixed in blends not only in winter but also during the summer.[1443]

7.1145. As the Panel has already explained, the parties do not dispute that PME, RME and SBME are all primarily used as biofuel mixed with mineral diesel transport fuel, in addition to certain other applications. However, the parties disagree on the extent of substitutability between the three types of biofuel, based on the different CFPP of each type of biofuel. Indeed, as explained, the evidence submitted by the parties confirms that low-temperature operability, and therefore, the CFPP, is an important factor to be considered for the use of biofuel in diesel engines depending on the climate of the relevant geographical region.

7.1146. With respect to the French market, the evidence on the record confirms that France requires a CFPP of -15ºC for the winter season and a CFPP of 0ºC during the summer season[1444], and also that PME is often blended in "FAME0" blends (i.e. blends with a CFPP of 0°C).[1445] Therefore, due to its higher CFPP, PME has to be blended with other biofuels in France during the summer season and is likely less commonly used during the winter season. However, the evidence on the record shows that palm oil has been commonly used in France as feedstock for biofuel production[1446], and also that the cold properties of fuels can be improved through the use of additives such as flow improvers.[1447]

7.1147. The Panel notes that, according to data from the French Government, from the total amount of biofuel produced in France for incorporation into diesel in 2019, 50% was made of rapeseed oil, 23% was made of palm oil and 18% was made of soybean oil; and, of the biofuel produced in France for incorporation into diesel in 2018, 53.53% was made of rapeseed oil, 22.45% was made of palm oil and 14.10% was made of soybean oil. This includes both methyl esters and HVO, which, in 2019, comprised, respectively, 83.5% and 16.5% of the biofuel produced in France for incorporation into diesel.[1448] Also, of the vegetable oil methyl ester produced in France in 2019, 64% was made of rapeseed oil, 23% was made of soybean oil and 9% was made of palm oil; and, of the vegetable oil methyl ester produced in France in 2018, 65% was made of rapeseed oil, 17% of soybean oil and 14% of palm oil.[1449] This means that palm oil-based biofuel was the second most-used biofuel in France in 2018 and 2019; and that PME was the third most-used oil-crop based methyl ester in

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[1442] Malaysia's first written submission, para. 912; second written submission, para. 388.
[1443] European Union's first written submission, paras. 1475-1486.
[1444] Biodiesel Standards in various EU member States (website accessed 25 April 2021), (Exhibit EU-137).
[1445] Commission Implementing Regulation (EU) 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia, OJ 2019 L 212, p. 1, (Exhibit EU-139), recital 297.
[1446] USDA FAS, "GAIN, Biofuels Annual: European Union", 22 June 2021, (Exhibit MYS-139), p. 27; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit EU-128), p. 31; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit MYS-77), p. 25.
[1447] Arbeitsgemeinschaft Qualitätsmanagement Biodiesel e.V., "Cold Properties of Biodiesel", (Exhibit EU-140), p. 3.
[1448] DGEC, "Panorama 2019 – Biofuels incorporated in France", (Exhibit EU-191), p. 6; French Parliament Report n. 2609, (Exhibit EU-205), p. 16.
[1449] DGEC, "Panorama 2019 – Biofuels incorporated in France", (Exhibit EU-191), p. 7.

France in 2018 and 2019. Palm oil-based biofuel was also more commonly used as biofuel feedstock than biofuels made from waste and animal fat.[1450]

7.1148. The Panel also refers to its discussion on cetane number and iodine value with respect to SBME, adding that both palm oil and soy have been imported into France in significant quantities for the production of biofuel.[1451] This would not have been the case, had there been no substitution between the PME, RME and SBME in spite of certain differences in their physical properties. Moreover, a 2020 report on biofuels from the French Parliament indicates that the biodiesel sector had been weakened by competition from imported biofuels made from palm oil and soybean oil, and that the use of these oils had made it possible to considerably lower the costs.[1452] This corroborates a significant degree of competition between PME, RME and SBME.

7.1149. These data evidence that, despite certain differences in product characteristics, there is a significant degree of competition between PME, RME and SBME. This is further reinforced by the fact that, in the context of an anti-dumping duty investigation into the imports of biodiesel from Argentina and Indonesia, the European Union rejected the claim that PME was not a like product to RME or SBME due to its higher CFPP, and considered that PME could be used throughout the Union throughout the year, by blending with other biodiesels before use, in the same way as RME and SBME; and that PME was therefore interchangeable with biodiesel made in the European Union.[1453]

7.2.2.1.4.3 Consumer perceptions

7.1150. With respect to consumer perceptions, Malaysia maintains that the relevant consumers, namely the producers of oil crop-based biofuels base their choices on the price of the product, its CFPP value and oxidative stability and the eligibility to count towards meeting the EU renewable energy targets.[1454]

7.1151. The European Union submits that the direct consumers of biofuels are the economic operators, who mix those fuels with fossil fuels to release them for consumption on the market. For the European Union, since they have to produce a blend which complies with certain requirements (for instance in terms of CFPP), and since different biofuels have different CFPP values, they necessarily have to be concerned about what biofuels they are blending and in which proportions.[1455] The European Union adds that the final consumers are not aware of whether palm oil biodiesel is contained in the product they are purchasing, but that, given the widespread public concern in the European Union associating palm oil production with deforestation, loss of biodiversity and climate change, it is clear that consumers' awareness about the presence of palm oil-based biofuels in the fuel mix is entirely capable of influencing their purchasing decisions, and their preferences and tastes necessarily influence what oil companies produce and what biofuels they blend.[1456]

7.1152. The Panel recalls its findings above that the evidence related to the trade defence measures indicates that final consumers are not aware of or concerned by the composition of the biofuel blend, if the product meets the required CFPP; and that economic operators involved in blending of biofuels will mix PME, RME and SBME with a view to obtaining a blend conforming with the CFPP specifications required by the customer. If the specification requires a particularly low CFPP, the amount of PME will admittedly be lower compared to fuel destined for warmer climates. Within the specification, however, PME competes with RME and SBME.

[1450] DGEC, "Panorama 2019 – Biofuels incorporated in France", (Exhibit EU-191), pp. 5-10.

[1451] According to a report on biofuels from the French Parliament, in 2018, the volume released for consumption of biofuels produced from palm oil in France represented 838 million litres, and the volume of biofuels produced from soy represented 472 million litres, being respectively 18% and 9.6% of the total volume of biofuels incorporated in France. Of the palm oil used in France for the production of biofuels incorporated into fuels in 2018, 71% originated from Indonesia and 22% from Malaysia. Also, 56.4% of the soy used was imported from Argentina, 21.5% from Brazil and 16.4% from Paraguay. (French Parliament Report n. 2609, (Exhibit EU-205), p. 62.)

[1452] The report mentions in this respect that European rapeseed biodiesel was worth 956 dollars per tonne, while Argentinian soy biodiesel was worth 708 dollars per tonne and Malaysian palm oil biodiesel was 678 dollars per tonne. (French Parliament Report n. 2609, (Exhibit EU-205), p. 75.)

[1453] Council Implementing Regulation (EU) 1194/2013, (Exhibit MYS-140), recitals 18-19.

[1454] Malaysia's first written submission, para. 913

[1455] European Union's first written submission, para. 1488.

[1456] European Union's first written submission, para. 1489-1490.

7.1153. The Panel also refers to its findings above regarding the European Union's assertion that final consumers' awareness about the presence of palm oil-based biofuels in the fuel mix is capable of influencing what biofuel oil companies will blend. The Panel recalls in particular that, before announcing a decrease in the use of palm oil as biofuel feedstock, Total had unsuccessfully challenged the exclusion of PME from the scope of renewable energy sources for the purposes of the French TIRIB.[1457]

7.2.2.1.4.4 Tariff classification

7.1154. Finally, on tariff classification, Malaysia maintains that all products at issue fall within the same chapter of the HS (Animal or vegetable fats and oil) but acknowledges that they have different HS codes at the 4-digit and 6-digit levels.[1458]

7.1155. The Panel has already found that the customs classification of PME, RME and SBME is consistent with the indication that they all belong to the category of biodiesel and corroborates the finding that they share important product characteristics and have the same application.

7.2.2.1.4.5 Conclusion on like products

7.1156. The Appellate Body has found that products that have very similar physical characteristics may not be like within the meaning of Article III:2 if their competitiveness or substitutability is low, while products that present certain physical differences may still be considered like if such physical differences have a limited impact on the competitive relationship between and among the products.[1459] The Appellate Body considered that, as long as the differences among the products, including difference in the raw material base, leave fundamentally unchanged the competitive relationship among the final products, the existence of these differences would not prevent a finding of likeness if, by considering all factors, the panel is able to come to the conclusion that the competitive relationship among the products is such as to justify a finding of likeness under Article III:2.[1460] The Appellate Body has also explained that not only products that are perfectly substitutable can fall within the scope of Article III:2, first sentence, as this would be too narrow an interpretation and would reduce the scope of the first sentence essentially to identical products. Rather, products that are close to being perfectly substitutable can be like products, whereas products that compete to a lesser degree would fall within the scope of the second sentence.[1461]

7.1157. The Panel considers that the evidence on the record demonstrates that, despite certain differences in product characteristics, there is a significant degree of competition between PME, RME and SBME in the French market. In the Panel's view, the competitive relationship among the products at issue in the French market is sufficient to justify a finding that, as regards FAME, even under the narrower scope of like products of Article III:2, first sentence, biofuels made from rapeseed oil and soybean oil are like palm oil-based biofuel.

7.1158. The Panel therefore finds that, as regards FAME, biofuels made from rapeseed oil and soybean oil are like palm oil-based biofuel within the meaning of Article III:2, first sentence.

7.2.2.1.4.6 Malaysia's additional argument concerning HVO made from palm oil, rapeseed oil and soybean oil

7.1159. The Panel recalls that Malaysia also considers HVO made from palm oil, rapeseed oil and soybean oil to be like products. The Panel has found, in the context of its analysis of like products under Articles 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 with respect to the high ILUC-risk cap and phase-out, that rapeseed oil-based HVO and soybean oil-based HVO is like HVO made from palm oil. The Panel has already explained, in this respect, that the evidence before it confirms that HVO can be produced from many types of vegetable oils, resulting in the same chemical composition and without affecting the biofuel's characteristics; that its properties, in particular relating to cold flow, depend on the production process rather than the feedstock; and

[1457] Press article, 11 October 2019, (Exhibit MYS-245); and THEN24, "TotalEnergies will no longer use palm oil from 2023", (Exhibit EU-324).
[1458] Malaysia's first written submission, para. 914.
[1459] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 120
[1460] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 125.
[1461] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 149.

that HVO is used as fuel in diesel engines either blended with mineral diesel or fully replacing it. These factual findings apply *mutatis mutandis* with respect to the French TIRIB measure.

7.1160. The Panel therefore finds that rapeseed oil-based HVO and soybean oil-based HVO is like HVO made from palm oil within the meaning of Article III:2, first sentence.

7.2.2.1.5 Taxation in excess of

7.1161. The Panel now proceeds to address the issue of whether imported palm oil-based biofuel is indirectly taxed in excess of like domestic oil crop-based biofuels.

7.1162. Malaysia submits that petrol and diesel fuels that contain imported palm oil-based biofuel are directly taxed in excess of petrol and diesel fuels that contain other like domestic oil crop-based biofuels; and that imported palm oil-based biofuel and palm oil as a biofuel feedstock are indirectly taxed in excess of like domestic oil crop-based biofuels and their feedstocks of domestic origin.[1462] Malaysia maintains that petrol and diesel fuels that contain palm oil-based biofuel, which is classified as non-renewable, are not eligible to benefit from the advantageous tax treatment; whereas in instances where petrol and diesel fuels incorporate biofuel made from other oil crop feedstock (e.g. rapeseed), the French TIRIB measure applies.[1463]

7.1163. The European Union does not contest that the exclusion of palm oil-based biofuel from the French TIRIB measure implies that fuels containing such biofuel, whether imported or domestically produced, may be taxed in excess of fuels containing other types of biofuels, whether imported or domestically produced. The European Union contests, however, that this tax differential is related to the origin of the product.[1464] For the European Union, the French TIRIB measure is an origin-neutral measure, because it is not the incorporation of domestic *vis-à-vis* imported biofuels that triggers the French TIRIB measure, but rather the type of biofuel that is incorporated regardless of its origin.[1465]

7.1164. The Panel notes that, with respect to taxation in excess of, the Appellate Body has stated that even the smallest amount of "excess" is "too much".[1466] Furthermore, a determination of whether an infringement of Article III:2, first sentence exists must be made on the basis of an overall assessment of the actual tax burdens imposed on imported products, on the one hand, and like domestic products, on the other hand.[1467]

7.1165. As explained in section 2 of this Report, entities that release fuel for consumption within the territory of France are liable to pay the French TIRIB as an additional tax that varies in relation to the extent to which the fuel released achieves established incorporation targets for renewable energy sources. While biofuels, including rapeseed oil- and soybean oil-based biofuels, are considered as renewable energy sources for the purposes of the French TIRIB, palm oil-based products are excluded from being considered as renewable energy sources for the purposes of the French TIRIB. The French TIRIB is determined according to a formula whose application results in a tax rate that varies in direct proportion to the difference between the targeted incorporation of renewable energy sources and the actual incorporation of such sources into the fuel released for consumption.

7.1166. The Panel recalls the examples provided in section 2 of this Report to illustrate the operation of the TIRIB formula using the 2020 incorporation target for diesel (8%) and the established 2020 rate (EUR 101 per hectolitre). Based on these examples, the Panel observes that:

a. If the diesel released for consumption contains 8% (or more) of renewable energy sources, including rapeseed oil- and soybean oil-based biofuels, the TIRIB rate would be EUR zero per hectolitre.

[1462] Malaysia's first written submission, para. 1021.
[1463] Malaysia's first written submission, para. 1020.
[1464] European Union's first written submission, paras. 1500-1501.
[1465] European Union's first written submission, paras. 1502-1503; second written submission, para. 294.
[1466] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23.
[1467] Appellate Body Reports, *Brazil – Taxation*, para. 5.35.

b. If the diesel released for consumption contains 8% (or more) of renewable energy sources, including rapeseed oil- and soybean oil-based biofuels, and any amount of palm oil-based biofuel, the TIRIB rate would still be EUR zero per hectolitre.

c. If the diesel released for consumption contains 6% of renewable energy sources, including rapeseed oil- and soybean oil-based biofuels, and 2% (or more) of palm oil-based biofuel, the TIRIB rate would be EUR 2.02 per hectolitre.

d. If the diesel released for consumption contains 2% of renewable energy sources, including rapeseed oil- and soybean oil-based biofuels, and 6% (or more) of palm oil-based biofuel, the TIRIB rate would be 6.06 euros per hectolitre.

e. If the diesel released for consumption does not contain any renewable energy source, including rapeseed oil- and soybean oil-based biofuels, but contains 8% (or more) of palm oil-based biofuel, the TIRIB rate would be EUR 8.08 per hectolitre.

7.1167. These examples show that, if palm oil-based biofuel is incorporated into diesel to satisfy any portion of the 8% incorporation target, replacing renewable energy sources, the tax burden on such diesel will increase in proportion to the amount of palm oil-based biofuel incorporated. In contrast, if rapeseed oil- and/or soybean oil-based biofuels are incorporated into diesel to satisfy any portion of the 8% incorporation target, the tax burden on such diesel will decrease in proportion to the amount of rapeseed oil- and/or soybean oil-based biofuels incorporated, with the possibility of achieving a tax rate of EUR zero per hectolitre if the 8% incorporation target is fully satisfied.

7.1168. In other words, as a consequence of the exclusion of palm oil-based products from being considered as renewable energy sources for the purposes of the French TIRIB, or more specifically, as a result of the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure, fuel containing palm oil-based biofuel for the purpose of satisfying any portion of the incorporation target will always be taxed in excess of fuel containing rapeseed oil- and soybean oil-based biofuels for the purpose of satisfying any portion of the incorporation target. This means, in turn, that the palm oil-based biofuel that is incorporated into fuel to satisfy any portion of the incorporation target will always be indirectly taxed in excess of the like products rapeseed oil- and soybean oil-based biofuels when incorporated into fuel to satisfy the incorporation targets.

7.1169. The European Union does not dispute this. However, it argues that the French TIRIB measure is an origin-neutral measure because it is not the incorporation of domestic *vis-à-vis* imported biofuels that triggers the reduction, but rather the type of biofuel that is incorporated regardless of its origin. The European Union submits that the incorporation of imported soybean oil, rapeseed oil, sunflower oil biofuels, and biofuels produced from waste material and animal fat as well as second generation biofuels triggers the same reduction as when these biofuels are domestic; and, conversely, the incorporation of domestic palm oil-based biofuel does not produce any reduction. The European Union adds that palm oil-based biofuel is also produced in the European Union, including in France.[1468]

7.1170. Malaysia submits that the relevant comparison is between the group of imported products and the group of like products of national origin, i.e. between petrol and diesel fuels, to the extent that they contain palm oil-based biofuels, and petrol and diesel fuels that contain other like domestic oil crop-based biofuels and their feedstocks of French origin. Malaysia adds that the fact that a Member produces itself the product that is subject to the challenged measure, or a complaining Member does not export the whole group of products, does not imply that the measure at issue does not distinguish based on the origin of the products.[1469]

7.1171. The Panel notes that Article III:2, first sentence provides for equality of competitive conditions of all products found to be like. If palm oil-based biofuel has been found to be like rapeseed oil- and soybean oil-based biofuel, the comparison to be made with respect to taxation in excess of is not between imported palm oil-based biofuel and domestic palm oil-based biofuel, but

[1468] European Union's first written submission, paras. 1501-1503; second written submission, para. 294.
[1469] Malaysia's second written submission, paras. 399-404.

between imported palm oil-based biofuel and the like domestic products rapeseed oil and soybean oil-based biofuel.[1470]

7.1172. Under this comparison, it is clear that fuel containing imported palm oil-based biofuel is taxed "in excess" of fuel containing the like domestic products rapeseed oil- and soybean oil-based biofuels. Consequently, imported palm oil-based biofuel is indirectly taxed "in excess" of the like domestic products rapeseed oil- and soybean oil-based biofuels.[1471]

7.1173. In any event, and without ruling on whether the following additional findings are necessary in order for Malaysia to establish its claim under Article III:2, first sentence, the Panel notes that Malaysia is one of the two world's largest producers of palm oil, which produces and exports palm oil as feedstock for biofuel production and palm oil-based biofuel[1472], including to the European Union.[1473]

7.1174. The European Union is the largest biodiesel producer in the world[1474] and France has been one of the major producers and consumers of biodiesel in the European Union.[1475] Rapeseed oil, palm oil and soybean oil have been the most-used feedstocks for biodiesel production in France.[1476] Thus, France produces rapeseed oil-based biofuel, soybean oil-based biofuel and palm oil-based biofuel. Rapeseed oil has been the major feedstock source for biodiesel production in the European Union[1477] and in France[1478], so most of the oil crop-based biofuel produced in France is rapeseed oil-based biofuel. France also produces soybean oil-based biofuel and palm oil-based biofuel, but to a lesser extent.[1479] Counted together, rapeseed oil- and soybean oil-based biofuels comprise most of the biodiesel produced in France.

7.1175. This means that, in effect, palm oil-based biofuel imported from Malaysia, which is all the biofuel imported from such Member, is indirectly taxed "in excess" of the like rapeseed oil and soybean oil based biofuels produced in France, which comprise most of the biofuels produced in France.

[1470] The situation at issue is similar to that in *Japan – Alcoholic Beverages II*. As the panel in *Indonesia – Autos* described it, *in Japan – Alcoholic Beverages II* "the internal tax imposed on domestic shochu was the same as that imposed on imported shochu; the higher tax imposed on imported vodka was also imposed on domestic vodka. Identical products (not considering brand differences) were taxed identically. The issue was whether the differences between the two products shochu and vodka, as defined for tax purposes, were so minor that shochu and vodka should be considered to be like products and therefore subject to the requirement of Article III:2, first sentence, that one should not be taxed in excess of the other." (Panel Report, *Indonesia – Autos*, para. 14.112.)

[1471] In line with the Panel's explanation in *Indonesia – Autos* regarding the situation *Japan – Alcoholic Beverages II*, this finding is not affected by the fact that the European Union also produces palm oil-based biofuel, and thus, that domestic palm oil-based biofuel is indirectly taxed identically to imported palm oil-based biofuel.

[1472] UFOP Global Market Supply 2020/2021, (Exhibit MYS-11), p. 27; UFOP Global Market Supply 2019/2020, (Exhibits EU-121, MYS-212), p. 25.

[1473] USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit MYS-139), p. 29; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit EU-128), p. 32; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit MYS-77), p. 27.

[1474] UFOP Global Market Supply 2020/2021, (Exhibit MYS-11), p. 27; UFOP Global Market Supply 2019/2020, (Exhibits EU-121, MYS-212), p. 25.

[1475] UFOP Global Market Supply 2020/2021, (Exhibit MYS-11), p. 28; UFOP Global Market Supply 2019/2020, (Exhibits EU-121, MYS-212), p. 24; USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit MYS-139), pp. 25-26; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit EU-128), pp. 28-29; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit MYS-77), pp. 22-27.

[1476] DGEC, "Panorama 2019 – Biofuels incorporated in France", (Exhibit EU-191), p. 6; French Parliament Report n. 2609, (Exhibit EU-205), p. 16.

[1477] UFOP Global Market Supply 2020/2021, (Exhibit MYS-11), p. 30; UFOP Global Market Supply 2019/2020, (Exhibits EU-121, MYS-212), p. 28; USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit MYS-139), p. 27; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit EU-128), p. 30; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit MYS-77), p. 25.

[1478] UFOP Global Market Supply 2020/2021, (Exhibit MYS-11), p. 30; UFOP Global Market Supply 2019/2020, (Exhibits EU-121, MYS-212), p. 28; DGEC, "Panorama 2019 – Biofuels incorporated in France", (Exhibit EU-191), p.6; French Parliament Report n. 2609, (Exhibit EU-205), p. 16.

[1479] DGEC, "Panorama 2019 – Biofuels incorporated in France", (Exhibit EU-191), p.6; French Parliament Report n. 2609, (Exhibit EU-205), p. 16.

7.1176. The Panel therefore finds, without ruling on whether these additional findings are necessary in order for Malaysia to establish its claim under Article III:2, that the situation where, as a result of the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure, palm oil-based biofuel is indirectly taxed "in excess" of rapeseed oil and soybean oil-based biofuels is, in effect, one where imported products are subject to taxes "in excess" of those applied to like domestic products.

7.2.2.1.6 Conclusion on Article III:2, first sentence

7.1177. For the reasons stated above, the Panel concludes that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is inconsistent with Article III:2, first sentence, of the GATT 1994, because it results in the application of internal taxes to imported palm oil-based biofuel in excess of those applied to the like domestic rapeseed and soybean oil-based biofuels.

7.2.2.2 Article III:2, second sentence

7.2.2.2.1 Introduction

7.1178. The Panel now turns to Malaysia's claim under Article III:2, second sentence.

7.1179. Malaysia submits[1480] that, should the Panel find that the measure at issue is not inconsistent with Article III:2, first sentence, the exclusion of petrol and diesel fuels, to the extent that they contain palm oil-based biofuel, from the French TIRIB measure is inconsistent with Article III:2, second sentence. Malaysia submits that: (i) petrol and diesel fuels that contain imported palm oil-based biofuel and petrol and diesel fuels that contain other domestic oil crop-based biofuels are directly competitive or substitutable products; (ii) petrol and diesel fuels that contain imported palm oil-based biofuel and palm oil as a feedstock for biofuel production are not similarly taxed to petrol and diesel that contain domestic oil crop-based biofuel and their feedstocks for biofuel production; and (iii) the dissimilar taxation of these directly competitive or substitutable products is applied so as to afford protection to domestic production.

