WORLD TRADE ORGANIZATION

WT/DS600/R/Add.1

5 March 2024

(24-2038)

Page: 1/116

Original: English

EUROPEAN UNION AND CERTAIN MEMBER STATES – 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/DS600/R.

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WORKING PROCEDURES OF THE PANEL

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WORKING PROCEDURES OF THE PANEL

Adopted on 13 September 2021
Revised on 16 February 2022

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 parties[1] 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 substantive meeting of the Panel with the parties, each party shall submit a written submission and a rebuttal submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each third party that chooses to make a written submission before the substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(3) 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.

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

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

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. Malaysia shall submit its response to the request before the 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 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 substantive meeting, and any subsequent submissions of the parties in relation thereto before the substantive 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 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 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 Malaysia should be numbered MYS-1, MYS-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 MYS-5, the first exhibit in connection with the next submission thus would be numbered MYS-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 the substantive 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 the substantive meeting, and in writing following the meeting, as provided for in paragraphs 15 and 22 below.

Substantive meeting

10. The Panel shall meet in closed session.

11. The parties shall participate in the meeting 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 the 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 substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Malaysia 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 45 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 the European Union presenting its 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.

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 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. Each party shall serve any document submitted in advance of the substantive meeting with the Panel directly on the third parties. For greater clarity, this includes, in accordance with paragraph 3(1) of these Working Procedures, the parties' rebuttal submissions.

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. 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).

e. 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.

f. 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 B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF MALAYSIA

INTRODUCTION

1. Malaysia challenges certain measures introduced by the European Union (EU) concerning biofuels, notably those relating to the determination of palm oil as a biofuel feedstock having a high indirect land-use change (ILUC) risk, a measure introduced by France regarding a tax exemption that does not apply to palm oil as a biofuel feedstock, as well as measures by Lithuania that implement the EU's measures relating to conventional biofuels and ILUC-risk.

2. Malaysia is the world's second largest producer of palm oil. In 2020, Malaysia produced around 19.14 million metric tonnes of crude palm oil, accounting for 26% of world palm oil production (73.79 million tonnes)[1] and 34% of world palm oil exports. In 2020, Malaysia exported around 1.94 million metric tonnes of palm oil to the EU. Malaysia's palm oil industry indirectly employs more than 3 million people and about 28% of all oil palm-planted area in Malaysia is owned or farmed by smallholder farmers, who have benefited enormously from oil palm cultivation.[2] Palm oil production and exports have been major factors in Malaysia's ability to reduce poverty from 50% in the 1970s, down to less than 5% today.

3. As one of the major producers and exporters of palm oil and products derived from palm oil, Malaysia recognises that it has an important role to play in fulfilling the growing global need for oils and fats in a sustainable manner. Malaysia is a responsible producer of palm oil and has long taken a global leadership role in instituting a continuous stream of oil palm cultivation and palm oil process innovations aimed at making palm oil production more sustainable and environmentally friendly. As of 31 December 2020, nearly 90% of Malaysia's total oil palm cultivation and around 95% of Malaysia's palm oil mills had obtained the Malaysian Sustainable Palm Oil (MSPO) certification. Starting from 1 January 2020, Malaysia made the MSPO certification mandatory.

4. In the context of addressing the environmental risks posed by the extensive use of fossil fuels, the EU and its Member States have, since 2009, adopted a policy of promoting the use of biofuels by setting national targets for the use of renewable energy in various sectors, including the transport sector. This policy led to a rapid increase in the EU consumption of biofuels, produced mainly from food and feed crops, including from palm oil.

5. In the most recent incarnation of its renewable energy directive, and in related implementation by EU Member States, there are elements that Malaysia considers to be inconsistent with the EU's and certain EU Member States' WTO obligations. At the centre of these concerns is the EU's determination that only palm oil entails a high ILUC risk. On that basis, the EU has determined that the share of oil palm crop-based biofuel and palm oil as a biofuel feedstock, unless certified as having a low ILUC-risk, shall not exceed the level of consumption of such fuel in each EU Member State in 2019 and, from 2023 to 2030, it shall gradually decrease to 0%.

