



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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS593/R.

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ANNEX A

WORKING PROCEDURES OF THE PANEL

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 7 December 2020

Revised on 22 January 2021

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.
- (2) The Panel reserves the right to modify these procedures and adopt additional procedures, as necessary, after consultation with the parties.

Confidentiality

2. (1) In accordance with the DSU, the deliberations of the Panel shall be confidential, and the documents submitted to it shall be treated as confidential and shall be made available to the parties and the third parties¹ to the dispute. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.
- (2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.
- (3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. The Panel may, upon request, fix a time-limit within which the party should endeavour to provide such summary.
- (4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.
- (2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.
- (3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.
- (4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below. Should the Panel exercise this right, it will provide an appropriate opportunity, where relevant, to the other party or third parties to comment on such additional submissions.

¹ To the extent provided for in Article 10.3 of the DSU.

Preliminary rulings

4. (1) If the European Union considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.
- a. The European Union shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission. Indonesia shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.
 - b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.
 - c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.
 - d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.
- (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.
- (2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.
6. (1) 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. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.
- (2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.
7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Indonesia should be numbered IDN-1, IDN-2, etc. Exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. If the last exhibit in connection with the first submission was numbered IDN-5, the first exhibit in connection with the next submission thus would be numbered IDN-6. If a party withdraws one or more

exhibits, or submits one or more exhibits intentionally blank, it should indicate "exhibit withdrawn"; or "exhibit left intentionally blank", respectively.

(2) With each submission, oral statement, and response to questions attaching new exhibits, a party shall provide an updated list of exhibits in Word or Excel format.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with the date that it was accessed.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 22 below.

Substantive meetings

10. The Panel shall meet in closed session.

11. The parties shall participate in the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request for interpretation to a WTO working language by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Indonesia to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

- b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least three working days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.
- c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions, through the Panel.
- d. The Panel may subsequently pose questions to the parties.
- e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Indonesia presenting its statement first. The party that presented its opening statement first shall present its closing statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.
- f. Following the meeting:
 - i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.
 - ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.
 - iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.
 - iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the timeframe established by the Panel before the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the European Union shall be given the opportunity to present its opening and closing statements first.

17. The Panel reserves the right to adopt additional working procedures governing substantive meetings with remote participation, as necessary.

Third party session

18. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

19. Each third party shall indicate to the Panel whether it intends to make a statement during the third-party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third-party session of the meeting with the Panel.

20. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

21. A request for interpretation to a WTO working language by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

22. The third-party session shall be conducted as follows:

- a. The parties and third parties may be present during the entirety of this session.
- b. The Panel shall first hear the statements of the third parties, who shall speak in alphabetical order. Each third party making a statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.
- c. Each third party should limit the duration of its statement according to the Panel's instructions and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least seven days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.
- d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party, through the Panel, for clarification on any matter raised in that third party's submission or oral statement.
- e. The Panel may subsequently pose questions to any third party.
- f. Following the third-party session:
 - i. Each third party shall submit the final written version of its statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.
 - ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.
 - iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.
 - iv. Each third party choosing to do so shall respond in writing to the questions from the Panel or a party, within the timeframe established before the end of the meeting.

23. The Panel reserves the right to adopt additional working procedures governing third-party sessions with remote participation, as necessary.

Descriptive part and executive summaries

24. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

25. Each party shall submit a single integrated executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements in accordance with the timetable adopted by the Panel.

26. The integrated executive summary shall not exceed 30 pages.

27. Each third party that submitted arguments (either in writing or at the third-party session) shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and oral statement do not exceed six pages in total, they shall serve as the executive summary of that third party's arguments. If the third-party submission and statement exceed six pages in total, the third party shall indicate if its submission or its statement should serve as its executive summary. If the third party indicates that it does not wish for the submission or oral statement, or both, to serve as its executive summary, it shall submit a separate integrated executive summary.

28. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented to the Panel in any other submissions.

Interim review

29. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

30. If no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review. Such written comments shall be limited to the other party's written request for review and shall be submitted in accordance with the timetable adopted by the Panel.

Interim and Final Report

31. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

32. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

- a. Each party and third party shall submit all documents to the Panel via the Disputes On-Line Registry Application (DORA) <https://dora.wto.org> by 5:00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into DORA shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Upload of a document into DORA shall constitute electronic service on the Panel, the other party, and the third parties.
- b. By 5:00 p.m. (Geneva time) the next working day following the electronic submission, each party and third party shall deliver one paper copy of all documents it submits to the Panel, including the exhibits, to the DS Registry (office No. 2047) for the DS Registry's archive. The DS Registrar shall stamp the documents with the date and time of delivery of the paper copy. If an exhibit is in a format that is impractical to deliver as a paper copy, then the party may deliver such exhibit in electronic format (email or on a CD-ROM, DVD or USB key). In this case, the cover page of the exhibit should indicate that the exhibit is only available in electronic format. If, for any reason, the DS Registry office is unavailable for the service of paper copies, the "next working day" shall mean the day that the Panel determines for such delivery once normal operations have resumed.
- c. The Panel shall provide the parties with the Descriptive Part of the Report, the Interim Report and the Final Report, as well as all other documents or communications issued by the Panel during the proceeding, via DORA.
- d. For any *ad hoc* communications, i.e. other than those identified in the Panel's Timetable, the Panel and the parties shall, in addition to following the procedures in paras. a., b., and

- c. above, notify the parties, or the other party and the Panel, and third parties, as relevant, via email of such *ad hoc* communication.
- e. If the parties or third parties have any questions or technical difficulties relating to DORA, they are invited to contact the DS Registry (DSRegistry@wto.org).
- f. If any party or third party is unable to meet the 5:00 p.m. deadline because of technical difficulties in uploading these documents into DORA, the party or third party concerned shall inform the DS Registry (DSRegistry@wto.org) without delay and provide an electronic version of all documents to be submitted to the Panel by email including any exhibits. The email shall be addressed to DSRegistry@wto.org, the Panel Secretary, the other party and, if appropriate, the third parties. The documents sent by email shall be submitted no later than 5:30 p.m. on the due date established by the Panel. If the file size of specific exhibits makes transmission by email impossible, or it would require more than five email messages, owing to the number of exhibits to be filed, to transmit all of them by email, the specific large file size exhibits, or those that cannot be attached to the first five email messages, shall be filed with the DS Registry (office No. 2047) and provided to the other party and, if appropriate, the third parties by no later than 9:30 a.m. the next working day on an electronic medium acceptable to the recipient. In that case, the party or third party concerned shall send a notification to the DS Registrar, copying the Panel Secretary, the other party, and the third parties, as appropriate, via email, identifying the numbers of the exhibits that cannot be transmitted by email.
- g. In case any party or third party is unable to access a document filed through DORA because of technical difficulties, it shall promptly, and in any case no later than 5 p.m. on the next working day after the due date for the filing of the document, inform the DS Registrar, the Panel Secretary, and the party or third party that filed the document, of the problem by email and shall, if possible, identify the relevant document(s). The DS Registrar will promptly try to identify a solution to the technical problem. In the meantime, the party or third party that filed the document(s) shall, promptly after being informed of the problem, provide an electronic version of the relevant document(s) to the affected party or third party by email, with a copy to the DS Registry (DSRegistry@wto.org) and the Panel Secretary to allow access to the document(s) while the technical problem is being addressed. The DS Registrar may provide an electronic version of the relevant document(s) by email if the affected party or third party so requests. The DS Registrar shall in that case copy the party or third party that filed the document(s) on the email message.

Correction of clerical errors in submissions

33. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected and should be made promptly following the filing of the submission in question.

ANNEX A-2**ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION (BCI)****Adopted on 13 January 2021**

1. These procedures adopted in accordance with paragraph 2(4) of the Panel's working procedures are additional to the general protection of confidential information set forth in paragraph 2(1) of the Panel's working procedures and apply to any business confidential information (BCI) that a party or a third party submits in the course of the present Panel proceedings.
2. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party or a third party submitting the information to the Panel, that is not available in the public domain, and the release of which would cause serious harm to the interests of the originator(s) of the information.
3. Each party and third party shall act in good faith and exercise restraint in designating information as BCI.
4. No person may have access to BCI, except a member of the Panel or the WTO Secretariat assigned to work on the present dispute, an employee of a party or a third party, an outside advisor or an expert providing assistance to a party or a third party and their clerical staff for the purposes of this dispute. A person having access to BCI shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees, outside advisors, and experts comply with these procedures.
5. An employee of a party or a third party, an outside advisor, or an expert assisting a party or a third party is not permitted access to BCI if that employee, outside advisor, or expert is an officer or employee of an enterprise, or an association of enterprises, engaged in the production, distribution, sale, export, or import of the products affected by the measures at issue in this dispute.
6. The party or third party submitting BCI shall mark the cover, first page, and each page of the document containing BCI to indicate the presence of such information in any document submitted to the Panel. Documents containing BCI should be marked as follows:
 - (i) The first page and/or cover of the document shall state in bold "**Contains Business Confidential Information on pages xxxxx**".
 - (ii) Each page of the document shall contain the notice in bold "**Contains Business Confidential Information**" at the top of the page.
 - (iii) Where the document contains both BCI and non-BCI information, the specific BCI in question shall be placed between double square brackets, as follows: [[xx,xxx.xx]].
7. A party or a third party submitting BCI in the form of, or as part of, an exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit IDN-1 (BCI)). If the entire content of an exhibit constitutes BCI, the cover page and the top of each page of the exhibit shall state in bold "**All of the information included in this exhibit is business confidential information**" without it being necessary to place all of the specific information in that exhibit between double brackets.
8. Any BCI that is submitted in a binary-encoded form shall include the terms "Business Confidential Information" or "BCI" in the file name. Upon uploading to Dispute Online Registry Application (DORA) of a document in binary-encoded form containing BCI, the confidentiality level for the document shall be selected as "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

9. If an oral statement contains BCI, the party or third party making such a statement shall inform the Panel accordingly in advance. The Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures can hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraphs 6 through 8 above.

10. If a party or a third party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and written copies of their oral statements, shall clearly identify all such information as BCI in those documents. All such documents shall be marked and treated as described in paragraphs 6 through 8 above.

11. If a party or a third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall address the objection, as appropriate. The same procedure should be followed if a party or a third party considers that the other party or a third party identified as BCI information which should not be so designated. The Panel shall have the right to intervene in any manner that it deems appropriate if it is of the view that restraint is not being exercised in the designation of BCI.

12. Any person authorized to have access to documents containing BCI under the terms of these procedures shall store all such documents, including in electronic form, so as to prevent unauthorized access to such information.

13. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, it will give each party an opportunity to review the report to ensure that it does not disclose any information that the party has properly designated as BCI.

14. At the conclusion of the dispute¹, and within a period to be fixed by the Panel, each party and third party shall either return all documents (including electronic material) containing BCI, submitted during the Panel proceedings, to the party that submitted such documents or certify in writing to the Panel and the other parties that all such documents have been destroyed, or otherwise protect the BCI against public disclosure, consistent with the party's obligations under its domestic laws. The WTO Secretariat shall have the right to retain the documents containing BCI for the archives of the WTO.

15. If a party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU, the WTO Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI governed by these procedures as part of the record, including any submissions containing information designated as BCI under these working procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible.

¹ Where this is defined as when (a) the Panel or Appellate Body report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel or the Appellate Body report; (b) the authority for the establishment of the Panel lapses under Article 12.12 of the DSU; or (c) a mutually satisfactory solution is notified to the DSB under Article 3.6 of the DSU.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES ON MEETINGS WITH REMOTE PARTICIPATION

Adopted on 29 March 2021

General

1. These Additional Working Procedures set out terms and modalities for meetings with the Panel by remote means.

Definitions

2. For the purposes of these Procedures:

"Remote participant" means any person participating in the meeting with the Panel by remote means. This includes members of the parties' and third parties' delegations, experts appointed by the Panel, and interpreters.

"Platform" means the Cisco Webex software through which remote participants will participate in the meeting with the Panel.

"Host" means the designated person within the WTO Secretariat responsible for the management of the platform for remote participants to participate in the meeting with the Panel.

Equipment and technical requirements

3. Each party and third party shall ensure that remote participants of its delegation join the meeting using the designated platform and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.
4. All technical questions, including the minimum equipment and technical requirements for the usage of the Platform, will be addressed in the advance testing sessions in paragraph 7 below between the host and the remote participants.

Technical support

5. (1) Each party and third party is responsible for its own technical support pertaining to its computer systems and networks.

(2) To the extent possible, the host will assist remote participants in planning, testing and conducting the virtual meeting and provide remote participants with technical support pertaining to the platform and its functionality.

(3) In order to guarantee the timely provision of technical support, the host will prioritize assisting those remote participants designated as main speakers in the delegation lists.

Pre-meeting

Registration

6. Each party and third party shall provide to the Panel a full list of the members of its delegation on a dedicated form no later than 5:00 p.m. (Geneva time) on 16 April 2021. Such list shall include all members of each party's and third party's delegation, including their email addresses. Each party and third party shall indicate in the list who among their remote participants will be their main speakers.

Advance testing

7. Remote participants will be invited to take part in two testing sessions with the Secretariat before the meeting with the Panel, at dates to be established by the Panel. One of these sessions will be a joint session with all remote participants in the meeting, including the panelists joining remotely. Such sessions will seek to reflect, as far as possible, the conditions of the proposed meeting. Remote participants should make themselves available for the test sessions.

Confidentiality and security

8. The meeting shall be confidential.
9. Remote participants shall at all times respect the confidentiality of the meeting and shall follow the security and confidentiality guidelines and instructions provided by the Panel.
10. Remote participants shall connect to the virtual meeting through a secure internet connection and shall avoid the use of an open or public internet connection.
11. The parties and third parties are strictly prohibited from:
 - (1) Recording, streaming or sharing, via audio, video, screenshot or otherwise, the virtual meeting or any part thereof; or
 - (2) Permitting any non-participant to attend, record, stream or otherwise share, via audio, video or screenshot, the virtual meeting or any part thereof.
12. The Panel will record the meeting and keep an official copy of the recording for the Panel's record. Such recording will include video and audio footage transmitted through the platform.

Conduct of the meeting

Access to the virtual meeting room

13. (1) The host will invite remote participants via email to join the virtual meeting room on the platform.
 - (2) For security reasons, access to the virtual meeting room will be password-protected and limited to remote participants, who shall not forward or share the virtual meeting link or password with unauthorized persons.
 - (3) Each party and third party shall ensure that only members of its delegation join the virtual meeting room.

Advance log-on

14. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

(2) All remote participants shall log on to the platform at least 30 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

Rules for participation

15. Remote participants shall follow any conduct and participation protocols and guidelines provided by the Panel in advance of the meeting or during the meeting.
16. Each party to the dispute is invited to limit the duration of its opening statement at a substantive meeting with remote participation to not more than 60 minutes.

Document sharing

17. (1) Before each party or third-party takes the floor, it shall provide the Panel and other remote participants at the meeting with a provisional written version of its opening statement (including any presentations) via email, in accordance with instructions provided by the Panel.
- (2) Any remote participant wishing to share a document with other remote participants during the meeting will do so via email, in accordance with instructions provided by the Panel and prior to referring to such document at the meeting.
- (3) Each party and third party shall submit the final written versions of its opening and closing statements, where relevant, and any documents shared with remote participants during the meeting, no later than 5 p.m. Geneva time on the first working day following the delivery of the statement or sharing the document, in accordance with the procedure laid down in paragraph 32 of the Panel's Working Procedures.

Pauses for internal coordination and consultation

18. The Panel may briefly pause a session at any time, at its own initiative or upon request by a party, to enable any necessary internal coordination and consultation within a party's delegation and/or among the panelists.

Technical issues

19. (1) Each party and third-party shall designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The host can be contacted via the platform, by sending an email to Leslie.Stephenson@wto.org, or by calling at +41 22 739 6148.
- (2) Should any technical interruptions occur, the host will directly coordinate with the affected remote participants to resolve the issue. After consulting the parties, the Panel may pause the session until the technical issue is resolved or may continue the proceedings with those remote participants that continue to be connected. If one of the main speakers is affected by a technical interruption, the Panel will make best efforts to accommodate request to briefly pause the session until the technical issues are resolved provided that pausing the session will not unduly disrupt the scheduled course of the meeting.

Relation with the Working Procedures

20. These additional Working Procedures complement the Working Procedures of the Panel adopted on 7 December 2020 and revised on 22 January 2021, and prevail over the latter to the extent of any conflict.
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ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA****I. INTRODUCTION**

1. Indonesia challenges a series of measures taken by the European Union and France affecting palm oil, which is a product that is not and cannot be produced in the European Union, and oil palm crop-based biofuel. Those measures are alleged to be based on a calculation of greenhouse gas (GHG) emissions, namely whether so-called indirect land-use change (ILUC) GHG emissions result in net GHG emissions savings from the use of biofuel being undone. As a result of those measures, oil palm crop-based biofuel is not eligible to meet EU renewable energy targets. There is no market for biofuel that cannot be used to meet those targets.

2. In particular, Indonesia complains about the European Union's 7 % limitation on biofuel made from food and feed crops and the high ILUC-risk cap and phase-out, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for certifying low ILUC-risk biofuel; and a number of related actions that are contrary to the European Union's WTO obligations. Indonesia also complains about the French biofuel tax reduction, a specific subsidy which causes serious prejudice to the interests of Indonesia, and results in discrimination against like products in violation of the MFN and national treatment obligations.

II. PRELIMINARY ISSUES**A. The European Union's objections under Article 6.2 of the DSU must fail**

3. The European Union's three objections under Article 6.2 of the DSU must fail.

4. The first objection is that Indonesia's panel request fails to identify the specific measure(s) at issue or provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The European Union argues that Indonesia has not explained which elements of the Delegated Regulation and Article 26 of RED II fall under the 7% limitation and the high ILUC-risk cap and phase-out. This objection is not substantiated because (i) it appears to focus on arguments developed in Indonesia's first written submission; (ii) it does not identify what specific errors result in a violation of Article 6.2 of the DSU and how those errors have prejudiced the European Union's rights of defence and (iii) in any event, Indonesia's panel request has clearly identified the specific measures at issue and explained what parts of RED II and the Delegated Regulation impose those measures. The European Union appears to take issue with the fact that Indonesia has been *too precise* in referring to specific parts or provisions of the relevant legal instruments when identifying the measures at issue. As a complainant, Indonesia can only identify the measures as it finds them in the European Union's legal instruments. The legal standard under Article 6.2 of the DSU is concerned with ensuring that panel requests are *sufficiently precise*.

5. The second objection, relating to Indonesia's claims in respect the French measures, is that the panel request failed to clearly present the problem because Indonesia did not indicate whether it complained about the first and/or second sentences of Article III:2 of the GATT 1994. This objection lacks merit because (i) the European Union is wrong to state that it is always necessary to identify the first, second, or both sentences of Article III:2 of the GATT 1994 in a panel request; (ii) the European Union has failed to read the panel request as a whole; and (iii) past case-law does not support this objection.

6. The third objection is that the panel request does not identify France's failure to make the reduction to the fuel tax available for oil palm crop-based biofuel, through the progressive elimination of the tax advantage for oil palm-crop based biofuel. It also submits that Indonesia's claim under Article III:2, second sentence, of the GATT 1994 is made only in respect of the exclusion of palm oil from the TIRIB reduction as such. Indonesia submits that its panel request, read as whole, put the European Union on notice that it would need to defend France's failure to make the reduction to the fuel tax available for oil palm and that this includes the progressive elimination of the tax advantage.

B. Indonesia's claims under Article X:3(a) of the GATT 1994 and Article 5.1.2 of the TBT Agreement may be examined by the Panel

7. Indonesia disagrees with the European Union that the measure challenged by Indonesia under both Article X:3(a) of the GATT 1994 and Article 5.1.2 of the TBT Agreement is the omission to adopt specific rules on certification of oil palm crop-based biofuel as low ILUC-risk and that this omission cannot be addressed by the Panel.

8. Under Article X:3(a), Indonesia challenges the unreasonable administration of Article 26(2) RED II by setting out criteria for certification of low ILUC-risk biofuel in the Delegated Regulation without providing for the necessary elements to enable oil palm crop-based biofuel to be certified. Under Article 5.1.2 of the TBT Agreement, Indonesia's claim stands on the basis of the text of the certification requirement set out in Article 26(2) of RED II and the Delegated Regulation. The various steps required to obtain certification and make use of the low ILUC-risk exception to the high ILUC-risk cap cannot take place in the absence of implementing rules at the date of transposition of RED II by EU Member States. As a result, the European Union violates Article X:3(a) of the GATT 1994 and Article 5.1.2 of the TBT Agreement by failing to adopt the relevant rules while already applying the high ILUC-risk cap and phase-out and the certification requirement.

C. The European Union mischaracterises the measures at issue

9. First, the European Union may not choose what measures it must defend and the Panel must examine. In total disregard of the specific measures identified in Indonesia's panel request, the European Union asserts that this dispute concerns the "EU Biofuels regime", that is, the EU legal framework for renewable energy.

10. Indonesia asks the Panel to respect its terms of reference. The measures at issue are the specific measures which Indonesia chose to identify in its panel request. Previous Appellate Body reports confirm that the starting point (including for assessing whether the measures are technical regulations) must be the measures at issue as identified in the panel request.

11. Second, the European Union wrongly argues that the Panel's terms of reference do not include the implementing rules to be adopted in respect of low ILUC-risk certification. Indonesia submits that the panel request properly identifies those rules and, if adopted in the course of the proceedings, any implementing rules in respect of the low ILUC-risk criteria fall within the Panel's terms of reference.

12. Indonesia does not ask the Panel to make an abstract ruling on hypothetical implementing measures that have not yet been adopted. The low ILUC-risk criteria as defined in the Delegated Regulation are impracticable regardless of any further implementing measures. Furthermore, Indonesia makes claims about the absence of implementing measures which precludes that certification schemes be designed and that low ILUC-risk certification may be obtained. These claims are not based on assumptions or predictions about the content of the implementing rules.

13. Third, the European Union's allegations in respect of the application and entry into force of the measures at issue must be rejected. The parties agree that the 7 % limitation applies and has full effect. However, the European Union submits that the high ILUC-risk cap and phase-out must be implemented from 1 July 2021 and that the phase-out starts from 31 December 2023. It adds that the Delegated Regulation, which entered into force on 10 June 2019, became directly applicable only as of 30 June 2021.

14. Indonesia submits that the high ILUC-risk cap and phase-out in Article 26(2) of RED II became effective at the time of the entry into force of RED II. RED II had to be fully transposed by the Member States by 30 June 2021. The cap already applied as of that date. For the phase-out, Article 26(2) refers to the period from 31 December 2023 until 31 December 2030. However, neither the transposition deadline nor the phase-out period precludes the Member States from already phasing out the use of oil palm crop-based biofuel – as confirmed by the evidence submitted by Indonesia showing that a considerable number of Member States have already transposed the high ILUC-risk cap and phase-out. In any event, the transposition requirement cannot shield Article 26(2) of RED II from scrutiny by a WTO panel. The European Union is also wrong to state that, until 1 July 2021, no provision of RED II can produce any legal effect. In particular, during the period of transposition, the Member States must refrain from acting in a manner that is liable seriously to compromise the attainment of the result prescribed by RED II.

III. THE EUROPEAN UNION FAILS TO PROVIDE AN OBJECTIVE AND COHERENT EXPLANATION OF THE MEASURES AT ISSUE

A. Introduction

15. The European Union alleges that the measures at issue are based on a calculation of GHG emissions, in particular ILUC GHG emissions, related to biofuel which result in net GHG emissions savings from the use of biofuel being undone. ILUC GHG emissions cannot be measured, calculated or attributed to biofuel consumed in the European Union. They are DLUC GHG emissions of agricultural products which are not destined to meet EU biofuel demand and can be cultivated anywhere in the world. Unlike ILUC GHG emissions, DLUC GHG emissions can be taken into account under international standards, such as ISO 14067:2018 and ISO 13065:2015, to establish the carbon footprint of products. Moreover, DLUC and DLUC GHG emissions relating to the cultivation of oil palm are already accounted for under the sustainability and GHG emissions savings criteria in RED II.

16. Indonesia submits that the European Union has failed to provide an objective and coherent explanation of the measures at issue.

B. ILUC and ILUC GHG emissions

17. ILUC indicates a type of indirect effect. Whether ILUC occurs and, if so, where and in respect of what crops, depends on many factors. Where oil palm is grown in Indonesia for the biofuel sector, this does not mean that the displacement occurs in Indonesia and involves palm oil grown for food and feed demand. The European Union accepts that ILUC GHG emissions can involve the cultivation of any agricultural commodity anywhere in the world and depend on various factors. The effects of ILUC, in terms of GHG emissions cannot be empirically demonstrated. The 7 % limitation and the high ILUC-risk cap and phase-out are nonetheless adopted to allegedly address ILUC GHG emissions relating to conventional biofuel. The 7 % limitation, which relied on modelling, was imposed on the assumption that it might become possible to observe and quantify ILUC GHG emissions at a later stage. It is, however, still not possible to verify whether, and to what extent, the alleged ILUC GHG emissions in fact occur and whether they are part of the life cycle of biofuel or another product made from the displaced crop grown elsewhere. In any event, the 7 % was primarily chosen to protect investments and give effect to preferences of the European Parliament. It was maintained despite a 2017 study concluding that the scientific evidence is extremely poor. Other studies also confirm that ILUC GHG emissions are inherently uncertain and the low confidence in attributing ILUC GHG emissions to biofuel.

C. High ILUC-risk feedstock

18. The European Union admits that the basis for the 7 % limitation is flawed, allegedly prompting it to seek another methodology in support of the high ILUC-risk cap and phase-out. Faced with pressure to exclude oil palm crop-based biofuel from the EU market and promote European vegetable oil produced from domestically cultivated crops, the European Union invented the so-called high ILUC-risk concept. The high ILUC-risk formula is designed to identify crops for which there is DLUC because of non-(EU) fuel demand. Palm oil is the only high ILUC-risk feedstock, primarily due to the design of the formula (which does not account for expansion in absolute terms) and the use of certain historical data. However, observable rates of prior expansion into high carbon-stock land cannot be used as a parameter for identifying feedstock posing a significant ILUC risk.

19. The five factors used in the formula show that the European Union considers that the entire expansion of the relevant crop, regardless of the possible drivers of that expansion, are attributed to the ILUC effects of EU biofuel demand – notwithstanding that the extent of EU biofuel demand is not taken into account. The formula relies on a historical approach to the share of expansion into high carbon-stock land. It thus assumes that existing trends will continue in the future and ignores the significant efforts made by oil palm producing countries, especially after becoming a party to the Paris Agreement. The historical approach is also based on the assumption that, if high levels of DLUC are found for a crop, this automatically and necessarily means that there is also a high level of ILUC for that crop. Yet, there is no basis for that assumption. The European Union itself admits that, *if* displacement occurs, this could relate to *any* crop cultivated *anywhere*. Focusing on the *relative* increase of the share of expansion penalises commercial crops with a small initial share of land to the benefits of crops which have already undergone significant historical expansion. If the European

Union is concerned about reducing GHG emissions, it would have assessed absolute expansion into high carbon stock land.

20. The data used in the formula is also flawed because of, notably, (i) the lack of explanation for the approach in respect of the productivity factor, and the comparison of the oil yield of palm oil to the grain yields of all other crops; (ii) the lack of certainty regarding whether and how residues and by-products were taken into account; (iii) the lack of certainty regarding how the average carbon value of high carbon stock land was calculated and to what extent this value accounts for the fact that some crops have higher than average carbon sequestration values; and (iv) the lack of certainty regarding the sources used to calculate the multiplier of 2.6 in the formula to account for the higher emissions from expansion onto peat land, as compared to forested land, and the use of non-representative data to arrive at that multiplier. Indonesia also considers that the 45 % value for the expansion of oil palm into forest is based on a single study that relies on historical data which does not take into account recent policy changes in Indonesia. The geographical information systems assessment is likely to over-estimate the contribution of oil palm to land use change and therefore disproportionately impacts younger commercial crops such as palm oil. Moreover, the data on the expansion into peat does not take into account differences between shallow and deep peat, which have different emission factors. It is also unclear how the average carbon value of high carbon stock land was calculated, and to what extent this value accounts for the fact that some crops, such as oil palm, have higher than average carbon sequestration values. Indonesia also contests the data used to calculate the productivity factor and the calculation of the 10% threshold of significant expansion into high carbon stock areas.

D. Low ILUC-risk biofuel and certification

21. Oil palm crop-based biofuel certified as low ILUC-risk is exempted from the high ILUC-risk cap and phase-out. The low ILUC-risk criteria allegedly seek to undo some of the emissions resulting from land use change due to the decision to cultivate oil palm. These criteria are neither practicable nor effective. Moreover, no low ILUC-risk certification can be obtained due to the absence of implementing legislation.

22. The concept of additionality as defined in the Delegated Regulation is not related to the mitigation or prevention of ILUC. The low ILUC-risk criteria are irrelevant for oil palm crop-based biofuel produced from palm oil in respect of which no additionality measure has been taken or where the required records of that measure do not exist. In any event, any feedstock produced from an increase in yields on existing agricultural land cannot cause ILUC. In practice, it is not possible to comply with any of the low ILUC-risk criteria, regardless of whether the financial additionality pathway, the abandoned or degraded land pathway or the smallholder pathway is used. As regards the financial additionality pathway, it is highly unlikely that producers would attempt to invest in low ILUC-risk eligible additionality measures, because the additionality requirements exacerbate the financial risk. The abandoned or severely degraded land pathway is also not an option. The terms "abandoned" and "severely degraded" land are not clearly defined in the Delegated Regulation. Moreover, the action needed to make it possible to grow oil palms on such land is time-consuming and expensive. The smallholder pathway is also not available because the definition of smallholders in the Delegated Regulation is considerably more restrictive than other definitions, and the limited number of smallholders who might meet that definition are unlikely to use that pathway because of their socio-economic conditions.

23. Additional obstacles to obtaining low ILUC-risk certification also result from the evidentiary requirements and there is no clear rationale for limiting certification to 10 years.

IV. THE MEASURES AT ISSUE AND ACCESS TO THE EU BIOFUEL MARKET

24. The demand for biofuel is driven by the EU renewable energy targets. Pursuant to Article 25(1) of RED II, the target for the minimum share of renewable energy in the final consumption of energy in the transport sector is set at 14 % by 2030. That target essentially creates, by regulatory means, a market for renewable energy, including biofuel, in the transport sector within the European Union. This regulatory model was chosen because otherwise renewable energy, including biofuel, would not be put to use in the European Union. The legislative history of the EU renewable energy targets confirms that they were introduced to create market opportunities for renewable energy, including biofuel. The European Union further intervened in the market for biofuel by establishing a different regulatory treatment for food and feed crop-based biofuel, which is subject to the 7 % limitation.

The 7 % limitation defines the market opportunities within the 14 % target available to biofuel made from food and feed crops, including oil palm crop-based biofuel. The measures at issue affect the availability of those market opportunities for oil palm crop-based biofuel. These measures have a significant effect on trade in, notably, oil palm crop-based biofuel as well as the feedstock used for its production, palm oil.

V. CLAIMS AGAINST THE EU MEASURES

A. Claims under the TBT Agreement

1. The measures at issue fall within the scope of the TBT Agreement

25. The 7 % limitation and the high ILUC-risk cap and phase-out, laid down in Article 26 of RED II and the Delegated Regulation, are technical regulations.