7.1180. The European Union submits[1481] that Malaysia has not demonstrated that the French TIRIB measure constitutes a violation of Article III:2, second sentence. More specifically, the European Union contends that Malaysia has not demonstrated that the relevant products are "directly competitive or substitutable" within the meaning of Article III:2, second sentence. Furthermore, while the European Union does not contest that the exclusion of palm oil-based biofuel from the French TIRIB measure implies that fuels containing such biofuel, whether imported or domestically produced, may be taxed differently to fuels containing other types of biofuels, whether imported or domestically produced, it contests that this tax differential is related to the origin of the product, that this tax differential exceeds the *de minimis* threshold to be considered as dissimilar taxation, and that it is applied so as to afford protection to domestic production.

7.1181. The Panel notes that Malaysia has stated that its claim under Article III:2, second sentence is made in the alternative to its claim under the first sentence. The Panel has already found a violation of Article III:2, first sentence, finding that the products at issue are like within the narrow meaning of such sentence. Therefore, the Panel could stop its analysis here.

7.1182. However, the Panel notes that the likeness of the products at issue under the first sentence of Article III:2 is an issue that remains disputed, and is admittedly less clear than the likeness of the products under the broader scope that applies with respect to Article 2.1 of the TBT Agreement and Articles III:4 and III:2, second sentence. Furthermore, given that the like products within the meaning of the first sentence have been considered as a subset of the "directly competitive or substitutable products" within the meaning of the second sentence[1482], the Panel's factual findings in the context of its assessment of the first sentence necessarily imply a view on whether the same

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[1480] Malaysia's first written submission, paras. 1025-1059; second written submission, paras. 353-405, and 410-418.

[1481] European Union's first written submission, paras. 1504-1561; second written submission, paras. 295-312.

[1482] Appellate Body Report, *Korea – Alcoholic Beverages*, para. 118. See also Appellate Body Report, *Canada – Periodicals*, p. 19.

products are directly competitive or substitutable for the purposes of the second sentence. In light of this, and for the sake of completeness, the Panel considers it appropriate to address Malaysia's claim with respect to Article III:2, second sentence.[1483]

7.2.2.2.2 Legal standard

7.1183. Article III:2, second sentence provides as follows:

> Moreover, no Member shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

7.1184. Article III:2, second sentence must be read together with the Note *Ad* Article III:2, which states as follows:

> A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

7.1185. Article III:1, referred to in Article III:2, second sentence, states that Members:

> recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

7.1186. Article III:2, second sentence has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.1187. Based on the text of Article III:2, second sentence, read together with its *Ad* Note, a complainant must demonstrate the following four elements to establish an inconsistency with this provision:

a. that the measure is an internal tax or other internal charge applied, directly or indirectly, to products;

b. that the imported and domestic products at issue are directly competitive or substitutable with respect to each other;

c. that these directly competitive or substitutable products are not similarly taxed; and

d. that the dissimilar taxation of these directly competitive or substitutable products is "applied… so as to afford protection to domestic production".[1484]

7.1188. With respect to the first element, the Panel has already found that the French TIRIB measure falls within the scope of Article III:2.

7.1189. The Panel will elaborate further on the elements of the legal standard in Article III:2, second sentence as necessary in the course of its assessment of the issues in dispute.

[1483] The Panel observes that it is not necessarily bound by the fact that a claim is formulated as a claim made in the alternative. (See e.g. Appellate Body Report, *US – Continued Zeroing*, paras. 274-279.)

[1484] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 24.

7.2.2.2.3 Directly competitive or substitutable products

7.1190. The Panel begins with the issue of whether the products at issue are directly competitive or substitutable within the meaning of Article III:2.

7.1191. Malaysia submits that if the Panel finds that petrol and diesel fuels that contain palm oil-based biofuel are not like petrol and diesel fuels that contain other oil crop-based biofuels, the same arguments and evidence lead to a conclusion that these products are directly competitive or substitutable within the meaning of Article III:2, second sentence.[1485]

7.1192. The European Union submits that Malaysia has not discharged its burden of demonstrating that palm oil-based biofuel and other crop-based biofuels are directly competitive or substitutable.[1486] The European Union maintains that Malaysia has merely demonstrated that palm oil, soybean and rapeseed oil biofuels appear to be in some competitive relationship, but it has not investigated how intensive this competitive relationship is. For the European Union, Malaysia has not described in any way the extent of the competitive relationship between those products on the French market, which is characterized by the fact that France requires a CFPP of -15ºC for the winter season, which greatly affects the extent to which PME can substitute other biodiesels.[1487]

7.1193. The Panel notes that Malaysia compares petrol and diesel fuels that contain imported palm oil-based biofuel with petrol and diesel fuels that contain other domestic oil crop-based biofuels, and argues that those products are directly competitive or substitutable within the meaning of Article III:2, second sentence. However, Article III:2, second sentence concerns the treatment of imported products as compared to the treatment of directly competitive or substitutable domestic products. Therefore, the comparison for the purposes of the analysis of directly competitive or substitutable products must be between imported and domestic products and not between a domestic product containing an imported input and a domestic product containing a domestic input.[1488] Therefore, for the purposes of its analysis of directly competitive or substitutable products, the Panel will compare palm oil-based biofuel with rapeseed oil and soybean oil-based biofuels, and not petrol and diesel fuels that contain imported palm oil-based biofuel with petrol and diesel fuels that contain other domestic oil crop-based biofuels.

7.1194. The Panel also notes that Malaysia makes the argument that palm oil as feedstock for biofuel production and other oil-crop feedstocks for biofuel production are directly competitive or substitutable within the meaning of Article III:2, second sentence; and that palm oil as biofuel feedstock and other directly competitive or substitutable biofuel feedstocks of domestic origin are dissimilarly taxed so as to afford protection to domestic production. The Panel notes that Malaysia's argument with respect to palm oil as biofuel feedstock rests on the same premise of its argument that palm oil-based biofuel and domestic oil crop-based biofuels are dissimilarly taxed so as to afford protection to domestic production. For the same reasons explained above[1489] with respect to Malaysia's argument concerning biofuel feedstocks under Article III:2, first sentence, the Panel does not consider it necessary to make additional findings with respect to palm oil as feedstock for biofuel production to secure a positive solution to this dispute or to assist the DSB in making the rulings and recommendations provided for in the covered agreements.

7.1195. The Panel recalls that both the analysis of like products under Article III:2, first sentence, and the analysis of direct competitiveness and substitutability under Article III:2, second sentence, require consideration of the competitive relationship between imported and domestic products, but like products is a narrower category than directly competitive and substitutable products, so the degree of competition and substitutability required under the first sentence is higher than that under the second sentence.[1490] The Panel further recalls that products that are close to being perfectly

[1485] Malaysia's first written submission, paras. 1028-1029.
[1486] European Union's first written submission, para. 1510.
[1487] European Union's first written submission, para. 1511-1512.
[1488] Malaysia has not argued that there is dissimilar taxation between imported petrol and diesel fuel and domestic petrol and diesel fuel, but between petrol and diesel fuels that contain imported palm oil-based biofuel and petrol and diesel fuels that contain other domestic oil crop-based biofuels.
[1489] See paras. 7.1132-7.1135 above.
[1490] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 148.

substitutable can be like products, whereas products that compete to a lesser degree would fall within the scope of Article III:2, second sentence.[1491]

7.1196. The Panel has already found the competitive relationship among the products at issue in the French market to be sufficient to justify a finding that, as regards FAME and HVO, even under the narrower scope of like products of Article III:2, first sentence, biofuels made from rapeseed oil and soybean oil are like palm oil-based biofuel. The factual findings made by the Panel in the context of finding that the competitive relationship among the products at issue suffices to make them like within the narrow scope of Article III:2, first sentence mean that, for the same reasons, and *a fortiori*, the products are directly competitive or substitutable within the wider scope of the second sentence of Article III:2.

7.1197. The Panel therefore finds that, as regards FAME and HVO, rapeseed oil- and soybean oil-based biofuels and palm oil-based biofuel are directly competitive and substitutable within the meaning of Article III:2, second sentence.

7.2.2.2.4 Dissimilar taxation

7.1198. The Panel now proceeds to address the issue of whether imported palm oil-based biofuel and domestic oil crop-based biofuel are not similarly taxed.

7.1199. Malaysia maintains that petrol and diesel fuels that contain imported palm oil-based biofuel and palm oil as a feedstock for biofuel production are not similarly taxed to petrol and diesel that contain domestic oil crop-based biofuel and their feedstocks for biofuel production.[1492] Malaysia submits that, while petrol and diesel fuels that contain oil crop-based biofuels other than palm oil are eligible for the reduction of the rate of the French TIRIB, petrol and diesel fuels that contain palm oil-based biofuel do not benefit from such reduction. For Malaysia, as a consequence, for petrol and diesel fuels that contain imported palm oil-based biofuel a higher tax rate is imposed, as compared to the tax levied on petrol and diesel fuels that contain domestic oil crop-based biofuel.[1493]

7.1200. The European Union submits that the incorporation of imported soybean oil, rapeseed oil, sunflower oil biofuels, and biofuels produced from waste material and animal fat as well as second generation biofuels triggers the same reduction as when these biofuels are domestic; and, conversely, the incorporation of domestic palm oil-based biofuel does not produce any reduction. For the European Union, it is not the incorporation of domestic *vis-à-vis* imported biofuels that triggers the reduction, but rather the type of biofuel that is incorporated regardless of its origin.[1494] The European Union adds that the discussion in the French Parliament on the exclusion of soybean oil-based biofuel from the French TIRIB measure from 2022 confirms that the French TIRIB measure makes a distinction based on crops, on the grounds of environmental protection, GHG emissions, climate change mitigation and biodiversity conservation, and not based on whether the crops are imported or domestically produced.[1495]

7.1201. The Panel has already found that imported palm oil-based biofuel is indirectly taxed in excess of the like domestic rapeseed oil- and soybean oil-based biofuels. Thus, there is a tax differential between the products at issue.

7.1202. The Appellate Body has clarified that to be "not similarly taxed" within the meaning of Article III:2, second sentence, the tax burden on imported products must be heavier than on directly competitive or substitutable domestic products, and more than *de minimis*. A determination of whether the tax burden is more than *de minimis* can only be made on a case-by-case basis.[1496] Panels must look at the market in question, and the products themselves, and assess whether the difference in taxation has an impact on the market.[1497]

[1491] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 149.
[1492] Malaysia's first written submission, para. 1045.
[1493] Malaysia's first written submission, paras. 1033 and 1039.
[1494] European Union's first written submission, paras. 1523-1524
[1495] European Union's first written submission, paras. 1531-1535.
[1496] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 27.
[1497] Panel Report, *Chile – Alcoholic Beverages*, paras. 7.90-7.91.

7.1203. In this respect, Malaysia presents an example of an economic operator releasing for consumption a volume of 200,000 hectolitres petrol and diesel fuels in 2020 and 2021. According to Malaysia:

a. If the economic operator includes a share of renewable biofuels eligible for the tax reduction of 7.92%, i.e. 0,08% below the target percentage of incorporation, the amount of the tax for diesel in 2020 would be: 200,000 hL* EUR 101 /hL * 0.08% = EUR 16,160; and the amount of the tax for petrol and diesel fuel in 2021 would be: 200,000 hL* EUR 104 /hL *0.08% = EUR 16,640. Should palm oil-based biofuel be incorporated in the petrol and diesel fuels, it would not be counted within the 7.92% but within the 0.08%.[1498]

b. If the economic operator instead includes 4.09% of palm oil-based biofuel and 3.91% of biofuel made of rapeseed oil, the amount of the TIRIB would be: 200,000 hL * EUR 101 /hL * 4.09% = EUR 826,180 for 2020; 200,000 hL * EUR 104 /hL * 4.09 = EUR 850,720 for 2021.[1499]

c. If the economic operator did not include any biofuel, or only palm oil-based biofuel, the amount of the TIRIB would be: 200,000 hL * EUR 101 /hL * 8% = EUR 1,616,000 in 2020 and 200,000 hL * EUR 104 /hL * 8% = EUR 1,664,000 in 2021.[1500]

7.1204. Malaysia submits that the difference in taxation is far above *de minimis*. That is because if the share of rapeseed oil-based biofuel incorporated into the petrol and diesel fuels is greater than or equal to the national target percentage for using renewable energy in the transport sector (8% in 2020 and 2021), the tax would be zero, case in which the difference in taxation between the two categories of like products is significantly higher and thus far above the *de minimis* standard.[1501]

7.1205. The European Union argues that, even if the Panel were to find that there is a tax differential, it would still find that it does not exceed the *de minimis* threshold because when an economic operator in France released petrol and diesel fuels for consumption that do not include any biofuel or that include only palm oil-based biofuel, the amount of the TIRIB in 2021 would be EUR 0.08 per litre of biofuel, as compared to EUR 0 per litre as applicable TIRIB where the incorporation objectives of renewable biofuels are fully met (8%). For the European Union, the difference is certainly not significant. The European Union adds that the calculations made by Malaysia are an overestimation of the TIRIB due, since the TIRIB revenue amounted to EUR 900,000 in 2018 and EUR 600,000 in 2019, for the whole of France, and the incorporation rates of renewable biofuels achieved in 2019 were 7.3% and 7.9% (in terms of actual volume) respectively for the diesel and petrol sectors, for target incorporation objectives, which were 7.9% that year on a national level.[1502]

7.1206. As previously explained, based on the examples provided in section 2 of this Report to illustrate the operation of the TIRIB formula, if the diesel released for consumption contains 8% (or more) of renewable energy sources, including rapeseed oil- and soybean oil-based biofuel, the TIRIB rate would be EUR zero per hectolitre. If this is compared to the full amount of the TIRIB rate of EUR 8.08 per hectolitre if the diesel released for consumption does not contain any renewable energy source, including rapeseed oil and soybean oil-based biofuel, but contains 8% (or more) of palm oil-based biofuel, the difference in taxation would be 8.08 euros per hectolitre.

7.1207. The Panel considers that the mere possibility of achieving a tax rate of EUR zero per hectolitre by fully satisfying the incorporation target is sufficient to have a significant impact on the market, incentivizing the use of qualifying biofuels for the purposes of the French TIRIB measure, including rapeseed oil- and soybean oil-based biofuels, allowing such biofuels to compete for a share of the fuel market, and excluding palm oil-based biofuel from competing for such share of the fuel market.

7.1208. This impact on the market can be illustrated by the fact that, before announcing a decrease in the use of palm oil as biofuel feedstock, Total had unsuccessfully challenged the exclusion of oil palm-crop based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB

[1498] Malaysia's first written submission, para. 1035.
[1499] Malaysia's first written submission, para. 1036.
[1500] Malaysia's first written submission, para. 1038.
[1501] Malaysia's first written submission, para. 1040.
[1502] European Union's first written submission, paras. 1540-1544.

measure.[1503] In addition, this is further reinforced by the EU's characterization of the tax as being "about increasing the cost of using fuels which do not contain a sufficient quantity of renewable energy, thereby creating an incentive for the use of those that contain such quantity."[1504]

7.1209. In light of the above, in the Panel's view, the tax burden on imported palm oil-based biofuel resulting from the difference in taxation is heavier than on directly competitive or substitutable domestic products, and more than *de minimis*. Consequently, the difference in taxation amounts to dissimilar taxation within the meaning of Article III:2, second sentence.

7.1210. Malaysia also refers to a mandate change whereby the share of rapeseed oil-based biofuel was counted at its actual value plus 20%. Malaysia submits that, from 1 August 2020 until 31 December 2021, any share of FAME whose CFPP is at the most -10°C, was counted at 20% over its actual value for the purposes of the French TIRIB measure. Malaysia maintains that only rapeseed oil-based biofuel, with a CFPP value of -14°C, benefited from the accounting change to the calculation of the reduction of the French TIRIB. According to Malaysia, petrol and diesel fuels that contained palm oil-based biofuel were excluded from benefitting from this increased counting because its CFPP value is higher than -10°C. For Malaysia, this reinforces its conclusion that the tax burden differential between the imported and domestic products is far above the *de minimis* standard.[1505]

7.1211. The European Union contends that the temporary incentive, which was in force from 1 August 2020 until 31 December 2020 and not prolonged, does not differentiate between domestically produced and imported biofuels, so it cannot be a valid basis for a claim regarding the tax differential between domestic and imported biofuels.[1506]

7.1212. The Panel has already found dissimilar taxation within the meaning of Article III:2, second sentence. This is regardless of the existence of the accounting change related to the CFPP of rapeseed oil-based biofuel, which was valid from 1 August 2020 until 31 December 2020. Therefore, it is not necessary for the Panel to rule on the increased counting, as it could only reinforce the conclusion on dissimilar taxation that it has already reached.

7.1213. The Panel therefore finds that, as a result of the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure, imported palm oil-based biofuel and the like domestic products rapeseed oil- and soybean oil-based biofuels are not similarly taxed.

7.2.2.2.5 So as to afford protection to domestic production

7.1214. The Panel now turns to the issue of whether the dissimilar taxation of these directly competitive or substitutable imported and domestic products is applied so as to afford protection to domestic production.

7.1215. Malaysia argues that the French TIRIB measure is applied so as to afford protection to domestic oil crop-based biofuels and their feedstocks because the tax differential is sufficiently high to conclude on its protective application; and because it is designed in such a way as to encourage the incorporation into petrol and diesel fuels of domestic oil crop-based biofuels and their feedstocks, such as rapeseed oil-based biofuel and its feedstock, to the detriment of imported palm oil-based biofuel.[1507] Malaysia submits that the design and structure of the French TIRIB measure demonstrate its protective application, because it excludes from the tax reduction petrol and diesel fuels, to the extent that they contain imported palm oil-based biofuel, and thus, palm oil-based biofuel and palm oil as a biofuel feedstock, whereas petrol and diesel fuels that contain domestic oil crop-based biofuels, and thus, domestic oil crop-based biofuels and their feedstocks benefit from the tax reduction. Malaysia adds that the increased counting for biofuel with a CFPP of at most -10°C for

[1503] Press article, 11 October 2019, (Exhibit MYS-245); and THEN24, "TotalEnergies will no longer use palm oil from 2023", (Exhibit EU-324).
[1504] European Union's first written submission, para. 1425.
[1505] Malaysia's first written submission, paras. 1046-1050.
[1506] European Union's first written submission, paras. 1525-1530.
[1507] Malaysia's first written submission, paras. 1055, 1057-1058; second written submission, para. 415.

the purposes of quantifying the tax reduction only benefited domestically produced rapeseed oil-based biofuel.[1508]

7.1216. The European Union disputes that its legal framework for renewable energy as well as the exclusion of palm oil-based biofuel from the French TIRIB measure is designed to afford protection to domestic products. The European Union argues that palm oil-based biofuel is not excluded from the French TIRIB measure because it is imported, as also domestic palm oil-based biofuel is subject to the same exclusion, which had serious consequences on investment and employment in France. The European Union maintains that, despite those consequences, the French legislator rejected the French Government's proposal to relax that exclusion, referring to the environmental and climate change impact of palm oil cultivation and the associated moral concerns, in line with the very objective and revealing structure of the French TIRIB.[1509]

7.1217. The Appellate Body has explained that the question of whether dissimilar taxation "affords protection" for the purposes of Article III:2, second sentence is not one of intent, but rather the structure of the measure in question and its application on domestic as compared to imported products.[1510] The Appellate Body also stated that, although the aim of a measure may not be easily ascertained, its protective application can most often be discerned from the "design, the architecture, and the revealing structure of a measure".[1511] The protective application of dissimilar taxation can only be determined "on a case-by-case basis, taking account of all relevant facts".[1512] In certain cases, the magnitude of the dissimilar taxation may be evidence of such a protective application.[1513]

7.1218. The Panel's analysis of its structure and application reveals that the French TIRIB is a tax that varies in relation to the extent to which the fuel released achieves established incorporation targets for renewable energy sources. While biofuels, including rapeseed oil- and soybean oil-based biofuels, are considered as renewable energy sources for the purposes of the French TIRIB, palm oil-based products are excluded from being considered as renewable energy sources.

7.1219. As already explained, as a consequence of the exclusion of palm oil-based products from being considered as renewable energy sources for the purposes of the French TIRIB, or more specifically, as a result of the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure, if palm oil-based biofuel is incorporated into diesel to satisfy any portion of the incorporation target, replacing renewable energy sources, the tax burden on such diesel will increase in proportion to the amount of palm oil-based biofuel incorporated. In contrast, if rapeseed oil- and/or soybean oil-based biofuels are incorporated into diesel to satisfy any portion of the incorporation target, the tax burden on such diesel will decrease in proportion to the amount of rapeseed oil- and/or soybean oil-based biofuels incorporated, with the possibility of achieving a tax rate of EUR zero per hectolitre if the incorporation target is fully satisfied. The Panel has already found that the mere possibility of achieving a tax rate of EUR zero per hectolitre by fully satisfying the incorporation target is sufficient to incentivize the use of qualifying biofuels for the purposes of the French TIRIB measure, including rapeseed oil- and soybean oil-based biofuels, allowing such biofuels to compete for a share of the fuel market, and excluding palm oil-based biofuel from competing for such share of the fuel market.

7.1220. The Panel also recalls that Malaysia is one of the two world's largest producers of palm oil, which produces and exports palm oil as feedstock for biofuel production and palm oil-based biofuel[1514], including to the European Union.[1515] In turn, France has been one of the major producers

[1508] Malaysia's first written submission, paras. 1055-1056; second written submission, paras. 417.
[1509] European Union's first written submission, paras. 1551-1552.
[1510] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29.
[1511] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29.
[1512] Appellate Body Report, *Korea – Alcoholic Beverages*, para. 137.
[1513] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29.
[1514] UFOP Global Market Supply 2020/2021, (Exhibit MYS-11), p. 27; UFOP Global Market Supply 2019/2020, (Exhibits EU-121, MYS-212), p. 25.
[1515] USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit MYS-139), p. 29; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit EU-128), p. 32; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit MYS-77), p. 27.

and consumers of biodiesel in the European Union[1516], producing rapeseed oil-based biofuel, soybean oil-based biofuel and palm oil-based biofuel.[1517] While most of the oil crop-based biofuel produced in France is rapeseed oil-based biofuel[1518], France also produces soybean oil-based biofuel and palm oil-based biofuel, but to a lesser extent.[1519] Counted together, rapeseed oil- and soybean oil-based biofuels comprise most of the biodiesel produced in France.

7.1221. This means that the exclusion of palm oil-based biofuels from the group of qualifying biofuels for the purposes of the French TIRIB measure has the effect of incentivizing the use of rapeseed oil-based biofuel, which is the oil crop-based biofuel that France produces the most, and soybean oil-based biofuels, which is also produced in France but to a smaller extent, to the advantage of the French domestic producers of such biofuels, and to the detriment of imports of palm oil-based biofuels from Malaysia. Therefore, by excluding palm oil-based biofuels from the group of qualifying biofuels, the French TIRIB measure has the effect of affording protection to French producers of rapeseed oil- and soybean oil-based biofuels.

7.1222. Malaysia also maintains that the French measure is a support scheme implemented under the general framework of the RED II and the Delegated Regulation and, therefore, any argumentation as regards the protectionist intention of the EU measures, in general terms, is also relevant to demonstrate the true objective pursued by the French TIRIB measure. Malaysia also refers to the role that protectionist motivations may have played in advancing the legislation in the French legislature.[1520]

7.1223. The European Union contends that the statements by Members of the French legislature in parliamentary debates demonstrate that the French TIRIB measure is driven primarily by environmental concerns.[1521] The European Union submits that the fact that the other oil crops biofuels do not fall within the same exclusion from the French TIRIB measure is objectively explained both by the EU analysis with regard to high ILUC-risk crop and their share of expansion in land with high-carbon stock, as well as by information elaborated by the French authorities, which concluded, for instance, that the large increase in rapeseed production in France between 2005 and 2008 had a limited effect on deforestation.[1522] For the European Union, it is coherent with the climate change and environmental objective of the French TIRIB that this type of biofuel is not treated the same way as palm oil-based biofuel for the purpose of the French TIRIB measure, and the fact that the incorporation of imported biofuel in the fuel released for consumption in France contributes to the French TIRIB measure confirms that the structure, design and application of the measure is not to afford protection to domestic products.[1523]

7.1224. The Panel has focused its analysis on the structure and application of the measure itself, and has found, on that basis, that the French TIRIB measure has the effect of affording protection to French producers of rapeseed oil- and soybean oil-based biofuels. Under these circumstances, the Panel considers it unnecessary, for the purposes of the evaluation of the claim under Article III:2, second sentence, to delve further into objectives expressed by individual legislators or the public policy concerns that may lay behind the measure.