MEASURES AT ISSUE

A. Challenged EU Measures

6. *Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources* (RED II) establishes a new binding EU target of a share of at least 32% of renewable energy in the EU gross final consumption of energy by 2030, aiming at "[e]nsur(ing) robust GHG emission savings and

[1] Oil World No. 6, Vol. 64, page 77.
[2] "Oil Palm Planted Areas 2020", Malaysian Palm Oil Board, available at https://bepi.mpob.gov.my/images/area/2020/Area_summary.pdf.

minimiz(ing) unintended environmental impacts".[3] EU Member States were required to transpose this general renewable energy policy framework by 30 June 2021.[4] Malaysia does not challenge the WTO consistency of the entire RED II, nor the network of regulation that the EU refers to as the "EU Biofuels Regime". Rather, Malaysia challenges certain specific measures taken by the EU under that "regime", which, jointly and severally, serve to remove oil-palm crop-based biofuel the EU biofuels market.

7. The RED II places a limit on biofuel consumption in the transport sector, which an EU Member State may take into account for its calculation of the share of energy from renewable sources and, ultimately, when assessing whether it achieves its renewable energy target. The amount of biofuels that may be derived from food and feed crops is set at 7% (or lower) of total energy consumption in the transport sector (hereinafter, the "7% limit"). For the transport sector, the RED II sets an overall objective of achieving 14% of its energy consumption from renewable sources by 2030.

8. After 1 January 2021, EU *Member* States' share of energy from renewable sources may not fall below certain specified thresholds. The thresholds are based on a calculation of the sum of: (i) the gross final consumption of electricity from renewable sources; (ii) the gross final consumption of energy from renewable sources in the heating and cooling sector; and (in relevant part) (iii) the final consumption of energy from renewable sources in the transport sector.

9. The *Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels* supplements the RED II by laying down the criteria for determining the high ILUC-risk feedstock, *i.e.*, feedstock for which a significant expansion of the production area into land with high-carbon stock is observed, as well as for certifying low ILUC-risk biofuels, bioliquids and biomass fuels. The alleged "scientific basis" for these criteria is provided in an accompanying Status Report.

10. In calculating an EU Member State's gross final consumption of energy from renewable sources, the share of biofuels, bioliquids, or biomass fuels associated with a high ILUC-risk , must be below the consumption level of such fuels in that EU Member State in 2019 (unless such fuels are certified to be "low ILUC-risk" fuels). The share of these "high ILUC-risk" biofuels, bioliquids, or biomass fuels may not exceed the level of consumption of such fuels in a given EU Member State in 2019 (hereinafter, referred to as the "high ILUC-risk cap"), unless they are certified to be "low ILUC-risk" biofuels, bioliquids or biomass fuels. The RED II provides that "[f]rom 31 December 2023 and until 31 December 2030 at the latest, that limit is to gradually decrease to 0%" (hereinafter, referred to as the "high ILUC-risk phase out").

11. The certification as low ILUC-risk (hereinafter, referred to as "low ILUC-risk certification") under Article 4 of the Delegated Regulation is theoretically possible for biofuels, bioliquids, and biomass fuels if all relevant criteria are met, namely: (i) such products comply with the sustainability and greenhouse gas (GHG) emissions saving criteria set out in Article 29 of the RED II; (ii) such products have been produced from additional feedstock obtained through additionality measures that meet the specific criteria set out in Article 5 of the Delegated Regulation; and (iii) the evidence needed to identify the additional feedstock and to substantiate claims regarding the production of additional feedstock is duly collected and thoroughly documented by the relevant economic operators.

12. The conditions set out in Articles 4 and 5 of the Delegated Regulation appear to have been designed so as to effectively exclude oil palm crop-based biofuels from the EU market.

[3] Article 3(1) of and recital 8 in the preamble to the RED II.
[4] Article 36(1) of the RED II.