26. First, it is common ground that RED II and the Delegated Regulation are "documents" within the meaning of Annex 1.1 to the TBT Agreement. Second, Article 26 of RED II and the Delegated Regulation apply to biofuel made out of food and feed crops, which is an identifiable group of products. They lay down one or more product characteristics of biofuel, namely its composition. Contrary to what the European Union argues, Indonesia need not show that the technical regulation expressly regulates the placing on the market of a product or how it affects trade. Indonesia emphasises that, without the EU renewable energy targets and other measures taken to implement those targets, there would be no competition between fossil fuel and biofuel in the EU transport sector. This means that there is no demand for renewable energy that is ineligible for meeting those targets. In particular, Article 26 imposes specific requirements regarding the composition of the renewable energy of which fuel consumed in the transport sector must be made. It prescribes the extent to which that energy may be composed of biofuel produced from food and feed crops. Solely the product composition of biofuel determines the question of eligibility for counting towards meeting the EU renewable energy targets. The composition of biofuel is a product characteristic. Third, the design, structure and operation of the measures at issue show that they regulate the composition of biofuel in a binding and compulsory manner: (i) RED II and the Delegated Regulation are binding legal acts and the failure to comply with them triggers the application of EU remedies; (ii) the specific rules set out in Article 26 of RED II and the Delegated Regulation are expressed in mandatory terms; (iii) biofuel made out of food and feed crops and subject to the 7 % limitation and the high ILUC-risk cap and phase-out is excluded from any support schemes put in place to meet EU renewable energy targets, taking into account the features of the EU biofuel market; and (iv) the fact that implementation by Member States is needed does not affect the responsibility of the European Union under WTO law.

27. Contrary to what the European Union argues, the possibility of EU Member States adopting more ambitious renewable energy targets and, in that context, promoting biofuel made from feed and food crops, including oil palm crop-based biofuel, does not relieve the European Union of its responsibilities under the GATT 1994 and the TBT Agreement. Hypothetical measures of this type cannot mitigate or serve as a supervening justification for the measures at issue.

28. The low ILUC-risk exception is not an integral and essential element of the high ILUC-risk cap and phase-out. The low ILUC-risk criteria are impracticable and ineffective. Even if they could be met, the low ILUC-risk exception is designed to cover only a very limited amount of oil palm crop-based biofuel, obtained from additional yield. Moreover, the exception is not operational due to the lack of implementing rules clarifying the low ILUC-risk criteria and the certification procedure. Therefore, an assessment of the high ILUC-risk cap and phase-out, considered as a whole and including the low ILUC-risk exception, shows that the exception does not affect the characterisation of the high ILUC-risk cap and phase-out as a technical regulation.

2. The high ILUC-risk cap and phase-out violates Article 2.1 of the TBT Agreement

29. The high ILUC-risk cap and phase-out, which is a technical regulation, violates both the MFN and national treatment obligations under Article 2.1 of the TBT Agreement.

30. First, oil palm crop-based biofuel (PME), rapeseed oil crop-based biofuel (RME) and soybean oil crop-based biofuel (SBME) are like products. Those products have the same or similar physical properties, end-uses, consumer tastes and preferences, and tariff classification. The starting point of the Panel's likeness analysis must be the products identified by Indonesia. As confirmed by the

Appellate Body in *US – COOL*, the universe of like products pertinent to a panel's assessment are the like products within the relevant market. In the present case, the relevant market is the market for biofuel made from food and feed (oil) crops. RED II determines the relevant market in which the competitive relationship between the products is to be assessed by the Panel. This is because the market opportunities for biofuel in general, and for food and feed crop-based biofuel specifically, are established by regulatory means, namely by Articles 25(1) and 26(1) of RED II. By definition, biofuel produced from waste or used cooking oil does not fall within that marketplace and is not relevant for the Panel's assessment of Indonesia's non-discrimination claims. Finally, for the purpose of the likeness analysis, Indonesia does not need to show that PME, RME and SBME are fully substitutable in the entire EU market and all year round. While sunflower oil-based biofuel (SFME) is like PME, RME and SBME, including SFME in the scope of like products is not *decisive* in determining the detrimental impact on the competitive opportunities of oil palm crop-based biofuel in the EU market, because its share in the EU market is only about 2 % and it is *not affected* by the high ILUC-risk cap and phase-out, and therefore is unlikely to have *any* impact on the assessment of less favourable treatment. Indonesia also submits that it does not bear the burden of proving that oil crop-based FAME and HVO are *not like*. In any event, these oil crop-based biofuels are not like given the important differences in respect of their price, physical and chemical characteristics, and tariff classification.

31. Second, the European Union treats oil palm crop-based biofuel, in particular PME, imported from Indonesia less favourably than like oil crop-based biofuel, in particular RME and SBME, produced in the European Union and imported from other third countries, and thereby violates both the national treatment and the MFN obligations under Article 2.1.

32. The high ILUC-risk cap and phase-out affects the competitive opportunities of oil palm crop-based biofuel, and more specifically – PME, within that marketplace. This is because there is no EU market for biofuel that is not eligible to be counted towards meeting the EU renewable energy targets. The high ILUC-risk cap and phase-out, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for certifying low ILUC-risk biofuel, is designed and structured in a manner so as to deny access of oil palm crop-based biofuel (PME) to the EU biofuel market, while rapeseed oil-based biofuel (RME) and soybean oil-based (SBME) biofuel can still enjoy access to that market within the 7 % limitation. Moreover, low ILUC-risk certification is available only to oil palm crop-based biofuel made out of *additional* yield. Biofuel produced from rapeseed oil and soybean oil stemming from *any* yield continues to enjoy market access opportunities within the 7 % limitation.

33. PME, RME and SBME are the three main categories of food and feed oil crop-based biofuel on the EU market established by Articles 25(1) and 26(1) of RED II. Considering that only oil palm crop-based biofuel is affected by the high ILUC-risk cap and phase-out, all of Indonesia's exports of oil crop-based biofuel, comprising PME, to the European Union are affected, while the majority of EU domestically produced oil crop-based biofuel, comprising RME and SBME, is not affected. Thus, the high ILUC-risk cap and phase-out has a clear asymmetric detrimental effect on oil palm crop-based biofuel imported from Indonesia. It also discriminates against oil palm crop-based biofuel, in particular PME, imported from Indonesia as compared to other like oil crop-based biofuel, in particular RME and SBME, imported from other third countries.

34. Third, the regulatory distinction based on the concept of "high ILUC-risk" is not legitimate, and, in any event, the regulatory distinction is not even-handed and is applied in a manner that constitutes arbitrary and unjustifiable discrimination or a disguised restriction on trade. Indonesia refers to its arguments and evidence presented under Article 2.2 of the TBT Agreement as well as under Article XX of the GATT 1994.

3. *The high ILUC-risk cap and phase-out and the 7 % limitation violate Article 2.2 of the TBT Agreement*

35. The high ILUC-risk cap and phase-out and the 7 % limitation violate Article 2.2 of the TBT Agreement because they are technical regulations that create unnecessary obstacles to international trade in palm oil and oil palm crop-based biofuel.

36. The high ILUC-risk cap and phase-out and the 7 % limitation have a limiting effect on international trade because they limit competitive opportunities of palm oil and oil palm crop-based biofuel in the EU market. Indonesia has established the discriminatory modification of conditions of competition for imported products from Indonesia resulting from the high ILUC-risk cap and phase-

out. Where the technical regulation is shown to modify conditions of competition for imported products in a discriminatory manner, that finding and the arguments and evidence supporting it may be taken into account for the purpose of establishing trade restrictiveness under Article 2.2. In those circumstances there is no scope to consider, in assessing the trade restrictiveness of the high ILUC-risk cap and phase-out, the presence of trade-enhancing effects.

37. The EU energy market, and in particular the market for biofuel, operates in such a manner that, where biofuel is not eligible to be taken into account for the purposes of meeting EU mandatory renewable energy targets, it is excluded from that market. As a result of the high ILUC-risk cap and phase-out, producers of biofuel will not use palm oil and fuel wholesalers will not purchase oil palm crop-based biofuel if that biofuel is not eligible to be counted towards meeting the EU renewable energy targets. Similarly, the 7 % limitation also restricts access of imported palm oil and oil palm crop-based biofuel to the competitive opportunities available in the market.

38. The 7% limitation and the high ILUC-risk cap and phase-out do not pursue legitimate objectives. Under the guise of environmental protection, the European Union seeks to exclude Indonesian oil palm crop-based biofuel and palm oil from the EU renewable energy market. The design and structure of the measures at issue as well as the relevant historical background demonstrate that the European Union's objective, in adopting both technical regulations, is protectionism. In particular, the protectionist objective of the high ILUC-risk cap and phase-out is demonstrated by, considering together, evidence relating to: (i) the European Union's history of seeking to limit imports of oil palm crop-based biofuel, *inter alia* through illegal trade barriers, (ii) the measure's legislative history and the stated intentions of the European Parliament, (iii) the design and structure of the measure, and (iv) the actions taken to preserve market access for important EU trading partners exporting soybean products. Indonesia further submits that the European Union has not rebutted that the 7 % limitation seeks to protect a fictional risk of ILUC GHG emissions that cannot be attributed to oil palm crop-based biofuel.

39. The general description of the European Union's alleged legitimate policy objectives bears no connection with the measures at issue. The European Union's arguments broadly refer to its pursuit of various objectives, mentioning that all of these matters are of public concern. No attempt is made to link any of these objectives to the specific measures at issue. Furthermore, recitals 69 to 73 in the preamble to RED I and recitals 81, 82 and 96 to 98 in the preamble to RED II, on which the European Union relies, do not show that the high ILUC-risk cap and phase-out concern "climate change and biodiversity loss".

40. If the Panel finds that the high ILUC-risk cap and phase-out and the 7 % limitation nonetheless pursue a legitimate objective by seeking to reduce ILUC GHG emissions, these technical regulations are more trade restrictive than necessary to fulfil that objective.

41. ILUC GHG emissions cannot be measured or quantified. There is therefore no evidence showing that oil palm crop-based biofuel exported from Indonesia into the European Union causes ILUC GHG emissions. It is not possible to verify whether, and to what extent, ILUC GHG emissions in fact occur. Furthermore, modelling is too uncertain to yield an accurate estimation of ILUC GHG emissions, as the European Union itself recognises.

42. The high ILUC-risk concept is in any event unrelated to ILUC and does not in fact seek to estimate ILUC or ILUC GHG emissions related to biofuel demand and production. Even if the European Commission's new methodology were to be taken at face value, this methodology fails to demonstrate that the cap and phase-out contributes to preventing ILUC GHG emissions. Regarding the 7 % limitation, it is impossible to attribute GHG emissions caused through the cultivation of food and feed crops for end uses other than production of crop-based biofuel, to the cultivation of crops for the production of crop-based biofuel. There is, in other words, no evidence to demonstrate that oil palm crop-based biofuel exported from Indonesia into the European Union will cause ILUC GHG emissions.

43. In rebutting the European Union's defences under paragraphs (a), (b) and (g) of the GATT 1994, as summarised at paragraphs 76 to 82 below, Indonesia shows that the measures at issue are not designed to protect EU public morals, to protect against risks to human, animal or plant life or health or to conserve exhaustible natural resources. All of the arguments and evidence presented in rebutting the defences under paragraphs (a), (b) and (g) of Article XX of the GATT 1994 are relevant for and form an integral part of Indonesia's position under Article 2.2 of the TBT Agreement.

44. Moreover, less trade restrictive alternative measures are available to the European Union. With respect to the high ILUC-risk cap and phase-out, first, if the European Union is concerned about reducing emissions related to fuel consumption in the transport sector it could first focus on reducing GHG emissions and achieving its Paris Agreement commitments in respect of risks arising within its own territory. Second, the European Union could extend its GHG emissions accounting to other agricultural products, as DLUC GHG emissions can be measured, quantified and attributed to the product made of that agricultural product, in accordance with a life cycle analysis and relevant international standards. Third, the European Union could offer technical and financial support to Indonesia, in accordance with its commitments under the Paris Agreement. Fourth, since meat and dairy products have larger effects on land use and GHG emissions, the European Union could tax these products, which would have an equivalent impact on preventing alleged ILUC GHG emissions. Fifth, the European Union could apply the low ILUC-risk criteria to all oil crop-based biofuel. Sixth, the European Union could require labelling of fuel as (for example) ILUC-risk when it is sold to final consumers. Finally, the European Union could introduce a sustainability certification scheme, such as the one laid down in Article 29 of RED II or well-recognised voluntary certification schemes, for all imported and domestically produced feed and food crops, regardless of the end use of these crops.

45. The 7 % limitation is based on the need to protect investments at home and thus does not bear any connection with the alleged "significant risk" of ILUC GHG emissions, which the European Union in any event does not and cannot quantify, and it is therefore more trade-restrictive than necessary. Less trade restrictive alternative measures which are reasonably available to the European Union would therefore be to remove the 7 % limitation or to set it at a higher level, considering that the 7 % figure is completely arbitrary.

4. The European Union's failure to use relevant international standards violates Article 2.4 of the TBT Agreement

46. The European Union violates Article 2.4 of the TBT Agreement by imposing the 7 % limitation and the high ILUC-risk cap and phase-out without using relevant international standards that concern the calculation of the carbon footprint and the sustainability of biofuel.

47. Indonesia has shown that relevant international standards exist for determining, based on a life cycle analysis, the carbon footprint of products and the sustainability of biofuel, including ISO 14040, 14044, 14067 and 13065. Those ISO standards constitute relevant international standards. They do not envisage or offer a basis for using any type of ILUC factor and were not used by the European Union as a basis for the 7 % limitation and the high ILUC-risk cap and phase-out. Complying with these standards was neither difficult nor impracticable. The precautionary principle has specifically *not* been written into the TBT Agreement, and particularly Article 2.4, and does not release the European Union from its WTO obligations.

5. The European Union's failure to explain the justification of its technical regulations in terms of Articles 2.2. to 2.4 violates Article 2.5 of the TBT Agreement

48. The European Union violates the first sentence of Article 2.5 of the TBT Agreement by failing to explain, as requested by Indonesia, the justification for preparing, adopting or applying the 7 % limitation and the high ILUC-risk cap and phase-out in Article 26 of RED II and the Delegated Regulation, which have a significant effect on trade.

49. Even where a WTO Member denies the application of the TBT Agreement, as the European Union does, it must nonetheless (i) explain the justification for that position given that the definition of a technical regulation is an integral part of the obligations under Articles 2.2 to 2.4 of the TBT Agreement and (ii) explain the justification for the measures in terms of Articles 2.2 to 2.4 of the TBT Agreement.

6. The high ILUC-risk cap and phase-out violates Article 2.8 of the TBT Agreement

50. The European Union violates Article 2.8 of the TBT Agreement because the high ILUC-risk cap and phase-out regulates trade in biofuel based on descriptive characteristics of product requirements instead of performance. The high ILUC-risk is a descriptive characteristic for which there is no scientific basis, and which does not relate to the environmental performance, established based on relevant ISO standards, of either biofuel or the raw material for biofuel production which it seeks to specify. Where it is suitable to specify a product requirement in terms of performance of the product,

Article 2.8 precludes a WTO Member from relying on a descriptive characteristic. If the European Union seeks to address GHG emissions of biofuel, it is proper to rely on relevant ISO standards that expressly enable to regulate biofuel based on its environmental performance. Those ISO standards set out how to determine the carbon footprint and sustainability of bioenergy, including requirements for quantifying GHG emissions, using a life cycle analysis. The European Union did not rely on those relevant ISO standards.

7. The European Union's failure to properly notify the technical regulations and to organise an adequate process for commenting violates Articles 2.9.2 and 2.9.4 of the TBT Agreement

51. The European Union has failed to properly notify the technical regulations at issue and to organise an adequate process for commenting on these technical regulations, in violation of Articles 2.9.2 and 2.9.4 of the TBT Agreement. No proposals for either RED II or the Delegated Regulation were notified to the WTO Secretariat, despite calls for such a notification. Moreover, the European Union failed to organise a meaningful commenting process in respect of the proposal for RED II and that for the Delegated Regulation.

8. The low ILUC-risk conformity assessment procedure violates Article 5.1.1 of the TBT Agreement

52. The European Union 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 Indonesian suppliers of oil palm crop-based biofuel. In particular, Indonesia has shown that (i) the low ILUC-risk certification is a conformity assessment procedure covered by Article 5.1.1 of the TBT Agreement; (ii) positive assurance is mandatory for oil palm crop-based biofuel made from (solely) additional yield of oil palm to be used within the 7 % limitation; (iii) all suppliers of oil palm crop-based biofuel and other oil crop-based biofuel are in a comparable situation and; (iv) the conditions for access to conformity assessment granted by the European Union to suppliers of domestic or third-country products modify the conditions of competition to the detriment of suppliers of like Indonesian products in a comparable situation.

9. The low ILUC-risk conformity assessment procedure violates Article 5.1.2 of the TBT Agreement

53. The European Union 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. The European Union has adopted a requirement for certification in order to benefit from the limited low ILUC-risk exception but makes it impossible to obtain certification, for various reasons. The low ILUC-risk criteria lack clarity, rendering them difficult, if not impossible, to meet. Moreover, the implementing rules have not been adopted, despite the passing of the 30 June 2021 deadline by which Member States must have fully implemented RED II, including the technical regulations at issue. A less strict certification procedure would be one making it possible for economic operators to obtain certification because the essential conditions are in place to design a certification scheme, to have it recognised by the European Commission and to implement the certification scheme in practice.

10. The European Union's failure to undertake, let alone complete, as expeditiously as possible the low ILUC-risk certification procedure violates Article 5.2.1 of the TBT Agreement

54. The European Union violates Article 5.2.1 of the TBT Agreement by failing to ensure, when implementing Article 5.1, that the low ILUC-risk conformity assessment procedure is undertaken and completed as expeditiously as possible. The European Union has taken no steps towards the recognition of voluntary certification schemes and has not proven that the criteria are practicable despite the fact that the certification requirement has already entered into force. As a result, no certification may be undertaken and completed as expeditiously as possible. The European Union's failure to adopt the required implementing rules, rendering impossible any recognition of voluntary schemes, affects all individual decisions regarding certification.

11. The European Union's failure to properly publish and notify the low ILUC-risk conformity assessment procedure and to organise an adequate process for commenting violates Articles 5.6.1, 5.6.2 and 5.6.4 of the TBT Agreement

55. Indonesia submits that the European Union violates Articles 5.6.1, 5.6.2 and 5.6.4 of the TBT Agreement by requiring certification that has a significant effect on trade of other WTO Members in circumstances where the content of the conformity assessment procedure does not accord with a relevant international standard without the required publication and notification of that certification procedure and organising an adequate process for commenting. Indonesia identified at least several deficiencies in the preparation of the low ILUC-risk certification procedure, based on the information currently available, when compared with relevant ISO standards, in particular ISO/IEC 17007:2010 which lays down principles as guidance for preparing conformity assessment procedures. Notably, key concepts and definitions have been left vague or undefined, no impact assessment was conducted, no further guidance and implementing legislation have been published. The high ILUC-risk cap set out in Article 26(2) of RED II already applies but the low ILUC-risk certification exception is not available and the implementing rules were not published.

12. The European Union's failure to promptly publish or otherwise make available the low ILUC-risk conformity assessment procedure violates Article 5.8 of the TBT Agreement

56. Indonesia submits that the European Union violates Article 5.8 of the TBT Agreement by failing to promptly publish or otherwise make available the low ILUC-risk conformity assessment. Indonesia's claim under Article 5.8 is made, in the alternative, in case the Panel rejects Indonesia's claim under Articles 5.1.2 on the specific ground that the Panel considers that the European Union has already adopted all elements of the conformity assessment procedure at issue. The sole elements of the adopted certification procedure that have been published are those laid down in Article 26 of RED II and Articles 4 to 6 of the Delegated Regulation. Both RED II and the Delegated Regulation recognise that these are not all elements of the certification procedure. All other elements, if adopted, have not been published or otherwise made available to interested parties in Indonesia.

13. The European Union's failure to take into account the circumstances specific to developing countries violates Articles 12.1 and 12.3 of the TBT Agreement

57. The European Union 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 conformity assessment procedure at issue, in a manner that has resulted in unnecessary obstacles to exports from developing countries such as Indonesia.

58. Indonesia (similar to other oil palm producing countries) is a developing country, which has special development, financial and trade needs that are affected by the technical regulations and the conformity assessment procedure at issue. Although the obligation to "take account of the special needs" does not prescribe a specific result that needs to be achieved, it is not sufficient for a WTO Member simply to refer to those special needs. It is neither sufficient nor necessary to show that processes were organised to receive comments from developing country Members or that, in the abstract, impact studies and assessments were ordered, and replies were written to letters from developing countries expressing their concerns. This is because such evidence does not demonstrate the *substantive content* of a respondent's *active and meaningful engagement* with the needs of developing country Members. In any event, even according to the European Union's own standard under Article 12.3, with which Indonesia disagrees, the European Union has failed to comply with the obligation set in that provision, because there was no impact assessment preceding the adoption of the Delegated Regulation. Indonesia emphasises the significance of the special and differential treatment provisions, such as Articles 12.1 and 12.3, in the WTO architecture.

B. Claims under the GATT 1994

1. The high ILUC-risk cap and phase-out makes effective quantitative prohibitions or restrictions on imports of palm oil and violates Article XI:1 of the GATT 1994

59. Indonesia claims that, by imposing the high ILUC-risk cap and phase-out, Article 26(2) of RED II and the Delegated Regulation put into practical effect a quantitative prohibition or restriction on the importation of palm oil, prohibited under Article XI:1 of the GATT 1994. If the Panel upholds Indonesia's claim under Article XI:1, there is no further need to consider the claim under Article III:4 of the GATT 1994 in respect of discrimination against palm oil imported from Indonesia.

60. Indonesia submits that the text of Article XI:1 does not preclude that an internal measure puts into effect a prohibition or restriction on importation, especially in the specific circumstance

where the affected imported goods are not and cannot be domestically produced. It is not disputed that measures through which a prohibition or restriction is made effective fall within the scope of Article XI:1. The use of the phrase "or other measures" signals that Article XI:1 has a broad scope of application. Past panels have also noted that there might be appropriate circumstances where an internal measure can operate so as to restrict imports. Indonesia argues that a measure regulating, for example, the sale or use of a product that is not and *cannot be* domestically produced logically does not and cannot apply to a domestic product. Indonesia submits that such a measure can operate so as to put into effect a prohibition or restriction on importation. Whether that is the case must be determined in light of the content, design and structure of the measure, the market in which it operates, the regulatory framework of which it forms part and other relevant factual circumstances.

61. Article XI:1 states that the prohibition or restriction must be "on the importation", meaning "with regard to" or "in connection with" importation. Based on the text of Article XI:1, that condition qualifies the prohibition or restriction and not the measures *through* which that prohibition or restriction is made operative. Internal regulations might not directly apply to imports but nonetheless be shown to produce or make operative prohibitions or restrictions on importation. The text of Article XI:1 accommodates for that possibility. It makes it clear that prohibitions or restrictions on importation or exportation may be "made effective *through* quotas, import or export licenses or *other measures*". The French and Spanish versions confirm this reading.

62. Interpreting Article XI:1 as not applicable to such measures, where they have the effect of operating so as to put into effect a prohibition or restriction on importation of the product that cannot be produced at home, would limit the effectiveness of this obligation. In particular, it would allow WTO Members to circumvent their obligations under Article XI:1 by implementing import restrictions through internal measures that, while not referring explicitly to importation, are designed to have a limiting effect on importation of a product that can only be of foreign origin. Furthermore, if no like product might exist in the relevant market, such measure could possibly, in an individual case, fall outside the scope of both Articles XI:1 and III:4.

63. Although the high ILUC-risk cap and phase-out applies to oil palm crop-based biofuel, its design, architecture and revealing structure show that it is a measure through which the European Union institutes or maintains a prohibition or restriction on the importation of palm oil. The high ILUC-risk cap and phase-out limits and eventually removes the eligibility of oil palm crop-based biofuel for meeting EU renewable energy targets. As a result, the high ILUC-risk cap and phase-out disincentivises the importation of palm oil for biofuel production into the European Union. Due to the operation of the EU energy market and the fact that the European Union cannot grow oil palms, the high ILUC-risk cap and phase-out operates as a measure through which a prohibition or restriction on the importation of palm oil is instituted or maintained.

2. *The high ILUC-risk cap and phase-out violates Article I:1 of the GATT 1994*

64. The high ILUC-risk cap and phase-out discriminates between oil palm crop-based biofuel (PME) and palm oil imported from Indonesia, on the one hand, and other like oil crop-based biofuel (RME and SBME) and other like oil crop feedstock, in particular soybean oil and rapeseed oil imported into the European Union from third countries, on the other hand, in a manner that is inconsistent with Article I:1 of the GATT 1994. The high ILUC-risk cap and phase-out falls within the scope of application of Article I:1, because it concerns "matters" covered by Article III:4 of the GATT 1994.

65. Indonesia has demonstrated, for the purposes of Article 2.1 of the TBT Agreement, that oil palm-crop based biofuel, in particular PME, is like other imported oil crop-based biofuel, in particular SBME and RME. The same considerations apply under Article I:1. Moreover, palm oil is like other imported oil crop feedstock for biofuel production, in particular soybean oil and rapeseed oil. The scope of like products is necessarily linked to the relevant market. In the present case, the relevant market is the market for biofuel made from food and feed (oil) crops and, by necessary implication, also the market for biofuel feedstock that stems from food and feed (oil) crops. In that market, there is a close competitive relationship between palm oil, rapeseed oil and soybean oil. The end use of those vegetable oils in the transport fuel sector is exactly the same and consumers, i.e. producers of oil crop-based biofuel, do not have any particular preference as regards the type of oil crop feedstock used for biofuel production.

66. The high ILUC-risk cap and phase-out confers an advantage on other oil crop-based biofuel, in particular RME and SBME, and other oil crop feedstock for biofuel production, such as rapeseed

oil and soybean oil, originating in the territory of any other country. That advantage is not extended "immediately and unconditionally" to like oil palm crop-based biofuel, in particular PME, and palm oil imported from Indonesia. In particular, the market access opportunities within the 7 % limitation are not available for oil palm crop-based biofuel. The market demand for oil palm crop-based biofuel, which is the only oil crop-based biofuel being subject to the high ILUC-risk cap and phase-out, will progressively shrink and eventually disappear according to the timeline in Article 26(2) of RED II. Soybean oil-based biofuel and rapeseed-oil based biofuel imported from third countries will continue enjoying market access opportunities within the 7 % limitation. In addition, more favourable competitive opportunities for like products within the 7 % limitation stem from the non-application of the low ILUC-risk criteria, including the additionality requirement. Only biofuel made out of *additional* yield of palm oil will be eligible for low ILUC-risk certification and hence could hypothetically regain market access within the 7 % limitation. Conversely, soybean oil-based biofuel and rapeseed oil-based biofuel derived from *any* yield (normal and additional) enjoy market access opportunities in the EU market within the 7 % limitation. The same considerations apply in respect of palm oil as a feedstock for biofuel production.

3. *The high ILUC-risk cap and phase-out violates Article III:4 of the GATT 1994*

67. The European Union violates Article III:4 of the GATT 1994 because, by limiting and phasing out the use of oil palm crop-based biofuel for meeting the 14 % renewable energy target, the high ILUC-risk cap and phase-out discriminates between palm oil and oil palm crop-based biofuel imported from Indonesia, on the one hand, and like products of EU origin, on the other. Oil palm crop-based biofuel is like other oil crop-based biofuel, in particular soybean and rapeseed oil-based biofuel. Palm oil is like other oil crop feedstock, in particular soybean oil and rapeseed oil, that is used for biofuel production. The same considerations apply as under Article I:1 of the GATT 1994 and Article 2.1 of the TBT Agreement. RED II and the Delegated Regulation, which impose the high ILUC-risk cap and phase-out, are "laws, regulations and requirements" within the meaning of Articles III:4 of the GATT 1994. These rules are binding. The high ILUC-risk cap and phase-out affects the internal sale, offering for sale and purchase of palm oil and oil palm crop-based biofuel, because it limits and eventually eliminates the eligibility of oil palm crop-based biofuel to be counted towards the EU renewable energy targets. There is no market for biofuel that is not eligible for meeting those targets and, as a result, no market for feedstock, causing that biofuel to become ineligible.

68. The less favourable treatment is shown by (i) comparing the treatment of oil palm crop-based biofuel imported from Indonesia, which comprises 100 % PME, with that of rapeseed oil and soybean oil-based biofuel, in particular RME and SBME, which comprises about two thirds of the EU market for oil crop-based biofuel, and (ii) comparing the treatment of palm oil imported from Indonesia for biofuel production, the product which is not and cannot be produced in the European Union, with that of rapeseed oil and soybean oil of EU origin that are used for biofuel production. Because only palm oil is classified as high ILUC-risk feedstock, only oil palm crop-based biofuel, in particular PME, is subject to the high ILUC-risk cap and phase-out. Therefore, the high ILUC-risk cap and phase-out has a clear asymmetrical effect on the conditions of competition for PME imported from Indonesia as compared to the group of like EU domestic products. In case of oil crop-based feedstock, the high ILUC-risk cap and phase-out affects only palm oil that is destined for biofuel production in the European Union, which cannot be produced in the European Union and is exclusively imported. This shows that the high ILUC-risk cap and phase-out has a detrimental impact on the competitive opportunities of oil palm crop-based biofuel (PME) and palm oil imported from Indonesia in the EU market.

4. *The European Union's failure to administer RED II in a reasonable manner violates Article X:3(a) of the GATT 1994*

69. The European Union violates Article X:3(a) of the GATT 1994 because it administers RED II in an unreasonable manner by setting out the criteria for certification of low ILUC-risk biofuel in the Delegated Regulation without providing for the necessary elements that enable certification to be obtained. The legal instrument being administered is RED II, and the legal instrument that regulates the application or implementation of that instrument is the Delegated Regulation. The Delegated Regulation was adopted to put into practical effect the requirement in Article 26(2) of RED II, that certified low ILUC-risk oil crop-based biofuel may be used, subject to the 7 % limitation and as an exception to the high ILUC-risk cap and phase-out, for meeting EU renewable energy targets in the transport sector. The implementation of that requirement is incomplete, rendering it impossible for low ILUC-risk oil crop-based biofuel to obtain certification even by 1 July 2021. The lack of necessary elements to obtain certification *despite* the imposition of a certification requirement constitutes a

failure to *properly* put into practical effect the relevant provisions of RED II. This constitutes unreasonable administration as low ILUC-risk certification is not available, while certification is required to make use of this limited exception.

5. *The European Union's defences under Article XX of the GATT 1994 must fail*

a. Introduction

70. Indonesia contests that the European Union has made a *prima facie* case that the measures at issue are simultaneously justified under paragraphs (a), (b) and (g) of Article XX of the GATT 1994. The European Union is wrong to focus on the objectives of the EU Biofuels regime as a whole. The question before the Panel is what the European Union seeks to achieve by means of the specific measures identified in the panel request. The European Union's defence suffers from imprecision, contradictions and legal errors and barely refers to the measures at issue, mostly due to the fact that the European Union asks the Panel for a green light for any and all EU measures (to be) adopted under the umbrella of the Green Deal. Moreover, the European Union has presented no defence under Article XX of the GATT 1994, of its unreasonable administration of RED II, which Indonesia challenged under Article X:3(a) of the GATT 1994.

b. Interpretation of Article XX of the GATT 1994

71. Indonesia disagrees with the European Union's interpretation of the required nexus between the measures and its objective. The European Union introduces a new test for establishing that nexus, namely "whether the measure is rational and reasonable both in its design and in its application" and whether there is a "material contribution". The European Union submits that the legal tests under subparagraphs (a), (b) and (g) of Article XX of the GATT 1994 "are *in practice* very similar". Indonesia objects that this new test disregards the fact that the text of the various paragraphs of Article XX of the GATT 1994 uses different terms to explain the required connection between a measure and the different legitimate objectives recognised under Article XX. The European Union's interpretation of "necessary to" and "relating to" as meaning "a close and genuine relationship of ends and means" is not based on a proper interpretation. The fact that the first step of the necessity test corresponds with the test under Article XX(g) does not justify ignoring all of the other steps. Finally, contrary to what is suggested by the European Union, there is no risk that WTO Members might arbitrarily justify a measure under Article XX(g) to avoid a stricter test under Articles XX(a) or XX(b).