7.1225. The Panel therefore finds that the French TIRIB measure has the effect of affording protection to French producers of rapeseed oil- and soybean oil-based biofuels, which is sufficient

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[1516] UFOP Global Market Supply 2020/2021, (Exhibit MYS-11), p. 28; UFOP Global Market Supply 2019/2020, (Exhibits EU-121, MYS-212), p. 24; USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit MYS-139), pp. 25-26; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit EU-128), pp. 28-29; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit MYS-77), pp. 22-27.

[1517] DGEC, "Panorama 2019 - Biofuels incorporated in France", (Exhibit EU-191), p. 6; French Parliament Report n. 2609, (Exhibit EU-205), p. 16.

[1518] UFOP Global Market Supply 2020/2021, (Exhibit MYS-11), p. 30; UFOP Global Market Supply 2019/2020, (Exhibits EU-121, MYS-212), p. 28; DGEC, "Panorama 2019 - Biofuels incorporated in France", (Exhibit EU-191), p.6; French Parliament Report n. 2609, (Exhibit EU-205), p. 16.

[1519] DGEC, "Panorama 2019 - Biofuels incorporated in France", (Exhibit EU-191), p.6; French Parliament Report n. 2609, (Exhibit EU-205), p. 16.

[1520] Malaysia's first written submission, para. 1059; second written submission, para. 416.

[1521] European Union's first written submission, para. 1555-1567.

[1522] European Union's first written submission, para. 1553.

[1523] European Union's first written submission, para. 1554; second written submission, para. 308.

under the circumstances of this dispute to conclude that the dissimilar taxation is applied "so as to afford protection to domestic production" within the meaning of Article III:2, second sentence.

7.2.2.2.6 Conclusion on Article III:2, second sentence

7.1226. The Panel concludes that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is inconsistent with Article III:2, second sentence, of the GATT 1994, because it results in dissimilar taxation between imported palm oil-based biofuel and the directly competitive or substitutable domestic rapeseed oil and soybean oil-based biofuels, and this dissimilar taxation is applied so as to afford protection to domestic production.[1524]

7.2.2.3 Article I:1

7.2.2.3.1 Introduction

7.1227. Having addressed the claims relating to the national treatment obligations in the first and second sentences of Article III:2, the Panel now proceeds to address whether the French TIRIB measure is inconsistent with the MFN obligation in Article I:1.

7.1228. Malaysia submits[1525] that the exclusion of petrol and diesel fuels, to the extent that they contain palm oil-based biofuel, from the French TIRIB measure is inconsistent with Article I:1, because it discriminates against such petrol and diesel fuels and, indirectly, against Malaysian palm oil-based biofuel and its feedstock, while favouring petrol and diesel fuels that contain other like imported oil crop-based biofuels and, thus, other like imported oil crop-based biofuels and their feedstocks of foreign origin. More specifically, Malaysia submits that: (i) the exclusion of petrol and diesel fuels, to the extent that they contain palm oil-based biofuel, from the French TIRIB measure falls within the scope of application of Article I:1; (ii) petrol and diesel fuels that contain imported palm oil-based biofuel are like petrol and diesel fuels that contain other imported oil crop-based biofuels; (iii) the exclusion of petrol and diesel fuels, to the extent that they contain palm oil-based biofuel, from the French TIRIB measure constitutes an advantage to petrol and diesel fuels that contain other like imported oil crop-based biofuels and their feedstocks of foreign origin; and (iv) that advantage is not extended immediately and unconditionally to petrol and diesel fuels that contain palm oil-based biofuel and palm oil as a feedstock for biofuel production.

7.1229. The European Union submits[1526] that Malaysia's claim under Article I:1 should be rejected. More specifically, the European Union does not dispute that the French TIRIB measure is a matter which is capable of falling within Article III:2, and therefore also within Article I:1. However, the European Union contends that Malaysia has not demonstrated that the relevant products are like within the meaning of Article I:1, first sentence. Furthermore, while the European Union does not contest that the French TIRIB measure grants an advantage, it contests that such advantage is not accorded immediately and unconditionally to the like product originating in all the other WTO Members.

7.2.2.3.2 Legal standard

7.1230. Article I:1 states:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately

[1524] Malaysia's first written submission, para. 1021.
[1525] Malaysia's first written submission, para. 974-999; second written submission, paras. 353-406.
[1526] European Union's first written submission, para. 1562-1577; second written submission, paras. 313-314.

and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

7.1231. As already noted in the context of the Panel's assessment of the claim under Article I:1 against the high ILUC-risk cap and phase-out, a complainant must demonstrate the following elements to establish an inconsistency with Article I:1:

a. that the measure at issue falls within the scope of application of Article I:1;

b. that the imported products at issue are like products within the meaning of Article I:1;

c. that the measure at issue grants an advantage, favour, privilege, or immunity on a product originating in the territory of any country; and

d. that the advantage so accorded is not accorded immediately and unconditionally to like products originating in the territory of all Members.[1527]

7.1232. The Panel will elaborate further on the elements of the legal standard in Article I:1 as necessary in the course of its assessment of the issues in dispute.

7.2.2.3.3 Scope of application of Article I:1

7.1233. The Panel begins with the issue of whether the French TIRIB measure falls within the scope of application of Article I:1.

7.1234. Malaysia maintains that, by demonstrating that the exclusion of petrol and diesel fuels, to the extent that they contain palm oil-based biofuel, from the French TIRIB measure is a matter referred to in Article III:2, it has established that it falls within the scope of Article I:1.[1528] Malaysia also contends that the likeness of the products is not relevant in determining whether a measure is a matter referred to in Article III:2.[1529]

7.1235. The European Union submits that the French TIRIB is an internal tax, and France is a WTO Member, so the French TIRIB is a matter which is capable of falling within Article III:2, and therefore also within Article I:1.[1530] The European Union submits, however, that the exclusion of palm oil-based biofuel from the French TIRIB measure creates a tax differential between products which Malaysia has not demonstrated to be like or directly competitive or substitutable, so the Panel should conclude that the exclusion from the French TIRIB measure is not a matter falling within Article III:2 and, as a consequence, under Article I:1.[1531]

7.1236. The Panel observes that Article I:1 covers a wide range of measures, including "all matters referred to in paragraphs 2 and 4 of Article III". Thus, internal matters subject to the national treatment obligation under Articles III:2 and III:4 are also within the scope of the MFN obligation under Article I:1.[1532] This includes internal taxes applied, directly or indirectly, to products, referred to in Article III:2.

7.1237. The Panel has already found that the French TIRIB is an internal tax applied, directly or indirectly, to products, which falls within the scope of Article III:2, and that, consequently, the French TIRIB measure, as a feature of the French TIRIB, also falls within the scope of Article III:2. Because the French TIRIB measure falls within the scope of Article III:2, it is a matter referred to in Article III:2 and it thus falls within the scope of Article I:1.

7.1238. As Malaysia contends, and contrary to the European Union's argument, whether the products concerned are like is irrelevant in the determination of whether the French TIRIB measure falls within the scope of Article I:1. Even if the products concerned were found not to be like, the French TIRIB would still be an internal tax applied to products, subject to the MFN obligation

[1527] Appellate Body Reports, *EC – Seal Products*, para. 5.86.
[1528] Malaysia's first written submission, paras. 977-978.
[1529] Malaysia's second written submission, para. 356.
[1530] European Union's first written submission, para. 1563.
[1531] European Union's first written submission, paras. 1564-1565.
[1532] Appellate Body Reports, *EC – Seal Products*, para. 5.80.

contained in Article I:1, and the French TIRIB measure, as a feature of the French TIRIB, would still fall under the scope of application of Article I:1 of the GATT 1994.

7.1239. The Panel therefore finds that the French TIRIB measure falls within the scope of application of Article I:1.

7.2.2.3.4 Like products

7.1240. The Panel now turns to the issue of whether the products at issue are like products within the meaning of Article I:1.

7.1241. Malaysia maintains that palm oil-based biofuel and palm oil as a biofuel feedstock are like other oil crop-based biofuels and their respective feedstocks; and thus, petrol and diesel fuels that contain palm oil-based biofuel are like petrol and diesel fuels that contain other oil crop-based biofuels for the purposes of Article I:1. Malaysia refers to its arguments in the context of its claims against the high ILUC-risk cap and phase-out.[1533]

7.1242. The European Union submits that it has already explained with regard to Article III:2 that Malaysia has neither demonstrated that palm oil-based biofuel is like all the other biodiesels or just RME, and SBME, nor has it shown that these products are directly competitive or substitutable, and notably in the French market. For the European Union, it follows that the exclusion of palm oil-based biofuel from the French TIRIB measure creates a tax differential between products which Malaysia has not demonstrated to be like or directly competitive or substitutable.[1534]

7.1243. The Panel notes that Malaysia compares petrol and diesel fuels that contain imported palm oil-based biofuel with petrol and diesel fuels that contain other imported oil crop-based biofuels, and argues that those products are like within the meaning of Article I:1. However, Article I:1 concerns the treatment of imported products as compared to the treatment of other like imported products. Therefore, the comparison for the purposes of the analysis of like products must be between imported products and not between a domestic product containing an imported input and a domestic product containing another imported input.[1535] Therefore, for the purposes of its analysis of like products, the Panel will compare palm oil-based biofuel with rapeseed oil and soybean oil-based biofuels, and not petrol and diesel fuels that contain imported palm oil-based biofuel with petrol and diesel fuels that contain other imported oil crop-based biofuels.

7.1244. The Panel also notes that Malaysia makes the argument that palm oil as feedstock for biofuel production is like other oil crop-based feedstocks for biofuel production within the meaning of Article I:I; and that the French TIRIB measure discriminates against palm oil as biofuel feedstock, while favouring other like oil crop-based biofuel feedstocks of different origins. The Panel notes that Malaysia's argument with respect to palm oil as biofuel feedstock rests on the same premise of its argument with respect to palm oil-based biofuel. For the same reasons explained above[1536] with respect to Malaysia's argument concerning biofuel feedstocks under Article III:2, first sentence, the Panel does not consider it necessary to make additional findings with respect to palm oil as feedstock for biofuel production to secure a positive solution to this dispute or to assist the DSB in making the rulings and recommendations provided for in the covered agreements.

7.1245. The Panel recalls that it has already found that, as regards FAME and HVO, rapeseed oil- and soybean oil-based biofuels are like palm oil-based biofuel within the narrow scope of Article III:2, first sentence. The factual findings made by the Panel in the context of finding that the competitive relationship among the products at issue suffices to make them like within the narrow scope of Article III:2, first sentence mean that, for the same reasons, and *a fortiori*, these products are like under the wider scope of Article I:1.

[1533] Malaysia's first written submission, para. 990.
[1534] European Union's first written submission, para. 1564.
[1535] Malaysia has not argued that there is discrimination among like petrol and diesel fuels of different origins, but between petrol and diesel fuels that contain imported palm oil-based biofuel and petrol and diesel fuels that contain other imported oil crop-based biofuels.
[1536] See paras. 7.1132-7.1135 above.

7.1246. The Panel therefore finds that, as regards FAME and HVO, rapeseed oil- and soybean-oil based biofuels are like palm oil-based biofuel within the meaning of Article I:1.

7.2.2.3.5 Advantage granted to a product originating in the territory of any other country

7.1247. The Panel will now proceed to address whether the exclusion of petrol and diesel fuels, to the extent that they contain palm oil-based biofuel, from the French TIRIB measure grants an advantage to other like imported oil crop-based biofuels.

7.1248. Malaysia submits that the exclusion of petrol and diesel fuels, to the extent that they contain palm oil-based biofuel, from the French TIRIB measure constitutes an advantage granted to petrol and diesel fuels that contain oil crop-based biofuels other than palm oil-based biofuel, regardless of their origin, and thus, indirectly, to imported oil crop-based biofuels other than palm oil-based biofuel and their respective feedstocks.[1537] Malaysia maintains that a tax reduction is available to petrol and diesel incorporating renewable energy biofuels, but excludes petrol and diesel fuels to the extent they contain palm oil-based biofuel.[1538] Malaysia argues that the economic operators will favour oil crop-based biofuels other than palm oil-based biofuel, whose incorporation into fuel can trigger either a lower or zero tax rate.[1539] For Malaysia, thus, the advantage of qualifying for a lower tax rate, and, as a result, better competitive opportunities, is granted to other imported oil crop-based biofuels, but not to palm oil-based biofuel.[1540]

7.1249. The European Union does not contest that the French TIRIB measure grants an advantage for the purpose of Article I:1.[1541]

7.1250. Previous panels have considered advantages within the meaning of Article I:1 to be those that create more favourable competitive opportunities or affect the commercial relationship between products of different origins.[1542] They have also found that an advantage exists when a measure modifies the conditions of competition for certain imported products relative to other like imported products.[1543] The focus of the analysis under Article I:1 should be on the impact of a given measure on the equality of competitive opportunities for the like imported products rather than the actual trade effects of a measure.[1544]

7.1251. The Panel recalls that the French TIRIB is a tax that varies in relation to the extent to which the fuel released achieves established incorporation targets for renewable energy sources. While biofuels, including rapeseed oil- and soybean oil-based biofuels, are considered as renewable energy sources for the purposes of the French TIRIB, palm oil-based products are excluded from being considered as renewable energy sources. As explained, if rapeseed oil- and soybean oil-based biofuels are incorporated into diesel to satisfy any portion of the incorporation target, the tax burden on such diesel will decrease in proportion to the amount of rapeseed oil- and/or soybean oil-based biofuels incorporated, with the possibility of achieving a tax rate of EUR zero per hectolitre if the incorporation target is fully satisfied.

7.1252. The Panel considers that a lower tax rate that can be as low as zero undoubtedly creates more favourable competitive opportunities for the products qualifying to receive such advantage. Indeed, when incorporated into fuel to satisfy the incorporation targets, rapeseed oil- and soybean oil-based biofuels originating in the territory of any country qualify to receive an advantage in the form of a lower tax rate that can be as low as zero, and this advantage allows such biofuels to compete for a share of the fuel market.

7.1253. The Panel therefore finds that the French TIRIB measure grants an advantage to rapeseed oil- and soybean oil-based biofuels originating in the territory of any country.

[1537] Malaysia's first written submission, para. 984.
[1538] Malaysia's first written submission, paras. 984-986.
[1539] Malaysia's first written submission, para. 987.
[1540] Malaysia's first written submission, paras. 986-989.
[1541] European Union's first written submission, para. 1567.
[1542] Panel Reports*, US – Poultry (China)*, para. 7.415, and *Colombia – Ports of Entry*, para. 7.341.
[1543] Panel Reports, *Brazil – Taxation*, para. 7.1041.
[1544] Appellate Body Reports, *EC – Seal Products*, para. 5.87.

7.2.2.3.6 Not accorded immediately and unconditionally to like products originating in the territory of all Members

7.1254. The Panel now turns to the issue of whether the advantage granted to rapeseed oil and soybean oil-based biofuels originating in the territory of any country is accorded immediately and unconditionally to imported palm oil-based biofuel.

7.1255. Malaysia maintains that the advantage granted to petrol and diesel fuels that contain other like imported oil crop-based biofuels and to their feedstocks is not accorded immediately and unconditionally to petrol and diesel fuels that contain imported palm oil-based biofuel and to palm oil as a biofuel feedstock.[1545] Malaysia submits that, by subjecting the French TIRIB measure to the classification of biofuels as renewable, and excluding palm oil-based biofuel from such classification, and thus, from the scope of products eligible to receive the tax reduction, a condition to the granting of an advantage has been introduced, which has a detrimental impact on the competitive opportunities of, and thus discriminates against petrol and diesel fuels that contain imported palm oil-based biofuel from Malaysia and against palm oil as a biofuel feedstock.[1546]

7.1256. The European Union maintains that the French TIRIB measure grants an advantage to imported or domestic oil crop-based biofuel other than imported or domestic palm oil-based biofuel. For the European Union, therefore, the French TIRIB measure does not grant an advantage to any product originating in any country, which is not accorded immediately and unconditionally to the like product originating in all the other WTO Members.[1547]

7.1257. The Panel notes that palm oil-based products are excluded from being considered as renewable energy sources for the purposes of the French TIRIB, or more specifically, palm oil-based biofuel is excluded from the group of qualifying biofuels for the purposes of the French TIRIB measure. This means that the advantage that is granted through the French TIRIB measure to rapeseed oil- and soybean oil-based biofuels is not conferred immediately and unconditionally to palm oil-based biofuel.

7.1258. The European Union submits that the French TIRIB measure is an origin-neutral measure, which creates a tax differential in the group of like products identified by Malaysia as all oil-crop based biofuels, but the tax differential created does not target any imports let alone imports from any WTO Member.[1548] The European Union adds that, in order to understand if the measure discriminates between like products from one Member *vis-à-vis* the products of other Members, it is necessary to consider the whole group of products that are like, domestic and imported.[1549] For the European Union, Malaysia should have assessed the impact of the regulatory distinction introduced by the French TIRIB measure on the whole group of like products, as they are produced by the different WTO Members, but it concentrates on rapeseed oil- and soybean oil-based biofuels, and therefore conducts a partial analysis that cannot demonstrate any asymmetrical impact of the measure on the whole group of like imported products.[1550]

7.1259. For the European Union, the simple fact that Malaysia does not export to the EU other vegetable oils for the production of biofuels than crude and refined palm oil does not say much about whether Malaysia is discriminated against *vis-à-vis* other Members when all the products that should be included in the comparison are considered.[1551]

7.1260. The Panel notes that Article I:1 requires that any advantage granted to any product, and not to some products, originating in any other country, and not some other countries, is accorded immediately and unconditionally to the like product originating in all other Members, and not in some other Members.[1552] A complainant does not need to demonstrate the trade effects of the measure

[1545] Malaysia's first written submission, para. 997.
[1546] Malaysia's first written submission, paras. 993-996.
[1547] European Union's first written submission, paras. 1568-1569.
[1548] European Union's first written submission, para. 1570.
[1549] European Union's first written submission, para. 1571.
[1550] European Union's first written submission, para. 1577.
[1551] European Union's first written submission, para. 1574.
[1552] Appellate Body Reports, *EC – Seal Products*, para. 5.87; and *Canada – Autos*, para. 79.

at issue, so the focus of the analysis should be on the impact of a given measure on the equality of competitive opportunities for the like imported products.[1553]

7.1261. If palm oil-based biofuel has been found to be like rapeseed oil- and soybean oil-based biofuels, the comparison to be made for the purposes of the MFN obligation is not between palm oil-based biofuel imported from Malaysia and palm oil-based biofuel imported from any other country, but between palm oil-based biofuel imported from Malaysia and the like products rapeseed oil- and soybean oil-based biofuels imported from any other country. Under this comparison, it is clear that the advantage that is granted to rapeseed oil- and soybean oil-based biofuels originating in the territory of any country is not accorded immediately and unconditionally to like palm oil-based biofuel originating in the territory of Malaysia. In the Panel's view, this is sufficient to find that this element of the analysis has been established.

7.1262. In any event, and to illustrate this further, the Panel notes that Malaysia is an important producer of palm oil-based biofuel[1554], which exports palm oil-based biofuel to the European Union[1555], and such biofuel does not qualify to receive the advantage of the French TIRIB measure; and France, one of the major consumers of biodiesel in the European Union[1556], imports biodiesel from the European Union[1557], which is mostly rapeseed oil-based biofuel[1558], and such biofuel qualifies to receive the advantage of the French TIRIB measure.

7.1263. The Panel therefore finds that the advantage granted to rapeseed oil and soybean oil based biofuels originating in the territory of any country is not accorded immediately and unconditionally to like palm oil-based biofuel originating in the territory of Malaysia.

7.2.2.3.7 Conclusion on Article I:1

7.1264. The Panel concludes that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is inconsistent with Article I:1 of the GATT 1994, because it grants an advantage to imported rapeseed oil- and soybean oil-based biofuels that is not immediately and unconditionally accorded to like palm oil-based biofuel imported from Malaysia.

7.2.2.4 Article XX – General exceptions

7.2.2.4.1 Introduction

7.1265. Having found that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is inconsistent with Article III:2 and Article I:1, the Panel now proceeds to address the European Union's invocation of the general exceptions in Article XX.

7.1266. The European Union submits[1559] that the exclusion of palm oil-based biofuel from the French TIRIB measure is justified under Article XX(a) ("necessary to protect public morals"), Article XX (b) ("necessary to protect human, animal or plant life or health") and Article XX(g) ("relating to the conservation of exhaustible natural resources"). The European Union maintains that the arguments contained in its defence with respect to the high ILUC-risk cap and phase-out apply *mutatis mutandis* to the exclusion of palm oil-based biofuel from the French TIRIB measure and

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[1553] Appellate Body Reports, *EC – Seal Products*, para. 5.87 and fn 1019.

[1554] UFOP Global Market Supply 2020/2021, (Exhibit MYS-11), p. 27; UFOP Global Market Supply 2019/2020, (Exhibit MYS-212), p. 25.

[1555] USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit MYS-139), p. 29; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit EU-128), p. 32; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit MYS-77), p. 27.

[1556] FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit MYS-139), pp. 25-26; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit EU-128), pp. 28-29; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit MYS-77), pp. 22-27.

[1557] French Parliament Report n. 2609, (Exhibit EU-205), p. 62.

[1558] UFOP Global Market Supply 2020/2021, (Exhibit MYS-11), p. 30.

[1559] European Union's first written submission, paras. 1578-1585; second written submission, paras. 315-318.

must be considered as an integral part of the European Union's response to Malaysia's GATT claims concerning the French TIRIB measure.[1560]

7.1267. Malaysia rejects[1561] the European Union's defence under Article XX with respect to the French TIRIB measure, and submits that its arguments and evidence rebutting the European Union's defence under Article XX of the high ILUC-risk cap and phase-out apply *mutatis mutandis* to the exclusion of palm oil-based biofuels from the French TIRIB measure.[1562]

7.1268. The Panel notes at the outset that, as the Appellate Body has explained, the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994.[1563] The Panel has concluded that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is inconsistent with the GATT. Therefore, the Panel will focus its analysis on the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure, as this is the aspect of the measure that gave rise to the finding of inconsistency.

7.1269. The Panel also notes that, given the parties' reliance on their arguments with respect to the high ILUC-risk cap and phase-out, the Panel will mostly refer to its analysis of the European Union's defence under Article XX with respect to the high ILUC-risk cap and phase-out. The Panel notes, however, that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is not identical in every aspect to the high ILUC-risk cap and phase-out. The Panel will therefore include in this section, as necessary, additional explanations on how its findings with respect to the high ILUC-risk cap and phase-out apply to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure.

7.2.2.4.2 Legal standard

7.1270. The European Union invokes the same exceptions under Article XX in respect of the French TIRIB measure that it invokes in respect of the high ILUC-risk cap and phase-out. For ease of reference, the Panel recalls that Article XX (General Exceptions) provides in relevant part as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
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> …
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

[1560] European Union's first written submission, para. 1580.

[1561] Malaysia's second written submission, para. 350.

[1562] Malaysia's second written submission, para. 350.

[1563] Appellate Body Reports, *EC – Seal Products*, para. 5.185. Additionally, in *Thailand – Cigarettes (Philippines)*, the Appellate Body observed that: "[W]hen Article XX(d) is invoked to justify an inconsistency with Article III:4, what must be shown to be "necessary" is the treatment giving rise to the finding of less favourable treatment. Thus, when less favourable treatment is found based on differences in the regulation of imports and of like domestic products, the analysis of an Article XX(d) defence should focus on whether those regulatory differences are 'necessary'". (Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177.)