13. As a result of the EU's measures, the demand for biofuels will inevitably turn to fuels that may be taken into account in order to meet the EU renewable energy targets and that benefit from EU Member States' support measures.

B. Challenged Measures of Certain EU Member States

14. The policy objectives set in the EU's Renewable Energy Directives must be transposed into domestic law by EU Member States and the RED II envisages that the renewable energy targets be reached by EU Member States with the help of various support schemes, including tax refunds, reductions, or exemptions. In this context, Malaysia challenges a measure introduced by France regarding a tax exemption that does not apply to palm oil as a biofuel feedstock, as well as measures by Lithuania that implement the EU's measures relating to ILUC-risk.

1. France's Measures

15. In order to promote the consumption of biofuels, France has resorted to fiscal incentives by implementing a fuel tax reduction mechanism based on the quantity of eligible biofuel incorporated into the energy mix through the incentive tax on incorporating biofuels (*taxe incitative relative à l'incorporation de biocarburants*, TIRIB) (the "French fuel tax reduction"). The objective of the TIRIB is to maximise the rate of biofuel incorporation in the production of fuels and to promote the inclusion of eligible biofuels in petrol and diesel released for consumption within France. The distinctive feature of the tax is the exclusion of palm oil-based biofuels as of 2020. In practice, no rational economic operator releasing fuel containing renewable energy will incorporate "ineligible" biofuels into the energy mix under circumstances where another commercially attractive alternative exists.

2. Lithuania's Measures

16. As an EU Member State, Lithuania is required to transpose EU Directives into national law. In view of the provisions of the RED II and the Delegated Regulation, Lithuania has amended its law on renewable energy to transpose the EU rules on ILUC.

17. Malaysia submits that, if the EU's measures at issue were to be found inconsistent with the EU's relevant WTO commitments, Lithuania's rules transposing the relevant elements of the RED II would also have to be found to be inconsistent with Lithuania's relevant WTO commitments.

CLAIMS UNDER THE TBT AGREEMENT IN RESPECT OF THE EU MEASURES

A. Introduction

18. Malaysia claims that the measures at issue violate the EU's obligations under the TBT Agreement and, in particular, its obligations under Articles 2.1, 2.2, 2.4, 2.5, 2.8, 2.9, 5.1.1, 5.1.2, 5.2, 5.6, 5.8, 12.1 and 12.3 of the TBT Agreement.

B. The 7% limit, the high ILUC-risk cap, and the high ILUC-risk phase out are technical regulations within the meaning of Annex 1.1 of the TBT Agreement

19. Malaysia contends that the 7% limit, the high ILUC-risk cap, and the high ILUC-risk phase out, as set out in Article 26 of the RED II and/or the Delegated Regulation, are technical regulations within the meaning of Annex 1.1 of the TBT Agreement.

20. Based on the definition, the Appellate Body has developed a three-tier test for determining whether a measure is a "technical regulation" under the TBT Agreement. Pursuant to this test, a measure is a technical regulation when:

i) it applies to an identifiable product or group of products;

ii) it lays down one or more product characteristics or their related processes and production methods; and

iii) compliance with the product characteristics or their related processes and production methods is mandatory.

21. For a measure to be a "technical regulation", it must "be applicable to an identifiable product, or group of products".[5]

22. Malaysia contends that the measures concerned clearly meet this requirement. The 7% limit applies, as is stated in Article 26(1) of the RED II, to "biofuels, bioliquids and biomass fuels produced from food and feed crops". The high ILUC-risk cap and the high ILUC-risk phase out apply, as provided in Article 26(2) of the RED II, to oil palm crop-based biofuel, which is regarded as a "biofuel with high ILUC-risk". Both "biofuels, bioliquids and biomass fuels produced from food and feed crops" and "oil palm crop-based biofuel with high ILUC risk" are an identifiable product or group of products.

23. In addition to its applicability to an identifiable product or group of products, Annex 1.1 also provides that such measure must be a measure, which "lays down product characteristics or their related processes and production methods".