72. The European Union also argues that paragraphs (b) and (g) protect similar values. First, Indonesia submits that, while a measure may fall within the scope of both paragraphs (b) and (g) of Article XX of the GATT 1994, it does not automatically follow that those paragraphs have the same scope. Second, paragraphs (b) and (g) are separate bases under Article XX for justifying measures taken for the protection of legitimate objectives. Third, whether a measure is designed to pursue either or both of those objectives must be determined based on the design, structure and operation of the measure, taking into account the proper interpretation of the text of both paragraphs. Not every measure concerning a natural resource necessarily falls under both paragraphs (b) and (g). Finally, it is relevant to take into account the required nexus between the measure and the interest protected, which requires that the focus must be on the principal interest protected by the measure.

73. The European Union argues that "[t]here is no explicit or implicit territorial limitation in Article XX". The European Union alleges that because of the reference in Annex A.1 to the SPS Agreement to "within the territory of the Member", any other provision in the WTO covered agreements (such as Article XX or Article 2.2 of the TBT Agreement) not containing an identical or similar phrase necessarily must have a wide scope and justify action taken to address risks taking place in the territory of another WTO Member.

74. Indonesia submits that the Panel need not take a general position on whether or not there is a territorial or jurisdictional limitation. Especially in the context of Article XX of the GATT 1994, the question of territorial limitation must be addressed in respect of the specific defences invoked by the European Union. The texts of Article 2.2 and Article XX recognise the right of WTO Members to protect legitimate objectives at levels which *they* consider appropriate. Accepting the European Union's position would involve a significant departure from general international law. Relevant rules of international law recognise that it is for Indonesia to account for the GHG emissions and removals taking place within its national territory and to act for the protection of the natural resources in its territory. Thus, measures adopted for the purpose of addressing GHG emissions in another WTO

Member's territory or preventing biodiversity loss in the territory of another WTO Member do not pursue a legitimate objective within the meaning of Article 2.2 of the TBT Agreement and paragraphs (b) and (g) of Article XX of the GATT 1994.

75. Finally, Indonesia accepts that, in principle, a measure may simultaneously pursue more than one of the legitimate objectives recognised under the paragraphs of Article XX of the GATT 1994. However, where a WTO Member relies on more than one paragraph of Article XX of the GATT 1994, it must meet the burden of proof in respect of *each* of the paragraphs and the chapeau taking into account the paragraph on which it has relied.

c. The defence under paragraph (a) must fail

76. The European Union argues that the high ILUC-risk cap and phase-out is necessary to protect EU public morals which "relate to a state of climate and environment emergency, to which deforestation (and in particular oil palm-induced deforestation) is a chief contributing factor". Indonesia contests that the high ILUC-risk cap and phase-out is designed to protect EU public morals. First, the European Union has not established the content of the EU public morals on which it relies. Second, the arguments and evidence presented by the European Union do not show that the measure at issue is designed to protect EU public morals. In particular, Indonesia submits that the totality of the evidence demonstrates that the high ILUC-risk cap and phase-out pursues a protectionist objective. The European Union mostly relies on recital 69 in the preamble to RED I. However, that recital has no bearing on the high ILUC risk cap and phase-out because it specifically concerns the sustainability criteria and predates the adoption of the measure at issue. Moreover, the fact that certain private undertakings attach a particular label to their products is not probative evidence of the existence of public morals. At best, the design and structure of the high ILUC-risk cap and phase-out, considered together with the text of RED II, show that the measure is allegedly part of the European Union's efforts to reduce GHG emissions.

77. In any event, the high ILUC-risk cap and phase-out is not necessary to protect EU public morals. First, the European Union has not shown that the high ILUC-risk cap and phase-out makes an actual contribution to the protection of EU public morals, in the sense of a genuine relationship of ends and means between the objective pursued and the measure at issue. Its arguments are also contradicted by the fact that it admits that ILUC GHG emissions can involve the cultivation of any agricultural commodity and accepts that any reduced demand in the EU biofuel sector can be remedied by increased demand for palm oil in other sectors and for oil palm crop-based biofuel in third countries. Second, the European Union is wrong to assert that the trade restrictiveness of the measure is "minimal, since [it does] not prevent market access". Indonesia has demonstrated that the high ILUC-risk cap and phase-out has a limiting effect on trade, as it intervenes in the quantity of biofuel made from feed and food crops, and especially oil palm crop-based biofuel, that may be consumed in the European Union.

78. Moreover, other alternative less trade restrictive measures are available, such as (i) reducing GHG emissions in line with Paris Agreement commitments in respect of risks arising within European Union's own territory; (ii) labelling fuel as (for example) low ILUC-risk when sold to final consumers; (iii) imposing a tax on meat and dairy products given their larger effects on land use and GHG emissions; (iv) applying a properly designed low ILUC-risk certification to all oil crop-based biofuel; (v) imposing a sustainability certification for all major (imported and domestically produced) food and feed crops. The alternative measures presented by Indonesia in rebutting the European Union's invocation of paragraph (a), are also relevant under paragraph (b).

d. The defence under paragraph (b) must fail

79. The European Union has not established that the high ILUC-risk cap and phase-out is necessary to protect human, animal or plant life or health from risks that might result from biodiversity loss. The text, design and structure of that measure do not show that objective. Instead, the high ILUC-risk cap and phase-out pursues a protectionist objective.

80. Indonesia also contests that the measure is necessary within the meaning of Article XX(b). The European Union has not established that the measure makes an actual contribution to the protection of human, animal or plant life or health and, if so, what the degree of the contribution is. The European Union's own contribution analysis is based on a calculation of ILUC GHG emissions. However, ILUC GHG emissions cannot be measured or quantified; nor can they be attributed to the use of biofuel. The European Union expressly admits that it is unaware of what emissions are

allegedly prevented by the measures at issue. Moreover, the high ILUC-risk cap and phase-out will result in increasing demand for feedstock, which might lead to more land being used to grow that feedstock to meet biofuel demand and result in more crops being displaced and being grown elsewhere. The European Union also ignores that GHG emissions and savings relating to the cultivation of (displaced) crops are to be included in the national inventories of the State where they are cultivated. Those emissions (or savings) may not be attributed to oil palm crop-based biofuel consumed or produced in the European Union. Indonesia also argues, similar to what it submits in rebutting the defence under paragraph (a), that the trade restrictiveness of the high ILUC-risk cap and phase-out is high. Finally, Indonesia considers that various alternative measures are available and refers to its arguments under Article XX(a) and Article 2.2 of the TBT Agreement.

e. The defence under paragraph (g) must fail

81. Indonesia submits that the European Union has not established that the high ILUC-risk cap and phase-out relates to the conservation of exhaustible natural resources and is even-handed. Instead, Indonesia has shown that the measure pursues a protectionist objective.

82. In any event, the European Union has not established why it considers that "a certain global temperature" is an exhaustible natural resource. If the European Union argues that increased GHG emissions result in global warming which, in turn, presents risks to human, animal or plant life of health, a policy aimed at addressing that concern falls within the scope of paragraph (b). The European Union has not shown that the high ILUC-risk cap and phase-out has a close and genuine relationship with preserving trees, plants and animals. A measure which merely incidentally or inadvertently pursues a conservation objective is not covered by paragraph (g). In any event, given that the ILUC GHG emissions can involve the cultivation of an agricultural commodity anywhere in the world, the European Union does not know what biodiversity it might be seeking to protect. Furthermore, the high ILUC-risk cap and phase-out is not made effective in conjunction with restrictions on domestic production or consumption. In particular, equivalent restrictions on domestic production or consumption, aimed at mitigating the alleged ILUC-risk, do not apply to other oil crop-based biofuel. Thus, the production and consumption of, especially, rapeseed oil and rapeseed oil-based biofuel in the European Union, which raise a "significant" risk of ILUC GHG emissions (according to the European Union), is not subject to restrictions that are the same as or similar to the restrictions applied to palm oil and oil palm-crop-based biofuel.

f. The requirements of the chapeau are not met

83. If the Panel finds that the measure is provisionally justified under one of the relevant paragraphs of Article XX, Indonesia submits that the European Union has not established that the measure satisfies the conditions of the chapeau.

84. Where a WTO Member is found to restrict importation of and discriminate against products it cannot produce, it is appropriate for a Panel to apply close scrutiny in reviewing the justification of those measures. This is especially the case where that Member also relies on risks to the legitimate interests recognised under individual paragraphs arising outside of its territory.

85. First, the European Union is wrong to emphasise that "the relevant condition prevailing in different countries is the production of certain feedstock". In particular, given that ILUC GHG emissions can involve the cultivation of any agricultural commodity (not necessarily food or feed crops used to produce biofuel) anywhere in the world and depend on various factors, the relevant condition is the cultivation of any agricultural commodity *not* used to make biofuel destined for the EU market and that is grown anywhere in the world. Second, the exception clause in Article XX of the GATT 1994 (or Article 2.2 of the TBT Agreement, for that matter) should not be used to enable a WTO Member to justify restrictions of and discrimination against products based on fictional ILUC GHG emissions that cannot be measured, quantified, or attributed to those products – taking into account also relevant international standards. Third, the high ILUC-risk cap and phase-out does not take into account relevant factors in the countries where the feedstock is grown, which explain whether land use change occurs, where and to what extent it occurs and what crop is grown elsewhere to meet food and feed demand. Fourth, the European Union cannot rely on the low ILUC-risk exception to argue that either the 7 % limitation or the high ILUC-risk cap and phase-out are "calibrated to allow palm oil-based biofuel under certain conditions ... which are consistent with the objectives pursued". That exception is neither effective to achieve the alleged objectives, nor practicable. Even if the exception could be used, certification cannot, at this time, be obtained. Moreover, no mitigation is needed for the "significant" risk resulting from biofuel other than oil palm

crop-based biofuel. Fifth, the high ILUC-risk cap and phase-out (or the 7 % limitation) does not take into account the conditions in individual countries where allegedly the ILUC GHG emissions and biodiversity loss occur. Due to the historical approach taken, the measure disregards the results of significant efforts made by oil palm producing countries, especially after becoming a Party to the Paris Agreement. To conclude, under the guise of environmental protection, the European Union seeks to exclude Indonesian oil palm crop-based biofuel and palm oil from the EU renewable energy market for protectionist purposes, while offering privileged access to other trading partners.

VI. CLAIMS IN RESPECT OF THE MEMBER STATE MEASURES

86. These proceedings also concern Indonesia's complaints about the French action to exclude oil palm crop-based biofuel from a fuel tax reduction that is available for biofuel. In 2005, France imposed a general tax on polluting activities in respect of certain fossil fuels to combat GHG emissions and promote the use of biofuel. In 2019, the tax became the incentive tax relating to the incorporation of biofuel ("French fuel tax"). In essence, this consists of a general tax on fuel released for consumption in France, and a reduction of that tax based on the quantity of qualifying biofuel incorporated therein. Indonesia refers to this reduction in payment as the "biofuel tax reduction". France seeks to promote the consumption of biofuel by exempting it from this fuel tax. However, for the purposes of this tax reduction mechanism, oil palm crop-based biofuel is expressly excluded from the definition of biofuel and from the full benefit of the tax advantage.

A. Claims under the GATT 1994

1. The French biofuel tax reduction is inconsistent with Article I:1 of the GATT 1994

87. Indonesia claims that the French fuel tax and reduction thereof violates the MFN obligation under Article I:1 of the GATT 1994 because it is an advantage that is not immediately and unconditionally conferred in respect of the use of oil palm crop-based biofuel from Indonesia whereas it is available for like crop-based biofuel from other WTO Members. The French biofuel tax reduction falls within the scope of Article I:1 because it is a "matter" referred to in Article III:2. Indonesia has demonstrated that oil palm crop-based biofuel is like other oil crop-based biofuel for the purposes of Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. The same likeness analysis applies to Indonesia's claim under Article I:1 of the GATT 1994 in respect of the same goods that are affected by the French biofuel tax reduction.

88. Indonesia submits that the French biofuel tax reduction confers an advantage on imported oil crop-based biofuel other than oil palm crop-based biofuel of Indonesian origin. The French biofuel tax reduction that is currently available to imported oil crop-based biofuel *other than* oil palm crop-based biofuel (that is, especially biofuel made out of rapeseed and soybean) means that those products, because of the share of "sustainable" renewable energy they contain, may incur a lower tax rate. Accordingly, the French biofuel tax reduction provides better competitive opportunities in the form of a lower tax rate, to the detriment of oil palm crop-based biofuel. Imported like oil crop-based biofuel other than oil palm crop-based biofuel (i) benefits from the tax rate reduction and (ii) will continue to enjoy that benefit without being subject to any system of progressive elimination by 2031.

2. The French biofuel tax reduction violates Article III:2 of the GATT 1994

89. Indonesia submits that, by excluding oil palm crop-based biofuel from reductions to the French fuel tax that are made available to other like oil crop-based biofuel, the European Union discriminates between imported oil palm crop-based biofuel and other like biofuel of EU origin, in violation of Article III:2 of the GATT 1994.

90. Indonesia submits that oil palm crop-based biofuel is like other oil crop-based biofuel for the purposes of Article III:2, first sentence, of the GATT 1994. Those products share the same or similar basic physical, chemical and technical characteristics and end-uses. This is also reflected in consumer tastes and preferences and tariff classifications, evidence of which should be taken into account "as a whole" by the Panel in its analysis.

91. The European Union does not dispute that the French biofuel tax is an internal tax. It also recognises that fuel containing oil palm crop-based biofuel will be taxed in excess of fuel containing other types of biofuel. In the case of imported oil palm crop-based biofuel, the entire amount of the

tax is due. Biofuel which does not contain any percentage of palm oil, but contains a certain share of "sustainable renewable energy" including all biofuel of domestic origin, is eligible to be included in the calculation for the reduction of the rate of the fuel tax, and thus results in a lower tax rate. Yet, Indonesia understands the European Union to argue that the tax differential is not related to the origin of the product as the incorporation of *domestic* crop-based biofuel triggers the same tax reduction.

92. Contrary to the European Union's argument, it is settled that the clear asymmetric impact of measures on the group of like imported products is sufficient to find *de facto* discrimination. Here there is a *de facto* difference in taxation between *imported* and *domestic* products. The main beneficiaries of the exemption from the tax are domestic products, while the *only* disadvantaged products are primarily imported. Up to 80 % of domestic product will *not* be subject to the tax, while *all* oil palm crop-based biofuel, the overwhelming majority of which is imported, will be subject to the tax. The fact that imported Indonesian oil palm crop-based biofuel is subject to a tax in excess of that applied to those domestic like products demonstrates a violation of Article III:2, first sentence.

93. Indonesia's arguments and evidence showing that the products are like also demonstrate that oil palm crop-based biofuel is directly competitive or substitutable with other oil crop-based biofuel within the meaning of Article III:2, second sentence. It is clear that PME provides an "alternative way of satisfying a particular need" in situations in which all three of RME, PME and SBME are available to blend into the fuel mix.

94. If fuel put on the French market contains biofuel but not oil palm crop-based biofuel, the tax reduction scheme applies. Those products containing a certain share of renewable energy (*not* based on palm oil) are eligible to be included in calculating the reduction of the rate of the fuel tax, and thus result in a lower tax rate. For biofuel containing EU produced oil crop feedstock, which is always a feedstock other than palm oil, a lower tax is levied. The addition of any oil palm crop-based biofuel instead of soybean or rapeseed crop-based biofuel, within the target percentage, directly results in a higher tax rate. This is significant in light of the volume of imports of biofuel from Indonesia into the European Union as compared with the share of consumption of biofuel in France in 2019. Therefore, imported oil palm crop-based biofuel is taxed dissimilarly to directly competitive or substitutable domestic oil crop-based biofuel. Additionally, this difference is more than *de minimis*. If the share of renewable energy is greater than or equal to the national target percentage for using renewable energy in the transport sector (8 % in 2020), the tax may be zero, which provides the opportunity for a vast difference in taxation between the two categories of like products.

95. Additionally, France introduced a change whereby the share of rapeseed oil-based biofuel is counted at its actual value plus 20 %, from 1 August 2020 until 31 March 2021. This amendment has affected the conditions of competition to the detriment of oil palm crop-based biofuel, as trade in rapeseed oil-based biofuel increased significantly in the wake of the publication of the amendment in August 2020.

96. The French biofuel tax reduction is designed, operates and is applied with the objective of affording protection to domestic oil crop-based biofuel and oil crop feedstock for biofuel production. The European Union grows all major oilseed crops, except for oil palm, that are used for biofuel production. All palm oil and a significant share of oil palm crop-based biofuel were imported into the European Union in 2019, while the majority of oil crop feedstock for biofuel production in the form of rapeseed oil, is produced domestically. It follows that the French biofuel tax reduction is designed in such a way as to encourage the use of domestically produced biofuel and other oil crop feedstock for biofuel consumption, such as rapeseed oil-based biofuel, at the expense of imported palm oil and oil palm crop-based biofuel. Indonesia recalls that the relevant point of comparison under Article III:2, second sentence is between directly competitive or substitutable products, such as between imported oil palm crop-based biofuel and, for example, domestic rapeseed oil crop-based biofuel. In this case, there is a more than *de minimis* difference in taxation, *de facto*, between imported and domestic products.

3. The French measures are not justified under Article XX of the GATT 1994

97. Insofar as the European Union does not advance any new arguments or evidence in respect of the justification of the French measures, Indonesia submits that, in any event, its arguments and

evidence rebutting the European Union's Article XX defence of the EU measures apply *mutatis mutandis* to the French measures.

B. Claims under the SCM Agreement

1. The French biofuel tax reduction is a specific subsidy within the meaning of Articles 1.1(a)(1)(iii) and 2 of the SCM Agreement

98. The release of fuel for consumption without any biofuel content requires operators to pay a tax. By exempting "sustainable" biofuel products from the French fuel tax through their classification as renewable energy, France foregoes the tax revenue that it would have received from sales of fuel which contains biofuel. The French biofuel tax reduction constitutes a financial contribution because it exempts oil crop-based biofuel (other than oil palm crop-based biofuel) from a specific tax, with the result that France foregoes revenue that would have been otherwise due. It is thus a financial contribution to the domestic biofuel industry within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement, despite the European Union's irrelevant contention that the French biofuel tax reduction does not pursue a budgetary objective.

99. A finding of the existence of a benefit "readily follows" from a finding that the government is foregoing revenue otherwise due because tax incentives are not available on the market. This financial contribution confers a benefit on producers of biofuel *other than* oil palm-crop based biofuel within the meaning of Article 1.1(b) of the SCM Agreement. It therefore constitutes a subsidy for the purposes of the SCM Agreement.

100. Indonesia claims that the French biofuel tax reduction is a prohibited subsidy. If that claim is upheld, the subsidy is also specific under Article 2.3.

101. In any event, irrespective of whether it is a prohibited subsidy, the French biofuel tax reduction is a specific subsidy. The French legislator has limited access to the subsidy to the biofuel industry. If the Panel finds that the subsidy at issue is not specific under Article 2.1(a) of the SCM Agreement, Indonesia submits that it is nonetheless *de facto* specific under Article 2.1(c) of the SCM Agreement. In this regard, Indonesia's arguments that the subsidy can only be accessed by the biofuel industry, may be used by the Panel to determine whether there is predominant use by certain enterprises or disproportionately large amounts of subsidy are granted to certain enterprises, indicating *de facto* specificity.

102. The European Union attempts to argue that, because Indonesia argues that a subsidy is *de jure* specific under Article 2.1(a) of the SCM Agreement, there is a legal obligation for it to also present arguments under Article 2.1(b). However, there is no obligation or rule which requires a complainant to present arguments under both subparagraphs (a) and (b) of Article 2.1. Neither party has raised arguments regarding the objective criteria or conditions governing the eligibility for the subsidy in question.

2. The French biofuel tax reduction is a subsidy prohibited by Article 3.1(b) of the SCM Agreement

103. Indonesia submits that the French biofuel tax reduction is a subsidy that is contingent, whether solely or as one of several conditions, upon the use of domestic oil crop-based biofuel over imported oil palm crop-based biofuel. Indonesia submits that Article 3.1(b) is not limited to situations where the subsidy recipient is required to use domestic goods to the complete exclusion of imported goods.

104. All palm oil and the predominant share of oil palm crop-based biofuel were *imported* into the European Union in 2019. The European Union grows all major oilseed crops that are used for biofuel production, *except* for oil palm. In addition, for the subsidy to be granted, there is a strict requirement that imported oil palm crop-based biofuel cannot be used, and therefore cannot benefit from the subsidy. In this case the measure requires exclusion of certain foreign products and the use of domestic products to access the subsidy. As such, the French biofuel tax reduction is a prohibited subsidy within the meaning of Article 3.1(b) of the SCM Agreement and violates Article 3.2 of the SCM Agreement, which disallows such subsidies being granted or maintained.

3. The French biofuel tax reduction is an actionable subsidy under Article 5(c) of the SCM Agreement which has adverse effects on the interests of Indonesia and in particular, genuinely and

substantially causes serious prejudice to the interests of Indonesia within the meaning of Articles 6.3(a) and 6.3(c) of the SCM Agreement

105. If the Panel rejects Indonesia's claim under Article 3 of the SCM Agreement, Indonesia submits that, in any event, the French biofuel tax reduction is an actionable subsidy within the meaning of Article 5(c) of the SCM Agreement. This subsidy causes adverse effects to the interests of Indonesia in the form of serious prejudice to its interests (or a threat thereof) within the meaning of Articles 6.3(a) and 6.3(c) of the SCM Agreement.

106. While the exclusion of oil palm crop-based biofuel from the subsidy effectively acts to deny access to the French market, the provision of the subsidy to domestically produced rapeseed and soybean oil-based biofuel promotes the sale and consumption of those products in France. This results in displacement of Indonesia's oil palm crop-based biofuel by domestically produced oil-crop based biofuel that may benefit from the tax reduction.

107. Imports of specifically PME into France, whether from third countries or via intra-EU trade, fell dramatically in 2020. Data submitted by Indonesia demonstrates that, in the first year of implementation of the French biofuel tax reduction, (i) imports and consumption of oil palm crop-based biofuel in France fell to zero and (ii) imports and consumption of the domestically produced like product, rapeseed oil-based biofuel, increased *despite* an overall decrease in imports and consumption of biofuel in the market.

108. All Indonesian exports to the European Union which would have been destined for France in 2020 but for the subsidy, were not delivered to France in 2020. Absent the subsidy, the sales of oil palm crop-based biofuel would have continued and would not have fallen to zero. Thus, a certain proportion of imports from Indonesia which could have been sold in France in 2020 was impeded. If the Panel considers that this evidence does not establish current displacement and impedance of Indonesian exports of oil palm crop-based biofuel into France via intra-EU trade, given the timing of the introduction of the measures, the evidence nonetheless shows an imminent and clearly foreseeable threat of serious prejudice to Indonesian exports in the near future.

109. Indonesia submits that, through the subsidy, Indonesian producers have faced significant lost sales of the like product in the French market. While France continues importing biofuel in 2020, estimates are that imports of oil palm-crop based biofuel have dropped to zero in that year. Certain of these sales are Indonesian exports which have necessarily been lost to domestic French or EU produced biofuel (made primarily from rapeseed oil, as well as soybean oil) or to foreign produced biofuel other than oil palm crop-based biofuel. Absent the challenged subsidy, at least some sales which were lost to French or European producers would not have been lost.

110. With regard to the issue of causation, Indonesia asks the Panel to examine a counterfactual scenario in which the subsidy granted by the French biofuel tax reduction does not exist. In this counterfactual scenario, there would be no difference in the tax rate between non-oil palm crop-based biofuel and oil palm crop-based biofuel, and France is still required to meet EU renewable energy targets, as it is not possible for Member States to meet these targets without the use of oil crop-based biofuel. Palm oil crop-based biofuel would suffer no disadvantage in comparison to other oil crop-based biofuel and would therefore have seen no significant decrease in imports into the French market, given its natural price advantage. As the like products are substitutable, the continued consumption of all non-oil palm crop-based biofuel in France indicates that, absent the subsidy, the level of consumption of oil palm crop-based biofuel would be above zero.

111. There is no other factor specific to France which would account for such a dramatic drop in import volumes in France alone. While imports of Indonesian biodiesel are subject to countervailing duties imposed in August 2019, which have impacted the volume of those imports into the European Union, France has seen a decrease in imports which goes beyond the rate seen in the European Union as a whole.

112. The imposition of the subsidy directly corresponds to (i) the sharp, sudden decline in imports of oil palm-crop based biofuel into France, (ii) the fact that those imports which would have taken place did not happen and, (iii) the relative increase in domestically produced rapeseed oil-based biofuel consumption in France. Other factors potentially impacting Indonesian imports into France such as COVID-19 or trade defence measures do not explain the complete lack of imports and

consumption of only one type of biofuel in France following the imposition of the measure. This is clearly evidenced by a zero rate of consumption in 2020. Given the design, structure and operation of the measure at issue, the effects of the French subsidy go beyond mere price effects. The subsidy in fact prevents oil palm crop-based biofuel from accessing the French market, demonstrating that the subsidy is a genuine and substantial cause of both displacement and impedance of Indonesian exports of oil palm crop-based biofuel, and a threat thereof.

ANNEX B-2**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION****1. INTRODUCTION**

1. Creating a sustainable future in the face of climate breakdown and biodiversity collapse is a global priority. These are intertwined phenomena that cannot be tackled in isolation. Fighting climate change while minimising the impact on biodiversity are among the most important objectives of the European Union. Seeking to protect these objectives is necessary to protect EU public morals. Promoting the increased use of renewable energy is a way to contribute to the achievement of these intertwined objectives.
2. The "EU Biofuels regime" promotes the use of renewable energy sources, specifically certain biofuels, bioliquids and biomass fuels, in the EU as part of a strategy to decarbonise the EU's transport sector. It is laid down by different legal instruments, including Directive (EU) 2018/2001 (RED II), Commission Delegated Regulation (EU) 2019/807, and the Status Report.
3. RED II establishes two binding Union targets (the EU targets):
 - The overall renewable energy target: the share of energy obtained from renewable sources in the Union's gross final consumption of energy must be at least 32% by 2030.
 - The transport target: Member States must 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.
4. In view of the environmental risks associated with increased demand for conventional biofuels, as well as to ensure that the EU Biofuels regime contributes to the EU objectives of mitigating climate change, and avoiding biodiversity destruction, thereby protecting EU public morals, RED II seeks to address land use change (LUC) induced by biofuels crops production, both direct (DLUC) and indirect (ILUC).
5. To address DLUC RED II defines sustainability and greenhouse gas emission criteria that all biofuels, bioliquids and biomass fuels must comply with in order to be eligible to be counted towards the EU targets. Biofuels produced from feedstock grown on high carbon stock land do not comply with those criteria.
6. ILUC is a global phenomenon transmitted through global markets for agricultural commodities. Consequently, ILUC induced by policies that promote biofuels may occur anywhere in the world. The global nature of ILUC explains why a country by country or even a regional approach to address ILUC risk would be ineffective and inappropriate.
7. Because the production of conventional biofuels causes LUC, RED II encourages a gradual shift in the transport sector away from those biofuels. It does so by setting the maximum share of the contribution to the renewable energy target in the transport sector that can be obtained from conventional biofuels ("7% maximum share") and by incentivising the use of advanced biofuels ("advanced biofuels obligation"). With regard to biofuels produced from feedstock for which a high risk of significant expansion of the production area into land with high-carbon stock is observed (high-ILUC risk biofuels), RED II caps and progressively limits the contribution of those biofuels to the transport renewable energy target (high ILUC risk cap and phase-out).
8. Both the 7% maximum share and the high ILUC risk cap and phase out contribute to the overall objectives of the EU biofuels regime as they are designed to avoid that ILUC linked to the production of the crops used to produce these biofuels is exacerbated by a further increase in EU demand as a consequence of the EU renewable energy policy.
9. RED II also establishes a system to certify biofuels as low ILUC-risk (low ILUC-risk biofuels). Biofuels certified as low ILUC-risk are not subject to the high ILUC risk cap and high ILUC risk

phase-out, and may contribute to the renewable energy targets to the same extent as other conventional biofuels.

10. Indonesia challenges certain elements of the EU biofuels regime, which it defines as measures, namely the 7% maximum share, the high ILUC risk cap and phase out and low ILUC-risk certification. It brings claims under a plethora of WTO provisions. Indonesia also challenges the concept of ILUC risk as such and the methodology used by the EU to determine that risk (the "high ILUC risk formula").
11. In that regard, Commission Delegated Regulation 2019/807 determines:
 - Criteria for the identification of feedstock with high ILUC risk for which a significant expansion of the production area into land with high carbon stock is observed; and
 - Criteria for determining low ILUC risk biofuels, and for certifying low ILUC-risk biofuels.
12. The criteria to identify high ILUC-risk feedstock are determined set down in Article 3 of Delegated Regulation 2019/807:
 - 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;
 - the share of such expansion into land with high-carbon stock is higher than 10%, in accordance with the following formula, whose variables have been set by the EU on the bases of the available scientific evidence and information, and a study based on satellite information - the GIS-based assessment - (as set out in detail in the Status Report).
13. "Land with high-carbon stock" comprises wetlands, including peatland, and continuously forested areas within the meaning of Article 29(4)(a), (b) and (c) of RED II.
14. The result obtained by applying the formula is a percentage, which indicates the share of annual expansion of each feedstock into land with high-carbon stock. That percentage must be compared with the identified threshold of significant expansion, which is 10%. This represents a normative choice indicating the level of risk accepted by the European Union. If the percentage is higher than 10%, then that feedstock is considered as a high ILUC-risk feedstock.
15. The Annex to Delegated Regulation 2019/807 sets out the results when the formula in Article 3 of the Delegated Regulation is applied to a range of different crops used to produce biofuels. At present, only palm oil meets the conditions to be classified as a high ILUC risk feedstock. This assessment is subject to periodic review in light of new data (Article 7 of the Delegated Regulation).
16. The criteria for ILUC-risk seek to identify which feed crops, if demand were further stimulated, would be likely to give rise to crop expansion into types of land associated with such high levels of GHG emissions and biodiversity loss that any additional unit of biofuel produced from that feed crop would not give rise to lower GHG emissions than a fossil fuel comparator. This conclusion is based on observed crop expansion and takes into account the known characteristics of certain types of land as well as the characteristics (yield and by-products) of individual crops.
17. The observable rates of expansion allow for an assessment of ILUC risk precisely because high rates of expansion sustain the conclusion that there is insufficient existing arable land available to accommodate additional demand for that crop without an extension of the production land and hence LUC. The share of expansion into high carbon stock land is indicative of the magnitude of additional GHG emissions and biodiversity loss resulting from the overall expansion of the cultivated area of a given crop. High levels of observable LUC for a specific crop into environmentally sensitive areas (high carbon stock/biodiverse) in parallel with increasing global demand for the same crop is an indicator that further increases in demand (for whatever purpose) will likely stimulate additional displacement effects.

18. Therefore, the formula for identifying high ILUC risk crops aims to identify crops for which there is strong evidence that an increased feedstock demand will lead to a high rate of expansion into high carbon stock land, i.e., pose a high ILUC-risk.
19. However, high ILUC risk biofuels can be produced in conditions minimising the risk of displacement expansion into high carbon stock land and therefore, may be certified as low ILUC risk. There are three alternative "pathways" to this end: financial attractiveness, cultivation on abandoned land or severely degraded land, and cultivation by small holders.

2. CLAIMS UNDER THE TBT AGREEMENT

2.1. Applicability of the TBT Agreement

Indonesia has not established that the TBT Agreement is applicable to this dispute

20. Whilst Indonesia asserts that the two measures it has carved out of the EU biofuels regime should be legally characterised as "technical regulations" within the meaning of Annex 1.1 of the TBT Agreement, and that low ILUC risk certification is a "conformity assessment procedure" within the meaning of Annex 1.3 of the TBT Agreement, it has not established either of these claims.
21. As regards the high ILUC risk cap and phase out, and the 7 % maximum share, Indonesia invites the Panel to adopt an excessively expansive interpretation of the term "lay down product characteristics" to accommodate its claims that these measures "lay down" the "composition of fuel". Such an analysis fails to take in to account objectively the integral and essential aspect of the measures, as assessed in their proper context, and departs from the case law of the Appellate Body.
22. Article 26 of RED II concerns the potential eligibility of certain biofuels to contribute to a "renewable energy target" but it leaves discretion to individual Member States to determine what their fuel mix will be. It does not "provide for" or "stipulate" the "composition of the products to which they apply", either positively or negatively. It identifies certain products on the basis that they are composed of certain inputs and defines the implications for eligibility to contribute to the renewable energy targets on that basis. This is analogous to a tariff schedule which identifies products on the basis of their composition and defines the implications resulting from that in terms of applicable duties but does not purport to regulate their composition as such. In fact, the "composition" of fuel is regulated in the European Union by other legislation which is not the subject of these proceedings.
23. As to the claims relating to conformity assessment procedures, Indonesia has failed to elucidate the basis of this claim, but in any event has not shown that there is a relevant technical regulation with which low ILUC risk certification is assessing conformity.