7.2.2.4.3 The Panel's assessment

7.2.2.4.3.1 Article XX(b) – necessary to protect human, animal or plant life or health

7.1271. The European Union submits that the exclusion of palm oil-based biofuel from the French TIRIB measure is consistent with the European Union's objectives of avoiding that demand for renewable energy contribute to increased greenhouse gas emissions and that they exacerbate biodiversity loss.[1564] For the European Union, the preservation of biodiversity and of the environment falls within the range of policies designed to protect human, animal or plant life or health.[1565]

7.1272. Malaysia rejects the European Union's contention.[1566]

7.1273. In the context of its analysis of Article XX(b) with respect to high ILUC-risk cap and phase-out, the Panel considered that this measure is aimed at limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.1274. With respect to the French TIRIB measure, the Panel notes that the Circular of 18 August 2020 explains in its introduction that this measure contributes to achieving the objective of the European Union of having a 10% of final consumption of energy produced from renewable sources in all forms of transport in 2020, as provided for in RED I, as amended; and that this objective is part of a broader binding objective of a share of at least 20% of energy produced from renewable sources in the gross final energy consumption of the European Union by 2020.[1567]

7.1275. With respect to the tax treatment of palm oil-based products more specifically, Article 46 of the Circular of 18 August 2020 explains that since 1 January 2020, pursuant to Article 266 *quindecies* of the French Customs Code, products made from palm oil are no longer considered to be biofuels, and that therefore biofuels produced from palm oil are no longer taken into account for the purposes of the French TIRIB measure.[1568] Articles 48 and 49 also explain, with respect to the progressive elimination of the French TIRIB measure for certain feedstocks that present a high-ILUC risk, that it follows from the Delegated Regulation, adopted on the basis of Article 26(2) of RED II, that only palm oil products pose a high ILUC risk, and that the French national legislator did not intend to use a different definition of high ILUC-risk from that established pursuant to Article 26(2) of RED II.[1569] Moreover, the 2020 report on biofuels from the French Parliament explains that, as palm oil-based biofuels are considered at the European level as posing a high-ILUC risk, Article 266 *quindecies*, as worded in the 2019 Finance Law, provides that palm oil-based products are not considered to be biofuels.[1570] Also, the French Constitutional Court has confirmed that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for purposes of the French TIRIB measure responds to concerns about the risk of ILUC-related GHG emissions associated with crop-based biofuels, and the high-ILUC risk posed by oil palm cultivation.[1571]

7.1276. The Panel considers that the reference to the objectives of RED I, the reliance on RED II and on the Delegated Regulation for considering that palm oil products pose a high ILUC risk, and the explanations of the French Parliament Report and the French Constitutional Court demonstrate that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure pursues the same objectives as the high ILUC-risk cap and phase-out.

[1564] European Union's first written submission, paras. 1579 and 1581.
[1565] European Union's first written submission, para. 1583.
[1566] Malaysia's second written submission, para. 350.
[1567] French Government Circular of 18 August 2020, (Exhibit EU-197), p. 6.
[1568] French Government Circular of 18 August 2020, (Exhibit EU-197), p. 19.
[1569] French Government Circular of 18 August 2020, (Exhibit EU-197), p. 19.
[1570] French Parliament Report n. 2609, (Exhibit EU-205), p. 49.
[1571] The 2019 Decision of the French Constitutional Court, concerning a challenge against the French TIRIB measure, explains that French legislator sought to reduce both the direct GHG emissions and the GHG indirect emissions caused by the displacement of agricultural crops for food with crops used to produce biofuels, leading to the cultivation, for food purposes, of non-agricultural land with a high carbon stock, such as forests or peatland. The French Constitutional Court also explains that the legislator had relied on the observation that palm oil stands out for its strong growth and the significant expansion in the global area surface devoted to its production, in particular on carbon-rich land, resulting in deforestation and the drying out of peatland. The Constitutional Court adds that the legislator thus took into account the fact that oil palm cultivation poses a high risk, higher than that posed by the cultivation of other oilseed crops, of indirectly causing an increase in GHG emissions. (French Parliament Report n. 2609, (Exhibit EU-205), pp. 50-51.)

Therefore, in the Panel's view, its reasoning regarding the identification of the objective of the measure with respect to the high ILUC-risk cap and phase-out applies *mutatis mutandis* to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure. For those same reasons already set out by the Panel with respect to assessment of the high ILUC-risk cap and phase-out under Article 2.2 of the TBT Agreement and Article XX(b) of the GATT, the Panel finds that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB has the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels, that this objective relates to the protection of human, animal or plant life or health, and that there is a sufficient nexus between the regulating Member and the activities being regulated.

7.1277. With respect to the necessity test, the European Union submits that the measure fulfils the required level of connection with the objectives sought, considering that it makes a genuine contribution to the protection of certain key values that are of the highest consideration in France while entailing a minimum degree of trade-restrictiveness, and that there are no reasonably available alternatives that would make an equally effective contribution to the objectives pursued.[1572]

7.1278. Malaysia rejects the European Union's contentions.[1573]

7.1279. In the context of its analysis of Article XX(b) with respect to the high ILUC-risk cap and phase-out, the Panel considered its analysis under Article 2.2 of the TBT agreement to apply *mutatis mutandis* to its analysis under Article XX(b). In particular, the Panel referred to its findings that the high ILUC-risk cap and phase-out is necessary to fulfil its objective, on the grounds that it is apt to make a material contribution to the achievement of that objective, and that this is the appropriate standard to apply having weighed and balanced its trade-restrictiveness and the risks that non-fulfilment of the objective would create. The Panel then found that none of the alternative measures put forward by Malaysia demonstrate that the high ILUC-risk cap and phase-out is more trade-restrictive than necessary to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.1280. With respect to trade-restrictiveness, the Panel considered that the high ILUC-risk cap and phase-out is trade-restrictive because it establishes a limitation on the total quantity of crop-based biofuels that are eligible to count towards the 14% target in the European Union, with the entirety of EU conventional biofuel demand being essentially defined by the RED regime. The Panel considered that the measure thereby has, by design, a "limiting effect on trade" insofar as crop-based biofuels are imported into the European Union.[1574] The Panel recalls that the fact that the European Union has created the market in question does not modify this assessment. In the Panel's view, very similar reasoning applies to its analysis with respect to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure. This exclusion is trade-restrictive because it establishes a limitation for palm oil-based biofuel to be included within the group of qualifying biofuels for the purposes of the French TIRIB measure, and thus, to count towards the incorporation targets set by France, with the entirety of French conventional biofuel demand being essentially defined by those incorporation targets.

7.1281. With respect to contribution to the objective, the Panel considered that, while it is not possible to quantify the extent to which the high ILUC-risk cap and phase-out contributes to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels, the measure is apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. As the Panel explained, the conclusion follows from the fact that the high ILUC-risk cap and phase-out has, by design, a limiting effect on EU demand for and consumption of those crop-based biofuels determined to be high ILUC risk. In the Panel's view, very similar reasoning applies to its analysis with respect to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure. The exclusion is apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels, because it has, by design, a limiting effect on French

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[1572] European Union's first written submission, para. 1584.

[1573] Malaysia's second written submission, para. 350.

[1574] The Panel recalls that, where the design and structure of the measure is sufficient to establish that it will have a limiting effect on trade, it is not necessary to make findings on the actual trade effects, or the anticipated effects, of the challenged measure. (See e.g. Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.392.)

demand for and consumption of palm oil-based biofuel, which has been determined to be high ILUC risk.

7.1282. The Panel's reasoning concerning the identification of the objective, the trade-restrictiveness and the contribution to the objective with respect to the high ILUC-risk cap and phase-out applies very similarly to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure. In the Panel's view, its weighing and balancing analysis of those elements with respect to the high ILUC-risk cap and phase-out applies *mutatis mutandis* to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure. Therefore, for those same reasons already set out by the Panel with respect to assessment of the high ILUC-risk cap and phase-out under Article 2.2 of the TBT Agreement and Article XX(b) of the GATT, the Panel preliminary concludes that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is necessary to fulfil the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.1283. The Panel has already found that none of the alternative measures put forward by Malaysia demonstrate that the high ILUC-risk cap and phase-out is more trade-restrictive than necessary to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels. Given that Malaysia does not refer to any alternative measures other than those put forward, and already assessed by the Panel, with respect to the high-ILUC risk cap and phase-out, the same reasoning applies with respect to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure.

7.1284. For these reasons, the Panel concludes that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is provisionally justified as a measure necessary to protect human, animal or plant life or health within the meaning of Article XX(b).

7.2.2.4.3.2 Article XX(g) – relating to the conservation of exhaustible natural resources

7.1285. The European Union submits that the exclusion of palm oil-based biofuel from the French TIRIB measure falls within the policies related to the conservation of living and non-living exhaustible natural resources, and it is even-handed inasmuch as such exclusion applies to the relevant biofuels irrespective of whether they are of domestic or imported origin.[1575]

7.1286. In the context of its analysis of Article XX(g) with respect to high ILUC-risk cap and phase-out, the Panel considered that because the high ILUC-risk cap and phase-out has, by design, a limiting effect on EU demand for and consumption of those crop-based biofuels determined to be high ILUC risk, the measure is apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. For this reason, the Panel considered that the high ILUC-risk cap and phase-out is a measure "relating to" the conservation of exhaustible natural resources, notably high-carbon stock land (forests, wetlands, and peatland).[1576]

7.1287. In the Panel's view, the same reasoning applies to its analysis with respect to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure. For those same reasons already set out by the Panel with respect to the high ILUC-risk cap and phase-out under Article 2.2 of the TBT Agreement and Article XX(g) of the GATT, the Panel finds that, because the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure has, by design, a limiting effect on French demand for and consumption of those crop-based biofuels determined to be high ILUC risk, the measure is apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. For this reason, the Panel finds that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure

[1575] European Union's first written submission, para. 1582.

[1576] Furthermore, in addition to high-carbon stock land being an exhaustible natural resource in and of itself, the Panel considered that measures taken to conserve high-carbon stock land, and thereby avoid the GHG emissions that would be released through their use, are related to the conservation of a wide range of exhaustible natural resources that are threatened by increased GHG emissions and climate change.

"relating to" the conservation of exhaustible natural resources, notably high-carbon stock land (forests, wetlands, and peatland).

7.1288. The Panel also considered, in the context of its analysis of Article XX(g) with respect to high ILUC-risk cap and phase-out, that this measure meets the requirement to be made effective in conjunction with restrictions on domestic production or consumption, because this measure, of itself, aims at and results in restricting EU demand for and consumption of crop-based biofuels determined to be high ILUC-risk pursuant to the formula in Article 3 of the Delegated Regulation. In the Panel's view, the same reasoning applies to its analysis with respect to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes the French TIRIB measure. For the same reasons already set out with respect to the high ILUC-risk cap and phase-out in the context of the Panel's earlier assessment under Article 2.2 and Article XX(g), the Panel finds that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure, of itself, aims at and results in restricting French demand for and consumption of crop-based biofuels determined to be high ILUC risk.

7.1289. For these reasons, the Panel concludes that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is provisionally justified as measure relating to the conservation of exhaustible natural resources that is made effective in conjunction with restrictions on domestic production or consumption within the meaning of Article XX(g).

7.2.2.4.3.3 Article XX(a) – necessary to protect public morals

7.1290. The European Union submits that the exclusion of palm oil-based biofuel from the French TIRIB measure is designed to contribute to the same objectives of the EU renewable energy legal framework, and that the French civil society and the French legislator consider the environmental impact of oil palm cultivation in terms of climate change and loss of biodiversity to be an issue of moral concern.[1577] For the European Union, the exclusion of palm oil-based biofuel from the French TIRIB measure addresses moral concerns in France related to climate change, environmental degradation and biodiversity loss.[1578]

7.1291. Malaysia rejects the European Union's contention.[1579]

7.1292. In the context of its analysis of Article XX(a) with respect to high ILUC-risk cap and phase-out, the Panel considered that a finding on whether the high ILUC-risk cap and phase-out is additionally justified under Article XX(a) would have no impact on the outcome of the proceedings. In the Panel's view, the same reasoning applies to its analysis with respect to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure. For those same reasons already set out with respect to the high ILUC-risk cap and phase-out in the context of the Panel's earlier assessment under Article 2.2 and Article XX(a), the Panel finds that it is unnecessary to rule on whether the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure necessary to protect public morals under Article XX(a).

7.2.2.4.3.4 *Chapeau* – arbitrary or unjustifiable discrimination between countries where the same conditions prevail

7.1293. Regarding the *chapeau*, the European Union submits that the exclusion of palm oil-based biofuel from the French TIRIB measure is applied without any arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[1580]

7.1294. Malaysia rejects the European Union's contention.[1581]

7.1295. In the context of its analysis of the *chapeau* with respect to high ILUC-risk cap and phase-out, the Panel concluded that the high ILUC-risk cap and phase-out has been administered in a

[1577] European Union's first written submission, para. 1579.
[1578] European Union's first written submission, para. 1583.
[1579] Malaysia's second written submission, para. 350.
[1580] European Union's first written submission, para. 1585.
[1581] Malaysia's second written submission, para. 350.

manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail because the European Union 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. As explained by the Panel in that context, those findings were based on the Panel's assessment of the high ILUC-risk cap and phase-out under Article 2.1 of the TBT Agreement. More specifically, the Panel's assessment of whether that measure's detrimental impact on palm oil-based biofuel stems exclusively from a "legitimate regulatory distinction", for the purposes of Article 2.1, appears to the Panel to involve the application of a legal standard that is very similar to the legal standard set out in the *chapeau* of Article XX. It was for that reason that the Panel considered that its findings under Article 2.1 extended *mutatis mutandis* to the Panel's assessment of the high ILUC-risk cap and phase-out under the *chapeau* of Article XX.

7.1296. The Panel notes that the European Union has not argued, or pointed to, the existence of any provisions or flexibilities for palm oil-based biofuels to be certified as low ILUC-risk for the purposes of the French TIRIB measure. If the existence of deficiencies in the design and implementation of the low ILUC-risk criteria and certification procedure with respect to the high ILUC-risk cap and phase-out is sufficient to conclude that such measure has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, then *a fortiori* the European Union's failure to demonstrate the existence of *any* provisions or flexibilities for palm oil-based biofuels to be certified as low ILUC-risk requires the Panel to conclude that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail. Also, as the Panel explained earlier, France has relied on RED II and on the Delegated Regulation for considering that palm oil products pose a high ILUC risk, and the Panel has found that the European Union has failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk.

7.1297. The Panel therefore concludes that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail. This is because the European Union has failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk[1582], and has failed to demonstrate the existence of any provisions or flexibilities for palm oil-based biofuels to be certified as low ILUC risk.

7.2.2.4.4 Conclusion on Article XX

7.1298. The Panel finds that:

a. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure relating to the conservation of exhaustible natural resources that is made effective in conjunction with restrictions on domestic production or consumption within the meaning of Article XX(g);

b. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure necessary to protect human, animal or plant life or health within the meaning of Article XX(b);

c. it is unnecessary to rule on whether the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure necessary to protect public morals under Article XX(a); and

d. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure has been administered in a manner that constitutes

[1582] For greater clarity, the Panel is not suggesting that in parallel with the review that is to be undertaken by the European Union, France should have also been expected to conduct a separate, independent review of the data used to determine which biofuels are high ILUC risk. Instead, the Panel considers that because the French TIRIB measure relies on the European Union's determination that palm oil products pose a high ILUC risk, the Panel's finding that the European Union's failure to review the data used to make that determination leads to arbitrary or unjustifiable discrimination necessarily extends to the French TIRIB measure, as well.

> arbitrary or unjustifiable discrimination between countries where the same conditions prevail because the European Union has failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk, and has failed to demonstrate the existence of any provisions or flexibilities for palm oil-based biofuels to be certified as low ILUC risk.

7.1299. One panelist has reached a different conclusion, as set out in section 7.4 of this Report.

7.2.3 Claims under the SCM Agreement

7.2.3.1 Article 1 - Existence of a subsidy

7.2.3.1.1 Introduction

7.1300. Having addressed the claims under the GATT 1994 with respect to the French TIRIB measure, the Panel now turns to the claims under the SCM Agreement. For Malaysia's claims to prevail, it must demonstrate that the challenged measure is a subsidy within the meaning of Article 1 of the SCM Agreement.

7.1301. Malaysia alleges inconsistency[1583] with provisions of the SCM Agreement on the basis of the French TIRIB measure. Malaysia asserts that the French TIRIB measure creates a financial contribution in the form of government revenue that is otherwise due that is foregone or not collected within the meaning of Article 1.1(a)(1)(ii). In the alternative, Malaysia also asserts that the French TIRIB measure is a form of income support in the sense of Article XVI of the GATT 1994 as provided for in Article 1.1(a)(2). Malaysia further submits that the alleged subsidy confers a benefit.

7.1302. The European Union submits[1584] that because the challenged tax treatment constitutes the same treatment as the appropriate normative benchmark, the French Government is not foregoing any revenue that is otherwise due. More specifically, the European Union argues that the tax treatment applied to all similarly situated taxpayers is identical because taxpayers are similarly situated under the principles of French TIRIB measure to the extent that they similarly contribute to the satisfaction of the qualifying biofuel incorporation targets. The European Union asserts that the French TIRIB measure is not a form of income support in the sense of Article XVI of the GATT 1994 as provided for in Article 1.1(a)(2) because the French TIRIB does nothing to maintain the income received by those entities releasing fuel for consumption in France. The European Union further submits that because the French TIRIB measure provides no financial contribution and is not a form of income support it cannot confer a benefit.

7.2.3.1.2 Legal standard

7.1303. Article 1 is entitled "Definition of a Subsidy", and reads as follows:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

[1583] Malaysia's first written submission, paras. 1061-1213; second written submission, paras. 428-524; responses to the Panel's questions, pp. 124-136; and comments on EU responses to the Panel's questions, pp. 326-339.

[1584] European Union's first written submission, paras. 1586-1654; second written submission, paras. 319-334; and responses to the Panel's questions, paras. 1030-1065.

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)[[1585]];

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

7.1304. The definition of a "subsidy" in Article 1, including the notion of a financial contribution in the form of government revenue that is otherwise due is foregone or not collected and benefit have been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases. With respect to income support, this precise term has not been interpreted and applied in a prior case. The parties' arguments reflect a divergence of views on how the term should be interpreted and applied to the facts of this dispute. The Panel notes that the closely related term, "price support", from the same provision has been interpreted and applied in several prior cases and may provide insights for a relevant analysis of the issues presented here.

7.1305. The parties agree that the determination of what is otherwise due involves a comparison between the circumstances presented and the circumstances that would pertain otherwise, the latter being referred to as a "defined, normative benchmark".[1586] The parties further agree that because Members "have the sovereign authority to determine their own rules of taxation, the comparison under Article 1.1(a)(1)(ii) of the SCM Agreement must necessarily be between the rules of taxation contained in the contested measure and other rules of taxation of the Member in question".[1587]

7.1306. The parties agree upon the analytical approach to be applied in examining this question. In particular, the parties agree that Article 1.1(a)(1)(ii) requires a panel to:

a. identify the tax treatment that applies to the alleged subsidy recipients;

b. identify a benchmark for comparison (e.g. a general rule of taxation); and

c. compare the challenged treatment and its reasons with the benchmark tax treatment.[1588]

[1585] The footnote to the text of Article 1.1(a)(1)(ii) states: "In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy."

[1586] Appellate Body Reports, *US – FSC*, para. 90; and *US – FSC (Article 21.5 – EC)*, paras. 87-89.

[1587] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 89.

[1588] Appellate Body Reports, *Brazil – Taxation*, para. 5.162.

7.1307. The comparison of the challenged tax treatment with the defined normative benchmark will determine the difference between the revenue actually raised and the revenue that would have been raised "otherwise".[1589]

7.1308. The Panel will elaborate further on the elements of the legal standard in Article 1, and in particular the notion of a financial contribution in the form of "government revenue that is otherwise due is foregone or not collected", "income support", and "benefit" as necessary in the course of its assessment of the issues in dispute. Each of these elements will be assessed in turn.

7.2.3.1.3 Financial contribution

7.1309. Malaysia contends that the challenged tax treatment confers a financial contribution in the form of "government revenue, otherwise due, that is foregone or not collected" under Article 1.1(a)(1)(ii).[1590] The European Union disputes this contention.[1591] With regard to financial contribution, there is no dispute between the parties regarding whether the French TIRIB is attributable to the French Government and operates within its territory.

7.1310. Malaysia emphasizes the exclusion of palm oil-based biofuel from the qualifying biofuels as central to its claims, and frames its arguments accordingly. Malaysia further submits that under the French TIRIB measure like products would be subject to the "same tax, 'but for' the tax rules applied by France under the contested measure."[1592] In other words, Malaysia submit that the French TIRIB measure affords favourable treatment to fuel containing qualifying biofuels, but palm oil-based biofuel is treated as equivalent to fossil fuel for tax purposes because it is not included among the qualifying biofuels.

7.1311. The Panel understands that in Malaysia's view qualifying biofuels and palm oil-based biofuel should be considered as similarly situated by the tax regime and should, therefore, receive similar tax treatment. Accordingly, the favourable treatment of qualifying biofuels as compared to palm oil-based biofuel should be considered as a financial contribution within the meaning of Article 1.1(a)(1)(ii). The Panel considers, however, that products that are similar (or like or even identical) from the perspective of product characteristics, uses, substitutability, production methods, tariff classifications, etc., are not necessarily similarly situated from the perspective of a Member's tax regime and tax principles. At this stage of the analysis, the Panel must focus on whether the allegedly subsidized taxpayer receives from the government the functional equivalent of a direct transfer of funds in the form of an amount of taxes that were due otherwise but was not required to be paid. Accordingly, the question for the Panel is not whether similar products are taxed similarly, but rather whether the challenged tax treatment constitutes the kind of departure from that tax regime and tax principles such that government revenue that was otherwise due was foregone or not collected.

7.1312. The Panel turns, therefore, to the three-step analysis of whether it has been established that "government revenue that is otherwise due is foregone or not collected" under Article 1.1(a)(1)(ii). In particular, the Panel will: (i) identify the tax treatment that applies to the alleged subsidy recipients; (ii) identify a benchmark for comparison (e.g. a general rule of taxation); and (iii) compare the challenged treatment and its reasons with the benchmark tax treatment. If the challenged treatment arises by reason of the application of the tax regime and its principles to the circumstances of the allegedly subsidized taxpayer, then government revenue otherwise due is not foregone or not collected.

7.2.3.1.3.1 The tax treatment applicable to the alleged subsidy recipients

7.1313. As explained in section 2 of this Report, entities that release fuel for consumption within the territory of France are liable to pay the TIRIB as an additional tax that varies in relation to the extent to which the energy content of the fuel released achieves established incorporation targets for qualifying energy sources. The Panel recalls that the TIRIB is applied in addition to the value added tax (VAT) and the internal consumption tax on energy products (TICPE). The amount of the TIRIB is determined according to the TIRIB formula.

[1589] Appellate Body Report, *US – FSC*, para. 90.
[1590] Malaysia's first written submission, para. 1067.
[1591] European Union's first written submission, para. 1620.
[1592] Malaysia's first written submission, para. 1078.

7.1314. The TIRIB formula results in a tax rate that varies in direct proportion to the factor (IT% - AI%), which is the difference between the targeted energy incorporation of qualifying biofuel and the actual incorporation of qualifying biofuel.

7.1315. The parties concur on the essential operation of the French TIRIB. The challenged tax treatment consists of the treatment of taxpayer entities that partially or fully satisfy the incorporation target of qualifying biofuel. In other words, the treatment of those entities that release fuel for consumption in France with an AI% that is greater than zero, yielding a (IT% - AI%) factor that is less than IT%.

7.2.3.1.3.2 Preliminary assessment of possible normative benchmarks

7.1316. The Panel now turns to a preliminary assessment of the appropriate normative benchmark. An examination of the record suggests consideration of four different normative benchmarks for comparison with the challenged tax treatment.