24. "Product characteristics" within the meaning of Annex 1.1 have been understood to cover "objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product" and to relate to "a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity". while product characteristics may be prescribed or imposed in either a positive or a negative form.[6]

25. Article 26(1), first sentence, of the RED II, which sets out the 7% limit, explicitly states that the products falling within its scope of application are biofuels, bioliquids, and biomass fuels consumed in transport, "where produced from food and feed crops". Since Article 26(1) of the RED II provides for the content of biofuels, bioliquids, and biomass fuels, Malaysia submits that the 7% limit stipulates the composition of the products to which it applies. By doing so, the 7% limit lays down a product characteristic within the meaning of Annex 1.1.

26. The high ILUC-risk cap and the high ILUC-risk phase out specify, in Article 26(2), first sentence, of the RED II, the products falling within the scope of their application as:

"high indirect land-use change-risk biofuels, bioliquids or biomass fuels produced from food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed […] unless they are certified to be low indirect land-use change-risk biofuels, bioliquids or biomass fuels […]".

27. The high ILUC-risk cap and the high ILUC-risk phase out thus stipulate the composition of the products to which they apply. By doing so, the high ILUC-risk cap and the high ILUC-risk phase out lay down a product characteristic within the meaning of Annex 1.1.

28. Finally, for a measure to be a technical regulation, Annex 1.1 requires that compliance with this measure is mandatory.

29. While biofuels, bioliquids and biomass fuels produced from food and feed crops and high ILUC-risk oil crop-based biofuels can technically still be placed on the EU market, the measures at issue instead affect the extent to which these products can be taken into account in meeting EU renewable energy targets. As the Appellate Body made clear in *US – Tuna II (Mexico)*, whether a product can or cannot be placed on the market when it does not comply with the requirements of the measure at issue does not determine whether compliance is "mandatory" or not, and thus whether it must be viewed as a technical regulation or a standard. Such determination must be made in light of the features of the measure and the circumstances of the case at hand. Malaysia argues that the 7% limit, the

[5] Appellate Body Report, *EC – Asbestos*, para. 70.
[6] Ibid., para. 67 and 69.

high ILUC-risk cap, and the high ILUC-risk phase out are mandatory in nature and, therefore, technical regulations. They form part and parcel of EU legislation; they prescribe a particular conduct; and they set out specific requirements that constitute the sole means of addressing a particular matter.

30. Article 26(1), first paragraph of the RED II states that:

"the share of biofuels and bioliquids, as well as of biomass fuels … *shall be* no more than one percentage point higher than the share of such fuels in the final consumption of energy in the road and rail transport sectors in 2020 in that Member State, with a maximum of 7% …" (emphasis added).

31. The 7% limit is clearly expressed in mandatory terms. Also, the 7% limit prescribes a particular conduct, and sets out a specific requirement that constitutes the sole means of addressing a particular matter, namely, to be taken into account for achieving the EU renewable energy targets.

32. With regard to the high ILUC-risk cap, Article 26(2), first sentence, of the RED II states that:

"the share of high indirect land-use change-risk biofuels, bioliquids and biomass fuels … *shall not* exceed the level of consumption of such fuels in that Member State in 2019 …" (emphasis added).

33. Article 26(2), second sentence, of the RED II states, with regard to the high ILUC-risk phase out, that the limit referred to Article 26(2), first sentence, "*shall* gradually decrease to 0%". Hence, both the high ILUC-risk cap and the high ILUC-risk phase out are mandatory in nature.

34. Therefore, based on the overall design, structure, and operation of the 7% limit, the high ILUC-risk cap, and the high ILUC-risk phase out, the measures at issue are mandatory. These measures are laid down in Article 26 of the RED II and the Delegated Regulation that prescribe rules "in a binding or compulsory fashion"[7] and the compliance with which is mandatory.