2.2. Order of analysis of Indonesia's claims under Article 2.1 and 2.2 of the TBT Agreement

24. In this dispute, the Panel should address the claims under Article 2.2 of the TBT Agreement before considering whether Indonesia has demonstrated that the high ILUC risk cap and phase out is discriminatory within the meaning of Article 2.1 of the TBT Agreement.
25. Indeed, whilst the legal standard and thus analytical exercise under these two provisions is distinct, the facts and matters that the Panel must consider overlap considerably.
26. Moreover, this order of analysis is consistent with the exercise that a Panel must undertake when considering the claims under the GATT 1994. Indonesia has presented its claims under Article 2.1 of the TBT Agreement in a manner which effectively invites the Panel to proceed on the (erroneous) premise that the measure "eliminates" the use of palm oil. This implies that there has already been **an evaluation of the degree of trade restrictiveness that the measure in fact entails. As that analysis is applied under Article 2.2 of the TBT Agreement, the EU submits that in this dispute the Panel should start by assessing the claims under that provision.**

2.3. Claims under Article 2.1 of the TBT Agreement

27. Indonesia claims that there is a violation of both the MFN and National Treatment obligation enshrined in Article 2.1 of the TBT Agreement on the basis that the high ILUC risk cap and phase out is de facto discriminatory.
28. However, to establish a violation, it is not sufficient for Indonesia to identify differentiation in treatment; a regulatory distinction is not probative of less favourable treatment under this provision. Members may, in the exercise of regulatory autonomy, introduce distinctions provided they are linked to legitimate objectives and applied in an even-handed manner. Moreover, there is no obligation under the TBT Agreement for Members to protect specific volumes in trade.
29. Regarding the likeness analysis, whilst the products identified by Indonesia are the starting point for the Panel's examination, Article 2.1 of the TBT Agreement and Articles I and III of the GATT 1994 require panels to assess objectively, on the basis of the nature and extent of the competitive relationship between the products in the market of the regulating Member, the universe of domestic products that are like the products imported from the complaining Member.
30. In the first place, Indonesia has failed to demonstrate that PME, RME, and SME are like products under Articles I, III of the GATT 1994 and 2.1 of the TBT Agreement.
31. First, as regards the products' properties, the three biofuels have significant CFPP differences that are not compensated by mixing and additives. The amount of PME used in a blend depends on the season and location across Europe and FAME0 blends often includes only up to 20% of PME. This indicates that PME has a limited substitutability with other biofuels.
32. Second, regarding the end-use, PME is only commonly used during the summer season in Southern Europe. The data reported under the Fuel Quality Directive also shows that in several EU Member States, PME has only a small market share of the biofuels market.
33. Third, regarding the consumer tastes and habits, due to the high requirements on the CFPP, predominantly FAME blends with rapeseed methyl ester as main component are used in winter. Some fuel companies in the Nordic countries indicate that their products do not include palm oil biofuel. Furthermore, despite the absence of biofuel feedstock labelling requirements, the EU consumers' tendency to avoid products containing palm oil products has also started to manifest in the fuels sector.
34. Fourth, regarding the tariff classification, biodiesel products, except for HVO, are classified under the same tariff code. This includes biodiesel made from waste oils, animal fats and various biodiesel mixtures. The lack of detail in the tariff classification does not support the claim that the identified products are like.
35. In any event, were the Panel to consider that Indonesia has demonstrated that PME, RME, and SME are like products, Indonesia's definition of allegedly like products is flawed because it does not include the entire universe of like biofuel products. Other biofuels, such as biofuels made from waste oil or animal fat and HVO biodiesel, also covered by RED II, are equally "like products" with the products identified by Indonesia and should have been also included. The exclusion of these products necessarily alters the analysis whether the "measures" modify the conditions of competition to the detriment of the group of imported products vis-à-vis the group of like domestic products.
36. In addition, Indonesia has failed to prove that the vegetable oils are "like". These oils have different physical characteristics, end-uses, customer preferences and tariff classifications.
37. Indonesia has also failed to establish that there is less favourable treatment. An objective assessment of the design, architecture, revealing structure, operation and application of the high ILUC risk cap and phase out indicates that any regulatory distinctions that apply are exclusively linked to the intertwined legitimate objectives pursued.
38. There is a body of scientific evidence and information substantiating the finding that palm oil is a high ILUC risk feedstock and that further stimulating its production would exacerbate observed

land use change effects. The formula is an objective methodology that accounts for the risk of those effects occurring on high carbon stock land and hence eliminating emissions savings over fossil fuels. The measure applies to all palm oil-based biofuel, irrespective of where it is produced.

39. Moreover, Indonesia seeks to distort the comparative exercise. Comparisons must be conducted at the level of the group of like products. As the regulatory distinction is designed and applied in an even-handed manner, any difference in treatment between sub-categories of like products within those groups cannot be considered as discriminatory within the meaning of Article 2.1 of the TBT Agreement.

2.4. Claims under Article 2.2 of the TBT Agreement

40. Indonesia seems to agree that the EU, like any other WTO Member, has the right to act for the purposes of reducing GHG emissions, to protect the environment and to respond to climate change.
41. Indeed, the relevant objectives pursued by the EU Biofuels Regime and the measures at issue are:
- a. climate change mitigation through reducing GHG emissions and decarbonising the transport sector;
 - b. ensuring high standards of environmental protection including the preservation of biodiversity, and minimising the potential adverse effects resulting from the EU renewable energy policy including biodiversity loss;
 - c. addressing the EU's moral concerns associated with the protection of the environment and preservation of biodiversity, and more generally, combating climate change.
42. These objectives are interlinked because the underlying phenomena that contribute to climate change, destruction of biodiversity and offend the EU morals feed each other and cannot be dealt with in isolation.
43. The EU disagrees with the proposition that the objectives of the measures can only be determined on the basis of explicit references contained in the piece of legislation laying down the measures. The presence or the absence of an explicit reference to a certain objective cannot be determinative. A panel must make an objective and independent assessment of the objectives pursued by a Member. To recall, in *Brazil — Taxation*, the discriminatory measure that Brazil wanted to justify (the PATVD programme) did not contain any explicit link to a public morals objective.
44. In any event, RED II and the legal framework of which it is part contain textual references to the need to address climate change, biodiversity destruction and the associated EU moral concerns in the context of the EU policy promoting the use of biofuels. Given that ILUC induced by biofuels' production may accentuate those phenomena, the EU measures concerning ILUC necessarily seek to protect the mentioned objectives.
45. The objectives pursued by the EU address common concerns of humankind. Climate breakdown and biodiversity destruction are among the most important and urgent challenges facing humanity in the XXI century and they raise ethical issues.
46. The EU also disagrees that the true objective of the measures at issue is in fact protectionist. The measures at issue do not offer more favourable treatment to domestic products.
47. The objectives pursued by the EU fall squarely within the open, non-exhaustive list of legitimate objectives enumerated in Article 2.2, which expressly refers to "protection of human health or safety, animal or plant life or health, or the environment". The protection of public morals is a legitimate objective under Article XX of GATT 1994, and therefore must be considered legitimate under Article 2.2 of TBT Agreement as well.

48. Given that it is for each Member to establish its public morals (for instance, religious beliefs), instead of questioning whether certain concerns fall under the remit of "public morals", previous panels rather focused on whether the measure at issue was necessary and not an arbitrary discrimination. Moreover, the ethical relevance of fighting climate change and protecting biodiversity is acknowledged by many countries and international organisations, religious and political leaders, philosophers and thinkers across the globe. In the present case, the public morals concerns are closely linked to the climate breakdown and biodiversity collapse, and the perceptions of the EU citizens and of the EU authorities in relation to those concerns.
49. The EU has demonstrated the existence of the climate breakdown and biodiversity collapse and these phenomena are not questioned by Indonesia. The EU has also established that EU citizens and the EU authorities consider that the adoption of policies to tackle those phenomena is not only a question of environmental protection, but also a moral or ethical issue.
50. Finally, similarly to Article XX of GATT 1994 and contrary to what is provided for in the SPS Agreement, there are no jurisdictional limitations in Article 2.2 of the TBT Agreement. There is neither a customary rule of international law nor any treaty rule that prohibits the adoption of unilateral trade measures as part of the efforts to address climate change. This is confirmed by the Appellate Body Reports in *US - Shrimp*.
51. Principle 12 of the Rio Declaration on Environment and Development does not prohibit unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country. The Rio Declaration provides that internationally agreed solutions are always preferable, but this does not mean that sometimes one cannot act more energetically, as reflected in the use of the oratory language "should cooperate", "should be avoided" and by expressions like "as far as possible". Principle 12 also replicates the language in the chapeau of Article XX of the GATT 1994 and in the preamble of the TBT Agreement (which informs the interpretation of Article 2.1).
52. Indonesia has failed to prove the trade restrictiveness of the measures at issue within the meaning of Article 2.2.
53. First, even if it is accepted that the measures have the effect of regulating economic activity on the biofuels market, any measure regulating an economic activity would likely alter the conditions of competition on the market for all relevant products and producers since market participants must adjust to the regulation. One cannot conclude from this that there is also a restriction of international trade.
54. Second, the aim of RED II is to further promote renewable energy in a way that contributes to achieving its objectives. The degree to which eligible fuels will or will not be "supported" is however a matter for each EU Member State to determine.
55. Third, there is no ban on the import, access to market or use of any biofuel in the EU. The measures at issue only determine eligibility to contribute towards the renewable energy targets of different biofuels, progressively reducing to zero by 2030 the counting of conventional biofuels produced from high ILUC-risk food and feed crops.
56. Fourth, the EU measures challenged by Indonesia seek to avoid that the EU renewable energy policy stimulates demand for biofuel crops that are associated with a significant ILUC risk. They are not designed to significantly restrict world trade in palm oil and palm oil biofuels, which depends only to a very marginal extent on EU demand.
57. Fifth, 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. Indonesia's arguments to the effect that low ILUC certification is impossible or impracticable is disproven by the fact that a number of voluntary certification schemes are already in place and have been recognised by the EU.
58. Sixth, if one follows Indonesia, then one has to note that the creation through public intervention of a biofuels market is an alteration of the normal functioning of the market which has a trade restrictive effect for fossil fuels and a trade enhancing effect for biofuels. The EU

Biofuels Regime actually promotes the penetration of conventional biofuels in the EU transport energy market, and the 7% simply set the upper limits on that promotion. WTO rules require neither a Member to create a legal framework for the promotion of conventional biofuels nor do they set the level of support conventional biofuels should receive.

59. Seventh, to the extent that the Panel finds that Indonesia has demonstrated that the measures impact trade because palm oil-based biofuels are "disincentivised", the EU submits that this is only to the extent necessary to ensure that the measures contribute to the objectives pursued in first place.
60. Eighth, the EU recalls that a panel may consider "both import-enhancing and import-reducing effects on the trade of other Members".
61. Indonesia contends that it is impossible to make a precise quantification of the contribution to the legitimate objectives because "ILUC can neither be observed nor measured". First, a quantitative assessment is not essential. Second, LUC can be observed and estimated. The fact that estimations of ILUC emissions are complex and lead to variable results is due to the indirect and global nature of ILUC. That does not mean ILUC emissions do not exist. The ILUC analysis showed that the policy-driven increase in demand for biofuels was a significant risk undermining the integrity of that policy and that different crops present a different risk in terms of increasing ILUC emissions and impact on biodiversity.
62. When considering the contribution of the measures to the objectives, it should be kept in mind first, the fact that international standards for assessing the carbon footprint of products do not aim to address ILUC. Hence, those standards are only partially suitable for decision making in order to properly mitigate climate change.
63. Second, the increased demand for 'conventional biofuels' is associated with a risk of LUC and the 7% maximum share is intended to "prepare for the transition towards advanced biofuels and minimise the overall [ILUC] impacts".
64. Third, the palm oil market is an international market of such a nature that if expansion into high carbon stock land is slowed down in one country, the pace most certainly will pick up in a different location with similar climate characteristics. That is why it is appropriate to adopt a global approach considering a worldwide average and not a country by country approach.
65. Fourth, the EU has chosen to focus on a recent but sufficiently long period to observe the expansion into high-carbon stock land of different biofuel crops.
66. Fifth, the EU's ILUC methodology takes the productivity factors of different biofuel crops into account as well as the high carbon sequestration value of oil palm.
67. Sixth, in order to determine what represents a significant expansion into high carbon stock land the Status Report makes reference to scientific studies and other concrete data. It follows that the measures at issue are clearly apt to and certainly not incapable of making a contribution to the fulfilment of the intertwined objectives of the EU.
68. Because of the nature of the risks and the fact that the consequences are far-reaching and difficult to predict with certainty (as they pertain to an emergency related to climate breakdown and biodiversity collapse), and considering the associated EU public morals, a qualitative analysis is suitable in the present case. Moreover, Indonesia's approach to the measures at issue is artificial. These measures are part of a broader legal framework (the EU Biofuels Regime), which in turn is a part of a comprehensive set of measures to address the climate breakdown, the biodiversity collapse and the associated public outcry. They do not operate in the real world in isolation from each other.
69. Finally, the EU Biofuels Regime favours biofuels when they achieve a certain level of emissions savings in comparison to fossil fuels. Advanced biofuels are preferred over conventional biofuels. These elements are all designed with the aim of making a material contribution to the intertwined objectives pursued.

70. With regard to the nature of the risks concerned and the gravity of the consequences of non-fulfilment, Indonesia seems focused on the GHG emissions reduction objective, and does not really address the other intertwined objectives, and in particular biodiversity loss. It has to be noted that in some contexts it might be difficult in practice to determine separately the nature of the risks and to quantify the gravity of the consequences that would arise from non-fulfilment. In such circumstances, 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.
71. As abundantly explained, the measures at issue pursue legitimate objectives as a composite whole, and climate change, biodiversity loss and the related moral concerns are regarded as values of high importance in the EU.
72. The EU further notes that Article 2.2 provides that a technical regulation should reflect (at the time of its adoption) the available scientific and technical information. Article 2.3 requires that technical regulations are not maintained if circumstances that led to their adoption no longer exist. The language of Article 2.3 suggests that precautionary measures are possible under the TBT Agreement.
73. Indonesia identified first four, then six possible alternative measures in respect of the high ILUC-risk cap and the high ILUC phase-out and two alternatives (and combinations of them) with regard to the 7 % maximum share.
74. Indonesia's six alternatives suffer from common deficiencies: they all start from the wrong premise that the measure at issue is a total ban on palm oil, and they do not address expansion into high carbon stock land in a way that would be equivalent to the ILUC methodology. Indeed, even if the sustainability criteria and the ILUC methodology both look at crop expansion in high carbon stock land, that does not imply that they are somehow duplicative because there are profound differences between them. In addition, as the EU Biofuels regime pursues multiple, legitimate policy objectives concurrently, any alternative measure must be able to contribute equally to all of those same policy objectives as a whole.
75. Indonesia proposes as a first alternative that the EU should limit the harvesting of forests for wood-based bioenergy in the EU.
76. The EU has long recognised the importance of forests and the negative effects of deforestation within the EU, as reflected inter alia in the 2013 Forest Strategy, the LULUCF Regulation and the EU and the Member States' commitments under the Kyoto Protocol.
77. In any event, regulating exclusively "at home" in the EU cannot achieve an equivalent contribution because of the asymmetries between the sources of concern (emissions and biodiversity loss) and where their effects manifest themselves, given that the expansion of palm oil production comes at the expense of tropical forests, which are some of the most biodiverse areas of the globe.
78. Second, Indonesia proposes that the EU could extend its GHG emissions accounting to "other" agricultural products, not clearly specified, which could mean any agricultural product that is not palm oil.
79. This does not take into account ILUC, but only DLUC based on LCA. Such an approach would be significantly more demanding in technical and administrative terms than the measures the EU adopted and not suitable in the case of the aggravating climate and biodiversity emergency.
80. Moreover, there is a qualitative difference between LUC and emissions triggered by increasing food demand and LUC induced by biofuel demand. Whilst the former is driven by the growing world population and increasing consumers' wealth and responds to the essential need for food, the latter is purely triggered by policies that support the consumption of biofuels on the assumption that their use contributes to reducing emissions and environmental impact.
81. Indonesia proposes third that an equivalent contribution could be achieved by the EU providing finance and technical support to Indonesia to ensure the preservation of its forests. The EU has already provided plenty of assistance to Indonesia. However, this cannot be considered as

making an equivalent contribution to the objectives pursued by the EU. The high ILUC-risk approach and the low ILUC-risk certification are complementing its assistance.

82. The EU's cooperation portfolio with Indonesia is worth 500 million euros in the past 10 years, while 100 million euros are dedicated to ongoing projects, and special assistance is given for sustainable economic development and climate change/environment. For example, a pilot action concerns *Defining and tracking "deforestation-free" palm oil* - (€550,000 contracted).
83. In spite of that, there are still shortcomings. For instance, the fitness check on the EU Timber Regulation and the FLEGT Regulation has found that illegal timber trade has remained persistent in Indonesia.
84. Indonesia proposes fourth that the EU could introduce a tax on meat and dairy products to reduce their consumption. The Delzeit study does not provide an adequate scientific foundation for Indonesia's claims. First, it acknowledges that the impacts of meat and dairy consumption are not as well studied as the impacts of biofuels. Second, the study indicates that a tax on meat and dairy would cause higher consumption by consumers of fossil fuels.
85. Fifth, in its second written submission Indonesia suggests a new alternative: "properly" designed low ILUC-risk criteria could be applied to all oil crop-based biofuel, without providing any information on how that could be designed.
86. Sixth, Indonesia suggests a second new alternative: labelling a fuel as ILUC-risk when sold to consumers purchasing fuel to drive their cars. However, there may be certain consumers who would simply prefer the cheapest price and not care about other considerations. Therefore, the measure would not be able to make an equivalent contribution. It is precisely in such circumstances that a regulatory authority has the possibility to intervene.
87. Indonesia alleges that the available alternatives in respect of the 7% maximum share would be its removal or the setting of a higher level, adding to that in its second written submission that they may be combined with any of the other six alternatives.
88. With regard to the removal/higher level alternatives, to the extent that limiting the eligibility of conventional biofuels prevents an increase in EU demand for that type of biofuels and thereby is capable of contributing to the EU objectives, removing that limitation or putting a higher limit by definition could not make an equivalent contribution.
89. With regard to the contention that these two alternatives could be combined with any of the other alternatives identified by Indonesia for the high ILUC-risk cap and phase-out, the EU wonders which case it is supposed to answer.
90. In light of the EU's detailed explanations, there is no doubt that the alternatives suggested by Indonesia are not reasonably available, they are not less trade restrictive and in particular do not make an equivalent contribution to the intertwined objectives sought by the EU.
91. In conclusion, Indonesia's claims under Article 2.2 of TBT Agreement should be dismissed because the measures at issue pursue legitimate objectives and they are not more trade restrictive than necessary.

2.5. Claims under Article 2.4 of the TBT Agreement

92. The ISO standards referenced by Indonesia are partially relevant because they relate to the estimation of direct greenhouse gas emissions on the basis of a life cycle analysis. Indonesia does not take issue with this aspect of RED II.
93. On the other hand, ILUC risks and ILUC emissions are neither an integral part of the ISO standards mentioned by Indonesia, nor of other international standards. ISO standards only recognise the existence of ILUC but do not currently recommend any specific methodology to account for those emissions. Therefore, Indonesia has neither demonstrated the relevance of those standards with regard to accounting for ILUC emissions, nor their appropriateness or

effectiveness to that effect. It follows that Indonesia has failed to make its case under Article 2.4 of the TBT Agreement.

2.6. Claims under Article 2.5 of the TBT Agreement

94. The EU does not accept that the "measures" identified by Indonesia have a significant effect on trade. The alleged trade restrictiveness of these measures is precisely one of the matters that Indonesia must demonstrate. It has failed to do so. Nor is it factually correct that the European Union has failed to engage with Indonesia. However, as the European Union has never considered that these measures are technical regulations for the purposes of the TBT Agreement, it is perfectly consistent with that position that it did not use the forum of the TBT Committee to address concerns Indonesia raised.

2.7. Claims under Article 2.8 of the TBT Agreement

95. Indonesia fails to demonstrate that it would be "appropriate" to achieve an equivalent effect impact through the imposition of "environmental performance" standards. The EU Biofuels regime seeks to reconcile a number of competing legitimate policy goals, of which environmental protection, climate change mitigation and the prevention of biodiversity loss all form part. The application of environmental performance standards would not fulfil the spectrum and balance of policy objectives pursued. Moreover, since the ISO standards invoked are irrelevant, inappropriate and ineffective for the fulfilment of the legitimate objectives pursued by the challenged measures, Indonesia's premise for its Article 2.8 claim also falls.

2.8. Claims regarding the alleged conformity assessment procedure

96. In the following, without prejudice to the position that Indonesia failed to show that the low ILUC-risk certification is a conformity assessment procedure, the EU makes the following comments about the various claims.

2.9. Claims under Article 5.1.1 of the TBT Agreement

97. When assessing whether suppliers are in a comparable situation, the scope of the assessment is between different suppliers of "like" products who are subject to the "conformity assessment" requirement. Hence, the question the Panel must determine is whether suppliers of "like products" are granted an equal opportunity to have their products assessed for conformity. Indonesia conflates this with access to the market as such, and seeks to distort the comparative analysis to that end.

98. Under the EU Biofuels regime, "access" to the conformity procedures is only relevant to producers of biofuels produced from high ILUC-risk feedstock. Indonesia has not demonstrated that access to the conformity assessment procedures is more difficult for Indonesia producers and its criticisms of the pathways for low ILUC risk certification do not advance its position in this respect.

2.10. Claims under Articles 5.1.2 and 5.2.1 of the TBT Agreement

99. The absence of detailed certification rules falls outside the scope of Article 5.1.2. In any case, the absence of detailed certification rules does not prevent obtaining low-ILUC risk certification. Indonesia's criticism is rather directed at the low-ILUC risk certification set out in Delegated Regulation which has been rejected elsewhere. In any event, the EU does not accept the premise that any form of verification amounts to an obstacle to trade.

100. Second, the phrase "undertaken and completed" in Article 5.2.1, shows that this provision covers approval procedures after receiving an application and, as a matter of principle, presupposes that there has been at least partial implementation. The certification rules on certification were not yet adopted. Since Indonesia complains about the absence of certification rules, its claim falls outside the scope of this provision and is premature.

2.11. Claims under Articles 5.6.1, 5.6.2 and 5.6.4 of the TBT Agreement

101. The EU considers that, in any event, it complied with the procedural obligations contained in these provisions by organising an expert workshop, a four weeks feedback period and a stakeholder meeting.

2.12. Claims under Article 5.8 of the TBT Agreement

102. Indonesia incorrectly asserts that the EU failed to promptly publish or otherwise make available the conformity assessment procedure in this case. The Delegated Regulation was published on 21 May 2019 while the draft implementing act was published on 29 June 2021.

2.13. Claims under Articles 12.1 and 12.3 of the TBT Agreement

103. The term "take into account" in Article 12.3 of the TBT Agreement means to give active and meaningful consideration to the special needs of developing country Members before reaching a decision. Article 12.3 imposes neither an obligation of result, nor prescribes how to take account or to document specifically how account was taken. This obligation is met if the developing country communicated its concerns and if the Member adopting the measure discussed these concerns, either internally or in exchanges or consultations with the developing country.

104. Moreover, Indonesia has not established that RED II would affect its "development, financial and trade needs".

105. In any event, the EU demonstrated that it gave meaningful and active consideration to Indonesia's relevant needs and adjusted some aspects of the measures at issue.

3. CLAIMS UNDER THE GATT 1994

3.1. Claims under Article I:1 of the GATT 1994

106. Indonesia has not established that the high ILUC risk cap and phase out violates Article I:1 of the GATT 1994. WTO Members are not required to extend an "advantage" which is subject to certain conditions to all Members in cases where their products do not meet those specified conditions.

107. As the overall GHG emissions associated with the production of different biofuels are different there is a legitimate basis on which to confer the alleged "advantage" only to the that subset of the "like" products (regardless of their origin) which meet the prescribed conditions in terms of overall GHG emissions.

108. Moreover, Indonesia's characterisation of the so-called "advantage" is flawed. Indonesia extends its claims under the GATT to palm oil as well as palm oil based biofuel. However, it has failed to adduce evidence as to the nature and conditions on the market for palm oil and failed to adduce sufficient evidence as regards palm oil based biofuel. Neither palm oil, nor palm oil based biofuel is excluded from the market by the measures or by the EU biofuels regime more generally. Member States retain the discretion to determine the extent to which they wish to treat any conventional biofuel as eligible to contribute to the renewable energy target. The size of any advantage cannot automatically be assimilated to "7 %".

3.2. Claims under Article III.4 of the GATT 1994

109. Article III:4 protects expectations of the equal competitive relationship between imported and domestic products. Article III:4 does not imply that any time an advantage is not conferred on one product of a group of like imported products a Panel can conclude that there is discrimination under Article III:4 of the GATT 1994.

110. In order to demonstrate that there is "less favourable treatment" within the meaning of Article III:4 of the GATT 1994, a complainant must both establish the appropriate product scope on the basis of which the comparison is to be conducted and further show that the "less favourable treatment" it has identified is attributable to the measure at issue. Indonesia has done neither.

111. Indonesia's claims of less favourable treatment are premised on the incorrect assertion that because of the high ILUC-risk cap and phase-out, palm oil based biofuel will be "excluded" from the market. Eligibility to contribute to the renewable targets is not determinative of market entry.
112. The comparison is to be conducted at the level of the group of like products. As Indonesia invites the Panel to embark on a skewed analysis based on a partial definition of the group of "like products", Indonesia's arguments are incapable of demonstrating that the challenged measures has an asymmetrical impact on imported products vis-à-vis domestic products, when the whole group of products is properly considered.

3.3. Claims under Article XI of the GATT 1994

Indonesia contends that the high ILUC-risk and phase-out falls within Article III:4 of the GATT 1994 but at the same time it also puts into practical effect a quantitative prohibition or restriction on the importation of palm oil, and palm oil biofuel. According to Indonesia, the concurrent application of Articles III and XI is exceptionally justified in the present case because palm oil cannot be produced in the EU.

113. However, the good to which the ILUC-risk cap and phase-out may apply is not palm oil, but biofuels. Moreover, palm oil based biofuel is produced in the European Union. The exceptional justification invoked by Indonesia therefore does not apply. Indonesia's logic leads therefore to the conclusion that any measure falling within Article III will also fall within Article XI.
114. However, it follows from the text of Articles XI and III as well as the jurisprudence that only measures that apply to importation itself and impose a condition on importation capable of limiting the quantity of imports of a product fall within Article XI. On the other hand, as a rule, internal regulatory measures fall under Article III. The detrimental impact on commercial opportunities for imported products that results from the application of an internal regulation cannot be considered as a measure falling within Article XI, as Article III and XI would substantially coincide and one of those two provisions would be inutile.
115. In the present case, Indonesia itself has explained that any hypothetical negative effect of the high ILUC-risk cap and phase-out on palm oil imports in the EU will be the consequence of a purely internal event, i.e. the decrease in the domestic demand for palm oil used for biofuel production induced by the high ILUC-risk cap and phase-out, and not of a restriction on importation itself, which limits the quantity or amount of palm oil that can be imported.
116. It follows that Indonesia has not demonstrated that Article XI of the GATT 1994 applies to the high ILUC-risk cap and phase-out.

3.4. Claims under Article X:3 (a) of the GATT 1994

117. Indonesia's claims fall outside the scope of Article X:3(a). The rules regarding the high ILUC-risk cap and the high ILUC-risk phase measures are substantive in nature and do not concern the administration of these measure or the way they are put into practical effect. Indonesia's claim relates to alleged flaws of these measures that can be examined for consistency with other provisions of the GATT 1994.
118. The absence of detailed certification rules is not inconsistent with Article X:3(a) as it does not demonstrate "unreasonable administration" or inconsistent implementation of the low ILUC-risk certification. The certification rules are not indispensable to carry out low-ILUC risk certification. The criteria set out in the Delegate Regulation for that purpose are already sufficiently detailed.

3.5. Article XX of the GATT 1994

119. The objectives pursued by the EU are intertwined. Climate change, environmental degradation and biodiversity loss trigger moral concerns. It cannot be contested that climate change induces biodiversity loss and biodiversity loss leads to climate change. Moreover, biodiversity has a high medical value and is of direct interest to humankind also from that perspective. The legal

standard under Article XX easily accommodates the intertwined objectives approach adopted by the EU.

120. Not only do Articles XX(b) and XX(g) protect similar values, but also the "necessary" and "relate to" tests are in practice very similar according to the relevant jurisprudence. Furthermore, the chapeau analysis may also serve as a tool to approach the necessity and "relate to" legal tests.
121. In the present case, the EU has demonstrated that there is a close and genuine relationship of ends and means between the measures at issue and the protection of public morals, of life and health of humans, animals and plants, and the conservation of exhaustible natural resources. In other words, the measures at issue are "necessary" within the meaning of Articles XX(a) and (b) and "relate to" as required by Article XX(g).
122. In addition, the EU considers that the text and aim of the chapeau requires an examination of the multiple objectives of the measures at issue. These measures are part of a comprehensive set of policies to address climate breakdown, environmental protection and biodiversity collapse, and to protect public morals in the EU.
123. Climate change has several relevant characteristics. In particular, its effects are not circumscribed to specific boundaries or regions and there is no direct connection between the source of GHG emissions and the effects of climate change: devastating effects can be produced in places that have low GHG emissions.
124. There is an unprecedented biodiversity collapse in the history of humankind. Species do not have time to adapt to changes that come in a split of a second in evolutionary terms. According to a scientific report from 2019, 1 million species are threatened with extinction on our planet and biomass studies from 2018 show that 96% of the mass of all mammals on Earth are the humans and their domesticated mammals, and only 4% wild mammals.
125. Importantly, there is a direct link between biodiversity loss and climate change, which is increasingly recognised by political leaders. It is clear that a rich biodiversity mitigates climate change to a very great extent. The climate breakdown and the biodiversity collapse affect and concern us all. That climate change, environmental degradation and biodiversity loss are of moral concern transcends boundaries, professions, age, wealth and political orientation.
126. Therefore, the EU 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. The EU is not requesting a "revolutionary" leap in case law, but to apply the existing case law to the new realities.
127. The objectives of the measures are within the framework of the values recognised as legitimate objectives by Article XX(a), (b) and (g) of GATT 1994. The measures meet the required level of connection between them and the objectives sought and are applied in a non-discriminatory manner between countries where the same conditions prevail, as required by the chapeau of Article XX.
128. There is no explicit or implicit territorial limitation in Article XX or in Article 2.2 of the TBT Agreement. Moreover, the Panel does not need to address the issue of whether there are or not implied jurisdictional limitations in Article XX in order to ensure a positive resolution of this dispute, as climate change and biodiversity are global in nature and therefore the required nexus with the EU territory exists. These elements are internationally recognised, including by the United Nations Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity.
129. In any event, the very text of Article XX supports the EU's position. For instance, Article XX(a) can be invoked for the protection of public morals in the WTO Member concerned related to circumstances outside its territory. If that were not the case, Members could not limit or prevent the import of goods produced in a way that offends their public morals (e.g. using slave labour, or in a way that does not conform to their religious beliefs) for the sole reason that the

circumstances resulting in an offence to their public morals do not occur within their borders. The same holds true under Article 2.2 of the TBT Agreement.