The General Tax on Polluting Activities

7.1317. The Panel first considers the appropriateness of the General Tax on Polluting Activities as a normative benchmark, as proposed by Malaysia. The General Tax on Polluting Activities appears to reflect a conceptual framework for imposing some level of taxation on certain polluting activities[1593] Under a different name and under a prior iteration of the relevant legislation, the TIRIB was categorized as a tax under the umbrella of the General Tax on Polluting Activities.[1594]

7.1318. Malaysia submits that the General Tax on Polluting Activities is the appropriate benchmark because it is alleged to apply to all comparable income of any comparably situated taxpayers.[1595] Malaysia considers the General Tax on Polluting Activities to be a general rule of taxation, and the challenged tax treatment to be an exception thereto.[1596]

7.1319. The Panel takes note of the conceptual and historical link between the General Tax on Polluting Activities and the French TIRIB. The Panel finds that Malaysia has not established the nature of the tax treatment provided for under the General Tax on Polluting Activities.[1597] Instead, Malaysia's submissions exclusively identify the various tax treatments provided for under the French TIRIB. To the extent that Malaysia intends the General Tax on Polluting Activities to serve as a broader tax regime that links exclusively to the maximum amount of tax potentially payable pursuant to the TIRIB formula, the Panel finds that such a link has not been established.[1598] Nor has the French TIRIB been established to apply in lieu of the General Tax on Polluting Activities to the extent that taxpayers subject to the French TIRIB also engage in polluting activities associated with those taxes.

7.1320. The Panel finds that the tax treatments associated with the General Tax on Polluting Activities do not correspond to an amount of revenue "otherwise due" in relation to the challenged tax treatment. Rather, the French TIRIB is an additional tax paid by entities in connection with the particular activity of releasing fuel for consumption within the territory of France as an additional tax that varies in relation to the extent to which the energy content of the fuel released achieves established incorporation targets for qualifying energy sources.

7.1321. For the above reasons, the Panel finds that the General Tax on Polluting Activities is not an appropriate normative benchmark in this case.

[1593] European Union's first written submission, paras. 1423-1424.
[1594] European Union's first written submission, paras. 1423-1424.
[1595] Malaysia's first written submission, para. 1074; response to Panel question No. 196, pp. 131-132.
[1596] Malaysia's second written submission, para. 444.
[1597] Malaysia's response to Panel question 196, pp. 131-132.
[1598] In any event, the Panel will examine below the maximum amount of tax potentially payable pursuant to the TIRIB formula as possible normative benchmark.

The tax treatment associated with the release of fuel fully satisfying the incorporation targets

7.1322. The second possible normative benchmark tax treatment, as proposed by the European Union, is the tax treatment associated with the release of fuel for consumption in France that fully satisfies the incorporation targets for qualifying biofuels.

7.1323. The European Union submits in this regard that the collection of no amount of tax pursuant to the French TIRIB is the intended and expected outcome from the application of the TIRIB formula and should, therefore, be considered as the normative benchmark treatment.[1599] The European Union argues that this demonstrates that payment of the tax is truly exceptional and the general rule is satisfaction of the incorporation targets.[1600] While the achievement of such an outcome is not mandated by the scheme, the European Union argues that collection of no tax is the intended and expected result of application of the French TIRIB and it is so designed to achieve that objective. On the basis of the above-described design and operation of the French TIRIB, the European Union submits that any tax paid functions as a fine or penalty imposed upon non-compliance with the incorporation objectives and should not be considered as an amount of tax that is "otherwise due". In this regard, the European Union submits that the French TIRIB is a behavioural tax with an environmental purpose and is not designed to raise any revenue.[1601]

7.1324. The Panel understands that all potential taxpayers operate under a scheme under which no amount of tax is due if the fuel they release satisfies the incorporation targets. Access to the zero tax treatment is otherwise uninhibited for these taxpayers. While it is established that some amount of tax was collected pursuant to the French TIRIB during the time periods for which the Panel has information, the extent of any failure of fuels released for consumption in France to satisfy the incorporation targets is extremely small. Nevertheless, the Panel considers that under Article 1.1(a)(1)(ii), the issue is not whether the French TIRIB is a behavioural tax or has an environmental purpose or was intended to raise revenue. The extent to which these features constitute elements of the challenged tax treatment and/or elements of the tax regime and tax principles that will define the normative benchmark does not require the Panel to assess the legitimacy of these features as elements of a Member's tax rules.

7.1325. The Panel considers that the key concept guiding the selection of an appropriate normative benchmark derives from the term otherwise due in the text of Article 1.1(a)(1)(ii). In particular, the appropriate normative benchmark represents the treatment associated with the tax liability otherwise due in accordance with the structure of the domestic tax regime and its organising principles as adopted by the Member pursuant to its own authority in comparison to the challenged tax treatment. The Panel is not persuaded that the collection of no amount of tax pursuant to the French TIRIB constitutes the appropriate normative benchmark treatment. Under certain circumstances under the French TIRIB an amount of tax liability is imposed on the taxpayer and, when paid, this amount represents government revenue that is due. The Panel does not consider that it would be appropriate to find under such a scheme that the structure of the domestic tax regime and its organising principles imposes no tax liability as a normative benchmark regardless of the frequency or the infrequency with which the circumstances associated with no tax liability arise. Instead, the appropriate normative benchmark should take into account those circumstances in which a tax liability arises in accordance with the "structure of the domestic tax regime and its organising principles".

7.1326. The Panel understands that the European Union analogizes the French TIRIB with a scheme of fines or penalties, but without asserting that the French TIRIB is not, in fact, a tax scheme. Accordingly, the Panel does not consider it necessary to determine the circumstances under which forms of payments, other than taxes, owing to the government would or would not constitute government revenue foregone or not collected within the meaning of Article 1.1(a)(1)(ii).

7.1327. For the above reasons, the Panel finds that the collection of no amount of tax pursuant to the French TIRIB is not an appropriate normative benchmark in this case.

[1599] European Union's first written submission, paras. 1444-1453.
[1600] European Union's first written submission, paras. 1444-1446.
[1601] European Union's first written submission, paras. 1444-1453, 1621-1623.

The tax treatment associated with the release of fuel that does not satisfy any part of the incorporation targets

7.1328. Malaysia submits that another possible benchmark that should be considered, as the normative benchmark for the purposes of comparison with the challenged tax treatment, is the maximum amount of tax potentially payable pursuant to the TIRIB formula, i.e. the amount of tax that would be payable if *no* portion of qualifying biofuel was incorporated into the fuel released for consumption. Malaysia argues that the French Government has established rules of taxation on fuel released for consumption in France such that revenue which is otherwise due is not collected from operators incorporating qualifying biofuels, which do not include palm oil-based biofuel, into fuel released for consumption in France.[1602]

7.1329. The Panel understands that this possible benchmark is premised on the notion that through the TIRIB formula, the French Government establishes the elements (rate, IT%) and permits the taxpayer to choose through their actions the amount of tax to pay by selecting the actual incorporation element (AI%). The variable amount of tax that a taxpayer would pay to the extent that they do not fully satisfy the incorporation target is what provides the motivation for them to incur whatever additional cost is associated with incorporating the qualifying biofuels. To the extent that the taxpayer opts to take on those additional costs, they do it to obtain the benefit of the lower tax liability and avoid the payment of the tax that would have otherwise been due if they had failed to incorporate qualifying biofuels. The taxpayer is aware of the amount of tax that they would have to pay if they do not incorporate qualifying biofuel into their fuel mix because the amount of TIRIB they pay will depend exclusively on their own choice about how much qualifying biofuel to include in the fuel mix they release for consumption in France.

7.1330. The above preliminary considerations suggest that the maximum amount of tax potentially payable pursuant to the TIRIB formula highlights the conditionality of accessing the favourable tax treatment which is a feature of a normative benchmark that might be relevant to the Panel's determination of whether the French TIRIB involves a financial contribution in the form of government revenue foregone or not collected.

The tax payable according to the TIRIB formula

7.1331. The fourth potential normative benchmark, as argued by the European Union, posits that the challenged treatment and the normative benchmark are, in fact, the same tax treatment.

7.1332. The European Union has argued, in effect, that the elements of the formula set by the government (rate, IT%) are established at a level designed, intended and expected to achieve the incorporation target.[1603] The European Union has argued that taxpayers that do not fulfil the incorporation targets are not considered as similarly situated under the TIRIB tax regime.[1604] The European Union has emphasized that the elements of the TIRIB formula are inseparable because the tax would be without incentivizing effect unless it applies the variable rate in connection with the extent to which the released fuel satisfies the incorporation targets.[1605]

7.1333. The Panel understands that this possible benchmark is premised on the notion that the TIRIB formula establishes an amount of tax that is due on the basis of the formula elements, and no element or elements of the formula considered in isolation from the rest of the formula represent an amount of tax that is due or that is "otherwise due". The Panel recalls that while the rate element of the formula is expressed as euros per hectolitre, the French TIRIB is exclusively concerned with a relatively small portion of the energy content of the fuel, i.e. that portion which the regime has targeted for incorporation of qualifying biofuels. The maximum tax due under the French TIRIB does not reflect the application of the defined tax rate per hectolitre of fuel released because the factor (IT% - AI%) will have a maximum value of IT%, which in 2020 was 8%.

7.1334. The Panel further recalls that an essential feature of the TIRIB regime is that the application of the formula results in a tax rate that varies in direct proportion to the factor (IT% - AI%), which is the difference between the targeted energy incorporation of qualifying biofuel and the actual

[1602] Malaysia's first written submission, para. 1079.
[1603] European Union's first written submission, paras. 1444-1453, and 1621-1623.
[1604] European Union's first written submission, paras. 1630-1634.
[1605] European Union's first written submission, para. 1450.

incorporation of qualifying biofuel. Because the tax varies directly in proportion to this factor, it is possible to characterize the TIRIB as a tax, not on the action of releasing hectolitres of fuel for consumption in France, but rather a tax on the extent to which the targeted level of qualifying biofuels has not been incorporated into the fuel released. Viewed in this light, the amount of tax can be seen as starting at zero when the targeted portion of qualifying biofuels have been incorporated, and increasing to its maximum amount in direct proportion to the missing percentages of qualifying biofuel.

7.1335. The above preliminary considerations suggest that the tax payable according to the TIRIB formula highlights the design and intended operation of the French TIRIB as a whole which is a feature of a normative benchmark that might be relevant to the Panel's determination of whether the French TIRIB involves a financial contribution in the form of government revenue foregone or not collected.

7.2.3.1.3.3 Final assessment of the appropriate normative benchmark

7.1336. Having preliminarily examined the four possible normative benchmarks suggested in this dispute, and having found two of those benchmarks exhibit certain features which could potentially make them appropriate normative benchmarks for comparison with the challenged tax treatment, the Panel now turns to a further assessment of those two benchmarks.

7.1337. The Panel recalls that the purpose of selecting a normative benchmark is to determine, through a comparison with the challenged tax treatment, whether "government revenue that is otherwise due is foregone or not collected" within the meaning of Article 1.1(a)(1)(ii). The Panel notes as well that the first category of financial contributions provided for under Article 1.1(a)(1)(i) includes various direct transfers of funds or potential direct transfers of funds. This provides some context for understanding the inclusion of the second category, which is the one relevant in this case. The Panel considers that where government revenue is otherwise due and the government foregoes or does not collect the amount otherwise due, this is the functional equivalent of a direct transfer of funds from the government. It is useful to recall that this stage of the analysis focuses solely on whether a financial contribution exists, rather than on any alleged effects of the challenged measure.

7.1338. The Panel takes note of prior reports that offer guidance on considerations for selecting an appropriate benchmark. The benchmark will not exist in the abstract, but rather in the rules of taxation established by the Member in question.[1606] This also flows from the notion that Members, in principle, have the sovereign authority to determine their own rules of taxation as they see fit.[1607] The analysis must, therefore, be sufficiently flexible to adjust to the complexities of a Member's domestic rules of taxation.[1608] The benchmarks to be applied are the economy-wide tax treatments from which the exemptions, reductions and suspensions are taken.[1609] However, given the variety and complexity of domestic tax systems, it will usually be very difficult to isolate a 'general' rule of taxation and 'exceptions' to that 'general' rule.[1610] In ascertaining a proper benchmark, the Appellate Body in *Brazil – Taxation* went further, stating that a panel would be expected to "examine the structure of the domestic tax regime and its organising principles" to determine what is "the tax treatment of comparable income of comparably situated taxpayers".[1611] The Panel agrees with that approach.

7.1339. In this context, the Panel considers that "comparability" and "similarly situated" are not determined in the abstract, nor on the basis of what is considered legitimate, appropriate or fair. Rather, "comparability" and "similarly situated" are determined in relation to the "structure of the domestic tax regime and its organising principles." The concern of the Appellate Body in *Brazil – Taxation* was over-reliance on the fact that the challenged measure took the form of an exception to a general rule. When a general rule appears to be broadly applicable and subject to various

[1606] Appellate Body Report, *US – FSC*, para. 90.
[1607] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 89.
[1608] Appellate Body Reports, *Brazil – Taxation*, para. 5.162 (quoting Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 91).
[1609] Appellate Body Reports, *Brazil – Taxation*, para. 5.181 (quoting Panel Reports, *Brazil – Taxation*, para. 7.414).
[1610] Appellate Body Reports, *Brazil – Taxation*, para. 5.162 (quoting Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 91).
[1611] Appellate Body Reports, *Brazil – Taxation*, para. 5.167.

exceptions, it may be necessary to look further to examine the extent to which the general rule, in light of the other exceptions, constitutes an inadequate benchmark because it insufficiently represents the structure of the tax regime and its organizing principles. This can be understood by considering, as the Appellate Body did in *Brazil – Taxation*, an example of a generally applicable tax with numerous and various exceptions. Thus, a corporate tax rate that is in principle applicable to all commercial entities, but with numerous and overlapping adjustments for various categories, sizes and circumstances of the entities taxed could not serve as an adequate benchmark for any one of the exceptions because it could be that few if any entities actually pay the tax at the generally applicable rate. This means that the tax regime and its organizing principles that determine the normative benchmark may be found in rules that take the form of exceptions to a general rule as much as in the form of the general rules themselves.

7.1340. This notion may be further illuminated with an example of a tax regime where the tax rate depends on the size of the company. If the tax rate increased according to the size, then small companies might appear to pay less than is otherwise due. If the tax rate decreases according to size, then large companies might appear to pay less than is otherwise due. If, however, company size is understood to be the organizing principle of the tax regime, then small, medium and large companies would not be considered as similarly situated and the amounts paid by companies of other sizes would not be relevant to determining what amount of tax is otherwise due. It might be observed that all sizes are not available to all companies and this might justify additional scrutiny of the breakdown of size categories and differences in tax rates, *et cetera*, possibly concluding nevertheless that company size is indeed an organizing principle of the tax regime. With this analytical approach in mind, the Panel turns to an examination of certain relevant aspects of the French TIRIB and then proceeds to further assess the third and fourth possible normative benchmarks as described above.

7.1341. The Panel recalls that the French TIRIB is not a broadly applicable, economy-wide tax. Rather, it applies exclusively to a particular activity, and it applies in addition to all other applicable taxes payable by these taxpayers. In relation to other taxes, the Panel therefore finds that the French TIRIB operates to increase the amount of tax that is otherwise due from these taxpayers because it has not been established that the French TIRIB applies in lieu of any broadly applicable tax or any other tax. Moreover, on the basis of the evidence presented, the Panel finds that it has not been established that any taxpayers are *ex ante* ineligible or otherwise incapable of incorporating qualifying biofuels. In other words, it appears that the full range of tax treatments provided for under the French TIRIB are available to all taxpayers without exception.

7.1342. Under the third possible normative benchmark, the Panel considers that the French TIRIB and its principles must be understood to reside in *certain elements of the TIRIB formula*, namely the elements established by the government (i.e. rate, IT%), but not in others, namely actual incorporation percentage (AI%). Thus, the French TIRIB would be characterized as establishing an amount of tax that would be due for each hectolitre of fuel released for consumption in France and every taxpayer will pay this amount of tax unless they choose to take actions (selecting the value for AI%) that will allow them to avoid payment of the tax.

7.1343. Under the fourth possible normative benchmark, the Panel understands that the French TIRIB and its principles are considered to reside in *the entire TIRIB formula*. With this understanding, taxpayers with different values of the factor (IT% - AI%) are not similarly situated with respect to the French TIRIB and its organizing principles. In other words, there would be nothing exceptional about the tax treatment of any particular taxpayer regardless of their particular value of AI% because all taxpayers with the same AI% are treated the same, the TIRIB formula does not identify any single rate of taxation as a default rate or as the general tax rate, nor as an exceptional tax rate. Instead, the tax due varies in direct proportion to the factor (IT% - AI%).

7.1344. In weighing the appropriateness of these two possible normative benchmarks, the Panel considers that the design and operation of the French TIRIB, as well as how it is situated in relationship to the broader tax regime, reveal that the fact that the amount of tax due varies in direct proportion to the factor (IT% - AI%) is a central and essential organizing principle of the French TIRIB. Thus, the Panel considers that this element is not an element of the TIRIB formula amenable to be disregarded as a principle of taxation under this scheme. As such, the Panel finds that the elements of the TIRIB formula go hand in hand and do not exist in isolation, and are

accurately described as being inseparably linked as integral parts of the TIRIB formula.[1612] In establishing a formula to determine the rate of tax that is proportional to the factor (IT% - AI%), the design of the French TIRIB establishes a range of tax rates each of which is applicable to similarly situated taxpayers. The Panel considers that for all taxpayers to which the TIRIB formula applies, the amount of tax that is due is determined by the formula and no other amount of tax is due. In sum, whatever tax liability is imposed by the French TIRIB it represents an additional tax on operators releasing fuel for consumption in France that are similarly situated to the extent that the targeted portion of the fuel released does not incorporate qualifying biofuels. Accordingly, the Panel finds that the TIRIB formula represents the most appropriate normative benchmark for comparison with the challenged tax treatment.

7.1345. While the third possible normative benchmark identifies a relationship between a lower tax due and the satisfaction of certain conditions that can be perceived as functioning in a manner similar to a tax credit, the Panel finds that this approach places inordinate emphasis on form rather than substance. In particular, breaking the TIRIB formula into its elements and treating one part of the formula, *i.e.* the maximum amount of tax per hectolitre (rate * IT%), as a general rule of taxation, fails to accurately reflect the French TIRIB and its organizing principles. Thus, on balance, the Panel finds that the maximum amount of tax potentially payable pursuant to the TIRIB formula fails to represent an appropriate benchmark tax treatment for the challenged tax treatment. Despite the conditionality attached to the lower tax rates, as highlighted by Malaysia, the Panel finds that the maximum amount of tax potentially payable pursuant to the TIRIB formula does not represent government revenue otherwise due within the meaning of Article 1.1(a)(1)(ii). Accordingly, the Panel finds that that the maximum amount of tax potentially payable pursuant to the TIRIB formula does not represent the most appropriate normative benchmark for comparison with the challenged tax treatment.

7.2.3.1.3.4 Conclusion on financial contribution

7.1346. The Panel finds that the challenged tax treatment consists of the treatment of taxpayer entities releasing fuel for consumption in France that partially or fully satisfies the incorporation target for qualifying biofuel. The Panel finds that the TIRIB formula represents the most appropriate normative benchmark for comparison with the challenged tax treatment. Because the challenged tax treatment is part of and incorporated into the benchmark tax treatment, both of which flow from the application of the TIRIB formula, the challenged tax treatment and the benchmark tax treatment are the same.

7.1347. Accordingly, the Panel finds that there is no difference between the challenged tax treatment and the benchmark tax treatment, and therefore, no government revenue has been foregone or not collected and no financial contribution exists within the meaning of Article 1.1(a)(1)(ii).

7.2.3.1.4 Income support

7.1348. Malaysia submits should the Panel find that financial contribution does not exist under Article 1.1(a)(1)(ii), that in the alternative the French TIRIB measure should be treated as providing an income support within the meaning of Article 1.1(a)(2).[1613]

7.1349. Article 1.1(a)(2) provides that a subsidy shall be deemed to exist if "there is any form of income or price support in the sense of Article XVI of GATT 1994". The first sentence of paragraph 1 of Article XVI refers to notification of "any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory". There is no definition or other form of guidance in the SCM Agreement regarding the meaning of "income or price support".

7.1350. Malaysia submits that by lowering the costs for the economic operators incorporating qualifying biofuels, the French TIRIB measure operates as an income support policy insulating such economic operators from the true costs that they would have to face in the absence of the challenged

[1612] Malaysia's second written submission, para. 452; European Union's first written submission, para. 1628.

[1613] Malaysia's first written submission, para. 1081.

tax treatment.[1614] Malaysia contends that lowering the tax expense increases the net income of economic operators incorporating qualifying biofuels, also permitting them to reduce the price of the fuels released for consumption attracting consumers and increasing market share.[1615]

7.1351. The European Union asserts that the French TIRIB measure does nothing to maintain the income received by those entities releasing fuel for consumption in France.[1616] The European Union argues that the production costs of the economic operators mixing different types of biofuels are not affected by the French TIRIB because it does not lower the biofuel production costs or the costs of acquiring biofuels.[1617] The European Union also asserts that the French TIRIB does not affect the price at which the fuel is released for consumption and therefore does not support what "comes in as the periodical produce of one's business".[1618]

7.1352. The Panel notes that the term "income support" in Article 1.1(a)(2) has not specifically been interpreted and applied in a prior dispute. However, the panel in *China – GOES* interpreted the closely connected term "price support", and the Panel is of the view that certain aspects of this analysis are equally relevant to the term "income support". That panel noted that the Appellate Body observed that the concept of "income or price support" under Article 1.1(a)(2) broadens the range of measures capable of providing subsidies beyond those that constitute a financial contribution.[1619] The panel further found that, like the notion of a financial contribution, "income or price support" should be understood to refer to a particular form of government action rather than to the effects of government action:

> Reading the term "price support" in this context, it is our view that it does not include all government intervention that may have an effect on prices, such as tariffs and quantitative restrictions. In particular, it is not clear that Article 1.1(a)(2) was intended to capture all manner of government measures that do not otherwise constitute a financial contribution, but may have an indirect effect on a market, including on prices. The concept of "price support" also acts as a gateway to the SCM Agreement, and it is our view that its focus is on the nature of government action, rather than upon the effects of such action. Consequently, the concept of "price support" has a more narrow meaning than suggested by the applicants, and includes direct government intervention in the market with the design to fix the price of a good at a particular level, for example, through purchase of surplus production when price is set above equilibrium.[1620]

7.1353. The panel also noted that "market price support" is a term used in the Agreement on Agriculture, and Annex 3 thereof provides that "market price support" is calculated as the difference between an external reference price and the "applied administered price".[1621] The panel considered this an indication that for this type of price support "a direct form of government control over domestic prices is required, in the form of a fixed, administered price, rather than a movement in prices being an indirect effect of another form of government intervention."

7.1354. With this understanding of "price support" as being a direct government intervention to achieve a particular price level for a good, the Panel considers that an "income support" would be a similar direct government intervention in the market to ensure that income for certain enterprises or associated with certain activities is maintained at or above a particular level. The Panel observes that the French TIRIB does involve an intervention in the market to incentivize the incorporation of the higher-cost biofuels through the application of different levels of tax liability. However, the French TIRIB is not tied to income levels of the taxpayers and it does not ensure that incomes are maintained at or above any particular level.

7.1355. While the variability factor as an element of the TIRIB formula, considered in isolation, does reduce the amount of tax due under certain conditions, which could then be viewed as supplementing the taxpayers' income net of tax as Malaysia argues, the Panel understands the concept of "income

[1614] Malaysia's first written submission, paras. 1085-1086.
[1615] Malaysia's second written submission, para. 456.
[1616] European Union's first written submission, para. 1646; second written submission, para. 328.
[1617] European Union's first written submission, para. 1646.
[1618] European Union's first written submission, para. 1646.
[1619] Appellate Body Report, *US – Softwood Lumber IV*, para. 52.
[1620] Panel report, *China – GOES*, para. 7.85.
[1621] Panel report, *China – GOES*, para. 7.87.

support" as narrower than a measure that simply reduces tax burden and thereby positively affects after-tax income. An "income support" would be expected to do more than reduce an expense (thereby permitting more income to be retained) and to do even more than merely add to income through its effects.