35. It is to be highlighted that the RED II and the Delegated Regulation are binding legal acts of the EU. According to Article 288 of the Treaty on the Functioning of the European Union (TFEU), a regulation is of "general application" and "binding in its entirety and directly applicable in all Member States"; while a directive is "binding, as to the result to be achieved, upon each Member State to which it is addressed" and "leave[s] to the national authorities the choice of form and methods". Thus, regulations are directly applicable and legally valid in the EU Member States without any need for implementation. Although directives are not directly applicable, they are mandatory "as to the result to be achieved", and EU Member States are obliged to transpose them into national law within the established deadline.

36. In view of the foregoing, Malaysia submits that the 7% limit, the high ILUC-risk cap, and the high ILUC-risk phase out, as set out in Article 26 of the RED II and/or the Delegated Regulation, are technical regulations within the meaning of Annex 1.1 of the TBT Agreement.

C. The high ILUC-risk cap and the high ILUC-risk phase out are inconsistent with the national treatment and MFN obligations under Article 2.1 of the TBT Agreement

37. Article 2.1 of the TBT Agreement sets out a three-tier test of consistency with the national and MFN treatment obligations under this provision. For the purposes of its claim under Article 2.1, Malaysia submits that:

i) the measures at issue are "technical regulations" within the meaning of Annex 1.1;

[7] Appellate Body Report, *EC – Asbestos*, para. 68.

ii) the products at issue are "like products", i.e., that oil palm crop-based biofuel is "like" other oil crop-based biofuel, such as biofuel made of rapeseed oil or soyabean oil; and

iii) the treatment accorded to Malaysia's oil palm crop-based biofuel imported into the EU is less favourable than that accorded to domestic "like products" and to "like products" imported into the EU from other countries.

38. With respect to the first element, Malaysia has concluded above that the high ILUC-risk cap and the high ILUC-risk phase out are technical regulations.

39. The second element of the Article 2.1 test requires an assessment as to whether the products at issue are "like products". Whether the products at issue are "like" is to be objectively assessed on the basis of *the nature and extent* of the competitive relationship between the products in the market of the regulating Member.[8] '*A sufficiently close* competitive relationship' is, therefore, an essential indicator that the products at issue are like.[9]

40. To determine whether the products at issue were in a genuine and sufficiently close competitive relationship to be considered "like" within the meaning of Article 2.1, the Appellate Body's approach essentially consists of employing four general criteria in analysing "likeness":

i) the properties, nature and quality of the products;

ii) the end-uses of the products;

iii) consumers' tastes and habits – also referred to as consumers' perceptions and behaviour – in respect of the products; and

iv) the tariff classification of the products.

41. With respect to physical characteristics, oil palm crop-based biofuel (PME) and other oil crop-based biofuels, such as biofuel made of rapeseed oil (RME) or biofuel made of soyabean oil (SBME), share the same chemical nature and similar basic physical characteristics.[10]

42. One of the main properties of biodiesel is its low temperature operability, which is usually determined by three parameters, of which the cold filter plugging point (CFPP) is considered to be the most reliable. The CFPP refers to "the temperature at which the biodiesel turns back into fat and cannot be used as fuel".[11] The CFPP value of biodiesel differs depending on the oil crop feedstock of which it is made. The CFPP of biodiesel made of RME or SBME is lower than the CFPP of biodiesel made of PME. While this difference in CFPP values relates to the physical characteristics of the biodiesel made from palm oil and biodiesel made of rapeseed or soyabean oil, it does not significantly affect the competitive relationship between and among oil crop-based biofuels in the EU market. Malaysia refers to the position taken by the European Commission in 2009 in the context of an anti-dumping investigation relating to biodiesel, noting that the difference in CFPP values "is a minor difference which can easily be compensated either by mixing different types of biodiesel or by using additives" and that "[t]he difference in CFPP practically does not play any role in most of the blends".[12]