130. Moreover, Article XX(g) of the GATT 1994 is explicitly intended to protect from risks that arise also outside a Member's borders. Indeed, a measure to be justified under that article must be accompanied by an even-handed restriction on domestic production or consumption which contributes to the same objective (i.e. a restriction applying within the borders of the Member adopting the measure). Therefore, necessarily the measure must pursue the same objective of conserving living and non-living natural resources outside the Member's territory.
131. Second, the treaty drafters put an express territorial limitation when they considered necessary to do so, such as in the SPS Agreement.
132. Third, this interpretation is confirmed by the object and purpose of the provision at issue. By applying the principle of effectiveness, the only conclusion that can be reached is that an effective protection of the non-trade values covered under Article XX or Article 2.2 cannot be reconciled with a territorial limitation.
133. Fourth, Indonesia summarily refers to a Panel's finding in *EC – Tariff Preferences*, which did not benefit from appellate review. Moreover, the panel in that case was faced with a different factual setting. On the other hand, already during the GATT era the *US – Tuna (EEC)* panel "could see no valid reason supporting the conclusion that the provisions of Article XX(g) apply only to polices related to the conservation of exhaustible natural resources located within the territory of the regulating member".
134. Fifth, the EU is not regulating what is happening in Indonesia. All that the EU is doing, in a manner that is perfectly consistent with WTO law, is to impose certain conditions for the products at issue to be considered eligible for the EU renewable energy targets when they are used in the EU market. Indeed, the very purpose of measures taken for the protection of the values embodied in the general exceptions in Article XX of the GATT 1994 (or in the balancing exercise in Article 2.2 of the TBT Agreement) is to induce compliance with certain legitimate policies, as confirmed by the Appellate Body.
135. Sixth, because of the global nature of ILUC, the risk for climate change and biodiversity destruction do not necessarily arise outside the EU borders, but may very well occur also within the EU. Hence, the 7% maximum share and the criteria for assessing high-ILUC risk biofuels apply to all conventional biofuel crops.
136. Finally, as the public morals are those of the EU, this aspect should be non-controversial. The fact that the EU public morals concerns are shared by a wide variety of cultures, religions, professions and across all age segments only reinforces our standpoint. Therefore, the effect of climate change and destruction of biodiversity may be felt in places different from those where GHG emissions occur or where biodiversity is affected. Likewise, where the GHG emissions occur or where biodiversity is affected does not make a difference for the EU public morals. If pristine habitats are wiped out and wild species are eliminated in Indonesia, the EU or elsewhere, it still impacts the EU public morals.
137. The EU has demonstrated that the measures at issue are apt to, and certainly capable of contributing to the stated objectives. The EU already explained that the objectives pursued by the specific measures challenged by Indonesia are the same as those pursued more generally by the entirety of the EU's regulatory framework promoting the use of energy from renewable sources, including under the EU Biofuels Regime.
138. Indonesia has identified certain aspects of the EU Biofuels Regime as the measures at issue. However, the various EU measures challenged by Indonesia do not exist in the void. They are part of a complex legal framework which addresses intertwined realities and they operate together to pursue the objectives of climate change mitigation, mitigating biodiversity loss and responding to correlative EU moral concerns.
139. The objectives pursued are important to the highest degree and measures at issue make a genuine contribution to these objectives. To the extent that the Panel finds that Indonesia has

demonstrated that the measures impact on trade because palm oil-based biofuels are "disincentivised", then that this is only to the extent necessary to ensure that the measures contribute to the objectives sought.

140. The measures at issue do not ban the use of certain biofuels in the transport sector. The respective rules only cap the amount considered eligible to contribute towards the renewable energy targets, progressively reducing to zero by 2030 the counting of conventional biofuels produced from high ILUC-risk food and feed crops. This is complemented by the low ILUC certification criteria. Thus, the trade impact of the measures at issue is limited.
141. To provide for an appropriate less trade restrictive alternative, the complainant must propose a solution that would be capable of achieving the same level of protection of all three intertwined objectives at the same time. But as shown by the analysis of the alternatives proposed by Indonesia in the context of Article 2.2 of the TBT Agreement, Indonesia has failed to propose any appropriate less trade restrictive alternative in the context of Article XX.
142. The measures at issue are even handed, as required by Article XX(g). The 7% maximum share as well as the methodology for determining high ILUC-risk crops apply to all domestic and imported food and feed crops, irrespective of their origin.
143. Finally, the measures at issue are applied in a non-discriminatory manner. The EU has engaged in very extensive efforts over a long period of time in various international fora in order to find common ground to properly address the climate and biodiversity emergency and will continue to do so. However, as international instruments usually express the lowest common denominator the EU has to address these urgent phenomena as there is no Planet B.
144. For the purposes of the chapeau analysis, given the global nature of ILUC and of the market in the biofuel crops the "relevant condition" is the risk of ILUC induced by the production of a certain feedstock. That is because different feedstocks have a different impact on the environment. The difference in treatment under the measures at issue is between different feedstock crops regardless of the countries where they are produced. It is therefore necessary to adopt an approach that examines the overall worldwide position with respect to each feedstock, rather than an approach that discriminates between countries, because the risk of ILUC linked to the production of a given feedstock is the same whatever country is producing that feedstock.
145. In conclusion, the EU's approach (i) is solidly grounded in the very legal text of Article XX(a), (b) and (g), and (ii) is embedded in the nature and operation of the composite objectives pursued by the measure at issue. Therefore, the measures at issue are justified under Article XX(a), (b) and (g) of GATT 1994 and its chapeau.

4. THE FRENCH MEASURE

4.1. Factual background

146. The TIRIB (i.e. *Taxe Incitative Relative à l'Incorporation de Biocarburant*) is a behavioural tax designed to change the behaviour of economic operators so that they will incorporate renewable energy in the fuel that they release for consumption, thereby contributing to achieving France's climate change and environmental objective. Accordingly, the TIRIB is designed to tax only fuels containing a proportion of renewable energy lower than the incorporation targets fixed by law.
147. The TIRIB is organised around a fiscal imposition and a reduction/exemption, which applies proportionally to the renewable energy incorporated, up to the target set by the French legislator. Palm oil biofuels are not considered "renewable energy" for the purpose of the TIRIB. The TIRIB and the TIRIB reduction are inseparably linked. One would have no reason to exist without the other.
148. The legislator does not pursue a budgetary objective through the TIRIB and indeed, since its establishment, the revenues produced by the TIRIB have been negligible.

4.2. Indonesia's GATT claims against the TIRIB

149. Indonesia challenges the TIRIB both under Article III:2, first sentence and second sentence of the GATT 1994, as well as under Article I:1 of the GATT 1994.
150. The EU maintains that the Article III:2 claims are not properly before the Panel because Indonesia's panel request is not sufficiently precise in the identification of the WTO provisions Indonesia wanted to rely on.
151. If the Panel nevertheless consider that Indonesia's claims are properly before it, the EU considers that Indonesia has not made a *prima facie* case under Article III:2 first sentence because it has demonstrated neither that PME is almost perfectly substitutable with RME and SME, nor that France taxes imported products in excess of like domestic products. With regard to the latter Indonesia has not correctly demonstrated that the exclusion from the TIRIB reduction of palm oil biofuels is due to the origin of the products and creates an asymmetrical impact for the group of imported products because Indonesia assumes: (i) that all rapeseed oil consumed in France for biofuel production in the period 2016-2019 is domestic; (ii) that all palm oil based biofuel consumed in France in the period 2016-2019 is imported; and it fails to consider other products that should be included in the group of like products (such as UCO biofuels, or HVO) both on the domestic and import side.
152. With regard to the second sentence of Article III:2, Indonesia has merely demonstrated that PME, RME and SBME are in *some* competitive relationship but it has failed to investigate how intense this competitive relationship is on the French market and whether it can be characterised as high, but imperfect degree of substitutability. Moreover, Indonesia has failed to demonstrate that the dissimilar taxation is linked to the origin of the products and it has not considered the whole group of products. Finally, Indonesia has not demonstrated that the measure is designed so as to afford protection to domestic producers.
153. Given that Indonesia has not demonstrated that the exclusion of palm oil biofuel from the TIRIB reduction is a matter falling within Article III:2 also Indonesia claims under Article I:1 of the GATT 1994 should be rejected. In any event, while Indonesia should have assessed the impact of the regulatory distinction introduced by the TIRIB reduction on the whole group of like products as they are produced by different WTO Members and imported in the EU and notably in France, it concentrated solely on RME, SBME and PME. Indonesia analysis is therefore incapable of demonstrating any violation of Article I:1 of the GATT 1994.

4.3. Indonesia's claims under the SCM Agreement

154. Indonesia has not demonstrated that the TIRIB reduction/exemption is a financial contribution because it has not demonstrated that the Government foregoes revenues otherwise due. Indonesia argues that the general rule under the regime of the TIRIB is the payment of the tax for the release of fuel for consumption without any biofuel, whereas the TIRIB reduction is the exception.
155. However, Indonesia applies an automatic and formalistic "rule/exception test" without taking into account the design, structure and organising principle of the TIRIB. In any event, if one were to identify a "general rule" which reflects the "normal" or "common situation" under the regime of the TIRIB, that would be a situation where the economic operators incorporate a sufficient quantity of "renewable" biofuels so that they are not liable to pay the TIRIB. The exception, is therefore the release in the French market of fuel not containing "renewable" biofuel which triggers payment of the tax. It follows that Indonesia's normative benchmark is incorrect, as the exclusion from the TIRIB reduction is neither the normative benchmark of the TIRIB nor the general rule of taxation, or the common scenario resulting from the organising principles of the TIRIB. It follows that Indonesia has not demonstrated that the TIRIB reduction implies that the government foregoes revenues otherwise due.
156. *Ad abundantiam*, the EU notes that Economic operators incorporating palm oil-based biofuel are not in a situation comparable to that of economic operators incorporating biofuels other than palm oil-based biofuel, as the latter do not contribute in any way to the public interest objectives that the TIRIB pursues. Their respective income is therefore not comparable either. On the other

hand, all taxpayers that incorporate renewable energy and their income are treated the same way, as they will not be liable to pay the TIRIB. Accordingly, because the challenged tax treatment constitutes the normative benchmark (i.e. it is the tax treatment applied to all comparable income of any comparably situated taxpayers and also the general rule of taxation under the TIRIB), the government is not foregoing any revenue that is otherwise due.

157. In any event, Indonesia has not demonstrated that the TIRIB is a specific subsidy as required by Article 2 of the SCM Agreement. Whilst Indonesia's approach to *de jure* specificity presupposes that certain economic operators are excluded from the reduction because they incorporate only a given type of biofuel, Indonesia itself denies this assumption and explains that in reality there is no such a group of enterprises.
158. Indonesia has not demonstrated that the TIRIB reduction is specific to an enterprise or industry since it did not explain what this 'industry' would be, and in any event it recognised that all the enterprises to which the TIRIB applies (economic operators that release fuels for consumption on the French market) are eligible (have access) to the TIRIB exemption, because they all incorporate any type of biofuel. Hence, the TIRIB exemption could not have a broader scope in terms of enterprises that have access to it, as no operator liable to pay the TIRIB is ineligible for the TIRIB exemption. Moreover, Indonesia has not made any effort to assess whether the criteria for determining eligibility and amount of the subsidy comply with Article 2.1(b) of the SCM Agreement. Also, Indonesia's late attempt to demonstrate that the TIRIB reduction would be *de facto* specific is against the Panel's rules of procedure and in any event is unsubstantiated as Indonesia has not presented any argument or fact that could be capable of demonstrating that a subsidy is *de facto* specific.
159. Indonesia failed to demonstrate that the TIRIB is a prohibited subsidy pursuant to Article 3.1(b) of the SCM Agreement, as there is no conditional relationship between the granting of the subsidy and the use of domestic over imported goods. Indonesia's arguments are aimed at showing that the TIRIB reduction may foster the use domestic goods by creating a preference for those goods, but this does not imply the existence of a condition to use domestic over imported goods in order to obtain the subsidy. Indonesia itself admits that French and EU operators are entitled and indeed obtain TIRIB reduction even when they use imported non-palm oil biofuels.
160. Finally, Indonesia has not demonstrated that the TIRIB reduction has caused serious prejudice to Indonesia under Article 6.3(a) and 6.3(c) of the SCM Agreement. Indonesia does not show any displacement, impedance, or a threat thereof, or lost sales for the following reasons.
161. First, Indonesia provides misleading reading of the data by Eurostat and unreliable estimates.
162. Second, the period Indonesia refers to is not appropriately representative. A representative period should comprise a number of years, and no conclusions can be drawn on the impact of the challenged measure from the comparison of one year to the other (all the more so when a uniform trend from one year to the next cannot be identified). Moreover, Indonesia fails to provide any valid forward-looking analysis to show a *threat* of serious prejudice [*US – Large Civil Aircraft (2nd complaint)*].
163. Third, the estimates of overall consumption and imports of biofuel in France were lower in 2020 compared to 2019, hence there was no substitution effect.
164. Fourth, the Indonesian B30 blending mandate and a high POGO spread negatively affected the global exports of palm oil-based biofuel from Indonesia, regardless of the TIRIB reduction. The decreased level of exports of palm oil-based biofuel from Indonesia globally confirms that other factors had a significant impact in the decrease of Indonesian exports to all importing countries.
165. Fifth, a genuine and substantial relationship of cause and effect between the TIRIB reduction and the market phenomena of displacement, impedance, or lost sales has not been established. Moreover, Indonesia has not conducted a proper causation and non-attribution analysis, failing to consider the other factors that have contributed to the alleged occurrence of any claimed

adverse effects. It follows that the TIRIB reduction is not a genuine and substantial cause of the alleged displacement, impedance or threat thereof, and lost sales.

166. The above considerations lead to conclude that Indonesia has failed to demonstrate that the TIRIB reduction is a specific subsidy in the meaning of Article 2 of the SCM Agreement, that it is a prohibited subsidy pursuant to Article 3.1(b) of the SCM Agreement, and that it has caused any serious prejudice under Article 6.3(a) and (c) of the SCM Agreement.

5. CONCLUSION

167. For the reasons set out in the foregoing, the EU requests the Panel to reject all the claims brought by Indonesia against both the EU measures and the French measure.

ANNEX C**ARGUMENTS OF THE THIRD PARTIES**

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ANNEX C-1**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA****I. INTRODUCTION**

1. These proceedings initiated by Indonesia raise significant issues concerning the substantive legal obligations and rights of WTO Members under the Agreement on Technical Barriers to Trade (TBT Agreement) and the General Agreement on Tariffs and Trade 1994 (the GATT 1994). The European Union's (EU) palm oil and oil palm crop-based biofuel measures at issue in this dispute test the boundaries of those rights and obligations

2. Australia's submissions in this dispute have focussed on the proper legal analysis that should be applied under the TBT Agreement and Article XX of the GATT 1994. In particular, Australia has:

- outlined the Panel's active role in examining scientific evidence in the context of the TBT Agreement, and in accordance with its obligations under Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU);
- demonstrated that the obligations under the TBT Agreement should not be interpreted in light of the "precautionary approach";
- set out the correct legal standard for 'trade restrictiveness', 'contribution' and 'less trade restrictive alternatives' under Article 2.2 of the TBT Agreement; and
- highlighted the distinct legal tests for 'necessity' under Articles XX(a) and (b), and 'relates to' under Article XX(g) of the GATT 1994.

II. EVALUATION OF SCIENTIFIC EVIDENCE WITHIN THE CONTEXT OF THE TBT AGREEMENT

3. Article 11 of the DSU provides, in relevant part, that the role of the Panel is to:

make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements

4. Australia submits that in fulfilling this obligation, it is appropriate for a panel to actively consider the extent to which the body of evidence before it, as a whole, provides a reasonable basis in support of the proposition for which it is being invoked.¹ In this assessment, to the extent that scientific evidence is being relied upon, a panel should have regard to 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."²

5. Australia further submits that limitations or the lack of available evidence also has probative value and should be taken into account by a panel.³

III. INTERPRETATION OF THE TBT AGREEMENT**A. THE "PRECAUTIONARY APPROACH"**

6. Australia submits that there is no textual basis in the TBT Agreement to support a 'reading in' of the "precautionary approach" to the obligations for technical regulations, conformity assessment procedures or standards, nor is it necessary to do so to properly decide this dispute. The Appellate

¹ Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.627.

² Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.516.

³ Panel Reports, *Australia – Tobacco Plain Packaging*, paras 7.938 - 7.943.

Body has set out the correct legal tests in relation to the key TBT obligations that are contested in this dispute. As noted below, in relation to Article 2.2, the Appellate Body has held that the assessment of 'necessity' involves consideration of a range of factors, including **the degree of contribution that the technical regulation makes to the achievement of a legitimate objective**.⁴ 'Contribution' should be discerned from the design, structure, and operation of the technical regulation, evidence relating to the application of the measure, as well as any limitations in the evidence.⁵ It should not be merely assumed or 'deemed' to exist through the invocation of the "precautionary approach". To do so would undermine the basic legal standards for a key TBT obligation. This would have systemic implications for the rights and obligations of every WTO Member.⁶

B. ARTICLE 2.2 OF THE TBT AGREEMENT

7. Article 2.2 of the TBT Agreement provides:

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

8. The assessment of 'necessity' in the context of Article 2.2, involves a 'relational analysis' of the following factors: (i) the trade restrictiveness of the technical regulation; (ii) the degree of contribution that the technical regulation makes to the achievement of a legitimate objective; and (iii) the risks non-fulfilment would create.⁷ In most cases, when considering whether a technical regulation is "more trade-restrictive than necessary", a comparison of the challenged measure and possible alternative measures should also be undertaken.⁸

9. The Appellate Body has confirmed that a technical regulation is 'trade restrictive' when it has a limiting effect on international trade.⁹ To determine the extent of 'trade restrictiveness' a panel should examine the structure, design and operation of the measure, as well as take into account all relevant evidence adduced by the parties.¹⁰ Australia does not agree with the EU's suggestion, that in the absence of a complete prevention of market access, the trade restrictiveness of a measure will necessarily be "minimal."¹¹ Further, Australia recalls that the existence of discrimination (in a finding under Article 2.1 of the TBT Agreement) may contribute to the establishment of 'trade restrictiveness' within the meaning of Article 2.2.¹²

10. With regards to the degree of contribution that a technical regulation makes to the achievement of the legitimate objectives, there is no single approach that is suited to conducting this type of analysis in all cases.¹³ In *Australia – Tobacco Plain Packaging* the panel, quoting the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)*, observed that the degree of achievement of a particular objective may be discerned from the design, structure, and operation of the technical

⁴ See e.g., Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.484 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.210).

⁵ See e.g., Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.938 - 7.943 and 7.483 - 7.484 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.210).

⁶ Panel Reports, *Australia – Tobacco Plain Packaging*, paras 7.938 - 7.943

⁷ Appellate Body Reports, *US – COOL*, para. 374 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 318). Restated in Appellate Body Report, *Australia – Tobacco Plain Packaging*, para 6.3.

⁸ Appellate Body Report, *US – Tuna II (Mexico)*, para. 322. See also Appellate Body Reports, *US – COOL*, paras. 374-378; *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.197; and *Australia – Tobacco Plain Packaging*, para 6.4.

⁹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

¹⁰ Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.392-6.393.

¹¹ European Union's First Written Submission, paras 823 - 826.

¹² Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.384-6.386. See also, Appellate Body Report, *US – COOL*, para. 477 (quoting Panel Reports, *US – COOL*, para. 7.574).

¹³ Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.484.

regulation, as well as from evidence relating to the application of the measure.¹⁴ Australia reiterates its previous statements that limitations in, or unavailability of, certain evidence, can have an impact on the nature and extent of the conclusions that may be drawn by a panel in determining a measure's 'degree of contribution'.¹⁵

11. Lastly, in relation to the comparison of the challenged measure and possible alternative measures, Australia recalls that the Appellate Body has stated that:

It would appear incongruous to expect a complainant, under Article 2.2 of the TBT Agreement, to provide detailed information on how a proposed alternative would be implemented by the respondent in practice, and precise and comprehensive estimates of the cost that such implementation would entail.¹⁶

12. In Australia's view, this suggests that the complainant need not provide an extensive or complete evidence-base for establishing that a proposed alternative measure is reasonably available. Rather, it would be more appropriate for the respondent, once a complainant has made a *prima facie* case, to establish that a proposed alternative measure is not reasonably available.¹⁷

C. ARTICLE XX OF THE GATT

13. It is important to note that the specific exceptions listed in paragraphs (a) – (j) of Article XX set different standards for establishing the relationship between the measure at issue and the relevant policy objective. This key distinction was highlighted by the Appellate Body in *US – Gasoline* when it noted:

Article XX uses different terms in respect of different categories: 'necessary' – in paragraphs (a), (b) and (d); 'essential' – in paragraph (j); 'relating to' – in paragraphs (c), (e) and (g); 'for the protection of' – in paragraph (f); 'in pursuance of' – in paragraph (h); and 'involving' – in paragraph (i).

It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.¹⁸

14. In Australia's view, the European Union has improperly sought to combine the legal tests for Articles XX(a) and (b) (i.e. "necessary") and Article XX(g) ("relating to"). Australia submits that the 'necessity' and the "relating to" tests set considerably different legal standards. Reliance upon Articles XX(a) and (b) requires more than the mere establishment of a "close and genuine relationship of ends and means" between the measure at issue and the legitimate policy objectives. It requires the weighing and balancing of a range of factors, and often a comparison with less trade restrictive alternatives, to determine that the measure is actually "necessary" to achieve that objective. In Australia's view, such differing legal standards are distinct and should not be conflated.

IV. CONCLUSION

15. Key considerations for the Panel in this case will relate to the 'necessity' of the European Union's trade restrictive measures. For the reasons discussed above, Australia respectfully submits that the Panel follow the existing established legal analysis for 'necessity' that has been developed by the Appellate Body in the interpretation of the TBT Agreement and the GATT 1994

¹⁴ Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.484 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.210).

¹⁵ Panel Reports, *Australia – Tobacco Plain Packaging*, paras 7.938 - 7.943.

¹⁶ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para 5.338

¹⁷ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para 5.338.

¹⁸ Appellate Body Report, *US – Gasoline*, paras. 17 – 18.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. INTRODUCTION

- 1 Brazil provides the following executive summary of its participation during the panel proceedings in this dispute.

II. ARGUMENTS

A. The European Union's concept of ILUC, as set out in RED II and in the Delegated Regulation, is not an adequate parameter for the imposition of trade restrictive measures

- 2 Both the high ILUC-risk cap and phase-out and the 7% limitation are underpinned by the concept of ILUC, as defined and applied by the European Union, and its alleged environmental impacts.
- 3 Should the Panel find the European Union's concept of ILUC, in and of itself, to be an acceptable standard for the imposition of trade restrictive measures, Brazil submits that it is the European Union's burden to demonstrate that the requirements and restrictions imposed by the challenged measures reflect an accurate and verifiable estimation of ILUC GHG emissions, both with respect to biofuels made from feed and food crops, in general, and to individual crops, in particular. The European Union has failed to meet this burden.

(i) The European Union's concept of ILUC, the 7% limitation and the high ILUC-risk cap and phase out

- 4 Brazil considers that the European Union was unable to provide a satisfactory justification as to how it arrived at the 7% limitation in light of its self-declared goal of minimizing overall ILUC emissions. There is simply no evidence to demonstrate that the chosen percentage for the limitation is adequate in any way. In fact, the very report which was commissioned to review the policy's effectiveness yielded inconclusive results and stressed the large degree of uncertainty related to the quantification of ILUC emissions.
- 5 Additionally, the lack of clarity regarding the choice of the 7% figure makes it impossible to assess (i) its adequacy in light of its objectives (ii) and its capacity to contribute to the stated goal. Therefore, while the 7% limitation allegedly aims to minimize overall ILUC impacts, the European Union has failed to demonstrate that its policy makes an actual contribution to its stated objective.
- 6 With regard to the high ILUC-risk cap and phase-out, Brazil considers that the criteria set out in Article 26(2) of RED II and in Article 3 of the Delegated Regulation are inadequate because: (i) they are incapable of accurately attributing ILUC effects to individual feedstock and (ii) they fail to incorporate relevant factors expressly mentioned in its preamble, such as the demand for biofuel triggered by the European Union's renewable energy policy.
- 7 Finally, Brazil takes issue with the European Union's choice of the 10% threshold for the determination of a supposed high risk of ILUC. The model applied by the European Union seems to work under the unrealistic assumption that, whenever feedstock is grown for the production of biofuel: (i) it is grown in an area that was previously *entirely* destined for food and feed markets; and (ii) the *entirety* of that area is replaced through agricultural expansion, by bringing *non-agricultural land* into production elsewhere.

B. The 7% limitation and the high ILUC-risk cap and phase out are not in conformity with Article 2.2 of the TBT Agreement, and the low ILUC-risk certification may not be in conformity with Article 5.1.2 of the TBT Agreement, if applicable.

- 8 Brazil considers that the challenged measures are not in conformity with Article 2.2 of the TBT Agreement, if applicable. This is because the European Union has failed to demonstrate that the challenged measures actually make a contribution to the goal of reducing overall GHG emissions. Additionally, Brazil submits that the challenged measures are more trade restrictive than necessary, because they are based on drastic and unsubstantiated assumptions regarding biofuel production and land use change, that find no basis on scientific evidence.
- 9 With regard to the low ILUC-risk certification, Brazil notes that, in claims under Article 5.1.2 of the TBT Agreement, it is the complainant's burden to provide examples of alternative manners of applying conformity assessment procedures that are less strict and reasonably available to the importing member, while giving an equivalent contribution to the objectives of providing the importing Member with adequate confidence of conformity.

C. The challenged measures cannot be justified under the general exceptions of Article XX of the GATT 1994.

- 10 By purporting to raise a "composite" defense involving the exceptions of Article XX(a), (b) and (g), the European Union is not relieved from the burden of justifying its measures under each of those provisions. A proper interpretation of Article XX requires an individual analysis of each subparagraph, as well as the chapeau, taking into consideration one policy objective at a time.
- 11 While the European Union has stated a list of alleged objectives for applying the high ILUC-risk cap and phase out, Brazil understands that, from the design and structure of RED II and of the Delegated Regulation, the high ILUC-risk cap and phase out seem to rely *exclusively* on GHG emissions as a parameter for the imposition of trade restrictions. Although the European Union enunciates the preservation of biodiversity as another objective of those measures, it fails to demonstrate their effective connection with that alleged objective. This seems to be confirmed by the fact that both RED II and the Delegated Regulation define the types of land over which agricultural expansion would result in high ILUC risk not in terms of biodiversity, but in terms of the carbon stock attributable to that land.

(i) Articles XX (a) and (b) of the GATT 1994

- 12 Beyond stating objectives, the European Union does not appear to have shown that the high ILUC-risk cap and phase out are *necessary* for the protection of public morals or for the protection of human, animal or plant life or health.
- 13 On the one hand, the *level of contribution* of the challenged measure to its objective cannot be observed or measured. In fact, there seems to be no scientific evidence to support the assumption that the supposed ILUC-related GHG emissions targeted by the high ILUC-risk cap and phase out surpass the GHG emission savings that would be achieved in the absence of the measure.
- 14 Moreover, the attempt by the European Union to justify the 10% limit on the expansion of feedstock into land with high-carbon stock is insufficient, as it is underpinned by drastic assumptions regarding biofuel production, with no basis on scientific evidence. The model proposed in Article 3(b) of the Delegated Regulation is also inadequate to estimate the ILUC risk attributable to individual crops as a result of their repurposing to the production of biofuels.
- 15 On the other hand, the *trade restrictiveness* of the high ILUC-risk cap and phase out is very high, as it results in a gradual reduction and eventual *de facto* prohibition of the use of biofuels made from crops classified as having a high ILUC risk. Alternative measures based on observable parameters are available to the European Union, such as the sustainability criteria set out in Article 29(2)-(7) and the GHG emission savings criteria in Article 29(19) of RED II.
- 16 In light of the foregoing, the European Union has failed to demonstrate that the high ILUC-risk cap and phase out can be qualified as necessary for the protection of human, animal and plant life or health in the terms of literal (b) of Article XX of the GATT 1994. For similar reasons, the European Union has failed to demonstrate that the challenged measure is necessary for the protection of public morals within the meaning of Article XX(a) of the GATT 1994.

(ii) Article XX(g) of the GATT 1994

- 17 With regard to the European Union's defense that the ILUC-risk cap and phase out are justified under Article XX(g) of the GATT 1994, Brazil cited findings by the Appellate Body in *US – Shrimp* as an example of the standard that should inform the assessment of a claim that a measure is justified under Article XX(g). The measures at issue in this dispute, insofar as they rely on the European Union's concept of ILUC, fail to meet that standard: the challenged measures appear to be "disproportionately wide in [their] scope and reach in relation to the policy objective of protection and conservation", and the "means and ends relationship" seems to fall short of being "observably a close and real one"¹
- 18 The reasoning provided by the European Union to demonstrate that the high ILUC-risk cap and phase out are related to the conservation of "a certain global temperature" is based on unsupported assumptions regarding biofuel production and on a simplistic model to determine crop-specific ILUC risk. Moreover, the high ILUC-risk cap and phase out operate on the unsupported assumption that the ILUC-related GHG emission savings they allegedly promote are superior to the GHG emission savings that would be achieved by the increased consumption of biofuels likely to occur in the absence of the limitation.
- 19 For these reasons, the Panel should find that the high ILUC-risk cap and phase out cannot be justified under Article XX(g) of the GATT 1994. This measure is "disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation".² It does not bear a "close, genuine and substantial relationship" to the conservation objective professed by the European Union.³ Thus, it does not qualify as a measure "relating to the conservation of exhaustible natural resources" under Article XX(g).

(iii) Chapeau of Article XX of the GATT 1994

- 20 Brazil submits that the high ILUC-risk and phase out constitute disguised restrictions on international trade under the chapeau of Article XX of the GATT 1994. This is because, (i) by electing to target ILUC-related GHG emissions specifically; and (ii) by adopting a formula for the designation of supposed high ILUC-risk crops that arbitrarily leaves out relevant factors, the European Union is operating a disguised restriction on the trade of biofuels produced from certain feedstock. Additionally, (iii) the low ILUC-risk certification procedure constitutes a disguised restriction on international trade by imposing arbitrary and unjustifiable criteria on producers seeking certification.
- 21 In fact, the choice of the European Union to target supposed ILUC-related GHG emissions, specifically, creates arbitrary and unjustifiable restrictions for the consumption of biofuels made from certain feedstock, based on alleged emissions that cannot be observed nor accurately estimated. The existence of alternative and more reliable criteria for the attribution of GHG emissions to specific biofuels, which could have been reasonably employed, should be considered not only in the Panel's analysis of necessity under literals (a) and (b) of Article XX of the GATT 1994, but also in the analysis of whether the challenged measure constitutes a disguised restriction on international trade in the terms of the chapeau of Article XX. Such alternative more reliable criteria include, but are not limited to, ISO standards and sustainability requirements.
- 22 As a second argument, Brazil considers that the formula set out in Article 3(b) of the Delegated Regulation deliberately leaves out a number of relevant factors that would undoubtedly influence its results, and its application amounts to unjustifiable restrictions in the consumption of certain biofuels. Specifically, the European Union's reliance on the formula in Article 3(b) of the Delegated Regulation appears to flow from the unsupported assumption that the entirety of the expansion into areas of high-carbon stock of a given crop results from the repurposing of that same crop to the production of biofuels. Moreover, the model introduced by the Delegated Regulation deliberately leaves out relevant factors, such as the demand for biofuel triggered by the European Union's renewable energy policy. Finally, there is no mechanism in the proposed formula to avoid the attribution to ILUC of land expansion provoked by other causes, such as

¹ Appellate Body Report, *US – Shrimp*, para. 141.

² Appellate Body Report, *US – Shrimp*, para. 141.

³ Appellate Body Report, *China – Rare Earths*, para 5.117.

demographic growth, subsistence farming, customer preferences, weather conditions and price fluctuations.