7.1356. Considering the TIRIB as a whole presents a different picture, whereby incomes are neither supplemented nor supported. The French TIRIB creates an additional variable tax on the economic activity of releasing fuel for consumption in France – an activity already taxed by the TICPE and the VAT. In addition, the French TIRIB creates a choice between incorporating qualifying biofuels at greater expense or refraining from such incorporation at the cost of a higher tax burden. From this perspective, the TIRIB overall increases the operating costs for the enterprises that undertake to incorporate the qualifying biofuels and increases the tax burden on the enterprises that do not satisfy the incorporation targets, and neither group of enterprises has their income supported.

7.1357. For the above reasons, the Panel finds that Malaysia has not established that the French TIRIB measure constitutes or incorporates an "income support" within the meaning of Article 1.1(a)(2).

7.2.3.1.5 Benefit

7.1358. The Panel recalls that it has found that Malaysia has failed to establish the existence of a financial contribution with respect to the French TIRIB. The Panel has also found that Malaysia has failed to establish the existence of an income support with respect to the French TIRIB. In the absence of establishing the alleged financial contribution or income support no benefit can be conferred thereby, and Malaysia's claims that a subsidy exists under Article 1 cannot prevail.

7.2.3.1.6 Conclusion with respect to the existence of a financial contribution

7.1359. For the above reasons, the Panel finds that Malaysia has failed to establish that government revenue has been foregone or not collected and, therefore, no financial contribution exists within the meaning of Article 1.1(a)(1)(ii). The Panel further finds that Malaysia has not established that the French TIRIB measure constitutes or incorporates an "income support" within the meaning of Article 1.1(a)(2). In the absence of establishing the alleged financial contribution or income support Malaysia has failed to demonstrate that the French TIRIB measure is a subsidy within the meaning of Article 1.

7.1360. Accordingly, the Panel concludes that Malaysia has failed to establish that the French TIRIB measure provides a subsidy that constitutes a specific subsidy that causes adverse effects in the form of serious prejudice under Articles 5.3(c), 6.3(a) and 6.3(c) of the SCM Agreement.

7.2.3.2 Further assessment assuming *arguendo* the existence of a financial contribution

7.1361. In the prior section, the Panel found that Malaysia has failed to establish that government revenue has been foregone or not collected and, therefore, no financial contribution exists within the meaning of Article 1.1(a)(1)(ii). Notwithstanding this conclusion, in the subsections that follow, the Panel proceeds to evaluate the merits of Malaysia's complaints against the European Union's alleged subsidization under the French TIRIB.

7.1362. Although the Panel did not find the maximum amount of tax potentially payable pursuant to the TIRIB formula to be the most appropriate normative benchmark, the Panel considers that this option exhibits certain features, which, at first view, suggested that it could have served as an appropriate benchmark. In these circumstances, and in light of the extensive argumentation that the parties have devoted to these issues, the Panel considers it appropriate to engage in a further analysis of the merits of Malaysia's claims on the basis of this normative benchmark.

7.1363. Accordingly, the Panel will proceed in the subsections below to conduct a further analysis of benefit, specificity, and adverse effects. The basis for this further analysis is the *arguendo* assumption that the maximum amount of tax potentially payable pursuant to the TIRIB formula could be considered as an appropriate normative benchmark. It is clear that the comparison of this benchmark with the challenged tax treatment would lead to the conclusion that the challenged tax treatment represents a tax liability lower than the benchmark tax liability to the extent that the

taxpayer has incorporated qualifying biofuel. This difference in tax liability would, therefore, represent a financial contribution in the form of government revenue foregone or not collected within the meaning of Article 1.1(a)(1)(ii).

7.2.3.2.1 Benefit

7.1364. The Panel now proceeds to consider, on the *arguendo* assumption that a financial contribution exists within the meaning of Article 1.1(a)(1)(ii), whether Malaysia has established that a benefit was thereby conferred within the meaning of Article 1.1(b).

7.1365. The Panel notes the financial contribution at issue is in the form of government revenue foregone or not collected, and this financial contribution would exist with respect to the difference between (i) the challenged tax treatment of operators releasing fuel for consumption in France that incorporates some portion of qualifying biofuels and (ii) the normative benchmark treatment of the maximum amount of tax potentially payable pursuant to the TIRIB formula, which would be paid by operators releasing fuel for consumption in France that incorporates no qualifying biofuels.

7.1366. The Panel considers that where a government purchases goods or services, sells goods, loans money, infuses equity and so on, there can be an important distinction between the question of a financial contribution being made and a benefit being conferred because the government could take the above actions at market prices or market rates. In such cases, the recipient of the financial contribution would be no better off than if they engaged in the same transaction with a private commercial entity on commercial terms.[1622] In the case of government revenue otherwise due that is foregone or not collected, it has been considered that such financial contributions are not available in the market. A recipient of a financial contribution in the form of government revenue foregone or not collected receives a benefit equal to the amount of tax otherwise due that was foregone or not collected.[1623] This has been considered to be so even where the taxpayer is induced to undertake some actions and incur associated expenses to qualify for the tax break. In this case the taxpayers do incur additional production costs to incorporate qualifying biofuels into the fuel mix and they are induced to do so to take advantage of the tax reduction. Because they choose to incorporate the costlier biofuels into their fuel mix to take advantage of the tax reductions, it can be reasoned that a benefit has been conferred on them by doing so.

7.1367. The Panel considers that the above rationale cannot be applied to assume that a benefit conferred in the form of a lower tax liability on the taxpayers, who are operators releasing fuel for consumption in France under the French TIRIB, will necessarily automatically confer a benefit upon the upstream suppliers of qualifying biofuels or on the producers of qualifying biofuels. The Panel considers that Malaysia has not provided sufficient additional information and argument to establish that under the circumstances of this case the conferral of a benefit should be considered to extend beyond the group of taxpayers.

7.1368. For the above reasons, the Panel considers that, on the *arguendo* assumption that a financial contribution exists as described above, a benefit would thereby be conferred on the operators that release fuel for consumption in France incorporating some portion of qualifying biofuels. The Panel considers that Malaysia has not established that the conferral of a benefit should be considered to extend beyond this group of taxpayers.

7.2.3.2.2 Article 2 - Specificity

7.2.3.2.2.1 Introduction

7.1369. Having proceeded on the *arguendo* assumption that the French TIRIB measure provides a financial contribution that would confer a benefit, the Panel now turns to consider whether such a subsidy would be specific within the meaning of Article 2.

[1622] See Panel Report, *Canada – Aircraft*, para. 9.112; see also Appellate Body Report, *Canada – Aircraft*, paras. 154, 157; and Panel Report, *Brazil – Aircraft*, para. 7.24.

[1623] See Panel Reports, *US – FSC*, paras. 7.41-7.103; *US – FSC (Article 21.5 – EC)*, paras. 8.3-8.48; *US – Large Civil Aircraft (2nd complain)*, paras. 7.115-7.171; *US – Tax Incentives*, para. 7.161; and Appellate Body Report, *US – FSC*, para. 140.

7.1370. Malaysia submits that the subsidy at issue is specific within the meaning of Article 2.1(a) because access to it "is explicitly limited to and benefits solely and exclusively those economic operators that incorporate and release for consumption petrol and diesel fuels incorporating biofuels *other than* oil palm crop-based biofuel".[1624]

7.1371. The European Union responds that, while Malaysia's approach presupposes that certain economic operators are excluded from the reduction because they incorporate only a given type of biofuel in their final product, Malaysia itself "denies this assumption and explains that in reality there is no such group of enterprises" by acknowledging that "all economic operators releasing fuel for consumption blend different types of biofuels".[1625] Moreover, the European Union submits that specificity does not exist by virtue of Article 2.1(b) because access to the subsidy is based on objective criteria or conditions governing the eligibility for, and the amount of, the alleged subsidy that are clearly spelled out in law, regulation, or other official document, so that they are capable of verification, and that eligibility is automatic.[1626]

7.2.3.2.2.2 Legal standard

7.1372. Article 2 is entitled "Specificity". Article 2.1 consists of three subparagraphs, which read as follows:

> 2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
>
> > (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
> >
> > (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[[1627]] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
> >
> > (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy[[1628]]. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

[1624] Malaysia's first written submission, para. 1119. (emphasis original). See also Malaysia's response to Panel question No. 195.

[1625] European Union's first written submission, paras. 1666-1667.

[1626] European Union's first written submission, para. 1673.

[1627] The footnote to the text of Article 2.1(b) states: "Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise."

[1628] The footnote to text of Article 2.1(c) states: "In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered."

7.1373. The provisions of Article 2 have been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.1374. The purpose of Article 2 is to ascertain whether the subsidy that is found to exist pursuant to Article 1.1 is specific. To this end, Article 2.1 sets out certain "principles" for determining whether *access* to a subsidy is limited to a particular class of recipients and the subsidy is, for that reason, specific. Article 2.1(a) states that a subsidy shall be specific if the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to that subsidy to certain enterprises or industries. Article 2.1(b) sets out that specificity "shall not exist" if the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, the subsidy, provided that eligibility is automatic, that such criteria or conditions are strictly adhered to, and that they are clearly spelled out in an official document so as to be capable of verification.

7.1375. In determining whether a subsidy is specific, both subparagraphs (a) and (b) thus focus on the same subject-matter, i.e. "the granting authority, or the legislation pursuant to which the granting authority operates".[1629] Article 2.1(a) talks of *explicit limits* on access to a subsidy. Article 2.1(b) enumerates the situations when a subsidy shall be regarded as non-specific, based on an analysis of the *conditions and criteria* for eligibility and amount of the subsidy as *clearly spelled out in law, regulation, or other official document*. The provisions thus envisage taking into account all relevant *de jure* features of a subsidy established through legislation and other instruments for the determination of specificity. The common aim and subject-matter of the two subparagraphs also suggests to the Panel that they apply concurrently.[1630]

7.1376. The Panel will elaborate further on the elements of the legal standard in Article 2 as necessary in the course of its assessment of the issues in dispute.

7.2.3.2.2.3 Assessment by the Panel

7.1377. In determining whether *de jure* specificity exists, Articles 2.1(a) directs the Panel to focus on explicit limits on access to the subsidy placed by the granting authority or the legislation pursuant to which it operates. Article 2.1(b) further requires the Panel to take into account the conditions and criteria for eligibility and amount of the subsidy as reflected in law, regulation, or another official document. In the present case, the Panel notes that the relevant *de jure* features of the subsidy at issue are set out in several instruments. The operators liable to pay the TIRIB are set out in the Circular of 18 August 2020 as follows:

> The persons liable to pay the TIRIB are the persons liable to pay the TICPE for the release for consumption of these fuels as a result of import, as a result of intra-Community circulation under a tax suspensive procedure, or on leaving establishments placed under a tax suspensive procedure (factories under customs control ["usines exercées"], tax warehouses for storage and, for ED95 and B100, tax warehouses for energy products). They are importers, approved warehouse keepers, registered recipients or occasional registered recipients.[1631]

7.1378. The text of this instrument expressly limits the payment of the TIRIB to those entities "that *release for consumption* these fuels as a result of import, as a result of intra-Community circulation under a tax suspensive procedure, or on leaving establishments placed under a tax suspensive procedure", i.e. "importers, approved warehouse keepers, registered recipients or occasional registered recipients". It follows that access to any reduction in the TIRIB is also limited to the same operators that are liable to pay the TIRIB, i.e. entities that release for consumption fuels in France, i.e. "importers, approved warehouse keepers, registered recipients or occasional registered recipients".

7.1379. Furthermore, Article 266 *quindecies* of the Customs Code provides that, for the purposes of the TIRIB, qualifying sources of energy in the fuel mix for achieving the incorporation target are renewable energy sources, and that energy from biofuels is renewable if it meets the sustainability

[1629] Panel Report, *US – Ripe Olives from Spain*, para. 7.27.
[1630] Panel Report, *US – Ripe Olives from Spain*, para. 7.28.
[1631] French Government Circular of 18 August 2020, (Exhibit EU-197), Article 8.

and reduction of greenhouse gas emissions criteria that are in line with RED II and the Delegated Regulation.[1632] In this manner, the Circular and the Customs Code set out a scheme for the payment of – and exemption from – the TIRIB for entities that release for consumption (i.e. importers, approved warehouse keepers, registered recipients or occasional registered recipients) fuels containing qualifying sources of energy.

7.1380. Article 266 *quindecies* of the French Customs Code also provides that "palm oil-based products are not considered to be biofuels" starting from 1 January 2020.[1633] The Circular of 18 August 2020 states that palm oil-based products are "excluded, from 2020, from the full benefit of the tax advantage regardless of their mode of production."[1634]

7.1381. Working together, these instruments indicate to the Panel that only those economic operators that incorporate and release for consumption fuels incorporating qualifying sources of energy have access to a reduction in the TIRIB, whereas operators that do not incorporate qualifying sources of energy do not have access to the reduction, and, to the extent that operators do not incorporate sufficient qualifying biofuels to meet the target, they have proportionally less access to the reduction in the TIRIB. Moreover, palm oil-based products do not constitute qualifying sources of energy for the purposes of accessing the French TIRIB measure.

7.1382. Under Article 2.1(a), "a limitation on access to a subsidy may be established 'in many different ways', including, for example, 'by virtue of the type of activities conducted by the recipients'".[1635] Based on the text of the underlying instruments discussed above, the Panel finds that the subsidy assumed *arguendo* to exist pursuant to Article 1.1 – i.e. the lower tax liability associated with incorporating qualifying biofuels – is specific within the meaning of Article 2.1(a) because access to such subsidy is limited to those economic operators that release for consumption fuels incorporating qualifying biofuels.

7.1383. According to Malaysia, the subsidy is specific to "certain enterprises" that are "those economic operators that incorporate and release for consumption petrol and diesel fuels incorporating biofuels other than oil palm crop-based biofuel". [1636] The European Union responds that while Malaysia's approach to specificity presupposes that certain economic operators are excluded from the French TIRIB measure because they incorporate only a given type of biofuel in their final product, Malaysia itself "denies this assumption and explains that *in reality* there is no such group of enterprises" by acknowledging that "all economic operators releasing fuel for consumption blend different types of biofuels."[1637] Moreover, the European Union points out that Malaysia "recognises the peculiarities of the blending process, whereby economic operators, *as a general practice*, incorporate different types of biofuels in the petrol and diesel fuels."[1638] The Panel notes, however, that, as discussed above, the focus of the inquiry of specificity under Article 2.1(a) is on whether *access* to the subsidy is explicitly limited to certain enterprises, not on whether they, *in fact,* receive the subsidy.[1639] Thus, the fact that Malaysia recognizes[1640] that all economic operators "in reality"[1641], or "as a general practice"[1642], blend different types of biofuel does not, without more, negate the proposition that *access* to the subsidy is *explicitly limited* to those economic operators that incorporate and release for consumption fuels incorporating biofuels other than palm oil-based biofuel.

7.1384. The European Union also asserts that specificity does not exist by virtue of Article 2.1(b) because the subsidy at issue is based on "objective criteria or conditions governing the eligibility for,

[1632] Article 266 quindecies - Code des douanes – Légifrance, (Exhibit EU-199).
[1633] Article 266 quindecies - Code des douanes – Légifrance, (Exhibit EU-199).
[1634] French Government Circular of 18 August 2020, (Exhibit EU-197), Article 8.
[1635] Panel Report, *US – Softwood Lumber VII*, para. 7.722 (quoting, *inter alia*, Appellate Body Report, *US – Washing Machines*, para. 5.223).
[1636] Malaysia's first written submission, para. 1119. (emphasis original) See also Malaysia's response to Panel question No. 195.
[1637] European Union's first written submission, paras. 1666-1667. (emphasis added)
[1638] Malaysia's response to Panel question No. 195.
[1639] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 368. (emphasis original) See also Panel Report, *US – Softwood Lumber VII*, paras. 7.709 and 7.721.
[1640] European Union's second written submission, para. 339 (noting that "[a]mong this group of enterprises there is no group that only incorporates a given type of biofuels").
[1641] European Union's first written submission, paras. 1666-1667. (emphasis added)
[1642] Malaysia's response to Panel question No. 195.

and the amount of, the alleged subsidy" that "are clearly spelled out in law, regulation, or other official document, so that they are capable of verification, and that eligibility is automatic".[1643]

7.1385. Malaysia, for its part, recognizes that the specificity analysis should accord appropriate consideration to both Article 2.1(a) and Article 2.1(b).[1644] However, as noted above in the context of Article 2.1(a), Malaysia also argues that access to the subsidy "is limited to certain enterprises, in particular, to the economic operators that release for consumption petrol and diesel fuels that contain biofuels *other than* oil palm crop-based biofuel".[1645]

7.1386. Article 2.1(b) stipulates that specificity "shall not exist" "[w]here the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to." Footnote 2 to Article 2.1(b) defines "objective criteria or conditions" as those "which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise".

7.1387. As discussed in the context of the Article 2.1(a) analysis above, the text of the underlying instruments establishes that only those operators that incorporate and release for consumption fuels incorporating qualifying sources of energy have access to a reduction in the TIRIB. This also implies that, for the purposes of Article 2.1(b), the criteria or conditions for eligibility for the French TIRIB measure are not "objective" insofar as they "favour certain enterprises over others", i.e. those operators that incorporate and release for consumption fuels incorporating qualifying sources of energy over those operators that incorporate and release for consumption fuels incorporating palm oil-based biofuel.[1646]

7.2.3.2.2.4 Conclusion on Article 2

7.1388. The instruments setting out the eligibility conditions for the subsidy establish that only those economic operators that release for consumption fuels incorporating qualifying biofuels have access to a favourable tax treatment under the French TIRIB measure, whereas operators that do not incorporate qualifying biofuels do not have access to the favourable tax treatment, and, to the extent that operators do not incorporate sufficient qualifying biofuels to meet the target, they have proportionally less access to the favourable tax treatment.

7.1389. The Panel thus finds that the subsidy assumed to exist for the purposes of the Panel's *arguendo* analysis is specific within the meaning of Article 2.1(a) because access to such subsidy is limited to those economic operators that release for consumption fuels incorporating qualifying biofuels. For the purposes of Article 2.1(b), this also means that the criteria or conditions for eligibility for the favourable tax treatment are not "objective" insofar as they "favour certain enterprises over others", i.e. those operators that release for consumption fuels incorporating qualifying biofuels over those operators that incorporate and release for consumption fuels not incorporating qualifying biofuel.

7.2.3.2.3 Articles 5(c), 6.3(a) and 6.3(c) – Adverse effects and serious prejudice

7.2.3.2.3.1 Introduction

7.1390. The Panel proceeded on the *arguendo* assumption that the French TIRIB provides a financial contribution, that a subsidy within the meaning of Article 1 would exist because a benefit would thereby be conferred, and that such subsidy would be specific within the meaning of Article 2. The Panel now turns to the claims under Article 5(c), 6.3(a) and 6.3(c) of the SCM Agreement.

[1643] European Union's first written submission, para. 1673.
[1644] Malaysia's first written submission, para. 1115.
[1645] Malaysia's first written submission, para. 1117.
[1646] See e.g. Panel Report, *US – Softwood Lumber VII*, para. 7.727.

7.1391. Malaysia submits[1647] that the French TIRIB measure is inconsistent with Article 5(c) because the favourable tax treatment it provides to operators releasing fuel for consumption in France incorporating qualifying biofuels constitutes an actionable subsidy which causes adverse effects to the interests of Malaysia, in the form of serious prejudice to its interests within the meaning of Articles 6.3(a) and 6.3(c).

7.1392. The European Union submits[1648] that Malaysia has not demonstrated that adverse effects have been caused by the French TIRIB measure. In particular, the European Union submits that causation has not been substantiated because*, inter alia*, the posited counterfactual scenario to show causation does not hold. According to the European Union, any decline of Malaysian exports of palm oil into France between 2019 and 2020 cannot be assumed to be attributable to the French TIRIB measure.[1649] The European Union further submits that Malaysia's causation analysis ignores factors that should be considered, including market conditions, the conceptual distance between the activities of the subsidy recipient and the products in respect of which the effects are alleged.[1650] Additionally, the European Union suggests that in the absence of the alleged subsidy the market phenomena of displacement and/or lost sales would have nonetheless occurred due to market factors as well as strong public pressure towards environmental protection and other demand related factors such as ethical concerns, reputation, branding, and corporate social responsibility.[1651]

7.2.3.2.3.2 Legal standard

7.1393. Article 5 is entitled "Adverse Effects". Article 5(c) read in conjunction with the introductory clause in Article 5 states:

> No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:
>
> …
>
> (c) serious prejudice to the interests of another Member.[[1652]]

7.1394. Article 6 of the SCM Agreement is entitled "Serious Prejudice". Article 6.3(a) and (c) provide that:

> 6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:
>
> > (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;
> >
> > …
> >
> > (c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;

[1647] Malaysia's first written submission, paras. 1120-1211; second written submission, paras. 469-523; responses to the Panel's questions, pp. 129-130; and comments on EU responses to the Panel's questions, pp. 334-339

[1648] European Union's first written submission, paras. 1675-1819; second written submission, paras. 342-363; and responses to the Panel's questions, paras. 1066-1095.

[1649] European Union's first written submission, para. 1710.

[1650] European Union first written submission, para. 1777.

[1651] European Union first written submission, paras. 1788-1793; European Union second written submission, para. 360; European Union response to Question No. 192.

[1652] The footnote to the text of Article 5(c) states: "The term "serious prejudice to the interests of another Member" is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice."

7.1395. Articles 5(c), 6.3(a) and 6.3(c) have been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.1396. The Panel will elaborate on the relevant elements of the legal standards in Articles 5(c), 6.3(a) and 6.3(c) as necessary in the course of its assessment of the issues in dispute.

7.2.3.2.3.3 General approach to the assessment of adverse effects and serious prejudice

7.1397. Malaysia utilized a two-step approach in presenting its arguments regarding adverse effects and serious prejudice. For each of the alleged effects of the alleged subsidy (displacement and lost sales), Malaysia sought to demonstrate the existence of the alleged effect, and then argued in a second step that the subsidy was a genuine and substantial cause of the effects.[1653]

7.1398. The Panel observes that analysis of adverse effects and serious prejudice has been undertaken using either a unitary or two-step approach.[1654] Under a unitary approach, the analysis of the particular market phenomena identified in the subparagraphs of Article 6.3 is not conducted separately from the analysis of whether there is a causal relationship between those market phenomena and the challenged subsidies. By contrast, under a two-step approach the analysis first seeks to identify the market phenomena, and then, as a second step, examines whether there is a causal relationship between the observed situation on the market and the subsidy. The Panel notes that the Appellate Body has observed that a unitary approach "has a sound conceptual foundation" and that it may be difficult to ascertain the existence of some of the market phenomena in Article 6.3 without considering the effect of the subsidy at issue.[1655] The Panel agrees with this line of thinking as elaborated in the following Appellate Body statement[1656]:

> [A] unitary approach that uses a counterfactual will generally be the more appropriate approach to undertaking the assessment required under Article 6.3 of the SCM Agreement. … [I]t is difficult to understand the market phenomena described in the various subparagraphs of Article 6.3 in isolation from the challenged subsidies. Rather, consideration of the effects of the challenged subsidies is intrinsic to the identification of those market phenomena. Any attempt to identify one of the market phenomena in Article 6.3 without considering the subsidies at issue can only be preliminary in nature since Article 6.3 requires that the market phenomenon be the effect of the challenged subsidy. This also means that a two-step approach simply defers the core of the analysis to the second step. In other cases, the problem might be the opposite. By artificially leaving aside the question of whether the market phenomenon is the effect of the subsidy, one could overlook market phenomena that are in fact occurring.
>
> The use of a counterfactual analysis provides an adjudicator with a useful analytical framework to isolate and properly identify the effects of the challenged subsidies. In general terms, the counterfactual analysis entails comparing the actual market situation that is before the adjudicator with the market situation that would have existed in the absence of the challenged subsidies. This requires the adjudicator to undertake a modelling exercise as to what the market would look like in the absence of the subsidies. Such an exercise is a necessary part of the counterfactual approach. As with other factual assessments, panels clearly have a margin of discretion in conducting the counterfactual analysis.

7.1399. Although Malaysia opted to follow the two-step approach, the Panel considers that it is within its discretion to determine the approach it considers most appropriate under the circumstances. The Panel considers certain aspects of the parties' submissions to have relevance in this respect. The parties agree that in the absence of government measures incentivizing the use of

[1653] Malaysia's first written submission, paras. 1143-1166, and 1184.