[8] Appellate Body Report, *US – Clove Cigarettes*, para. 192.
[9] Appellate Body Report, *US – Clove Cigarettes*, para. 191.
[10] B. R. Moser, "Influence of Blending Canola, Palm, Soybean, and Sunflower Oil Methyl Esters on Fuel Properties of Biodiesel" (2008), Vol. 22, *Energy & Fuels*, pp. 4301-4306, available at https://pubs.acs.org/doi/10.1021/ef800588x (acc accessed 13 October 2021); I. Barabás and I.-A. Todoruţ, "Biodiesel Quality, Standards and Properties", in G. Montero, *Biodiesel – Quality, Emissions and By-Products* (IntechOpen, 2011), available at https://www.intechopen.com/chapters/23666 (accessed 13 October 2021).
[11] Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.122.
[12] Commission Regulation (EC) No 193/2009 of 11 March 2009 imposing a provisional anti-dumping duty on imports of biodiesel originating in the United States of America, OJ 2009 L 67, p. 26, para. 33(c), available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009R0193 (accessed 13 October 2021).

43. Notably, in light of technological developments in recent years, all oil crop biofuel feedstocks can be interchangeably used to produce hydrotreated (hydrogenated) vegetable oil (HVO), with a final product that displays the same physical and chemical properties, irrespective of the particular feedstock(s) used to produce it. HVO delivers the same performance and can be used in all seasons in all EU Member States' markets, irrespective of the particular feedstock(s) used to produce it. HVO allows biofuel producers and blenders to decide on the specific feedstock to be used only on the basis of price considerations and market availability. With respect to its physical characteristics and chemical properties, HVO oil palm crop-based biofuel is not only "like" vis-à-vis other oil crop-based biofuels, but in fact identical to any other HVO oil crop-based biofuels.[13]

44. With respect to product end uses, Malaysia notes that biofuel made of PME and other oil crop-based biofuels (such as RME and SBME) are typically blended to produce FAME, which is in turn blended with conventional diesel to produce the fuel sold at the gas station. Oil crop-based biofuels, thus, have the same end use. The share of each type of oil crop-based biofuels in FAME depends on price, availability of supply, and the need to meet the relevant quality standards. Malaysia notes that the EU standard EN 590[14] for diesel fuel and the EU standard EN 14214[15] for biodiesel do not differentiate among the different types of biofuels based on the feedstock from which they are made.

45. With respect to the end use of HVO oil palm crop-based biofuel, Malaysia recalls that the final product displays the same physical and chemical properties, irrespective of the particular feedstock(s) used to produce it, and that it delivers the same performance, and can be used in all seasons in all EU Member States' markets, irrespective of the particular feedstock(s) used.

46. As relates to consumer preferences, perceptions and behaviour, Malaysia notes that consumers of oil crop-based biofuels are the producers of FAME and HVO. These consumers typically blend various types of biofuels. They do not have a particular preference for any of the biofuels, which are blended to produce FAME. What matters to customers is the CFPP, irrespective of the feedstock used. Therefore, their choice between biofuels is based on price, availability of supply, and the need to meet the relevant quality standards. These standards may differ from season to season and from country to country, depending on climatological conditions. Given the difference in CFPP values, some oil crop-based biofuels may, in some circumstances, be more appropriate to use or used more than others to meet the relevant quality standards. However, the different types of oil crop-based biofuels are highly substitutable from the perspective of consumers. With respect to HVO oil palm crop-based biofuel, Malaysia notes that HVO delivers the same performance and can be used by the relevant consumers, namely the biofuel blenders and fuel producers, in all seasons in all EU Member States' markets, irrespective of the particular feedstock(s) used to produce it.

47. In light of the above, Malaysia submits that all oil crop-based biofuels are "like products" within the meaning of Article 2.1.

48. The third element of the test of consistency relates to the question of whether the measure at issue accords "treatment no less favourable". In *US – Clove Cigarettes*, the Appellate Body established a two-tier test to determine whether a technical regulation accords "treatment no less favourable" within the meaning of Article 2.1. First, it must be examined whether the measure at issue distorts the conditions of competition to the detriment of products imported by the complainant. Second, in cases of *de facto* discrimination, it has to be determined whether the detrimental impact of the measure at issue stems exclusively

[13] Ibid., at paras. 156-175

[14] EN 590 provides for the requirements and test methods for automotive diesel fuels.