(a) Low ILUC-risk certification

- 23 As final argument, Brazil submits that the low ILUC-risk certification procedure is applied in a manner that constitutes a disguised restriction on international trade for at least three reasons: (i) the criteria used to grant low ILUC-risk certification seem to be disconnected from the concept of ILUC as defined in Recital 81 of the Preamble to RED II; (ii) the additionality criteria set out in Article 4(b), read together with Recital 13 of the Preamble to the Delegated Regulation, are arbitrary; and (iii) the three pathways provided for in Articles 5(a)(i), (ii) and (iii) are impractical and disproportionately restrictive.
- 24 First, the requirements set out in the Delegated Regulation for obtaining a low ILUC-risk certification seem to be exclusively linked to additionality measures, and thus do not allow producers to demonstrate that their crops did not cause ILUC as defined in Recital 81 of the Preamble to RED II.
- 25 As a second issue, the additionality criteria set out in Article 4(b) of the Delegated Regulation, read together with Recital 13 of the Preamble to RED II, is disproportionately restrictive in light of its objective and excessively burdensome on producers seeking certification. This is because, the requirement that only production exceeding the dynamic yield baseline for a property to be eligible for low ILUC-risk certification is based on unsupported assumptions on biofuel production and creates an undue evidentiary burden for applicants.
- 26 Finally, Brazil requests that the Panel examine whether the three "additionality pathways" set out in Articles 5(a)(i), (ii) and (iii) of the Delegated Regulation are applied in a manner that constitutes a disguised restriction on international trade. Each of the pathways seems to present requirements that are unjustifiable and arbitrary in light of the goal of preventing the certification of biofuel that led to ILUC into land with high carbon stock.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. ARTICLE 2.1 OF THE TBT AGREEMENT

A. The meaning of "less favourable treatment" under Article 2.1 of the TBT Agreement

1. The United States has argued that Article 2.1 of the TBT Agreement is directed at controlling only origin-based discrimination¹. In Canada's view, the non-discrimination obligation in Article 2.1 is intended to capture situations where imported products that are "like" domestic products face inequality of competitive conditions, *regardless of whether it is origin-based or not*.

2. The interpretive approach proposed by the US would amount to a return to the "aim and effects" test from the GATT era – an inquiry into whether the product distinction in question had the "aim" of protecting domestic industry, and whether that product distinction had the "effect" of protecting the domestic industry². This approach has consistently been rejected by panels and the Appellate Body³ in favour of an objective analysis that looks to the properties, nature, quality, end-uses, and tariff classifications of the products at issue⁴.

3. Contrary to what the US asserts, the Appellate Body's findings in *US – COOL* do not "collapse" the obligations in Articles 2.1 and 2.2 and *do not* combine restrictive interpretations of each provision into a single test under Article 2.1⁵. These tests remain distinct, with Article 2.1 focused on the discriminatory aspects of the measure, and Article 2.2 concerned with the necessity of the measure's trade restrictiveness. The only connection between the two obligations is the identification of the legitimate objective being pursued.

4. Canada agrees that the balance to be struck "between, on the one hand, the pursuit of trade liberalization and, on the other hand, Members' right to regulate"⁶ is important. However, Canada considers that the appropriate way to strike this balance has already been considered by the Appellate Body, which recognized this in *US – Clove Cigarettes* through the LRD test. Canada views this test as a reasonable, practical way of reconciling these objectives, that is firmly rooted in accepted principles of treaty interpretation, and Canada can see no cogent reason for the Panel in this dispute to depart from previous panel and Appellate Body reports that have carefully considered this issue.

B. The universe of "like products" may differ under Article 2.1 of the TBT Agreement and Article 5.1.1 of the TBT Agreement

5. Article 2.1 of the TBT Agreement is concerned with discriminatory treatment in the context of *products that are on the market*. The purpose of assessing whether a group of products are "like" under Article 2.1 is to determine whether a measure results in less favourable treatment by modifying the conditions of competition to the detriment of imported "like" products.

¹ United States' third party submission, para. 12.

² Panel Report, *United States–Taxes on Automobiles*, paras. 5.9-5.10.

³ See Appellate Body Report, *US – Clove Cigarettes*, at fn 372, where the Appellate Body expressly rejected the United States' argument that a panel must examine whether detrimental impacts are related to the foreign origin of the products or explained by other factors or circumstances.

⁴ See, for example, Appellate Body Reports in *US – Tuna II (Mexico)*, para. 215; and in *US – COOL*, para. 271.

⁵ United States' third party submission, para. 18.

⁶ Appellate Body Report, *US – Clove Cigarettes*, para. 109.

6. In contrast, Article 5.1.1 disciplines discriminatory treatment of a *supplier's access to a conformity assessment procedure*⁷. As confirmed by the panel in *Russia-Railway Equipment*, the obligations under this provision attach to the suppliers of products as opposed to the product itself⁸.

7. Therefore, while the analytical approach for determining likeness under the two provisions is the same, the product scope, or "universe" of products to be compared, may be different⁹. If a positive assurance of conformity with a technical regulation or standard is required, then the relevant comparator group under Article 5.1.1 is "like products" *for which assurance of conformity is required*.

C. The different scope of the non-discrimination obligations under Article 2.1 and Article 5.1.1 of the TBT Agreement

8. Indonesia argues that the EU's conformity assessment procedure¹⁰ governing low ILUC-risk certification is inconsistent with Article 5.1.1 of the TBT Agreement¹¹ because suppliers of other oil crop-based biofuels do not need to access a conformity assessment procedure to be eligible for the 7% contribution limit¹². This is an argument that the EU is discriminating between products that are subject to the CAP, and those that are not. Canada views this kind of discrimination claim as beyond the scope of Article 5.1.1.

9. If Indonesia is concerned with potentially differential treatment afforded to products because they are *not subject to the CAP at all*, then such a claim should not be brought under Article 5.1.1, but rather under Article 2.1 of the TBT Agreement and/or Article III:4 of the GATT 1994. These are the provisions that discipline measures that modify the conditions of competition to the detriment of imported products as compared to like domestic or other origin products¹³.

D. The Panel's role in determining the relevant "like products" under Article 2.1 of the TBT Agreement

10. Under Article 2.1 of the TBT Agreement, a complaining Member must set out what it considers to be the relevant group of comparator products in order for the panel to assess whether the measure at issue accords less favourable treatment to imported products than to like domestic or other origin products. However, a panel is not bound by the assessment of the complaining member; it remains both necessary and appropriate for *the panel itself* 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 [Article 2.1]"¹⁴.

11. This is consistent with the Panel's mandate under the Dispute Settlement Understanding to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements"¹⁵.

II. RELATIONSHIP BETWEEN GATT ARTICLE III:4 AND ARTICLE XI:1

12. In determining whether Article XI:1 is also applicable to the measure at issue, the Panel must focus on whether the measure, or an aspect of it, is by nature a measure that has a limiting effect on the importation of palm oil. In Canada's view, it is not evident from the design, content, or architecture of the high ILUC-risk cap and phase out, or from the explanation provided, that it is also a measure governed by Article XI:1. These factors indicate that the measure is imposed to

⁷ See the text of Article 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" (emphasis added).

⁸ Panel Report, *Russia-Railway Equipment*, para. 5.122.

⁹ European Union's first written submission, para. 958.

¹⁰ Canada takes no position on whether the EU's measure can properly be characterized as such.

¹¹ Indonesia's first written submission, para. 881.

¹² Indonesia's first written submission, para. 909.

¹³ Appellate Body Reports, *US – Clove Cigarettes*, paras. 179-180; *US – Tuna II (Mexico)*, paras. 214-215; and *US – COOL*, paras. 268-269.

¹⁴ Appellate Body Report, *US – Clove Cigarettes*, para. 191.

¹⁵ Article 11 of the DSU (emphasis added).

regulate biofuel in the EU's internal market, rather than to restrict the quantity of palm oil imported into the EU.

13. An internal measure that has a detrimental impact on competitive opportunities for imported products could have a limiting effect on the quantity imported. However, it is not sufficient to point to the detrimental impact on competitive opportunities for imported products to demonstrate that the internal measure covered by Article III:4 is also governed by Article XI:1. It must be shown how the measure, or an aspect of it, is by nature also a measure that operates to impose a restriction on importation. A "restriction" in this context would not include a reduction in demand for an imported product.

III. GATT ARTICLE XX

A. The importance of maintaining distinct legal tests for Articles XX(a), (b) and (g) in the GATT 1994

14. The EU contends that the legal tests under these subparagraphs of Article XX of the GATT 1994 "are *in practice* very similar"¹⁶. Based on this conclusion, the EU appears to propose an aggregate test in the first stage of the two-step Article XX analysis that focuses on whether a disputed measure is "rational and reasonable in both its design and application"¹⁷.

15. While a measure, such as a measure designed to respond to the climate crisis, may pursue a variety of the objectives described in the paragraphs of GATT Article XX, Canada disagrees with an approach that would conflate the legal tests under these paragraphs.

16. Under paragraph (g), "relating to" requires a close relationship of ends and means. While "necessity" under (b) also requires a genuine relationship between ends and means, this relationship is just *one part* of the overall "necessity" test. This makes the "necessity" test under (b) distinct from (g) despite the common element of a close and genuine relationship between means and ends. Since these tests require a Member to demonstrate different things, it follows that they should not be collapsed into a single "rational and reasonable" test that would eliminate this distinction¹⁸.

17. If a panel were to decide to collapse the different tests under Article XX, doing so would not only mark a significant departure from prior panel and Appellate Body findings¹⁹, but would effectively undermine the specific language Members chose to include in the text of Article XX. If a Member wishes to avail itself of multiple paragraphs under Article XX to defend its measures, *then it is currently able to do so*. That Member must demonstrate that the required elements under each paragraph have individually been met. The crosscutting nature of a measure does not change this.

B. The issue of a territorial or jurisdictional limitation in Article XX of the GATT 1994

18. Canada emphasizes that the question of whether Article XX can be relied upon to address concerns that lack a sufficient nexus with the invoking Member has not been explicitly considered by a panel nor the Appellate Body to date²⁰. Canada strongly cautions this panel against adopting

¹⁶ European Union's first written submission, para. 1249 (emphasis original).

¹⁷ Ibid., para. 1252.

¹⁸ See FN 147 in *Korea - Various Measures on Beef*, where the Appellate Body made this comment: "We recall that we have twice interpreted Article XX(g), which requires a measure *"relating to the conservation of exhaustible natural resources"* (emphasis added). **This requirement is more flexible textually than the "necessity" requirement found in Article XX(d).** We note that, under the more flexible "relating to" standard of Article XX(g), we accepted in *US - Gasoline* a measure because it presented a *"substantial relationship"*, (emphasis added) i.e., a close and genuine relationship of ends and means, with the conservation of clean air. In *US - Shrimp* we accepted a measure because it was "reasonably related" to the protection and conservation of sea turtles (bolded emphasis added; original footnotes omitted).

¹⁹ Ibid. See also Appellate Body Report, *US - Gasoline*, p. 18, where the Appellate Body noted that the different words in each paragraph were chosen for a reason, and that it "does not seem reasonable" to assume that "in respect of each and every category, the same kind or degree of connection or relationship [is required] between the measure under appraisal and the state interest or policy sought to be promoted or realized."

²⁰ See Appellate Body Report, *EC - Seal Products*, at para 5.173, where the Appellate Body emphasized the systemic importance of determining the jurisdictional limitations of Article XX, but did not explore the issue because it was not raised by the disputing parties. See also Appellate Body Report, *US - Shrimp*, para. 133,

an interpretation that would establish a blanket jurisdictional limitation in all paragraphs under Article XX, given the sweeping systemic implications of such an interpretation for the rights and obligations of all WTO Members.

IV. THE APPROPRIATE LEGAL TEST GOVERNING IMPORT SUBSTITUTION CONTINGENCY UNDER ARTICLE 3.1(B) OF THE SCM AGREEMENT

19. Indonesia raises claims under the *SCM Agreement* only with respect to the French biofuel tax reduction. Indonesia argues that the French biofuel tax reduction is a subsidy that is *de facto* contingent on the use of domestic oil crop-based biofuel over imported oil palm crop-based biofuel, because it creates a preference for the use of the former over the latter²¹.

20. In Canada's view, the effects of domestic production subsidies, including effects that may result in increased use of domestic goods at the expense of imports cannot be used as a legal standard by the Panel to determine whether the French biofuel tax reduction is a prohibited import substitution subsidy within the meaning of Article 3.1(b).

21. Consistent with the legal standard outlined by the Appellate Body in *US – Tax Incentives*²² and *EC and certain member States – Large Civil Aircraft*²³ for import substitution contingency under Article 3.1(b), the Panel should inquire as to whether the granting of the French biofuel tax reduction is conditional upon the use of domestic over imported goods, and not whether the granting of the French biofuel tax reduction results in an increased use of domestic goods. In other words, for the Panel to find that the measure violates Article 3.1(b), it must observe a conditionality relationship – and not a causal relationship – between the measure and the use of domestic over imported products. Therefore, the Panel's analysis under Article 3.1(b) should focus on the conditions of the measure rather than its effects.

22. Based on the foregoing, Canada invites the Panel to carefully examine the terms, design, structure and operation of the French biofuel tax reduction and the relevant factual circumstances to determine whether a condition requiring the use of domestic over imported goods can be discerned from all the relevant evidence.

where the Appellate Body had an opportunity to address the jurisdictional scope of Article XX (g) but did not do so since, on the facts of that particular dispute, sea turtles were known to swim through US waters and this fact established a "sufficient nexus" between the sea turtles and the United States.

²¹ Indonesia's first written submission, paras. 1352 and 1358.

²² Appellate Body Report, *US – Tax Incentives*, paras. 5.12, 5.14 and 5.15.

²³ Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1046; *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.63.

ANNEX C-4**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA****I. INTRODUCTION**

1. The Republic of Colombia ("Colombia") has a substantial interest in these proceedings since the palm sector forms a significant part of the country's agricultural industry, accounting for almost the entire oilseed sector and 17.8% of Colombia's total cultivated land area. Moreover, Colombia's crude palm oil is mainly exported to the European Union, in particular, the Netherlands (32%), Spain (21%), and Germany (6.3%).
2. Colombia recognizes Members' sovereign right to implement measures for the legitimate objective of protecting the environment, subject, at a minimum, to the requirement that these measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or are a disguised restriction on international trade.
3. In this case, however, Colombia agrees with the Republic of Indonesia ("Indonesia") that the challenged measures adopted by the European Union ("EU") discriminate against palm oil and oil palm crop-based biofuels and are a disguised restriction on international trade, thereby breaching the EU's multilateral obligations and nullifying and impairing the WTO rights of Indonesia, Malaysia, Colombia, and other Members.

II. LEGAL GROUNDS**1. The challenged measures are inconsistent with article I:1 of the GATT 1994**

4. Colombia agrees with the analysis undertaken by Indonesia under the most favored nation ("MFN") clause in Article I:1 of the GATT 1994 regarding the discrimination between soybean oil-based biofuel and rapeseed oil-based biofuel (*first generation*) imported from the EU's trading partners and oil palm crop-based biofuel imported from Indonesia.¹
5. However, Colombia respectfully submits that there is a further MFN violation arising out of the differential treatment accorded to oil palm crop-based biofuel that ought to be able to obtain a low ILUC risk certification but which, in practice, will not likely obtain such certification as a result of the design of the certification scheme (certified oil palm crop-based biofuel vs. not certified oil palm crop-based biofuel). For instance, Colombian palm oil farmers have only a remote chance of obtaining the certification and, at most, for only a limited amount of palm oil utilizing the additionality criteria.
6. Colombia submits that a "one-size-fits-all" approach to the palm oil industry does not account for the significant distinctions between palm oil industries of different WTO Members, which have proven differences in terms of environmental impact. Colombia has an agricultural frontier of more than 39 million hectares, of which is currently only uses just under 8 million hectares. This means that Colombia has extensive lands that are not currently being exploited for agricultural purposes and that could be made productive without any deforestation and without generating any of the perceived GHG or other negative effects of ILUC. In these circumstances, the ILUC criterion cannot and should not be generalized or, much less, be circumscribed to a single commodity. For the reasons just explained, palm oil in Colombia is sustainable and ILUC-free. Thus, it should not be *ex-ante* discriminated against by the challenged measures.²

¹ First Written Submission of Indonesia, paras. 1134-1172.

² Rangel, Alfredo. Conflict, Myths and Realities. available at: <https://web.fedepalma.org/sites/all/themes/rspo/publicaciones/sociales/Oil-palm-in-Colombia-myths-and-realities.pdf>

7. Lastly, Colombia does not share the EU's position that Indonesia's claim under Article I:1 of the GATT 1994, concerning the existence of an advantage, is flawed.³ Colombia submits that a *de iure* advantage is accorded to certain biofuels in the form of the ability to be considered for the calculation of the final consumption of renewable energy (Directive 2018/2001) and in the form of a certification scheme available for only certain biofuels and oil-crops (Delegated Act).

2. The challenged measures are inconsistent with article III:4 of the GATT 1994

8. Article III:4 of the GATT 1994 contains the obligation of national treatment ("NT") concerning internal regulations, prohibiting discrimination against imported products *vis-à-vis* similar domestic products. Three conditions must be met for a measure to be considered inconsistent with Article III:4, namely:⁴ (a) imported products and products of national origin shall be "like products"; (b) the measure at issue shall be a law, regulation, or requirement that affects the internal sale, offering for sale, purchase, transportation, distribution, or use of products in the domestic market; and (c) imported products shall be accorded "less favorable treatment" than that accorded to domestic products, implying a modification in the conditions of competition in the relevant market to the detriment of imported products.⁵
9. **First**, concerning the likeness analysis, the challenged measures *de iure* differentiate between *oil palm crop-based* biofuel and *other oil crop-based* biofuels (e.g., those made out of rapeseed, sunflower, and soybean oil). Colombia considers that palm oil crop-based biofuels are "like" other oil crop-based biofuels. These biofuels have similar physical characteristics, regardless of the crop used as a raw material for their production (First Written Submission of Indonesia, paras. 486-490), share the same end-use as a transport fuel (First Written Submission of Indonesia, paras. 491-494), and have the same tariff classification (382600). From the perspective of consumers, biofuels made out of different crops are *substitutable*, especially considering that the demand for biofuels in the EU does not reveal any preference for a particular type of oil crop used as raw material. Economic operators producing diesel blends are not concerned about the type of oil crop feedstock used in the blend (First Written Submission of Indonesia, paras. 495-501). Therefore, there is a clear cross-elasticity in demand for the two products.
10. **Second**, the challenged measures –part of an intricate web of different legally binding instruments– are regulations affecting the sale and purchase of biofuels and are, thus, covered by Article III:4 of the GATT 1994 (First Written Submission of Indonesia, paras. 1180-1181).
11. **Third**, concerning the less favorable treatment, Colombia identifies a *de iure* less favorable treatment of *oil palm crop-based* biofuel (imported) than the treatment accorded to *oil crop-based* biofuels made out of rapeseed, sunflower and soybean oil (locally produced).⁶ Under the challenged measures, first-generation biofuels with a high risk of causing ILUC will gradually reduce their contribution to the renewable energy share to 0% in 2030. While *oil palm crop-based* biofuel is categorized as having high ILUC risk, rapeseed oil, sunflower oil, and soybean oil-based biofuels are not so categorized. Due to this distinction, these products do not enjoy *effective equality of competitive opportunities* in the EU market.

3. The challenged measures are not justified under article XX of the GATT 1994

12. In its First Written Submission, the EU sought to justify the challenged measures under Article XX (a), (b), and (g) of the GATT 1994.⁷ Colombia also considers that the challenged measures cannot be justified under Articles XX (a), (b), or (g) of the GATT 1994, as they do not, in fact, further the environmental purposes on which the EU relies.

³ First Written Submission of the European Union, para. 1102.

⁴ Appellate Body Report, *Korea - Various Measures Affecting Beef*, para. 133.

⁵ Appellate Body Report, *Korea - Various Measures Affecting Beef*, para. 137; Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 7.196.

⁶ Index Mundi, European Union Rapeseed Production by year, available at: <https://www.indexmundi.com/agriculture/?country=eu&commodity=rapeseed-oil&graph=production>; Index Mundi, European Union Soybean Oilseed Production by year

<https://www.indexmundi.com/agriculture/?country=eu&commodity=soybean-oilseed&graph=production>

⁷ First Written Submission of the European Union, para. 1331.

13. Two conditions must be satisfied for a measure to be justified under Article XX. First, the measure must meet the specific requirements of at least one of the ten exceptions provided in paragraphs (a) to (j) of Article XX. Second, the measure must fulfill the requirements outlined in Article XX's *chapeau*.⁸
14. First, concerning the necessity test in paragraphs (a) and (b) Article XX, Colombia respectfully submits that the Panel should find that the measures do not contribute to the objectives pursued by the EU. This applies particularly to the EU's position that the measures at issue were designed to bolster sustainable crops.
15. The EU has alleged that the measures make a material contribution to the pursued objectives, as there are scientific grounds for supporting the EU's biofuels regime. These stated grounds are (i) biofuels may contribute to lower GHG emissions; (ii) there is a link between biofuel production and land-use change, whereas land-use change resulting from increased biofuel production causes GHG emissions; (iii) that the type of land associated with ILUC has an impact on the level of GHG emissions associated with transforming it to crop cultivation, and iv) that ILUC has adverse impacts on the environment and causes biodiversity loss.⁹
16. Nevertheless, the EU does not present any conclusive evidence of these alleged contributions. The ILUC Production Expansion Report relies on data from 1989 to 2013 (which indicates a 45% expansion into land in 1989). However, the Report does not establish the extent to which it reflects current rates of ILUC. Moreover, in Article 3 of the Delegated Act, the relevant expansion area to determine high ILUC risk is "the global production area,"¹⁰ and the Production Expansion Report's conclusion of 45% expansion is assessed "globally."¹¹ Even if the historical link between ILUC and palm oil is currently relevant, this is not dispositive that such a link exists in Indonesia. Thus, the measures' expected contribution is overestimated, either as a general matter regarding all WTO Members that produce palm oil or regarding palm oil produced in Indonesia.
17. Concerning the necessity test in paragraph (g) Article XX, it must be examined whether a measure is "related to" the conservation of exhaustible natural resources within that Member's territory, and not whether it is "necessary" for the protection of such value. The Appellate Body has summarized such an analysis as entailing the consideration of whether the measure at issue has "a close and genuine relationship of ends and means to the conservation of exhaustible natural resources when such trade measures are brought into operation, adopted, or applied and 'work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource.'"¹²
18. In this context, Colombia respectfully requests the Panel to assess whether the measures at issue work together with restrictions on domestic production or consumption in order to find whether they operate to conserve an exhaustible natural resource.
19. Second, regarding the *chapeau* to Article XX of the GATT 1994, the Appellate Body has divided the legal standard of the *chapeau* into its constituent parts: (i) the measure's application must result in discrimination; (ii) that discrimination must be arbitrary or unjustifiable; (iii) the discrimination must occur between Members where the same conditions prevail.¹³
20. Contrary to the *chapeau* of Article XX of the GATT 1994, the challenged measures arbitrarily and unjustifiably discriminate between countries where the same conditions prevail. In the context of the *chapeau*, the EU is discriminating between biofuel-supplying countries based on a general global study with respect to the association between palm oil and ILUC, regardless of the connection between a given palm oil consignment and ILUC, ignoring whether the supplying country maintains measures that address ILUC (either through limitations on land clearing, or GHG mitigation), and disregarding the different characteristics of palm oil production in the

⁸ Appellate Body Report, *US - Gasoline*, page 22, and Panel Report, *Brazil - Retreaded Tyres*, para. 139.

⁹ First Written Submission of the European Union, para. 1306.

¹⁰ Article 4 of Delegated Regulation.

¹¹ ILUC Production Expansion Report, at. 8.

¹² Appellate Body Report, *China - Rare Earths*, para. 5.94.

¹³ Appellate Body Report, *US - Shrimp*, paras. 150.

territories of different WTO Members. Thus, feed crops exported by certain WTO Members are associated with an unacceptable risk of ILUC but are not targeted by the EU's measures.

4. The challenged measures are in breach of article 2.1 of the TBT agreement

21. Case law has established that the elements for a violation of Article 2.1 of the TBT Agreement are: (i) that the measure is a "technical regulation"; (ii) that imported products and national products or those of any other country are "like products"; and (iii) that imported products be granted "less favorable treatment" than that granted to similar products of national origin or of any other country.¹⁴
22. **Concerning whether a measure is a "technical regulation,"** the Appellate Body has noted that three criteria must be satisfied for a measure to be considered a technical regulation, namely: (i) the measure applies to an identifiable product or group of products; (ii) the measure establishes characteristics of the product or the processes and production methods related to them; and (iii) compliance with the characteristics is mandatory.¹⁵
23. Colombia considers that Article 26.2 and its Delegated Act would qualify as a "technical regulation" because they establish characteristics of the products (their raw materials) and would therefore fall under the TBT Agreement. As the challenged measures meet the three requirements necessary to constitute a "technical regulation," Colombia's position is in line with Indonesia's considerations (First Written Submission of Indonesia, paras. 403 and subsequent). The measures apply to a specific product (*i.e.*, biofuel), negatively establish its characteristics (*i.e.*, it cannot be produced from palm oil crops), and its observance is mandatory (*i.e.*, the characteristic shall be met to be able to consider biofuel as renewable energy without any limitation). Therefore, the measures – and in particular the arbitrary 7% maximum quota – fall within the purview of Annex 1.1 to the TBT Agreement and are, thus, subject to the TBT Agreement's disciplines.
24. **Concerning the question of whether compared products are "like,"** previous decisions have stated that, under Article 2.1 of the TBT Agreement, the same four criteria of similarity that have traditionally been used under Article III: 4 of the GATT 1994 can be applied, namely: (i) the properties, nature, and quality of the products; (ii) its end uses; (iii) the habits and preferences of consumers; and (iv) the tariff classification.¹⁶ It is essentially about determining the extent to which two products are in a "competitive relationship" in a given market.¹⁷
25. For the same reasons outlined above in the analysis under the GATT 1994, Colombia submits that first-generation biofuels from palm oil crops and other crops, such as rapeseed and soybean, are "like products" as they are in a *competitive relationship*.
26. **Concerning the question on the "less favorable treatment,"** the Appellate Body has noted that an analysis under Article 2.1 of the TBT Agreement involves assessing whether the technical Regulation in question modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of imported similar products of national origin or any other country.¹⁸
27. Colombia notes that Article 26.1 of Directive 2018/2001 establishes a *de iure* discrimination against oil palm crop-based biofuels. This discrimination consists of palm oil being characterized *ex-ante* as having a high ILUC risk (which is not locally produced in the EU), *favoring* products such as rapeseed oil-based and soybean oil-based biofuels (which are produced in the EU as well as in the territories of certain EU preferential trading partners). In particular, as crop-based biofuels will not count as renewable energy to achieve the EU's fixed targets, the demand for

¹⁴ Panel Report, *EC - Trademarks and Geographical Indications (Australia)*, para. 7,444. See also panel report, *EC - Seal Products*, para. 7.129.

¹⁵ Appellate Body Report, *EC - Sardines*, para. 176.

¹⁶ Appellate Body Report, *EC - Asbestos*, para. 101.

¹⁷ Appellate Body Report, *US - Clove Cigarettes*, para. 120.

¹⁸ Appellate Body Report, *US - COOL*, para. 268 (referring to Appellate Body Reports, *US - Clove Cigarettes*, para. 180; and *US - Tuna II (Mexico)*, para. 215).

this type of biofuel will gradually decrease in the EU, modifying the relevant conditions of competition to the detriment of the imported like products.

5. The challenged measures are inconsistent with article 2.2 of the TBT agreement

28. Article 2.2 TBT Agreement sets out a four-tier test of consistency, namely, "(i) whether the measure at issue is a technical regulation under Annex 1.1; (ii) whether the measure at issue is trade-restrictive; (iii) whether the measure at issue fulfills a legitimate objective; and (iv) whether the measure at issue is not more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create".¹⁹
29. **Concerning the first element**, whether the measure at issue is a technical regulation under Annex 1.1, please refer to the analysis on Article 2.1 of the TBT Agreement above.
30. **Concerning the second element** of the four-tier consistency test, whether the measure at issue is trade-restrictive, Article 2.2 does not proscribe trade-restrictive measures. It stipulates that "technical regulations shall not be "more trade-restrictive than necessary to fulfill a legitimate objective." It also refers to "unnecessary obstacles" to trade and, therefore, allows for some degree of trade restrictiveness. Thus, the provision is concerned with restrictions on international trade that *exceed* what is necessary to achieve a legitimate objective.
31. Colombia submits that the relevant effects are the effects on trade with all WTO Members, *i.e.*, not only Indonesia but also Colombia and other palm oil producers. Thus, the restrictiveness of the measures shall be assessed with regard to all WTO Members. The measures have had a high degree of trade restrictiveness as they virtually prohibit the entry of first-generation palm oil-based biofuels into the EU's market by not considering them renewable energy above the arbitrary maximum share of 7% of final energy consumption and by encouraging a complete phase-out of their use.
32. **Concerning the third element** of the consistency test, whether the measure at issue fulfills a legitimate objective, the Appellate Body has addressed: "(i) how to establish the objective pursued by the measure at issue;²⁰ (ii) which objectives are "legitimate objectives" within the meaning of Article 2.2;²¹ (iii) when a measure "fulfills" a legitimate objective;²² and (iv) how to establish whether, and if so, to what extent, the measure at issue fulfills the legitimate objective pursued."²³
33. In this regard, Colombia considers that the alleged objective of the measures (protecting the environment through ILUC prevention) is a curtain hiding the true objective of the measures, namely, favoring local and trading partners' biofuel production. If the protection of the environment was the true objective of the measures, the EU should have implemented restrictions for all oils that are produced from crops harmful to the environment. As mentioned above, soybean oil has produced large-scale deforestation in other countries. However, soybean oil is not considered by the measures as "first-generation biofuels with a high risk of causing ILUC" and therefore will not be restricted.
34. Colombia considers that the protection of the environment has a territoriality principle that is not respected by the measures at issue because they aimed at imposing a regulatory program in force in the EU to third countries in order to be able to import into the EU.
35. **The fourth element** of the four-tier consistency test, whether the measure at issue is not more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create, comprises the assessment of whether the restrictions on international trade exceed what is necessary to achieve the degree of the contribution that the technical

¹⁹ Van den Bossche, P. & Zdouc, W., *The Law and Policy of the WTO*, ch. 3: (dispute settlement), (Cambridge, 4th ed. 2017), p. 913.

²⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 314.

²¹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 313.

²² Appellate Body Report, *US – Tuna II (Mexico)*, para. 315.

²³ Appellate Body Report, *US – Tuna II (Mexico)*, para. 317. Van den Bossche, P. & Zdouc, W., *The Law and Policy of the WTO*, ch. 3: (dispute settlement), (Cambridge, 4th ed. 2017), p. 914.

Regulation at issue makes to the achievement of the pursued legitimate objective.²⁴ It is not the measure at issue but the measure's trade restrictiveness that is assessed for necessity.

36. In this particular case, the measures' high restrictiveness should be *weighed and balanced* against their negligible contribution to protecting the environment through ILUC reduction. In this sense, the Panel should conclude that the restrictions on international trade *exceed* what is necessary to achieve the degree of the contribution that the measures at issue make to achieve the pursued legitimate objective, preventing an *ex-ante* bias determination about the harmful effects of palm oil for the environment.

37. In conclusion, the challenged measures are highly trade-restrictive, do not pursue the legitimate objective of protecting the environment, and, in any case, do not contribute to the said objective. There are less-trade restrictive alternative measures that may achieve an equivalent degree of contribution to protecting the environment. Therefore, Colombia submits that the challenged measures are inconsistent with Article 2.2 of the TBT Agreement, in line with Indonesia's claim (First Written Submission of Indonesia, paras. 559-ss).