[1654] Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1107; *US – Upland Cotton*, para. 431; and *US – Upland Cotton (Article 21.5 – Brazil)*, para. 354.

[1655] Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1107; and *US – Upland Cotton*, para. 354.

[1656] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1109-1110 (fns omitted).

biofuels, there would be no commercial reason for operators releasing fuel for consumption in France to incorporate biofuels into their fuel mix. This is because biofuels cannot compete on a commercial basis with fossil fuels.[1657] Moreover, there are substantial questions regarding whether, in the absence of the challenged subsidy, any opportunities for palm oil-based biofuel to compete for a share of the fuel mix would arise.[1658]

7.1400. The Panel's resolution of these latter questions will be key to establishing the appropriate counterfactual for the causation analysis. Were the Panel to conclude that there would be a counterfactual biofuel market that did *not* offer competitive opportunities to palm oil-based biofuel, then the alleged adverse effects would not have been caused by the subsidy. Alternatively, were the Panel to take the opposite view, the nature of the competitive opportunities for palm oil-based biofuel existing in the counterfactual would necessarily inform the subsequent analysis of the market effects. This suggests that a unitary analysis of the adverse effects would be the most efficient way for the Panel to proceed. In this respect, the Panel finds that in the circumstances of this dispute, and as the Appellate Body has observed, "a two-step approach simply defers the core of the analysis to the second step". Accordingly, the Panel determines to take a unitary approach and to turn next to the issue of the appropriate counterfactual analysis.

7.2.3.2.3.4 The appropriate counterfactual analysis

7.1401. To prevail on a claim of serious prejudice, the complainant must demonstrate that the subsidies at issue have caused one or more of a range of prescribed effects in the relevant market. The causal link between a subsidy and its effects that is required to make this showing has been consistently described as "a genuine and substantial relationship of cause and effect", although a panel need not determine it to be the sole cause of that effect, or even that it is the only substantial cause of that effect.[1659]

7.1402. A number of factors have been considered as relevant for an assessment of whether a challenged subsidy causes the effects that constitute serious prejudice, such as the nature of the subsidy; the way in which the subsidy operates; the extent to which the subsidy is provided in respect of a particular product or products; conditions in the market; and the conceptual distance between the activities of the subsidy recipient and the products in respect of which the market phenomena are alleged.[1660] As mentioned above, a counterfactual analysis has been considered as critical in considering these factors to determine whether the alleged market phenomena are the effect of the challenged subsidies.[1661]

7.1403. In an examination of alleged lost sales, for example, this would involve a comparison of the sales actually made by the competing firm(s) of the complaining Member with a counterfactual scenario in which the subsidized firm(s) would not have received the challenged subsidies. There would be lost sales where a counterfactual scenario shows that sales made by the subsidized firm(s) would have been made instead by the competing firm(s) of the complaining Member, thus revealing the effect of the challenged subsidies.

7.1404. In some circumstances, factors other than the subsidy at issue may have caused or contributed to a particular market effect. Effects of those other causal factors should not be attributed to the subsidies at issue, and the extent to which the other causal factors dilute the causal link between those subsidies and the alleged adverse effects should be taken into account when determining whether there is a genuine and substantial relationship of cause and effect between the subsidies and the alleged market phenomenon.[1662] This examination is referred to as the non-attribution analysis.

[1657] Malaysia's first written submission, paras. 563, 1188.

[1658] Malaysia's first written submission, paras. 1151-1152; and second written submission, paras. 503-506; European Union's first written submission paras. 1790-1795.

[1659] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 913.

[1660] See Panel Report, *Korea – Commercial Vessels*, para. 7.560.

[1661] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1109-1110.

[1662] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 914. See also Appellate Body Reports, *US – Upland Cotton*, para. 437; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 375; and *EC and certain member States – Large Civil Aircraft*, paras. 1232 and 1376.

7.1405. The selection of an appropriate counterfactual will, as a threshold matter, shape any analysis of adverse effects and serious prejudice in the relevant markets, causation thereof, and non-attribution.

7.1406. The parties acknowledge that the appropriate counterfactual scenario is one that would exist in the absence of the challenged subsidy.[1663] The Panel recalls that it has found, premised on the *arguendo* assumption that the French TIRIB provides a financial contribution in the form of government revenue foregone, a benefit is conferred on the taxpayers whose tax liability is reduced, and such subsidy is specific within the meaning of Article 2. Accordingly, the counterfactual scenario would be one where the French TIRIB no longer lowers the tax liability of taxpayers incorporating qualifying biofuels.

7.1407. The parties agree that in the absence of an incentive to incorporate biofuels into the fuel mix, there is no commercial reason for operators releasing fuel for consumption in France to incorporate such biofuels because biofuels cannot compete on a commercial basis with fossil fuels.[1664] It follows that in the absence of the incentive created by the French TIRIB there is no market for biofuel to be incorporated in the fuel mix consumed in France. The commercial non-viability of biofuels for incorporation in the fuel mix *vis-à-vis* fossil fuels supports the conclusion that in the absence of the incentive created by the French TIRIB all crop-based biofuels would disappear from the transport fuel market in France.

7.1408. In other words, while the absence of the subsidy would eliminate the incentive to incorporate the qualifying biofuels into the mix of fuel released for consumption in France, it would not restore palm oil-based biofuel to the market position where it competed with other oil crop-based biofuels. According to this reasoning, the counterfactual analysis shows that "the market situation that would have existed in the absence of the challenged subsidies" is not one where the alleged adverse effects to Malaysia's interests are mitigated. If the subsidy were the cause of the adverse effects then its absence should result in the mitigation of those adverse effects. This not being the case, the challenged subsidies are shown not to have caused the alleged adverse effects. Put simply, the absence of the challenged subsidy would not result in better market results for palm oil-based biofuel in the face of commercial non-viability of any oil crop-based biofuels *vis-à-vis* fossil fuels.

7.1409. Malaysia contends that the counterfactual should additionally account for the continued applicability of EU renewable energy targets such that oil crop-based biofuel would still need to be used in France to meet those targets.[1665] Malaysia views the EU renewable energy targets as mandates that France must take some action to fulfil.[1666]

7.1410. The Panel recalls that while the EU renewable energy targets permit palm oil-based biofuel to fulfil some portion of the targets during the phase-out period, incorporation of palm oil-based biofuel is not required by the targets. The Panel notes Malaysia's emphasis on considerations that could favour an implementation that results in market opportunities for palm oil-based biofuel, whereas the European Union has highlighted the policy motivations for alternative outcomes that would not entail market opportunities for palm oil-based biofuel.[1667] In this regard, the Panel recalls that the counterfactual approach "requires the adjudicator to undertake a modelling exercise as to what the market would look like in the absence of the subsidies".[1668] The differences in views of the parties on the role of EU renewable energy targets, however, raises questions about whether, in addition to modelling how market conditions would have responded in the absence of the subsidies, the Panel should also speculate whether and how the subsidizing Member might adopt (or might have adopted) alternative interventions to respond to its various priorities in the absence of the challenged subsidy.

[1663] Malaysia's first written submission, paras. 1194-1196; European Union's first written submission, paras. 1787-1788.

[1664] Malaysia's first written submission, paras. 563 and 1188; European Union's first written submission, paras. 10 and 1425.

[1665] Malaysia's first written submission, para. 1152.

[1666] Malaysia's first written submission, para. 1152.

[1667] Malaysia's first written submission, paras. 1194-1201; European Union's first written submission, para. 1624.

[1668] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1110.

7.1411. The Panel recalls that the purpose of undertaking the counterfactual analysis under Article 5(c) is to ascertain whether the subsidy causes the alleged adverse effects rather than to explore a range of alternative policy options. On the basis of reliable evidence and an understanding of market dynamics, the Panel considers that it is relatively feasible to undertake a modelling exercise that supports a reasoned conclusion that in the absence of the subsidy it is probable that market conditions would respond, or would have responded, in a particular way that shows whether the adverse effects would have been mitigated in the absence of the subsidy.

7.1412. The Panel recognizes that the existence of the EU renewable energy targets suggests that it is possible that France would adopt, or would have adopted, some other implementation in the absence of the subsidy. However, the Panel considers a counterfactual analysis regarding alternative government interventions that could be, or could have been, adopted in the absence of the subsidy to implement the EU renewable energy targets to be considerably more speculative than a market modelling exercise. To the extent that any such speculation would be warranted, the Panel considers that the evidence suggests the French Government would continue to pursue the policy goal of excluding palm oil-based biofuels sooner than the deadline under the EU directive. Crucially, the Panel finds insufficient evidence on the record to conclude that in the absence of the subsidy an alternative government intervention would necessarily establish a competitive relationship between palm oil-based biofuel and other oil crop-based biofuels for a share of the fuel mix in France.

7.1413. As mentioned, the usefulness of applying a counterfactual analysis is "to isolate and properly identify the effects of the challenged subsidies".[1669] The Panel is, therefore, mindful that the appropriate counterfactual analysis should isolate the effects of the challenged subsidy as compared to other aspects of the French TIRIB that do not constitute the subsidy *per se.* Malaysia has focused its causation arguments on alleged effects arising in the 2019-2020 period when palm oil-based biofuel was excluded from the group of qualifying biofuels as compared to prior years when palm oil-based biofuel was a qualifying biofuel, was eligible for the favourable tax treatment, and was on that basis competing with other biofuels for incorporation in the fuel mix.[1670] Malaysia points to the correspondence in time of the effects of the challenged subsidy that arose from 2019 to 2020.[1671] There is not, however, a correspondence in time between the adoption of the challenged subsidy and the alleged adverse effects. Rather, the alleged adverse effects correspond in time with the proposed and implemented *exclusion* of palm oil-based biofuel from the group of qualifying biofuels. The correspondence in time of the adoption of the *exclusion* as opposed to the pre-existing tax reduction suggests to the Panel that the alleged adverse effects were the effect of the *exclusion* rather than the challenged subsidy. The Panel notes in this regard that Malaysia has claimed that the exclusion of petrol and diesel fuels, to the extent that they contain palm oil-based biofuel, from the French TIRIB measure is inconsistent with Articles I:1 and III:2 of the GATT 1994, and the Panel has made affirmative findings in relation to those claims.

7.1414. The Panel recalls, however, that the subsidy in question is the favourable tax treatment afforded to the taxpayers incorporating qualifying biofuels such that less tax is paid than would have been due otherwise. The Panel is, therefore, constrained to examine the effects of the specific subsidy found to exist (on an *arguendo* basis), and not other aspects of the French TIRIB that do not constitute the subsidy. In the Panel's view, the subsidy has the effect of creating demand for qualifying biofuel to be incorporated into fuel released for consumption in France. The subsidy thus permits the qualifying biofuels to overcome a competitive disadvantage *vis-à-vis* fossil fuel. The marketing opportunities for palm oil-based biofuel existed when it was treated as a qualifying biofuel, and such opportunities could exist again only as a consequence of some other intervention to create similar opportunities. Accordingly, the Panel finds that the counterfactual analysis supports the conclusion that the alleged adverse effects are not caused by the subsidy at issue here (which enables some biofuels to compete with fossil fuels), but are rather caused by the exclusion of palm oil-based biofuel from the group of qualifying biofuels. As such, the Panel finds that Malaysia has not established that the alleged adverse effects are caused by the subsidy within the meaning of Articles 5(c), 6.3(a) and 6.3(c).

[1669] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1100.

[1670] Malaysia's first written submission, paras. 1144-1166.

[1671] Malaysia's first written submission, paras. 1145, 1161-1162, 1165, and 1190; and second written submission, paras. 490, 494, and 498.

7.2.3.2.3.5 Conclusion on adverse effects and serious prejudice

7.1415. For the above reasons, assuming *arguendo* that the French TIRIB provides a financial contribution within the meaning of Article 1.1(a)(1)(ii) such that a subsidy within the meaning of Article 1 exists because a benefit is thereby conferred, and that such subsidy is specific within the meaning of Article 2, the Panel finds that Malaysia has not established that such subsidy causes the alleged adverse effects within the meaning of Articles 5(c), 6.3(a) and 6.3(c).

7.2.3.3 Overall conclusion regarding the claims under the SCM Agreement

7.1416. The Panel finds that Malaysia has failed to establish that the French TIRIB measure provides a subsidy that constitutes a specific subsidy that causes adverse effects in the form of serious prejudice under Articles 5(c), 6.3(a) and 6.3(c) of the SCM Agreement.

7.3 Claims in respect of the Lithuanian measures

7.3.1 Introduction

7.1417. In addition to the EU-wide measures and the French measure, Malaysia challenges certain Lithuanian measures.

7.1418. Malaysia submits[1672] that if the EU measures at issue were to be found inconsistent with the European Union's relevant WTO commitments, Lithuania's rules transposing the relevant elements of the RED II would also have to be found to be inconsistent with Lithuania's relevant WTO commitments.

7.1419. The European Union submits[1673] that Malaysia's panel request fails to identify with sufficient precision the relevant provisions of the Lithuanian law in question, which of the EU measures they relate to, or which provisions of Lithuania's legal order implementing those provisions are inconsistent with which WTO obligations. In any event, the European Union argues that Malaysia has failed to make a *prima facie* case as it does not advance any evidence and arguments to explain why Lithuania's measures violate the same obligations under the TBT Agreement and the GATT 1994 that Malaysia raises in respect of the EU measures.

7.3.2 Malaysia's panel request

7.1420. The Panel refers to paragraphs 2.76 and 2.77 in the descriptive part of this Report which set out the Lithuanian measures as Malaysia describes them in Part III of its panel request.

7.1421. Furthermore, the Panel notes that Part IV of Malaysia's panel request is entitled "Legal Basis of the Complaint". Following a review of the EU-wide and French measures, which include an enumerated listing of the legal claims in respect of each set of measures, paragraph 34 of Malaysia's panel request states the following, under the heading "Lithuania":

> 34. As noted above, Malaysia contends that the measures set out particularly, but not exclusively, in Article 26 of the RED II and the Delegated Regulation are inconsistent with the EU's obligations under the TBT Agreement and the GATT 1994. Hence, any implementation by Lithuania of these measures in its domestic law would also be inconsistent with the same obligations under the TBT Agreement and the GATT 1994.

7.3.3 Malaysia's submissions

7.1422. Malaysia addresses the Lithuanian measure in its first written submission in two identically worded paragraphs that contain the argument set out above. Malaysia does not develop this

[1672] Malaysia's first written submission, paras. 373, 380-383, 404-406, 1214; second written submission, paras. 525-535; response to Panel question No. 5, pp. 3-4; and comments on the European Union's responses to Panel questions No. 6 and No. 15, pp. 42, 62.

[1673] European Union's first written submission, paras. 1821-1833; second written submission, para. 365; response to Panel question No. 6, paras. 6-12; and comments on Malaysia's response to Panel question No. 5, paras. 1-11.

argument in subsequent submissions. Furthermore, Malaysia while eventually submitting the text of the Lithuanian Law No. XI-1375 as an exhibit, has not provided a translation of this text into a WTO working language.

7.3.4 Panel's assessment

7.1423. The Panel is faced with two issues, namely whether the measure has been properly identified pursuant to Article 6.2 of the DSU and if so, whether Malaysia has made a *prima facie* case. These issues present a logical sequence, and the Panel would normally have to decide the Article 6.2 issue first.

7.1424. The parties hold opposing views on whether Malaysia's panel request complies with the dual requirements in Article 6.2 of the DSU to "identify the specific measures at issue" and "the legal basis of the complaint sufficient to present the problem clearly". The parties have elaborated their arguments on the adequacy of Malaysia's panel request in the course of the proceedings, including in responses to questions from the Panel. The parties' arguments as developed raise multiple interrelated issues that would require the Panel to analyse and rule on multiple issues implicating different aspects of the panel request.

7.1425. First and foremost, while Malaysia's panel request does not appear to identify the contents of any specific provision of the Lithuanian law in question[1674], it does include references to elements of RED II and the Delegated Regulation that might in principle enable a reasonable inference to be drawn. However, the elements of RED II and the Delegated Regulation are referred to through several different formulations that are potentially confusing, including:

- a relatively general reference to "the provisions of the RED II and the Delegated Regulation" in paragraph 29;
- what could be construed as a narrower reference to the high ILUC-risk cap and phase-out measure in Article 26(2) in the narrative description referring to "high ILUC-risk" and "the gradual decrease to 0%" given in paragraph 30; and
- the reference to "the measures set out particularly, but not exclusively, in Article 26 of the RED II and the Delegated Regulation" in paragraph 34, which is an explicit indication that the relevant EU-wide measures whose implementation into Lithuanian law Malaysia is challenging is not necessarily limited to the high ILUC-risk cap and phase-out measure in Article 26(2).

7.1426. Furthermore, including in a panel request a hyperlink to the full text of the challenged measure, as Malaysia did with respect to the Lithuanian law in question, could in principle be a means of identifying the measure at issue.[1675] Such identification would, however, still be subject to the requirement of sufficient precision so as to put the respondent on notice with regard to the nature of the challenged measure.[1676] It appears that the website accessible through the hyperlink included by Malaysia in the panel request contains the full text of the Lithuanian law without specifying any particular provisions in which the measure(s) at issue is (are) contained. In addition, the full text of the Lithuanian law that is linked is in the original language.

7.1427. The issues raised under Article 6.2 are further complicated by the fact that Malaysia's panel request refers to "Lithuania's measure" in the singular in paragraph 31 but refers to "any implementation by Lithuania of these measures in its domestic law" in paragraph 34 in a manner that could be understood to mean that it challenges more than one Lithuanian measure. In its response to Panel questions, Malaysia refers to "Lithuanian measures at issue", in the plural, and appears to contend that multiple measures are identified in paragraph 31 of the panel request.[1677]

[1674] Malaysia maintains that the panel request contains an "explicit list of Lithuanian legislation". (See Malaysia's second written submission, para. 529; Malaysia's panel request, para. 31.) However, the Panel notes that the list of provisions found in para. 31(i) refers to the amended provisions of the legal act in question rather than the specific provisions containing the measures at issue.

[1675] Appellate Body Report, *Argentina – Import Measures*, para. 5.51.

[1676] Appellate Body Report, *Argentina – Import Measures*, para. 5.52.

[1677] Malaysia's response to Panel question No. 5, pp. 3-4.

Yet, paragraph 31 merely lists the "legal instruments" through which "Lithuania's measure is set up and implemented".[1678]

7.1428. The Panel would also need to clarify the relationship between the different parts of the panel request set out above for the purposes of identifying "the legal basis of the complaint". In response to a question from the Panel, Malaysia contends that its panel request identifies as the legal basis of its complaint *all* provisions of the TBT Agreement and the GATT 1994 which form the basis for Malaysia's claims against *all* the EU-wide measures.[1679] The wording of paragraph 34 of the panel request, if read in isolation, provides a textual basis for such a conclusion. However, paragraph 30 appears to refer specifically to implementation of the EU-wide high ILUC-risk cap and phase-out, and paragraph 31 refers to the "measure" in the singular. If read in conjunction with those elements, paragraph 34 could equally be read to mean "the same obligations under the TBT Agreement and the GATT 1994" as those that provide the legal basis of its complaint against the high ILUC-risk phase-out.

7.1429. In contrast to the potential complexities surrounding the issues relating to consistency with the requirements of Article 6.2 of the DSU, however, it is in the Panel's view clear that Malaysia has not endeavoured to make a *prima facie* case in respect of the Lithuanian measures.

7.1430. The Panel recalls that the burden of demonstrating that the Lithuanian measures are inconsistent with the relevant provisions of the TBT Agreement and the GATT 1994 rests on Malaysia as the complainant in this dispute.[1680] It is therefore for Malaysia to put forward evidence and arguments sufficient to make a *prima facie* case of violation of obligations in those provisions.[1681] The Appellate Body has made it clear that:

> [I]t is incumbent upon a party to identify in its submissions the relevance of the provisions of legislation—the evidence—on which it relies to support its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position.[1682]

7.1431. In *US – Gambling*, the panel found that the complaining Member "could not and did not make any prima facie demonstration"[1683] in respect of a category of US federal and state laws which the panel summed up as:

> Laws that are contained in the Panel request but which are not discussed to an extent that could enable the Panel to identify according to which particular provisions and how the laws result in a prohibition on the cross-border supply of gambling and betting services which would be inconsistent with the United States' obligations under the GATS.[1684]

7.1432. This finding was not reviewed on appeal, but in that same dispute the Appellate Body confirmed that a complaining party "may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency".[1685]

7.1433. The Panel agrees with the European Union that Malaysia has not advanced arguments or adduced evidence that the Lithuanian measure(s) is inconsistent with any of the specific provisions of the TBT Agreement and the GATT 1994 claimed by Malaysia to have been violated. In particular, Malaysia has not identified or described the contents of any specific provision of Law No XI-1375 containing the challenged measure(s), let alone how the measure(s) operates. Consequently, the Panel agrees with the European Union that, after receiving all the parties' submissions in these proceedings, neither the Panel nor the European Union is in a position to know which specific provision(s) of Lithuanian Law No XI-1375 on renewable energy should be analysed in light of which

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[1678] Malaysia's panel request, para. 31.
[1679] Malaysia's response to Panel question No. 5, pp. 3-4.
[1680] Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 14; and *EC – Hormones*, para. 109.
[1681] Appellate Body Report, *EC – Hormones*, para. 98.
[1682] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 191.
[1683] Panel Report, *US – Gambling*, para. 6.217.
[1684] Panel Report, *US – Gambling*, para. 6.215.
[1685] Appellate Body Report, *US – Gambling*, para. 140.

legal claims (i.e. what measure(s) are at stake and which claims are to be connected to which measure).[1686] Additionally, Malaysia has not provided the Panel or the European Union with the text of Lithuania's Law No XI-1375 translated into a WTO working language, contrary to the requirements of paragraph 6(1) of the Working Procedures adopted by the Panel.[1687]

7.1434. Furthermore, Malaysia's arguments against the Lithuanian measure(s) in this dispute consist of only two paragraphs, in its first written submission, that essentially repeat the description of the Lithuanian measure(s) at issue included in its panel request.[1688]

7.1435. In sum, Malaysia has effectively left to the Panel the task of identifying which specific provision(s) of Lithuanian Law No XI-1375 on renewable energy should be analysed in light of which legal claims, and has not provided the Panel with the text of the Lithuanian legislation in a WTO working language in accordance with paragraph 6(1) of the Working Procedures. While Malaysia has not formally abandoned its claims against the Lithuanian measure(s), the foregoing establishes that it has made no effort to develop or argue its claims and has patently failed to present a *prima facie* case. In light of this, the Panel sees no reason to rule on the host of interrelated issues regarding the consistency of Malaysia's panel request with Article 6.2.

7.1436. In a prior case where a responding Member requested a preliminary ruling under Article 6.2 in respect of claims that the complaining Member subsequently abandoned, the panel stated that:

> The mere fact that we are still left with an Article 6.2 issue does not mean that we need to, or should, resolve it. As a threshold matter, it is necessary to consider whether resolving this issue would make any practical difference. …
>
> At this stage, we note that other panels confronting issues that they determined were moot responded by not examining them further.[[33]] In the particular circumstances of this case, we consider that the aim of the WTO dispute settlement mechanism, which is to "secure a positive solution to a dispute"[[34]], does not require us to rule on an Article 6.2 issue that we have determined is moot. Indeed, it appears futile to offer a ruling linked to claims that the complaining party no longer deems fruitful to pursue.[[35]] We likewise consider that a ruling on the Article 6.2 issue that pertains to the abandoned claims is not necessary to "assist the DSB in making the recommendations or in giving the rulings provided for"[[36]] in the covered agreements.[1689]
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> [33] See, e.g. Panel Reports, *China – X-Ray Equipment*, para. 7.410; *US – Hot-Rolled Steel*, paras. 7.52 and 7.60; *US – Lamb*, para. 5.65; and *Guatemala – Cement II*, para. 8.171.
> [34] Article 3.7, second sentence, of the DSU.
> [35] Article 3.7, first sentence, of the DSU provides that before bringing a case, a Member is to exercise its judgement as to whether action under the DSU procedures would be fruitful. It seems to us that similar logic can be reasonably brought to bear on the matter of pursuing claims before a panel.
> [36] Article 11, second sentence, of the DSU.