[15] EN 14214 is the European specification for FAME that sets out the requirements and test methods for biodiesel for use in diesel engines. EN 14214 allows the use of many different feedstocks and manufacturing processes as long as the finished FAME product meets certain minimum specifications. Regardless of the FAME source, composition, or manufacturing process, the marketed FAME products must comply with the EN 14214 specification in order to manufacture EN 590 diesel fuel and, thus, have the same end use.

from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.[16]

49. Malaysia contends that the high ILUC-risk cap and the high ILUC-risk phase out distort the conditions of competition on the EU market of oil crop-based biofuels to the detriment of oil palm crop-based biofuel imported from Malaysia, and that the detrimental impact of these measures does not stem from a legitimate regulatory distinction. The high ILUC-risk cap and the high ILUC-risk phase out, as set out in Article 26(2) of the RED II, first limit and subsequently *de facto* exclude oil palm crop-based biofuel from being counted towards the EU renewable energy targets. As the principal feature of the EU market of oil crop-based biofuels is that this market would not exist but for the EU renewable energy targets (and related support measures), these measures virtually guarantee the elimination of oil palm crop-based biofuel on the market. Malaysia, thus, contends that the measures at issue have a detrimental impact on the competitive conditions of oil palm crop-based biofuel from Malaysia when compared to the competitive conditions of domestic EU biofuels made from other oil crops, as well as biofuels made from other oil crops imported into the EU from other countries. The measures at issue are, therefore, inconsistent with both the national treatment obligation and the MFN treatment obligation under Article 2.1.

50. In the present case, the high ILUC-risk cap and the high ILUC-risk phase out are *de facto* discriminatory. The Panel must, therefore, examine whether the detrimental impact of these measures on the competitive conditions of oil palm crop-based biofuel stems exclusively from a legitimate regulatory distinction. In determining whether it does, the Panel must carefully scrutinise the design, architecture, revealing structure, operation, and application of these measures. In particular, the Panel must analyse whether they are designed and applied in an even-handed manner, or whether they lack even-handedness, for example, because they are designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination.

51. High ILUC-risk biofuels, which are subject to the measures at issue, are biofuels made from feedstock for which a significant expansion of the production area into land with high carbon stock is observed. Article 3 of the Delegated Regulation sets out two cumulative criteria for determining high ILUC-risk feedstocks: i) the average annual expansion of the global production area of the feedstock since 2008 must be higher than 1% and affect more than 100,000 hectares; and ii) the share of that expansion into land with high-carbon stock must be higher than 10%.

52. The result of the application of these criteria is that only palm oil, and no other oil crop, is classified as a high ILUC-risk feedstock, and that only oil palm crop-based biofuel, and no other oil crop-based biofuels, are subject to the high ILUC-risk cap and the high ILUC-risk phase out. However, Malaysia contends that the use of high ILUC-risk as a regulatory distinction is highly problematic, as it is impossible to establish a causal link between the cultivation of food and feed crops for the production of biofuel in one geographical location, and the growing of crops in another geographical location. Furthermore, the modelling of ILUC emissions is too uncertain to yield an accurate estimation of ILUC. Malaysia, thus, submits that high ILUC-risk is not a reliable and appropriate regulatory distinction, and, therefore, not justifiable.

53. Malaysia submits, in the alternative, that the high ILUC-risk cap and the high ILUC-risk phase out, the measures at issue, are not applied in an even-handed manner. According to Malaysia, the regulatory distinction drawn by these measures is not calibrated to the risk that they seek to address. The aforementioned classification of high ILUC-risk result of the application of these criteria is that only palm oil, and no other oil crops, is classified as a high ILUC-risk feedstock, and that only oil palm crop-based biofuel, and no other oil crop-based biofuels, are subject to the high ILUC-risk cap and the high ILUC-risk phase out.