III. CONCLUSION

38. Supporting Indonesia's claims, Colombia states that:

- The challenged measures are inconsistent with Article I:1 of the GATT 1994.
- The challenged measures are inconsistent with Article III:4 of the GATT 1994.
- The challenged measures are not justified under Article XX (a), (b), and (g) of the GATT 1994.
- In general, the challenged measures are within the purview of the TBT Agreement.
- The challenged measures are inconsistent with the NT and MFN obligations set out in Article 2.1 of the TBT Agreement.
- The challenged measures are inconsistent with Article 2.2 of the TBT Agreement as they exceed the degree of restrictiveness necessary to achieve the allegedly pursued goal.

²⁴ Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ECUADOR

I. Ecuador's Oral statement

The rules and procedures of the international trade system are established with the voluntary accord of all the participants. Unilateral technical measures adopted by a country or a group of States may break this principle, provoke discrimination, and curtail international trade. Furthermore, those actions can affect third-party interests and may elicit, in the long run, a chain reaction of unilateral actions that end up in detriment to everyone.

If unilateral decisions discriminate against some countries or some products vis-a-vis similar ones, if they create unnecessary or discriminatory technical barriers to products and do not arise from international and transparent consultations prescribed by multilateral trade norms, those decisions are not attuned to the rules of the international trade system.

Adopting unilateral measures such as the ILUC-risk certification procedure, not issued by or according to a recognized international organization that establishes international standards, may affect agricultural producers from members who follow international standards in their industrial and commercial activities.

II. The main arguments of Ecuador's brief as a third interested party are:

a. Use of international standards, or their relevant parts, as a basis for technical regulations.

To the eyes of Ecuador, the European Union has **not** used international standards or their relevant parts, as a basis for their technical regulations: (i) the method used by the EU to measure ILUC risk is not an international standard; (ii) the method has not been adopted by any international standardization organization; the method has not been made available to the public as the Multilateral Agreements provide.

Therefore, it is relevant that the Panel analyses - assuming that the EU can prove that the ILUC risk analysis method is an international standard - if the EU measure has an international standard as an essential element. Ecuador suggests the Panel analyze the RSPO Certification as an international standard that can achieve the environmental objectives of the EU. Moreover, the Panel must examine whether the method used by the EU to measure ILUC risk is relevant to fulfill the pursued objective. Ecuador's position is that since the ILUC risk analysis method is not considered an international standard, it cannot comply with either of the two previous assumptions.

b. Ensure that technical regulations are not prepared, adopted or applied with the objective of or generating the effect of creating unnecessary obstacles to international trade.

Ecuador believes that there are less restrictive measures than the ILUC risk analysis method to achieve the EU objective. Discriminatory treatment of imported products shows that a measure is trade restrictive.

Therefore, the Panel must take into consideration that the proposed alternative measure must not achieve a contribution level that is "identical" to that of the original measure (more restrictive), but rather one that must be "equivalent." Moreover, Ecuador suggests the Panel analyze whether the proposed alternative measure is available to the other Member Countries - in the case of the RSPO Certification, it is.

c. Ensure that imported products are granted a treatment no less favorable than that granted to similar products of national origin and originating in any other country.

The expression "similar products" must be understood concerning the nature and scope of their competitive relationship and the obligation of Members to grant equal conditions of competition

to imported and domestic products. We recall the Panel of the similarity test, emphasizing that it is to be considered all the evidence presented in the case that concerns us.

d. Establishment of technical regulations based on product requirements in terms of performance and not on its design or descriptive characteristics.

The Panel must analyze whether the measure imposed by the EU complies with the spirit of Art.2.8 of the TBT Agreement, or if, on the contrary, it creates unnecessary technical barriers to trade by establishing requirements in terms of product characteristics and not in terms of performance.

Ecuador believes that the ILUC risk analysis method responds entirely to the composition of the product and not to its performance, creating unnecessary technical barriers to trade that could grant protection to certain similar products of national and foreign origin.

e. Special and differentiated treatment for Developing Country Members.

Not all Members have the same conditions in terms of financing, trade, and development. Therefore, special and differentiated treatment must be granted in all stages of preparation and application of technical regulations, standards, and conformity verification procedures, taking into account the special needs of Developing Country Members. The Panel will have to analyze whether the EU complied with this obligation.

Ecuador believes that the EU has failed to demonstrate that its measure is based on an international standard or that the relevant part of an international standard has been used as a basis for its technical regulation.

From the analysis conducted, it is clear that the measure applied has been prepared not only disregarding the principle of avoidance of unnecessary obstacles but in a manner that precisely creates an unnecessary obstacle that could've been avoided through the use of other international standards. This measure has been applied in a fashion that affords less favorable treatment to imported products than the treatment accorded to similar goods produced domestically and to other similar goods imported from other Members. The EU measure establishes product requirements in terms of the product's characteristics, such as the production methods, instead of its performance characteristics. Finally, the EU has not demonstrated how it has considered the special development, financial and trade needs of developing country Members. all Members have the same conditions in terms of financing, trade and development. Therefore, special and differentiated treatment is to be granted in all stages of preparation and application of technical regulations, standards and conformity verification procedures, taking into account the special needs of Developing Country Members. The Panel will have to analyze whether the EU complied with this obligation.

In conclusion, Ecuador believes that the EU has failed to demonstrate that its measure is based on an international standard, or that the relevant part of an international standard has been used as a basis for its technical regulation. It is clear, from the analysis conducted, that the measure applied has been prepared not only disregarding the principle of avoidance of unnecessary obstacles, but in a manner which precisely creates an unnecessary obstacle which could've been avoided using other international standards. This measure has been applied in a fashion that affords less favorable treatment to imported products than the treatment accorded too similar goods produced domestically and to other similar goods imported from other Members. The measure applied by the EU establishes product requirements in terms of the characteristics of the product such as the production methods, instead of its performance characteristics. Finally, the EU has not demonstrated how it has considered the special development, financial and trade needs of developing country Members.

III. The main arguments of the written answers from Ecuador as a Third Party to questions raised by the Panel are:

a. Question 2.

- i. Ecuador recalls the Panel's mandate established under article 11 of the DSU to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. the Panel must analyze in an objective manner if such arguments presented by the complainant are in conformity with Article 2.1. of the TBT Agreement and other related provision.

b. Question 3.

- i. Ecuador finds necessary to differentiate a border measure from an internal measure. Ecuador believes that article III as such, only deals with internal measures that may affect the competitive relationship between domestic products in relation to imported products, once such products are inside the territory of a WTO Member meanwhile other GATT provisions such as Article XI, deal specifically with border measures. Therefore, Ecuador supports the fact that Article III:4 and Article XI:1 are mutually exclusive.

c. Question 4.

- i. Ecuador agrees with the European Union's assertion regarding the scope of the Panel's mandate; however, two important clarifications must be made: (i) the Panel must analyze international standards, rather than "scientific opinions" or "scientific reports"; and, (ii) verify if these are the main constituent or fundamental principle for the purpose of the technical regulation, before their ability to generate the appearance that the measure is based on science or finds adequate support.

d. Question 6.

- i. It is clear for Ecuador that not only those measures that define the composition of products or regulate market access conditions can constitute technical regulations within the meaning of Annex 1.1 of the TBT Agreement, since it would be limited to a very basic analysis of the measure at issue. Instead, the Panel should build on the work done by its predecessors and stick to the verification of the elements of the three-tier test for determining whether a measure is a "technical regulation" under the TBT Agreement: going from a literal reading of the content of the measure to finding the essential and integral elements of the measure as an integrated whole.

e. Question 9.

- i. The term "special" highlights that these needs differ from those of other Members. Thus, the necessity test conducted for verifying compliance with Article 12.3 of the TBT Agreement is additional to that conducted for verifying compliance with Article 2.2 of the TBT Agreement.
- ii. In this context, fulfilling necessity test of Art. 12.3 on whether a measure "create(s) unnecessary obstacles to exports from developing country Members" would require at least, but not be limited to, the following assessment: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure for exports from developing country Members; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure.

f. Question 10.

- i. It is very useful to recall that Ecuador and other Members have requested information from the EU as early as 2018 (TBT Committees in June 2018, November 2018, March 2019, June 2019, November 2019, February 2020, May 2020, October 2020 and February 2021). This information requests have not been properly addressed by the EU. This demonstration alone constitutes a prima facie case, that the burden is on the EU, the respondent, to refute this.

ANNEX C-6**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN****I. FACTORS TO BE TAKEN INTO CONSIDERATION IN EXAMINING WHETHER A TECHNICAL REGULATION ACCORDS LESS FAVOURABLE TREATMENT UNDER ARTICLE 2.1 OF THE TBT AGREEMENT**

1. Indonesia argues that the European Union violates the most-favoured nation ("MFN") and national treatment obligations under Article 2.1 of the TBT Agreement "by capping and phasing out the use of oil palm crop-based biofuel for meeting EU renewable energy targets, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for certifying low ILUC-risk biofuel".¹ More specifically, Indonesia argues that: (a) the high ILUC-risk cap and phase-out as laid down in Article 26 of RED II and the Delegated Regulation is a technical regulation within the meaning of Annex 1.1 to the TBT Agreement;² (b) oil palm crop-based biofuel is like other oil crop-based biofuel, i.e. biofuel made out of oil crop feedstock other than palm oil;³ and (c) oil palm crop-based biofuel is treated less favourably, because (i) solely oil palm crop-based biofuel is subject to the high ILUC-risk cap and phase-out, and (ii) solely oil palm crop-based biofuel (made out of additional yield) must meet the low ILUC-risk criteria in order to be eligible for being counted towards meeting the 7 % limitation.⁴

2. The European Union submits that: (a) Indonesia has failed to demonstrate that Article 26 of RED II and the Delegated Regulation are "technical regulations" within the meaning of the TBT Agreement;⁵ (b) even if they were technical regulations, Indonesia has taken a "fluctuating and inconsistent approach" to "like" products, which does not satisfy Indonesia's "threshold of proof to establish its claim"; (c) Indonesia has not demonstrated that the measure creates less favourable treatment in the sense of less competitive conditions for palm-oil biofuel because: (i) it has failed to demonstrate a causal link between the alleged "detrimental impacts" and the EU measures it is challenging⁶, and (ii) palm oil-based biofuel produced in Indonesia is treated identically to palm oil-based biofuel produced in all other WTO Member and in the European Union;⁷ and (d) to the extent there is a distinction between palm oil-based biofuel and other conventional biofuels, such distinction stems from legitimate regulatory objectives, namely, the European Union's "attachment to climate change mitigation, environmental and biodiversity objectives".⁸

3. Article 2.1 of the TBT Agreement prohibits WTO Members from imposing technical regulations that accord to imported products less favourable treatment than that accorded to like domestic products or like products from other countries.

4. The Parties agree that, for purposes of determining whether the EU measure accords less favourable treatment to palm oil biofuels from Indonesian origin, the Panel should follow the two-step test articulated by the Appellate Body in *US – Clove Cigarettes*.⁹ Under this test, the panel first must determine whether the challenged technical regulation modifies the conditions of competition to the detriment of the imported product vis-a-vis the like products of domestic origin or originating in any other country. If the panel answers this questions in the affirmative, the panel must then "further analyze" whether any detrimental impact stems exclusively from a legitimate regulatory distinction.¹⁰ In making this assessment, the panel "must carefully scrutinize the

¹ Indonesia's first written submission, para. 467.

² Indonesia's first written submission, para. 470.

³ Indonesia's first written submission, para. 471.

⁴ Indonesia's first written submission, para. 513.

⁵ European Union's first written submission, para. 527.

⁶ European Union's first written submission, para. 675.

⁷ European Union's first written submission, para. 698.

⁸ European Union's first written submission, para. 705.

⁹ Indonesia's first written submission, para. 508; European Union's first written submission, para. 524.

¹⁰ Appellate Body Report, *US – Clove Cigarettes*, para. 182.

particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue".¹¹ Japan agrees with this approach.

5. Indonesia contests the legitimacy of the regulatory distinction drawn by the EU measure¹² and additionally argues that, even if the distinction were found to be legitimate, the distinction is applied in an arbitrary and unjustifiable manner.¹³ In this regard, Japan is aware that the Appellate Body stated that "[i]f we determine that the regulatory distinctions [] are designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination, those distinctions cannot be considered 'legitimate'".¹⁴ Moreover, in Japan's view, the key factor on which a panel should focus when assessing less favourable treatment is whether there is a reasonable connection between the objective circumstances of the measure and its policy objectives. Japan will therefore focus on Indonesia's arguments on the nexus between the regulatory distinction found in the measure and the measure's policy objectives.

6. Japan recalls, in this regard, that the Appellate Body stated that the assessment of whether the detrimental impact stems exclusively from a legitimate regulatory distinction is "likely [to] involve[] consideration of the nexus between the regulatory distinctions found in the measure and the measure's policy objectives"¹⁵, although "consideration of other factors ... may also be relevant to the analysis".¹⁶ As Indonesia recognizes in its submission,¹⁷ the actual trade effects on certain countries resulting from imposition of the measure are not one of the "other factors" to be considered. While there could be circumstances where the products subject to the regulatory measure at issue are imported mostly from a certain country or countries, such disproportionate impact as a result of the measure must not be a basis of the analysis in the second step of the test and the discrimination must not be inferred from the trade effects.

7. In light of the above, in Japan's view, whether the technical regulation accords less favourable treatment should not be examined based on whether there is disproportionate impact on the imported products, but on whether the technical regulation is appropriately tailored to achieve its objective. In other words, if the measure causes detrimental impact in a way that is not intended to address the relevant policy objectives, it would accord less favourable treatment to imported products because of such excessive impact, and therefore would violate Article 2.1 of the TBT Agreement. Therefore, if the Panel agrees that the challenged measure is a "technical regulation", Japan requests the Panel to carefully scrutinize the relationship between the objective circumstances, including the design, architecture, revealing structure, operation, and application of the technical regulation at issue and its policy objectives.

II. FACTORS TO BE TAKEN INTO CONSIDERATION IN DETERMINING WHAT ARE THE "LIKE PRODUCTS OF NATIONAL ORIGIN" AND THE "LIKE PRODUCTS ORIGINATING IN ANY OTHER COUNTRY" UNDER ARTICLE 2.1 OF THE TBT AGREEMENT

8. The Appellate Body has found that a panel must seek to establish, based on the nature and extent of the competitive relationship between the products in the market of the regulating Member, the products of domestic (and other) origin(s) that are "like" the products imported from the complaining Member. For the examination of "likeness", the panels and the Appellate Body have considered the following four criteria: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-use; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular function in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.¹⁸

9. In Japan's view, the extent of the competitive relationship should not be defined too strictly in order not to improperly narrow the scope of the technical regulations to be covered by the obligation to accord no less favourable treatment under Article 2.1 of the TBT Agreement. Rather,

¹¹ Appellate Body Report, *US – Clove Cigarettes*, para. 182.

¹² Indonesia's first written submission, para. 525.

¹³ Indonesia's first written submission, para. 548.

¹⁴ Appellate Body Reports, *US – COOL*, para. 340.

¹⁵ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)* para. 7.97.

¹⁶ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.95.

¹⁷ Indonesia's first written submission, para. 516.

¹⁸ Appellate Body Report, *EC – Asbestos*, para. 101; Panel Report, *US – Tuna II (Mexico)*, paras. 7.235 and 7.240.

"likeness" should be carefully examined in accordance with the four criteria mentioned above. Japan believes that the existence of direct competition is not necessarily required between the imported products and domestic "like" products.

III. ASSESSMENT UNDER ARTICLE III OF THE GATT 1994

10. Japan notes that historically there have been a variety and shifting of interpretations of Article III in relation to *de facto* discrimination, and there are still divergent views among Members on this interpretative question. Japan suggests that the Panel take into account this shifting understanding of Article III and, in particular, of the extent to which regulatory purpose is relevant to an assessment of *de facto* discrimination in order that the Panel considers the matter at hand in perspectives.

IV. FACTORS TO BE TAKEN INTO CONSIDERATION IN EXAMINING THE EFFECTS OF SUBSIDIES UNDER ARTICLES 5 AND 6.3 OF THE SCM AGREEMENT

11. Indonesia argues, in the alternative to its import-contingency claim, that the French biofuel tax reduction is an actionable subsidy under Article 5(c) of the SCM Agreement that has adverse effects on the interests of Indonesia. In particular, Indonesia submits that the French biofuel tax causes serious prejudice (or threat thereof) to Indonesia's interests in the form of displacement or impedance and significant lost sales within the meaning of Articles 6.3(a) and 6.3(c) of the SCM Agreement, respectively.¹⁹

12. For its part, the European Union argues that the French biofuel tax reduction is not an actionable subsidy within the meaning of Article 5(c) of the SCM Agreement and has not caused serious prejudice under Articles 6.3(a) and 6.3(c).²⁰ According to the European Union, Indonesia has failed to show an occurrence of "displacement" or "impedance" within the meaning of Article 6.3(a)²¹, or a threat thereof, or the occurrence of any significant lost sales under Article 6.3(c).²² The European Union further argues that Indonesia has not conducted a proper causation and non-attribution analysis.²³

13. Japan requests the Panel to consider the nature, design and operation of the subsidy at issue when examining the effect of subsidy.

14. The Appellate Body has repeatedly emphasized the relevance of the nature of the subsidies for the analysis of causation. For example:

- In *US – Upland Cotton*, the Appellate Body stressed in an operative passage that "[t]he nature of a subsidy plays an important role in any analysis of whether the effect of the subsidy is significant price suppression under Article 6.3(c)".²⁴
- In *EC and certain member States – Large Civil Aircraft*, the Appellate Body held that in order to determine whether the effect of the subsidy is one of the situations expressed in Article 6.3 of the SCM Agreement:

The appropriateness of a particular method may have to be determined on a case-specific basis, depending on a number of factors and factual circumstances *such as the nature, design and operation of the subsidies at issue*, the alleged market phenomena, and the extent to which the subsidies are provided in relation to a particular product or products, among others.²⁵ (emphasis added)

15. The relevance of the nature, design, and operation of subsidies may be illustrated with the following examples. Japan believes that where certain subsidies have positive effects not only on the recipients, but also on any private entity in the relevant industry, such subsidies may be found not to cause serious prejudice depending on factual circumstances, including their "nature" as shown

¹⁹ Indonesia's first written submission, paras. 1360-1361.

²⁰ European Union's first written submission, para. 1682.

²¹ European Union's first written submission, para. 1622.

²² European Union's first written submission, para. 1629.

²³ European Union's first written submission, para. 1681.

²⁴ Appellate Body Report, *US – Upland Cotton*, para. 450.

²⁵ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1376.

in the *US – Upland Cotton* case. For example, research and development activities by a business enterprise are likely to generate technological spill-over effect in the relevant industry or in other industries. Subsidies to such activities to recompense such spill-over effect will help achieve the optimal level of the activities. Such subsidies ensure, rather than harm, the proper functioning of the competitive market.

16. On the contrary, if evidence shows that actors need not to act based on commercial considerations due to subsidies they receive, it would provide a strong indication that the conditions of competition in the market are distorted, and thus, may be found to have adverse effect.

17. Therefore, Japan requests the Panel to consider the nature, design and operation of the subsidy at issue when examining the effect of subsidy.

ANNEX C-7**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF MALAYSIA****I. INTRODUCTION**

In light of the substantial economic and trade interests at stake in the dispute, as well as the systemic issues of interpretation, Malaysia provided the Panel with a detailed Third Party Submission, made an Oral Statement at the Panel's meeting with the Third Parties, and provided detailed Responses to the Panel's Questions to the Third Parties. For its detailed arguments, Malaysia respectfully refers the Panel to its Third Party Submission, its Oral Statement, and its Responses to the Panel's Questions.

II. CLAIMS IN RESPECT OF THE EU MEASURES**A. Claims under the TBT Agreement**

Malaysia considers that Indonesia has shown in a compelling way that the measures at issue are inconsistent with the various provisions of the TBT Agreement. In particular, that those measures are inconsistent with the EU's obligations under Articles 2.1, 2.2, 2.4, 2.5, 2.8, 2.9.2, 2.9.4, 5.1.1, 5.1.2, 5.2.1, 5.6.1, 5.6.2, 5.6.4, 5.8, 12.1 and 12.3 of the TBT Agreement.

Application of the TBT Agreement

Malaysia notes that Indonesia has successfully demonstrated that Article 26 of the RED II and the Delegated Regulation, being documents laying down the conditions for using biofuel to meet EU renewable targets based on the composition of the fuel (by imposing the 7% limitation and the high ILUC-risk cap and phase-out), are technical regulations that are inconsistent with the EU's obligations under the TBT Agreement.

Documents applicable to an identifiable product or group of products

Malaysia notes that Article 26 of the RED II and the Delegated Regulation, which impose the 7% limitation and the high ILUC-risk cap and phase-out, are documents applicable to an identifiable product or group of products. Article 26 of the RED II states that it applies to 'biofuels, bioliquids and biomass fuels produced from food and feed crops' used in the EU transport sector. Those are also the products to which the Delegated Regulation applies. Malaysia notes that the EU does not dispute that the provisions identified by Indonesia (Article 26 of the RED II and the Delegated Regulation) make reference to biofuels derived from food and feed crops. However, the EU contends that those provisions form part of a broader regime, which addresses the use of renewable fuels more generally in the EU transport sector. The EU also submitted that Article 26 of the RED II and the Delegated Regulation cannot be read in isolation. In this regard, Malaysia considers that, regardless of whether those provisions form part of a broader regime or are to be read together with other provisions of the RED II, 'biofuels, bioliquids and biomass fuels produced from food and feed crops' are the products at issue in Article 26 of the RED II and the Delegated Regulation. Hence, Malaysia submits that 'biofuels, bioliquids and biomass fuels produced from food and feed crops' constitute an 'identifiable product or group of products'.

Documents laying down one or more product characteristics of biofuel

Malaysia agrees with Indonesia that Article 26 of the RED II and the Delegated Regulation lay down one or more product characteristics of biofuel. The relevant product characteristic, as argued by Indonesia, is the composition of fuel, including fuel derived from renewable non-fossil sources. Such fuel is, due to its composition, considered to be renewable energy. As indicated by Indonesia, Article 26 of the RED II and the Delegated Regulation discipline the composition of biofuel (and, thus, of fuel derived from renewable energy sources), by referring to whether the biofuel is derived from food or feed crops. In particular, they prescribe that biofuel *not* derived from food or feed crops is not subject to the 7% limitation and the high ILUC-risk cap and phase-out. Malaysia concurs with Indonesia that, within the category of biofuel derived from food or feed crops, which is the subject of the 7% limitation, Article 26(2) of the RED II and the Delegated Regulation introduce a further explicit distinction. The title of Article 26 of the RED II reads 'Specific rules for biofuels, bioliquids

and biomass fuels produced from food and feed crops'. It makes a distinction between biofuels, bioliquids and biomass fuels produced from food and feed crops and other types of biofuels, such as advanced biofuels, which are not subject to the 7% limitation and the high ILUC-risk cap and phase-out. These rules also make a further distinction between high ILUC-risk and low ILUC-risk biofuels, bioliquids or biomass fuels produced from food and feed crop. Prompted by Article 26(2) of the RED II and the Delegated Regulation, EU Member States have begun the process of regulating the use of oil palm-based biofuels. This is clearly evidenced by measures already adopted by France and under consideration in other EU Member States, for instance, in Belgium, Denmark, the Netherlands, and Austria.

Compliance with the product characteristics is mandatory

Malaysia contends that Article 26 of the RED II and the Delegated Regulation 'prescribe rules in a binding or compulsory fashion' and, therefore, compliance with the product characteristics of biofuel laid down therein is mandatory. The requirements regarding the share of biofuel derived from food and feed crops, which may be used in order to meet the EU renewable energy targets under Articles 7 and 25(1) of the RED II, are legally enforceable and binding. Malaysia disagrees with the EU's contention that Indonesia's analytical approach to the definition of the 'measures', as well as Indonesia's interpretation of what constitutes a product characteristic, 'departs from the orthodoxy in the case law'. Malaysia disagrees with the EU that Indonesia has identified the relevant 'identifiable group of products' 'artificially narrowly as to comprise exclusively "biofuel made out of food and feed crops"'. Biofuels derived from food and feed crops are precisely the products to which Article 26 of the RED II and the Delegated Regulation apply. Thus, 'biofuel made out of food and feed crops' is the relevant identifiable group of products and fulfils one of the elements in the definition of technical regulation in Annex 1.1 to the TBT Agreement.

Malaysia disagrees with the EU that the essential nature of Article 26 of the RED II and of the Delegated Regulation is 'not to define the "composition" of biofuels or to regulate market access conditions', but 'is to identify those biofuels which the European Union considers are best able to contribute to renewable energy, environmental and climate change objectives'. Article 26 of the RED II and the Delegated Regulation identify the biofuels, which the EU considers are best able to contribute to its policy objectives, by defining their composition. Also, contrary to what the EU argues, there is *de facto* no room on the EU biofuel market for the biofuels that are identified, pursuant to Article 26 of the RED II and the Delegated Regulation, as high ILUC-risk biofuels. Hence, Article 26 of the RED II and the Delegated Regulation do regulate market access conditions.

Article 2.1 of the TBT Agreement

Malaysia concurs with Indonesia that, by capping and phasing-out the use of oil palm crop-based biofuel for meeting the EU renewable energy targets, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for certifying low ILUC-risk biofuel, the EU acts inconsistently with both the MFN and national treatment obligations under Article 2.1 of the TBT Agreement. The measures at issue, being technical regulations within the meaning of Annex 1.1 to the TBT Agreement, discriminate between and accord less favourable treatment to: (i) 'like' oil crop-based biofuel of different foreign origin; and (ii) oil palm crop-based biofuel from third countries and 'like' oil crop-based biofuel of EU origin, in particular biofuel derived from rapeseed oil or soybean oil.

Malaysia disagrees with the EU's contention that 'Indonesia's like product analysis is flawed and contradictory because Indonesia claims that all oil-based biofuels are like but it only seeks to demonstrate that palm oil based biofuel is like soybean and rape seed oil biofuels'. While Indonesia's likeness analysis focusses, on the one hand, on oil palm-crop based biofuel and, on the other hand, rapeseed crop-based and soybean crop-based biofuels (i.e., the most relevant other oil crop-based biofuels), it sufficiently demonstrates that oil palm crop-based biofuel is 'like' all other oil crop-based biofuels. Unlike the EU, Malaysia considers the findings in the context of trade remedy disputes regarding the likeness of biofuels highly relevant, as these cases concerned the same products as those at issue in the present case and these products were considered 'like' in the context of these trade remedy cases.

Malaysia supports Indonesia's claim that the EU acted inconsistently with the national treatment and the MFN obligations under Article 2.1 and agrees with Indonesia that the detrimental impact on competitive opportunities of oil palm crop-based biofuel in the EU market is discernible from the design, structure, and expected operation of the high ILUC-risk cap and phase-out, taking into

account the criteria for determining high ILUC-risk feedstock and the criteria for certifying low ILUC-risk biofuel. The application of the high ILUC-risk cap and phase-out, taking into account the criteria for determining high ILUC-risk biofuel feedstock and the criteria for certifying low ILUC-risk biofuel feedstock, is designed and structured so as to deny access of oil palm crop-based biofuel to the EU biofuel market, while rapeseed oil-based biofuel and soybean oil-based biofuel produced in the EU and other 'like' oil crop-based biofuel imported to the EU from third countries can still enjoy access to that market within the 7% limitation.

Malaysia disagrees with the EU's contention that the high ILUC-risk cap and phase-out do not constitute a restriction on importation. Malaysia struggles to understand why the EU considers it important to mention repeatedly that the EU is an important producer of oil palm crop-based biofuel. Indonesia's claim is that the EU accords imported oil palm crop-based biofuels treatment less favourable than the domestic 'like' oil crop-based biofuels (for the national treatment violation) or 'like' oil crop-based biofuels (for the MFN violation). The fact that the EU also produces oil palm crop-based biofuel is irrelevant to an assessment of 'treatment less favourable' under Article 2.1 of the TBT Agreement. With respect to the US' argument in its third party submission, Malaysia understands the US to argue that, to establish whether a measure accords "treatment no less favourable" under Article 2.1 of the TBT Agreement, there is no need for the Appellate Body's legitimate regulatory distinction (LRD) test. The US argues that this LRD test does not have any basis in the text of Article 2.1. Malaysia considers that the Appellate Body's legitimate regulatory distinction (LRD) test, as it was elaborated in the case law, strikes the correct balance between, on the one hand, the pursuit of trade liberalization and, on the other hand, Members' rights to regulate.

Malaysia disagrees with the EU that Article 26 of the RED II and the Delegated Regulation do not limit the access of oil palm crop-based biofuel to the EU's biofuel market. As Indonesia correctly argues, there is *de facto* no room on the EU's biofuel market for biofuels that cannot be counted towards meeting the EU renewable energy targets (i.e., biofuels that are identified pursuant to Article 26 of the RED II and the Delegated Regulation as high ILUC-risk biofuels) and that cannot benefit from the support schemes provided by EU Member States, as foreseen by Article 4 of the RED II and as defined in Article 2(5) of the RED II, to overcome their competitive disadvantage vis-à-vis fossil fuels. Malaysia disagrees with the EU that there are sound scientific grounds for the methodology it uses to determine whether certain feedstocks are high ILUC-risk. The EU concedes that high ILUC emissions cannot be directly observed with a sufficient degree of accuracy, but, at the same time, contends that its high ILUC criteria are based on the observable rates of expansion of palm oil production into land of high-carbon stock. Malaysia takes note of the EU's argument that Article 26 of the RED II affords a margin of discretion to EU Member States in deciding which biofuels they would allow under the 7% limitation on food and feed crop based biofuels. Whatever way this discretion may be exercised, as Malaysia understands it, oil palm crop-based biofuels would, in any case, be first capped and then excluded from the 7% reserved for biofuels derived from food or feed crops based on the scientifically flawed and broadly criticised ILUC approach adopted by the EU.

Article 2.2 of the TBT Agreement

Malaysia agrees with Indonesia that the high ILUC-risk cap and phase-out and the 7% limitation are technical regulations that create unnecessary obstacles to international trade in palm oil and in oil palm crop-based biofuel, and, therefore, are inconsistent with Article 2.2 of the TBT Agreement. The alleged environmental protection objective of the EU cannot conceal the concurrent purpose of the measures at issue, which is to single out and exclude oil palm crop-based biofuel and palm oil from the EU biofuel market, while offering privileged access to other trading partners, notably certain producers of soybean-based biofuel. Malaysia disagrees with the EU's contention that Indonesia does 'not show in any way' that the measures at issue do not pursue the environmental and climate change objectives of the EU, or that these measures do not contribute to achieving those objectives. Malaysia submits that Indonesia, at the very least, casts significant doubt on the objectives pursued by the EU and that, to the extent the measures at issue do pursue environmental and climate change objectives, they do so to an insufficient degree and at the sole expense of other WTO Members. While the EU firmly states that the pursuit of policy objectives under Article 2.2 of the TBT Agreement has no jurisdictional limitation, Malaysia queries whether this is correct. Malaysia disagrees with the EU that Article 26 of the RED II and the Delegated Regulation do not prevent market access and that, therefore, any impact on trade is minimal. On the contrary, the negative impact on trade of the measures at issue is very significant, as they are set to eventually *de facto* ban oil palm crop-based biofuels and palm oil as a biofuel feedstock from the EU biofuel market. Malaysia considers, in particular, that possible alternative measures were and are reasonably available to the EU to achieve its regulatory objectives in a less trade restrictive manner (see below).

Articles 2.5, 2.8, 2.9.2, 2.9.4, 12.1 and 12.3 of the TBT Agreement

Malaysia agrees with Indonesia that the EU acted inconsistently with Articles 2.4, 2.5, 2.8, 2.9.2 and 2.9.4 of the TBT Agreement. For its detailed arguments, Malaysia respectfully refers the Panel to its Third Party Submission and its responses to the Panel's questions.