7.1437. Similarly, here, it would be entirely futile to resolve the host of interrelated issues regarding the consistency of Malaysia's panel request with Article 6.2 of the DSU only to conclude that Malaysia had failed to establish a *prima facie* case. The Panel, therefore, leaves these issues open and, for the purposes of a finding on the non-existence of a *prima facie* case, assumes consistency with Article 6.2 on an *arguendo* basis.

[1686] European Union's response to Question No. 6, paras. 6-12.

[1687] Para. 6(1) of the Working Procedures states that "If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the proceeding." Para. 6(1) adds that "The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause." Malaysia has not invoked any alleged good cause for not complying with para. 6(1), or for seeking time to provide a translation in accordance with para. 6(1).

[1688] Malaysia's first written submission, paras. 380-382.

[1689] Preliminary ruling by the panel in *US – Countervailing and Anti-Dumping Duties (China)*, WT/DS449/4, paras. 3.9-3.10.

7.3.5 Conclusion with respect to the Lithuanian measure(s)

7.1438. The Panel finds that Malaysia has failed to establish a *prima facie* case of violation under the TBT Agreement or the GATT 1994 with respect to any Lithuanian measure(s) that fall within its terms of reference.

7.4 Separate opinion by one panelist

7.1439. The Panel majority has undertaken a long and careful evaluation of the parties' arguments concerning the high ILUC-risk cap and phase-out. The Panel majority has found that the high ILUC-risk cap and phase-out is consistent with the requirements of Article 2.2 of the TBT Agreement. The Panel majority has further found that while this measure is inconsistent with the requirements of Article 2.1 of the TBT Agreement and Article XX of the GATT 1994, such inconsistencies are limited to certain aspects of how the high ILUC-risk cap and phase-out is administered. While I agree with parts of the Panel majority's analysis, I respectfully disagree with certain key aspects of its reasoning that lead to the conclusions that (i) the measure is consistent with Article 2.2, and (ii) the inconsistencies under Article 2.1 and Article XX are limited to certain aspects of how the high ILUC-risk cap and phase-out is administered.

7.1440. Malaysia has challenged two sets of measures.

7.1441. First, Malaysia challenges the 7% maximum share under RED II that applies equally and without discrimination to all crop-based biofuels. I agree with the Panel majority that the 7% maximum share, which applies without differentiation to all crop-based biofuels, has not been shown to be inconsistent with the TBT Agreement. It may be noted in this respect that Malaysia did not pursue any claims under Article 2.1 of the TBT Agreement or Article I:1 and III:4 of the GATT 1994 in respect of the 7% maximum share.

7.1442. Second, Malaysia challenges the EU and French measures that single out one particular type of crop-based biofuels – i.e. palm oil-based biofuel – and with a view to eliminating that one type of biofuel from the EU renewable energy market. I also agree with the Panel majority that the high ILUC-risk cap and phase-out has been applied in a manner that is inconsistent with Article 2.1 of the TBT Agreement and the *chapeau* of Article XX of the GATT 1994, for the reasons stated by the majority; and I further agree that this extends *mutatis mutandis* to the French TIRIB measure.

7.1443. However, I do not consider the inconsistencies with the TBT Agreement and the GATT 1994 to be limited to these issues, which relate exclusively to certain deficiencies in the manner in which it has been administered. In my view Malaysia has provided sufficient evidence to meet its burden of demonstrating that the objective of the measure includes an element of protectionism; and this conclusion is reinforced by the evidence showing there is an element of arbitrariness in singling out palm oil-based biofuel for the high ILUC-risk cap and phase-out when other types of oils, notably soybean, appear to pose the same alleged risk.

7.1444. The difference in view underlying this separate opinion is essentially a matter of how much weight to give to certain evidence before the Panel. I will not exhaustively identify and analyse all of the evidence that could be referred to in connection with the issues raised, or repeat all of the arguments and counterarguments of the parties that have a bearing on these issues. Instead, what follows sets forth the basic rationale behind the conclusions I reach by identifying some of the evidence that I give more weight to than the Panel majority.

7.1445. Beginning with the objective of the high ILUC-risk cap and phase-out, and the related issue of protectionism, there is evidence before the Panel that is difficult to reconcile with the conclusion that the exclusive objective of the measure is to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels. What follows briefly identifies and discusses some of this evidence.

7.1446. First, I give more weight than the Panel majority to the explicitly protectionist recommendation contained in the 4 April 2017 resolution of the European Parliament that called for a phase-out of palm oil as a biofuel component preferably by 2020. In this 15-page resolution, the European Parliament conducts an analysis of the climate change, environmental, deforestation and social implications of palm oil production (and to some extent that of other vegetable crops and

agriculture in general). While this resolution does refer to ILUC-related concerns, it explicitly calls for the promotion of "more sustainable alternatives for biofuel use, such as … oils produced from *domestically cultivated* rape and sunflower seeds".[1690] Thus, by its own terms, the resolution recommends a ban or phase-out of consumption of palm oil-based biofuel in the European Union while calling for biofuels to be produced from "domestically cultivated" rape and sunflower seeds.

7.1447. Second, I give more weight than the Panel majority to the evidence provided by Malaysia showing that the European Union has a long history of enacting trade barriers to limit imports of palm oil-based biofuel to protect the EU biofuel industry.[1691] Malaysia has referred to, as evidence, various EU anti-dumping determinations on imports of biodiesel.[1692] The trade defence measures on imported biofuels taken by the European Union over an extended period of time can be viewed as evidence that domestic EU producers have at various points sought and received protection from imports of biofuels, including (but not limited to) palm oil-based biofuel, in the form of trade measures.

7.1448. Third, I give more weight than the Panel majority to the anticipated effect of the high ILUC-risk cap and phase-out on EU production of competing vegetable oils and biofuels when assessing the objective of the measure. The measures at issue in this dispute have been the subject of academic analyses and commentary by various institutions, and some of these studies have been placed on the record. According to Delzeit et al[1693]:

> The palm oil restriction leads to an increased input of all other vegetable oils into biodiesel production, while rapeseed oil is the main beneficiary of the restriction with an increased input share of 9 percentage points. This finding already indicates a preferential treatment of EU-domestically produced vegetable oil over imports, given that the EU is the largest global producer of rapeseed.[1694]
>
> …
>
> [T]he increasing demand for biofuels is to a large extent satisfied by rapeseed based biodiesel, which is especially driven by the phase-out of palm oil-based biodiesel that causes imports of palm oil and palm oil-based biodiesel to the EU to decline. This is compensated for by higher production quantities of EU-based rapeseed and rapeseed oil, and to a certain degree by an increase of imported soybean oil. EU farmers can be considered to be beneficiaries of this policy since they generate additional revenues due to expanding the production of rapeseed while simultaneously obtaining higher prices.[1695]

7.1449. This evidence must be assessed holistically, rather than examining each of these statements in isolation from the others. When it is assessed in this manner, I conclude that the objective of the high ILUC-risk cap and phase-out is not simply to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels. Rather, the objective of the measure appears to also include an element of protectionism.

7.1450. The conclusion that the measure appears to include an element of protectionism is reinforced by other evidence before the Panel that strongly implies a degree of arbitrariness in singling out palm oil-based biofuel from the perspective of the stated objective of limiting ILUC-related GHG emissions associated with the production of crop-based biofuels. The fundamental issue here is that certain other types of crop-based biofuels, in particular soybean-based biofuels, appear to pose a similar risk of ILUC-related GHG emissions. What follows briefly identifies and discusses some of this evidence.

7.1451. First, the 4 April 2017 resolution of the European Parliament that called for a phase-out of palm oil as a biofuel component preferably by 2020 (already referred to above) actually

[1690] European Parliament Resolution of 4 April 2017, (Exhibit MYS-102), para. 83. (emphasis added)
[1691] Malaysia's first written submission, para. 584.
[1692] The relevant determinations and exhibits are referenced at Malaysia's first written submission, paras. 207 and 584.
[1693] See Delzeit et al, Kiel Working Paper No. 2203, (Exhibit IDN-2).
[1694] See Delzeit et al, Kiel Working Paper No. 2203, (Exhibit IDN-2), p. 10.
[1695] See Delzeit et al, Kiel Working Paper No. 2203, (Exhibit IDN-2), p. 17.

acknowledges that soybean- and other plant-based oils may have a much higher environmental footprint than palm oil-based biofuels. In this resolution, the European Parliament:

> Observes that other plant-based oils produced from soybeans, rapeseed and other crops have a much higher environmental footprint and require much more extensive land use than palm oil; notes that other oil crops typically entail a more intensive use of pesticides and fertiliser[.][1696]

7.1452. Second, in a literature review summarized in the Study Report (2017), in seven out of the nine studies which were examined and estimated ILUC emissions for all types of oil crop, *soybean and rapeseed* were found to have higher estimated ILUC emissions than oil palm.[1697]

7.1453. Third, an internal legal opinion prepared by the European Commission in 2018 constitutes further evidence of the same conclusion, and I gave appropriate weight to this piece of evidence. To recall, on 17 January 2018, the European Parliament called for the phasing out, by 2021, of palm oil-based biofuel for calculating EU renewable energy targets. The proposed amendment would have singled out palm oil as the only biofuel feedstock to be excluded from counting towards the EU renewable energy consumption targets. The European Parliament's proposed amendment raised substantive concerns in the European Commission about the compatibility of those amendments with the European Union's WTO obligations. Malaysia has submitted as an exhibit, in this connection, internal legal advice regarding the consistency of the proposed amendment with EU and WTO law.[1698] That opinion concludes that:

> Such discriminatory treatment does not seem to be justifiable under the GATT general exceptions, *not least because of a lack of sound scientific evidence warranting the suggested differential treatment* to safeguard certain legitimate societal values, notably life or health (Art. XX(b)) or the conservation of exhaustible natural resources (Art. XX(g)).[1699]

7.1454. The conclusion that there is "a lack of sound scientific evidence warranting the suggested differential treatment" appears to have been based on the assessment that other types of crops could have higher ILUC-related GHG emissions than palm oil. The opinion states:

> While there is some evidence that palm oil creates, on average, more carbon emissions than other oil crops, certain sources of palm oil may have associated emissions below that average. *Other types of crops also vary in terms of emissions* and, depending on circumstances, *could have higher associated emissions than certain sources of palm oil.* The Parliament position does not take this issue into account. This is something that could clearly undermine any EU argument under subparagraph (g).[1700]

7.1455. Such concerns are also reflected in the independent academic analysis conducted by Delzeit et al:

> The motivation by the EU for the phase-out is the protection of high carbon stock (hcs) land by reducing the expansion of palm fruit production. Nevertheless, besides an expansion in rapeseed production, our results show an expansion of soybean production

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[1696] European Parliament Resolution of 4 April 2017, (Exhibit MYS-102), para. 6.

[1697] Malaysia's first written submission, para. 580(ii). In 2017, a Study Report on the Reporting Requirements on Biofuels and Bioliquids stemming from the Directive (EU) 2015/1513 was published, authored by Woltjer et al. (Study Report (2017), (Exhibit MYS-189)). Study Report (2017) found 30 studies which reported on land use change and ILUC factors of different biofuel. These studies were based on a number of models and methods, reporting (I)LUC per mass unit. Out of the 30 studies selected by the Study Report (2017), nine made a comparison possible between so-called ILUC GHG emissions of different types of biodiesel, as relevant to this dispute. Seven of those studies produced results that provided higher GHG emissions estimates for soybean-based biofuel than oil palm crop-based biofuel.

[1698] Letter of DG Trade to DG Energy, (Exhibit MYS-44).

[1699] See Letter of DG Trade to DG Energy, (Exhibit MYS-44), p. 2. (emphasis added)

[1700] See Letter of DG Trade to DG Energy, (Exhibit MYS-44), Annex - Revision of the EU RED (RED II): Compatibility of Amendment 307 of the European Parliament with WTO law – Key elements of legal analysis, at p. 2. (emphasis added)

> in Brazil. There is a considerable probability that a share of this expansion might actually take place in hcs land, but now in South America instead of South-East Asia.
>
> Therefore, a key factor for accessing the effectiveness of the policy is the biofuel productivity of oilseed crops in terms of land use. As shown above, our model results indicate that due to the palm oil phase-out, more than three times of the area saved by reduced palm fruit cultivation is needed for additional soybean and rapeseed production to meet the demand for biofuels. These findings lie in between the range of results of other studies. Debenath (2019) states that the biofuel yield for palm fruit is 4.45 mt/ha while it is 1 mt/ha for rapeseed and 0.36 mt/ha for soybean. In contrast, in their report for the European Commission, Valin et al. (2015) assume 1.7 times higher biofuel yield per ha for palm fruit compared to rapeseed, and 5 times higher yield compared to soybean. For the RED II calculation of land expansion into hcs-land, as described in the introduction, the European Commission chooses a productivity factor of 2.5 for palm fruit and 1 for rapeseed and soybean (European Union 2019). Compared to the scientific studies, especially the productivity factor for soybean is selected very generously. Moreover, given the absolute historic expansion of soybean production areas into hcs land in South America, like the Amazon Forest but also the Cerrado or the Chaco Forest, it is questionable whether the shift in biodiesel production from palm oil to soybean oil substantially reduces global emissions from land use change. The relatively lower share of expansion into hcs land of soybean compared to palm fruit production might be overcompensated by the higher amount of land required for producing the same amount of biodiesel. Consequently, it raises concerns if it is justified to have a palm oil biodiesel phase-out, but not a soybean oil biodiesel phase-out.[1701]

7.1456. The formula developed by the European Union in the context of the Delegated Regulation raises a number of highly technical issues. However, the singling out of palm oil-based biofuel, notwithstanding the seemingly similar risk of ILUC-related GHG emissions associated with soybean, seems to stem from how the formula seeks to measure ILUC-related GHG emissions on the basis of relative expansion of land, and the relative share of that expansion into high-carbon stock land. As Delzeit et al explain when discussing this central feature of the formula:

> The resulting share of expansion into land with high-carbon stock is much higher for palm fruit (42%) than for soybean (8%). However, the absolute annual expansion of production areas since 2008 is 4.5 times higher for soybean compared to palm fruit (ibid.). As a consequence, when multiplying the absolute annual expansion area with Xhcs, the resulting absolute expansion into land with high-carbon stock of palm fruit and soybean are quite close in size.[1702]

7.1457. On this issue, I give more weight to the expert opinion of Professor Finkbeiner than the Panel majority. In his expert opinion, Professor Finkbeiner states:

> [F]or climate change and the real world impact, it is not the relative effect that matters, it is the absolute effect as the absolute amount of land use change correlates with the associated GHG emissions (see section 2.2.1). As an example, based on the data in the Delegated Regulation, soybean leads to an annual increase in land use of 3183,5 kha and 3,0%, whereas palm oil leads to an annual increase in land use of 702,5 kha and 4,0%. This means that for soybean about 3,5 times more land expansion happened, but the relative growth for palm oil is larger. However, it is the absolute amount of land use that matters and contributes to GHG emissions, not the relative one.[1703]

7.1458. This evidence relating to the arbitrariness of singling out palm oil must be assessed holistically, rather than examining each of these statements in isolation from the others and must also be viewed together with the evidence suggesting that the measure appears to also include an element of protectionism. My weighing of the evidence leads me to the conclusions that Malaysia has substantiated its assertion that there is an element of protectionism behind the decision to single out palm oil-based biofuel, and that the different treatment of soybean and palm oil is arbitrary from

[1701] See Delzeit et al, Kiel Working Paper No. 2203, (Exhibit IDN-2), pp. 17-18.
[1702] See Delzeit et al, Kiel Working Paper No. 2203, (Exhibit IDN-2), p. 5.
[1703] See Finkbeiner Expert Opinion, (Exhibit MYS-45), p. 18.

the perspective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.1459. Those conclusions, taken together, lead me to conclude that the high ILUC-risk cap and phase-out (a) does not have an exclusively "legitimate objective", and is therefore fundamentally inconsistent with Article 2.2 of the TBT Agreement; (b) results in a detrimental impact on palm oil-based-biofuel that does not stem "exclusively from a legitimate regulatory distinction", and is therefore fundamentally inconsistent with Article 2.1 of the TBT Agreement; and (c) is applied in a manner that constitutes "arbitrary or unjustifiable discrimination" and a "disguised restriction on trade" within the meaning of the *chapeau* of Article XX of the GATT 1994. This analysis extends *mutatis mutandis* to the assessment of the French TIRIB measure under Article XX of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATION

8.1. With regard to the EU measures at issue, the Panel finds that[1704]:

a. the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations within the meaning of Annex 1.1 to the TBT Agreement;

b. Malaysia has failed to establish that the high ILUC-risk cap and phase-out is inconsistent with the obligation in Article 2.4 of the TBT Agreement to use relevant international standards as a basis for technical regulations;

c. Malaysia has failed to establish that the 7% maximum share and the high ILUC-risk cap and phase-out are inconsistent with the obligation in Article 2.2 of the TBT Agreement to ensure that technical regulations are not more trade-restrictive than necessary to fulfil a legitimate objective;

d. the European Union has administered the high ILUC-risk cap and phase-out inconsistently with Article 2.1 of the TBT Agreement by failing 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, which results in arbitrary or unjustifiable discrimination between countries where the same conditions prevail;

e. Malaysia has not established that the European Union has acted inconsistently with Article 2.5 of the TBT Agreement by failing to explain the justification for preparing, adopting or applying the 7% maximum share and the high ILUC-risk cap and phase-out in terms of Articles 2.2 to 2.4 of the TBT Agreement;

f. Malaysia has not established that the high ILUC-risk cap and phase-out is inconsistent with the obligation in Article 2.8 of the TBT Agreement to whenever appropriate specify technical regulations in terms of performance rather than design or descriptive characteristics;

g. regarding the claims under Article 2.9 of the TBT Agreement, the European Union has acted inconsistently with:

    i. Article 2.9.2 by failing to notify the proposed 7% maximum share and the proposed high ILUC-risk cap and phase-out measures; and

    ii. Article 2.9.4 by having failed to organize a commenting process in respect of the proposed 7% maximum share and the proposed high ILUC-risk cap and phase-out measures in accordance with the requirements of that provision;

h. the low ILUC-risk certification procedure is a "conformity assessment procedure" within the meaning of Annex 1.3 to the TBT Agreement;

[1704] The Panel sets out its conclusions in accordance with the order of analysis of the claims followed in section 7. The Panel recalls that the basis for following this order of analysis is elaborated in section 7.1.1.2 of this Report.

i. Malaysia has failed to establish that the low ILUC-risk certification procedure is inconsistent with the obligation in Article 5.1.1 of the TBT Agreement to ensure that conformity assessment procedures grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country;

j. the low ILUC-risk certification procedure, as set out in Article 6 of the Delegated Regulation, is inconsistent with Article 5.1.2 of the TBT Agreement since deficiencies in the implementation of the low ILUC-risk procedure have created unnecessary obstacles to international trade;

k. Malaysia has failed to establish that the European Union has acted inconsistently with the obligation in Article 5.2.1 of the TBT Agreement to ensure that conformity assessment procedures are undertaken and completed as expeditiously as possible;

l. regarding the claims under Article 5.6 of the TBT Agreement, the European Union has acted inconsistently with:

  i. Article 5.6.1 of the TBT Agreement by failing to publish a notice of the proposed low ILUC-risk certification procedure at an early appropriate stage in such a manner as to enable interested parties in Malaysia and other WTO Members to become acquainted with it;

  ii. Article 5.6.2 of the TBT Agreement by failing to notify the proposed low ILUC-risk certification procedure; and

  iii. Article 5.6.4 of the TBT Agreement by having failed to organize a commenting process in respect of the proposed low ILUC-risk certification procedure in accordance with the requirements of that provision;

m. Malaysia has not established that the European Union has acted inconsistently with the obligation in Article 5.8 of the TBT Agreement to ensure that conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them;

n. Malaysia has failed to establish that the European Union has acted inconsistently with Article 12.3 of the TBT Agreement, as informed by Article 12.1 of the TBT Agreement;

o. Malaysia has not established that the high ILUC-risk cap and phase-out or the low ILUC-risk certification procedure is inconsistent with the obligation in Article XI:1 of the GATT 1994 to not institute or maintain any prohibitions or restrictions on the importation of any product of the territory of another Member;

p. the high ILUC-risk cap and phase-out is inconsistent with Article III:4 of the GATT 1994 because it accords less favourable treatment to palm oil-based biofuel from Malaysia than that accorded to like products of EU origin;

q. the high ILUC-risk cap and phase-out is inconsistent with Article I:1 of the GATT 1994 because it does not accord an advantage to palm oil-based biofuel from Malaysia that is accorded to like products imported from third countries;

r. insofar as Malaysia challenges the low ILUC-risk certification procedure as a separate measure under Article III:4 and Article I:1 it has not established any inconsistency with these obligations;

s. the European Union has acted inconsistently with Article X:3(a) of the GATT 1994 by administering the high ILUC-risk cap and phase-out in Article 26 of RED II in a manner that is not reasonable, to the extent that deficiencies in the design and implementation of the low ILUC-risk criteria and procedure do not provide for the elements needed for palm oil-based biofuel to be certified as low ILUC-risk;

t. with respect to Article XX of the GATT 1994:

i. the high ILUC-risk cap and phase-out is a measure relating to the conservation of exhaustible natural resources that is made effective in conjunction with restrictions on domestic production or consumption within the meaning of Article XX(g);

ii. the high ILUC-risk cap and phase-out is a measure necessary to protect human, animal or plant life or health within the meaning of Article XX(b);

iii. it is unnecessary to rule on whether the high ILUC-risk cap and phase-out is a measure necessary to protect public morals under Article XX(a); and

iv. the high ILUC-risk cap and phase-out has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail because the European Union 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.

8.2. With regard to the French TIRIB measure, the Panel finds that[1705]:

a. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is inconsistent with Article III:2, first sentence, of the GATT 1994, because it results in the application of internal taxes to imported palm oil-based biofuel in excess of those applied to the like domestic rapeseed and soybean oil based biofuels;

b. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is inconsistent with Article III:2, second sentence, of the GATT 1994, because it results in dissimilar taxation between imported palm oil-based biofuel and the directly competitive or substitutable domestic rapeseed and soybean oil based biofuels, and this dissimilar taxation is applied so as to afford protection to domestic production;

c. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is inconsistent with Article I:1 of the GATT 1994, because it grants an advantage to imported rapeseed and soybean oil based biofuels that is not immediately and unconditionally accorded to like palm oil-based biofuel imported from Malaysia;

d. with respect to Article XX of the GATT 1994:

i. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure relating to the conservation of exhaustible natural resources that is made effective in conjunction with restrictions on domestic production or consumption within the meaning of Article XX(g);

ii. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure necessary to protect human, animal or plant life or health within the meaning of Article XX(b);

iii. it is unnecessary to rule on whether the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure necessary to protect public morals under Article XX(a); and

[1705] The Panel sets out its conclusions in accordance with the order of analysis of the claims followed in section 7 of this Report. The Panel recalls that the basis for following this order of analysis is explained in section 7.2.1.2.

iv. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, because the European Union has failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk, and has failed to demonstrate the existence of any provisions or flexibilities for palm oil-based biofuels to be certified as low ILUC-risk;

e. Malaysia has failed to establish that the French TIRIB measure provides a specific subsidy that causes adverse effects in the form of serious prejudice under Articles 5(c), 6.3(a) and 6.3(c) of the SCM Agreement.

8.3. The Panel finds that Malaysia has failed to establish a *prima facie* case of violation under the TBT Agreement or the GATT 1994 with respect to any Lithuanian measure(s) that fall within its terms of reference.

8.4. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures at issue are inconsistent with the TBT Agreement and the GATT 1994, they have nullified or impaired benefits accruing to the Malaysia under those agreements.

8.5. Pursuant to Article 19.1 of the DSU, the Panel recommends that the European Union bring its measures into conformity with its obligations under the TBT Agreement and the GATT 1994 to the extent that it has not already done so.

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