Conformity assessment procedure

Malaysia agrees with Indonesia that the EU acts inconsistently with 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 Indonesian suppliers of oil palm crop-based biofuel'. Malaysia considers that Indonesia has established that the procedure for the low ILUC-risk certification is a conformity assessment procedure within the meaning of the TBT Agreement. Malaysia notes that the arguments of the EU, with regard to Indonesia's claim of inconsistency with Articles 5.1.1, 5.1.2, 5.2.1, 5.6, and 5.8 of the TBT Agreement, are primarily based on its contention that the procedure for certifying oil palm crop-based biofuel as low ILUC-risk is not a conformity assessment procedure and those articles of the TBT Agreement are, thus, not applicable. The EU considers that the measure at issue is not a conformity assessment procedure because Article 26 of the RED II and the Delegated Regulation are not technical regulations. As discussed above, Malaysia disagrees with the EU's contention that Article 26 of the RED II and the Delegated Regulation are not technical regulations.

B. Claims under the GATT 1994

Malaysia considers that Indonesia has shown that the measures at issue are inconsistent with the obligations of the EU under the GATT 1994 including, in particular, Articles I:1, III:4, X:3(a), and XI:1 thereof.

Article I:1 of the GATT 1994

Malaysia agrees with Indonesia's interpretative analysis regarding the MFN treatment obligation under Article I:1 of the GATT 1994. Malaysia disagrees with the EU that Indonesia's claim, as to the existence of an 'advantage' within the meaning of Article I:1 of the GATT 1994, is flawed because it relies on an erroneous assumption with respect to the link between eligibility to contribute to a renewable energy target and market access, which Indonesia has not demonstrated. Malaysia considers that Indonesia convincingly demonstrated the existence of this link by pointing out the fact that market access opportunities for palm oil are inevitably affected by the 7% limitation for biofuel that can be counted towards the EU renewable energy targets, by the criteria for determining high ILUC-risk feedstocks, and the criteria for classifying and certifying low ILUC-risk biofuels, and, thus, by the creation of more favourable competitive opportunities for biofuels derived from other oil crops, such as rapeseed and soybean. Additionally, Malaysia disagrees with the EU's contention that the products at issue, namely oil palm crop-based biofuel and other oil crop-based biofuels, as well as palm oil and other oil crop feedstocks (e.g., rapeseed oil and soybean oil), are not 'like' products.

Finally, Malaysia does not agree with the EU that Indonesia's claim, that the effect of the measures at issue is to create an advantage, 'reflects wrong assumptions as to the nature and operation of the EU Biofuels regime'. According to the EU, the measures at issue must be implemented by the EU Member States for purposes of achieving their objectives and 'are not "binding" in the sense that they impose the outcome that Indonesia alleges'. Malaysia notes in this regard that, while EU Member States may have a margin of discretion in deciding how to implement Article 26 of the RED II, this provision, in combination with the Delegated Regulation, accords an 'advantage' to oil crop-based biofuels other than oil palm crop-based biofuel, and to oil crops other than oil palms. The advantage is the ability to be counted towards EU renewable energy targets and, therefore, to benefit from the applicable EU Member States' support schemes.

Article III:4 of the GATT 1994

Malaysia supports Indonesia's claim that the EU acted inconsistently with the national treatment obligation under Article III:4 of the GATT 1994 and disagrees with the EU's contention that Article 26 of the RED II and the Delegated Regulation do not affect the internal sale of the products at issue, because these measures, according to the EU, do not set out market access conditions. As already noted above, Malaysia agrees with Indonesia that the measures at issue firstly *de facto* limit

access of, and secondly eventually *de facto* ban, palm oil and oil palm crop-based biofuel from the EU biofuel market because they cannot be counted towards the EU renewable energy targets. Malaysia also disagrees with the EU that Indonesia mischaracterises the operation of the low ILUC-risk certification procedure. Indonesia's correct characterisation of this procedure demonstrates that less favourable treatment is accorded to palm oil and oil palm crop-based biofuel. Contrary to the EU, Malaysia considers that, in establishing that 'treatment less favourable' was accorded, Indonesia did not err in comparing the treatment accorded to palm oil and oil palm crop-based biofuel with, respectively, treatment accorded to rapeseed oil and soybean oil and to rapeseed crop-based biofuels and soybean crop-based biofuels.

Article X:3 of the GATT 1994

Malaysia agrees with Indonesia's claim that the EU has acted and continues to act inconsistently with Article X:3(a) of the GATT 1994 because it administers the RED II in an unreasonable manner by setting out the criteria for certification of low ILUC-risk biofuels in the Delegated Regulation without providing for the necessary elements that enable such certification to be obtained.

Article XI:1 of the GATT 1994

Malaysia concurs with Indonesia's assessment that the EU 'violates Article XI:1 of the GATT 1994 by imposing the high ILUC-risk cap and phase-out, which result in quantitative prohibitions or restrictions on imports of palm oil'. Malaysia notes that Article XI:1 of the GATT 1994 has broad scope. As to the question of whether Article XI:1 of the GATT 1994 covers only border measures or also internal measures covered by Article III:4 of the GATT 1994, the Panel in *India – Autos* noted that it cannot be excluded *a priori* that different aspects of a measure may affect the competitive opportunities of imports in different ways, making them fall within the scope of either Article III or Article XI, or even that there may be, in perhaps exceptional circumstances, a potential for overlap between the two provisions. Malaysia notes that the assessment of consistency with either provision would focus on different aspects of the measure at issue. An assessment of consistency with Article III:4 would focus on whether the measure affects the conditions of competition on the domestic market (i.e., whether it has a detrimental impact on the competitive conditions on the imported products), while an assessment of consistency with Article XI:1 would focus on the opportunities (*de jure* or *de facto*) for importation (i.e., whether the measure has a limiting effect on the quantity of the product being imported). These assessments of consistency have to be made on a case-by-case basis and in light of the specific characteristics of the measure at issue and the market concerned. Malaysia considers that the measures at issue affect both the opportunities for importation into the EU *and* the competitive opportunities on the domestic market of the EU. Hence, both Article XI and Article III:4 are applicable to the measures at issue.

General exceptions under Article XX of the GATT 1994

Malaysia submits that the EU did not demonstrate that the measures at issue are *prima facie* justified under Article XX of the GATT 1994 and Malaysia would like to point out that different legal standards apply under the distinct paragraphs of Article XX invoked by the EU. Therefore, Malaysia considers that, in order to determine whether an otherwise GATT-inconsistent measure is provisionally justified under Article XX, the Panel must examine, separately, whether the distinct requirements of the relevant paragraphs of Article XX are met.

First, Malaysia is of the opinion that Article XX of the GATT 1994 cannot be invoked to protect societal values and interests of the EU *outside* its territorial jurisdiction, such as the protection of the environment and biodiversity in Indonesia. Contrary to the EU's arguments, Malaysia notes that there is an *implied* jurisdictional limitation in Article XX of the GATT 1994. While Malaysia does not dispute that climate change and the loss of biodiversity are global problems, Malaysia disagrees with the EU that there is a 'direct nexus', within the meaning of the current case law, between the EU territory and the objectives pursued by the EU when it seeks to achieve these objectives through the measures at issue in this case. Malaysia notes that the present case is different from the situation in *US – Shrimp*, where the Appellate Body established that there was 'a sufficient nexus' between the migratory and endangered sea turtles and the United States for purposes of Article XX(g) of the GATT 1994 because the sea turtles 'migrate to, or traverse, at one time or another, waters subject to United States jurisdiction'. Second, in respect of Article XX(a) of the GATT 1994, invoked by the EU, Malaysia notes that the concept of 'public morals' is undefined in the GATT 1994 and its scope, by its very nature, is difficult to delineate. As recognised in the case law, WTO Members should be accorded 'some scope' in order to define their public morals for the purposes of Article XX(a) of the

GATT 1994. However, this does not mean that each Member enjoys unfettered discretion. Malaysia submits that the EU has not adduced sufficient evidence to demonstrate the existence of a real and present concern in the EU with regard to high ILUC-risk and the use of oil palm crop-based biofuels as a renewable energy source. Malaysia also contends that the EU has failed to demonstrate the required relationship between the alleged protection of public morals and the measures at issue, namely that the measures at issue are 'not incapable' of protecting public morals. Third, with respect to the 'necessity' and 'relating to' requirements in paragraphs (a), (b) and (g) of Article XX of the GATT 1994, Malaysia disagrees with the EU's contention that 'the legal tests under these subparagraphs ... are *in practice* very similar'. If the Panel were to accept this interpretation of the EU, it would open the door for a much softer test of justifiability of otherwise GATT-inconsistent measures under Article XX(a) and (b) of the GATT 1994. As to Article XX(a) and (b), Malaysia contends that the EU measures at issue are not 'necessary' because reasonably alternative measures were and are available (see below). As to the 'relating to' requirement, Malaysia considers that the measures at issue are disproportionate in their scope or reach in relation to the policy objectives pursued. Fourth, the measures at issue are not 'made effective in conjunction with restrictions on domestic production or consumption' as required by Article XX(g) of the GATT 1994. Malaysia contends that, contrary to the EU's assertions, the EU failed to impose 'like' restrictions (i.e., the high ILUC-risk cap and phase out) on the production of biofuel from domestically-produced oil crop-based biofuel feedstocks and that the measures at issue, therefore, do not meet the 'even-handedness' requirement of Article XX(g) of the GATT 1994. Fifth, in the unlikely event that the Panel were to conclude that the measures at issue are provisionally justified under subparagraphs (a), (b) and/or (g) of Article XX of the GATT 1994, Malaysia would contend that the measures at issue do not meet the requirements of the *chapeau* of Article XX of the GATT 1994. Malaysia contends that the measures at issue result in arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The availability of alternative measures

Malaysia provided some of its thoughts on the issue of the reasonably available alternative measures in the context of Article 2.2 of the TBT Agreement and the defence relied upon by the EU in the context of Article XX of the GATT 1994. Malaysia would like to emphasise that it considers that there were and are alternative, less trade-restrictive, measures available to the EU. In simple terms, these alternative less trade-restrictive measures would be more targeted to address only the food and feed crops cultivated on land with high-carbon stock and would not be discriminatory. In particular, given the evident flaws of the ILUC approach, Malaysia considers that an approach based on policies addressing direct land use change (DLUC) would allow more targeted measures to attain the objectives that the EU alleges to pursue. Such approach has been applied by the EU itself in a number of inter-governmental and voluntary schemes for various commodities, including palm oil. Certification schemes, in cooperation with producing countries, such as the EU's Forest Law Enforcement, Governance and Trade (FLEGT) scheme for timber, which has been implemented in Indonesia, could serve as blueprints for a less trade-restrictive, but rather trade-stimulating, approach. In addition to FLEGT, the EU has successfully entered into or recognised a number of other standardisation and certification schemes (for example, the EU rules to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing and, for palm oil, the International Sustainability and Carbon Certification (ISCC) sustainability certification and the recognised voluntary scheme of RSPO-RED under the Roundtable on Sustainable Palm Oil) with varying degrees of compliance and enforcement (for example, licensing, audit, traceability, segregation, etc.).

CLAIMS IN RESPECT OF FRANCE'S MEASURE

Malaysia concurs with Indonesia that the French biofuel tax reduction is inconsistent with the obligations of France under Articles I:1 and III:2 of the GATT 1994, as well as its obligations under the SCM Agreement, and in particular Article 5(c) thereof.

ANNEX C-8

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE REPUBLIC OF KOREA*

I. Introduction

1. Mr. Chairperson and distinguished Members of the Panel, Korea appreciates the opportunity to participate as a third party in this dispute and to present its views to the Panel.
2. The Republic of Korea ("Korea") intervenes as a third party because of its systemic interest in the correct interpretation of the provisions of the WTO agreements at issue in this dispute.
3. Korea will not repeat the arguments of its third party submission. In today's statement, Korea will address the concept of "public morals" in Article XX(a) of the GATT 1994.

II. Article XX(a) of the GATT 1994 – Public Morals

4. The European Union ("EU") argues that the EU's Biofuel regime, including RED II and the Delegated Regulation, are measures necessary to protect "public morals."¹
5. Prior panels have interpreted "public morals" to denote "standards of right and wrong conduct maintained by or on behalf of a community or nation".² Recognizing the diversity of values among Members, prior panels have acknowledged that the content of the concept may vary³ and indeed various different policies have been found to be capable of falling within the concept of "public morals".⁴
6. However, the flexibility inherent in the concept of "public morals" cannot be limitless and some discipline must apply to its use. This was recognized by the panel in *Brazil – Taxation*, which stated that, "although Members have some scope to define and apply for themselves the concept of 'public morals' in their respective territories, according to their own systems and scales of values, this latitude does not excuse a responding party in dispute settlement from its burden of establishing that the alleged public policy objective at issue is indeed a public moral objective according to its value system."⁵ Korea also recalls the Appellate Body's finding that, while panels should take into account the invoking Member's articulation of the objectives pursued through its measure, panels are not bound by the invoking Members' characterizations of such objectives.⁶
7. Korea additionally draws attention to the approach taken by the panel in *EC – Seal Products*. Although that panel was addressing Article 2.2 of the TBT Agreement, its approach is instructive for this case.
8. The *EC – Seal Products* panel observed that the question of whether a measure aims to address public morals relating to "a particular concern" in the society of a regulating Member requires an assessment of two issues: first, whether the concern in question indeed exists in that society; and, second, whether such concern falls within the scope of "public morals" as defined and applied by a regulating Member in its territory, according to its own systems and scales of values.⁷ In particular, the panel in *EC – Seal Products* considered whether the evidence in that case demonstrated: (a) the existence of the EU public's concerns on seal welfare and/or any other concerns or issues that the EU seeks to address; and, (b) the connection between such concerns, if

* The Republic of Korea requested that its oral statement is used as its integrated executive summary.

¹ See, for example, EU's FWS, paras. 1253, 1273, and 1292-1299.

² Panel Report, *US – Gambling*, para. 6.465; Panel Report, *Colombia – Textiles*, para. 7.299.

³ Panel Report, *Colombia – Textiles*, para. 7.299.

⁴ Panel Report, *Brazil – Taxation*, para. 7.521.

⁵ Panel Report, *Brazil-Taxation*, para. 7.558. See also Panel Report, *US-Tariff Measures (China)*, para. 7.131.

⁶ Appellate Body Report, *EC-Seal Products*, para. 5.144.

⁷ Panel Report, *EC-Seal Products*, para. 7.383.

proven to exist, and "public morals" (i.e. standards of right or wrong) as defined and applied within the EU.⁸

9. In this case, the measures challenged by Indonesia are the high Indirect Land-use Change ("ILUC") - risk cap and phase-out on biofuels produced from food and feed crops—in particular palm oil and oil palm crop-based biofuels—for which a significant expansion of the production area into land with high-carbon stock is observed.⁹

10. Based on Korea's understanding of the EU's position, the particular concerns reflected in the high ILUC-risk cap and phase-out for biofuels produced from food and feed crops are climate change and the loss of biodiversity directly associated with deforestation, which is a broad concept that is affected by a significant number of factors.¹⁰

11. The EU suggests that its citizens are concerned with environmental, biodiversity loss and climate change issues. It refers to a recent survey in the EU that allegedly shows that the general public believes the present European Commission should prioritize the environment and climate.¹¹ The EU also presents another survey showing that the majority of EU citizens see climate change as a serious problem, and consider it important that their national government sets ambitious targets to increase the amount of renewable energy used, and provide support for improving energy efficiency by 2030.¹²

12. Korea understands and shares many of the EU concerns about climate change and environmental degradation. The narrower question raised in this case is whether such concerns are issues that fall within the scope of the concept of "public morals" as it is used in Article XX(a) of the GATT 1994. The Panel should scrutinize in particular whether the EU has established a sufficient connection between these concerns and the "standards of right or wrong" in the EU. In doing, the Panel may wish to keep in mind that environmental concerns are already addressed in subparagraphs (b) and (g) of Article XX.

III. Conclusion

13. This concludes Korea's oral statement. Korea thanks the Panel and the Secretariat for your attention and for giving due consideration to the issues raised by Korea in its submission and in this oral statement. Korea looks forward to the Panel's questions.

⁸ Panel Report, *EC-Seal Products*, para. 7.384.

⁹ Indonesia's FWS pp. 320 – 347.

¹⁰ EU's FWS paras. 172 and 177.

¹¹ EU's FWS, para. 1292.

¹² EU's FWS, para. 1293.

ANNEX C-9**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES****EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY SUBMISSION****I. INTERPRETATION OF ARTICLE 2.1 OF THE TBT AGREEMENT**

1. Indonesia claims that the High ILUC Risk Cap breaches Article 2.1 of the TBT Agreement because it "discriminates between like oil crop-based biofuel of different foreign origin and between oil palm crop-based biofuel from Indonesia and like oil crop-based biofuel of EU origin." To establish a breach of Article 2.1, the complainant must prove three elements: (i) that the measure at issue is a technical regulation; (ii) that the imported and domestic products are "like"; and (iii) that the treatment accorded to imported products is less favorable than that accorded to like domestic products or like products from other countries.

2. With respect to the third element, a complainant may seek to establish sufficient facts to demonstrate that the measure, *de facto*, treats imports less favorably than like domestic products (or other foreign products). Like Article III:4 of the GATT 1994, Article 2.1 does not forbid Members from making regulatory distinctions between different products that may fall within a single group of "like products". Nor does Article 2.1 prohibit measures that may result in some detrimental effect on imported products as compared to some like domestic products. Instead, what Article 2.1 prohibits are measures that accord less favorable treatment to imported products as compared to like domestic products *based on origin*.

3. The conclusion that Article 2.1 is directed to controlling origin-based discrimination is based on its text, in its context. The provision itself compares the treatment accorded to different products on the basis of origin: "products imported from the territory of any Member", "products of national origin", and "products originating in any other Member". Similarly, the preamble to the Agreement reflects that measures should not be "applied in a manner which would constitute a means of arbitrary or unjustifiable *discrimination between countries* where the same conditions prevail".

4. Examination of the reasons for any distinctions made among a group of like products is particularly important in the context of technical regulations, where measures may necessarily draw distinctions between products based on "product characteristics or their related processes and production methods." If a respondent demonstrates that different and detrimental treatment is based on, for example, the environmental or public health aim pursued—and not the foreign origin of a product—then the measure does not amount to less favorable treatment under Article 2.1.

5. In recent reports, the Appellate Body has found that, in the context of the TBT Agreement, any detrimental impact found to exist with respect to imported products will constitute a breach of Article 2.1 unless the "detrimental impact on imports *stems exclusively from* legitimate regulatory distinctions." This requirement—that any detrimental impact "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.

6. The Appellate Body's erroneous approach may invite panels to attempt to balance the detrimental impact of a measure against its contribution to the objective at issue – an assessment that is more about proportionality (weighing costs and benefits), and less about origin-based discrimination.

7. As the European Union recognizes in this dispute, the Appellate Body's approach is "a requirement which in essence imposes a further obligation on the complainant to demonstrate the degree of trade restrictiveness of the measure in question." The European Union is correct – but this "further obligation" is not found in Article 2.1 nor necessary to assess origin-based discrimination. The United States agrees that it is important under the TBT Agreement to assess the trade-restrictiveness of a measure. However, in a manner *unique* to the TBT Agreement, trade restrictiveness already comprises an affirmative obligation under Article 2.2. That is, where a

technical regulation does not discriminate inconsistently with Article 2.1, for example, that measure may separately breach a Member's obligations if it is nonetheless more trade restrictive than necessary to fulfil a legitimate objective under Article 2.2 of the TBT Agreement.

8. In eliding these two provisions, the Appellate Body has not only narrowed the scope of actions that would otherwise survive a less favorable treatment examination (under the equivalent of Article III:4), it has narrowed the scope of actions that could survive a trade-restrictiveness review (under what should be Article 2.2). Thus, while the Appellate Body may have intended to permit a broad scope of justified regulatory action in creating its "legitimate regulatory distinction" test, by collapsing the obligations in 2.1 and 2.2, the Appellate Body in fact combined more restrictive interpretations of each provision into a single test under Article 2.1. This Panel should not repeat the same error. Instead, the Panel should interpret Article 2.1 based on its text, and as panels and the Appellate Body have interpreted the same obligation under the GATT for decades, assess whether any different and detrimental impact is based on factors unrelated to a product's foreign origin. In so doing, the Panel would restore the balance in the WTO "between, on the one hand, the pursuit of trade liberalization and, on the other hand, Members' right to regulate."

9. The question of whether any detrimental impact is based on factors not relating to the origin of the products in question is one that should be answered taking all relevant facts into account. For example, if the regulatory purpose invoked bears a rational relationship to the measure at issue, this would be indicative of non-discrimination. Similarly, if the measure is apt to advance the regulatory purpose identified by the regulating Member, this too would be indicative of non-discrimination. A panel would evaluate this as part of the overall assessment of whether a measure modified the conditions of competition to the detriment of imported or other foreign products. If an evaluation of the measure did not support the proposition that detrimental impact was non-origin-based, or if an examination of the facts reveals the regulatory distinction to be a proxy for origin, for example, then the measure would breach the national treatment or MFN obligation.

10. For the reasons set out above, the Panel should interpret and apply Article 2.1 of the TBT Agreement according to its text as directed to prohibiting origin-based discrimination. As past reports on Article III:4 concluded, different and detrimental treatment of imports will constitute a breach of the obligation where the alleged detriment is not explained by factors unrelated to the foreign origin of the product, such as where the measure and distinction at issue does not bear a rational relationship to the regulatory purpose invoked. Here, the European Union argues that the regulatory purpose of the High ILUC Risk Cap is to further "climate change mitigation, [and] environmental and biodiversity objectives." If, taking into account all the facts, the Panel finds that the impact on Indonesian imports is not origin-based, then the Panel should conclude that Indonesia has not met its burden to demonstrate "less favourable treatment" under Article 2.1.

II. INTERPRETATION OF ARTICLE 2.2 OF THE TBT AGREEMENT

11. Indonesia also argues that the High ILUC Risk Cap breaches Article 2.2 of the TBT Agreement by creating unnecessary obstacles to international trade in palm oil and oil palm crop-based biofuel. According to Indonesia, the High ILUC Risk Cap "do[es] not pursue a legitimate objective" and is "more trade-restrictive than necessary," and thus, breaches Article 2.2. The European Union argues that "the measures at issue have neither the purpose nor the effect of creating 'unnecessary obstacles to trade', given that: they pursue legitimate objectives; and they are not more trade-restrictive than necessary in order to fulfil those objectives."

12. The first sentence of Article 2.2 establishes the general rule that Members shall ensure that technical regulations do not create unnecessary obstacles to international trade, while the second sentence of Article 2.2 makes this general rule operational by explaining that "for this purpose" "technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective."

13. If the measure contributes, or is apt to contribute to, a legitimate objective, then a measure is inconsistent with Article 2.2 only if the measure is "more trade-restrictive than necessary to fulfill" that legitimate objective. To establish that this is the case, a complaining Member must prove that: (1) there is a reasonably available alternative measure; (2) that fulfills the Member's legitimate objective at the level that the Member considers appropriate; and (3) is significantly less trade restrictive. As is the case for the parallel provision in the SPS Agreement, the key legal question for

Article 2.2 is whether the importing Member could have adopted a less trade-restrictive measure to achieve its objective at the chosen level.

14. The first step is for the panel to consider the extent to which the challenged measure contributes, or is apt to contribute, to the Member's "legitimate objective." In this case, Indonesia and the European Union use different framing to characterize the "legitimate objective" underlying the High ILUC Risk Cap. According to Indonesia, the European Union adopted the measure to address broad concerns related to "environmental protection in general and the reduction of GHG emissions in particular." The European Union frames its objective much more specifically, explaining that "the values protected by the measures at issue are not just reducing GHG emissions, but addressing together climate change, environmental protection and biodiversity loss, and protecting the public morals in the European Union." The United States observes that it is for the respondent—not the complainant—to identify the legitimate objectives that motivate a given measure. If a complainant wishes to challenge the genuineness of a respondent's professed objective, it can do so by demonstrating that the measure makes no (or little) contribution toward the alleged objective, and that thus, less trade restrictive options are available to meet the objective in question.

15. Therefore, the Panel should base its analysis on the extent to which the High ILUC Risk Cap contributes, or is apt to contribute, the objective identified by the European Union; and whether another less trade-restrictive measure identified by Indonesia is available to the European Union that makes, or is apt to make, a similar contribution.

III. INTERPRETATION OF ARTICLE 2.4 OF THE TBT AGREEMENT

16. With respect to whether a relevant international standard exists under Article 2.4, the TBT Agreement does not define the term "international standard." This term, however, is defined in ISO/IEC Guide 2 as a "[s]tandard that is adopted by an international standardizing/standards organization and made available to the public." Moreover, the TBT Agreement defines "standard" as "a document approved by a recognized body," and specifies that an "international body" is a "body ... whose membership is open to the relevant bodies of at least all Members."

17. Regarding whether a given international standard is "ineffective or inappropriate" to fulfill the legitimate objectives pursued, the term "ineffective" refers to something which not "having the function of accomplishing", "having a result", or "brought to bear", whereas "inappropriate" refers to something which is not "specially suitable", "proper", or "fitting." If the Panel agrees with the European Union that the ISO standards Indonesia cites are not effective and appropriate to address the specific objectives that the European Union has identified, this would suggest that an element of an Article 2.4 claim has not been made out.

IV. INTERPRETATION OF ARTICLE 5.1 OF THE TBT AGREEMENT

18. Indonesia claims that the conformity assessment procedure (CAP) for the High ILUC Risk Cap breaches Article 5.1 of the TBT Agreement. To establish that a measure is inconsistent with Article 5.1.1, a complaining Member must demonstrate three elements: (1) the measure concerns a "conformity assessment procedure"; (2) the products at issue are "like products"; and, (3) access to the CAP is granted on a "less favourable" basis to suppliers of products originating in the territory of a Member than to "suppliers of like products of national origin or originating in any other country, in a comparable situation."

19. In assessing this claim, the Panel must determine whether the difference in treatment under conformity assessment procedures provides a sufficient basis for finding that like products are nonetheless not "in a comparable situation" or whether the difference in treatment is such that imported products are treated less favorably than like domestic products.

EXECUTIVE SUMMARY OF THE U.S. ORAL STATEMENT

I. THE PROPER APPROACH TO AN ARTICLE XX ANALYSIS

20. Article XX sets out the circumstances in which measures that have been found to be inconsistent with another provision of the GATT will nevertheless be justified and therefore not be

found inconsistent with a Member's WTO obligations. The EU has asserted defenses of challenged measures under subparagraphs (a), (b), and (g) of Article XX.

21. The EU argues that the measures at issue are part of a comprehensive set of policies taken to address multiple objectives that are "within the framework of the values recognized as legitimate objectives by Article XX(a), (b) and (g) of the GATT 1994." It also suggests that, because the legal requirements of each of these subparagraphs are "in practice very similar", the Panel may perform a single analysis whereby it assesses whether the measure is "rational and reasonable both in its design and application."

22. While a respondent might characterize the objective of a measure as being comprehensive and falling under multiple subparagraphs, that does not mean the respondent is relieved of its burden to articulate and substantiate the relationship between the measure and the objective identified in each of the various subparagraphs in the manner required - *i.e.*, to demonstrate that it is "necessary to" or "relating to" the given objective.

II. WHETHER ARTICLE XX DEFENSES ARE AVAILABLE IN CONNECTION WITH EXTRATERRITORIAL HARM

23. According to Colombia and Malaysia, a Member cannot invoke Article XX to protect values and interests outside of that Member's territory. Nothing in the text of Article XX supports the type of territorial limitation for the objective of the Member imposing the measure that Colombia and Malaysia are proposing. Furthermore, many measures involving extraterritorial interests have been challenged in the past, and those same measures have been found to satisfy the requirements of the subarticles of Article XX.

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

24. Response to Question 2: Articles 7.1 and 6.2 of the DSU set out panels' terms of reference. Under Article 7.1, when the DSB establishes a panel, the panel's terms of reference are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint." Thus, under the DSU, a panel's terms of reference define which measures and which claims it may consider. A panel may not consider any measures or claims not set out in the complaining Member's panel request. However, a panel's terms of reference do not define the scope of products a panel may analyze with respect to a discrimination claim. In particular, a panel's terms of reference do not limit the arguments a complainant might make in substantiating a claim, or the defenses and arguments a responding party may invoke.

25. Response to Question 4: First, we note that the European Union does not characterize this paragraph as a statement setting out a "standard of review," as the question suggests, and we do not consider it necessary or helpful for the Panel to view the statement in that way. With respect to the substance of the statement, the United States agrees that it is not the Panel's role to second guess a Member's interpretation and application of scientific research. A Member is free to choose the level of protection it believes appropriate in developing domestic policies. This includes the way in which that Member responds to the available scientific research, and therefore also means that a Member need not base its regulations on the majority scientific view in all cases, provided it respects its SPS commitments, such as to maintain its measures with sufficient scientific evidence.

26. Response to Question 5: Under Article 2.2 of the TBT Agreement, a Member may choose its own level of protection. Article 2.2 refers to the "fulfill[ment]" of objectives. In light of the sixth preambular recital of the TBT Agreement, this "fulfill[ment]" refers to a Member's right to achieve legitimate objectives "at the levels it considers appropriate." To the extent that the precautionary principle is germane to the interpretation of the TBT Agreement, that principle is reflected in the text of the TBT Agreement itself. The Panel thus should interpret the text according to customary rules of international law, as is required by the DSU.

27. Response to Question 6: In *US – Tuna II*, the dispute referred to in the Panel's question, the panel and Appellate Body erred in finding that the regulation at issue was "mandatory" within the meaning of the Annex, and therefore a "technical regulation" for purposes of the TBT Agreement.

Therefore, the Appellate Body's analysis in that dispute is of limited utility. In addition, however, the Appellate Body did not find that the U.S. tuna measure was a technical regulation within the meaning of Annex 1.1 because it "set down product characteristics or their related processes and production methods." Rather, the basis of the original panel's finding that the measure was a technical regulation, which the Appellate Body affirmed, was that the measure established "labelling requirements" within the meaning of the second sentence of Annex 1.1. In this dispute, however, neither party has argued that the challenged measure is a technical regulation based on the second sentence of Annex 1.1. Indonesia argues that the measure sets down product characteristics or their related processes and production methods within the meaning of the first sentence of Annex 1.1, while the EU contends that it does not. Therefore, the Panel's analysis should focus on whether the challenged measure is a technical regulation for that reason and not for another reason, such as the Appellate Body found in *US – Tuna II*.

28. Response to Questions 9 and 10: With respect to Article 12.3, the phrase "take account of" means "to consider along with other factors in reaching a decision." Thus, Article 12.3 simply requires a developed country Member to "consider" the special needs of developing country Members "with a view to ensuring that" their measures do not create unnecessary obstacles to trade"; Article 12.3 does not require a developed country Member to ensure that its measures do not have such effect on such Members. It follows that to substantiate a claim under Article 12.3, a complainant would need to show evidence that a respondent did not "consider" the needs of developing countries when designing the measure at issue. Such evidence could take various different forms depending on the specific facts of the case at hand. This interpretation contrasts to the mandatory language reflected in Article 2.2, which requires Members to ensure that their measures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.

29. Response to Questions 11 and 12: The text of Article 5.1.2 of the TBT Agreement does not require a complaining Member to identify and establish a less trade-restrictive alternative measure that provides "adequate confidence" of conformity. However, in referring to "necessary," the second sentence provides that proving the existence of an available, less "strict" or "strictly applied" alternative CAP that provides such "adequate confidence" would establish that a challenged CAP is inconsistent with Article 5.1.2. There are significant textual differences between Article 5.1.2 and Article 2.2 of the TBT Agreement. First, Article 5.1.2 and Annex 1.3 specify the purpose of conformity assessment procedures as being to ensure that products conform to the relevant technical regulation or standard, while Article 2.2 refers to an open list of "legitimate objectives." Second, Article 2.2 refers to the "fulfill[ment]" of objectives, which, in light of the sixth preambular recital of the TBT Agreement, has been interpreted as referring to a Member's right to achieve legitimate objectives "at the levels it considers appropriate." Article 5.1.2, by contrast, refers to the "adequate confidence" of a Member that products conform with a technical regulation or standard. Thus, the text of Article 5.1.2 must be the basis for interpreting that provision; similarities to other provisions should not interfere with faithfully interpreting the provision itself.