54. Malaysia also submits that the high ILUC-risk cap and the high ILUC-risk phase out have been designed and applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination. The measures at issue apply to oil palm crop-based biofuel, but not to biofuels made from other oil crops. This discrimination is both unjustified and arbitrary, since

[16] Appellate Body Report, *US – Clove Cigarettes*, paras. 180 and 182.

there is no rational relationship between the discrimination and the primary objective of the measures at issue, namely the avoidance of additional GHG emissions.

55. Based on the fact that the regulatory distinction drawn by the measures at issue is not calibrated with the risks these measures seek to address, on the serious doubts regarding the rational relationship between the regulatory distinction and the objective pursued by the measures at issue, and on the fact that the measures at issue are designed and applied in a manner that constitutes arbitrary and unjustifiable discrimination, Malaysia submits that the detrimental impact of the measures at issue does not stem exclusively from a legitimate regulatory distinction, but reflects discrimination of oil palm crop-based biofuel from Malaysia.

D. The 7% limit, the high ILUC-risk cap and the high ILUC-risk phase out create unnecessary obstacles to international trade and, therefore, are inconsistent with Article 2.2 of the TBT Agreement

56. Malaysia submits that the 7% limit, the high ILUC-risk cap and the high ILUC-risk phase out are inconsistent with the obligations under Article 2.2 of the TBT Agreement.

57. The case law has concluded that, in essence, Article 2.2 serves as a necessity test in the TBT Agreement. It seeks to achieve a balance between two opposing objectives, namely trade liberalisation and the pursuit of a legitimate policy objective by WTO Members. The established case law has set out a four-tier test of consistency with Article 2.2. Based on this four-tier test, Malaysia submits that:

i) the measures at issue in this dispute, i.e., the 7% limit, the high ILUC-risk cap and the high ILUC-risk phase out, are "technical regulations" within the meaning of Annex 1.1;

ii) the measures at issue are "trade-restrictive";

iii) they fulfil their alleged objectives to an extent that is very difficult, if not impossible, to determine, and is, in any case, quite limited; and

iv) the measures at issue are "more trade-restrictive than necessary" to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

58. With regard to the first element, Malaysia has concluded above that the 7% limit, the high ILUC-risk cap and the high ILUC-risk phase out are technical regulations.

59. The second element of the test of consistency with Article 2.2 relates to the question of whether the measure at issue is "trade-restrictive". Here, a panel must determine that the measure(s) at issue have "a limiting effect on trade".[17]

60. The high ILUC-risk cap and the high ILUC-risk phase out unmistakably have a restrictive, *i.e.*, limiting, effect on trade in oil palm crop-based biofuel because these measures first limit and subsequently *de facto* exclude oil palm crop-based biofuel from being counted towards the EU's renewable energy targets. There is no demand for oil palm crop-based biofuel that cannot be counted towards the EU renewable energy targets. Hence, Malaysia submits that the high ILUC-risk cap and the high ILUC-risk phase out are "trade restrictive" within the meaning of Article 2.2.

61. The third element of the test of consistency with Article 2.2 relates to the question of whether the measure at issue fulfils a legitimate objective. This question raises a number of intermediate questions, such as: (i) how to establish the objective(s) pursued by the measure at issue; (ii) which objectives are "legitimate objectives" within the meaning of Article 2.2; (iii) when a measure "fulfils" a legitimate objective; and (iv) how to establish

[17] Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

whether, and if so, to what extent, the measure at issue fulfils the legitimate objective pursued.

62. With respect to the determination of a proper objective, the parties agree that a panel is not bound by a Member's characterisation of the objectives it pursues through the measure. Similarly, Malaysia agrees with the EU's assessment that the Appellate Body in *US – Tuna II (Mexico)* "clarified that a panel must make an *objective* and *independent assessment* of the objectives pursued by a Member".[18] Malaysia contends that, given that the objectives pursued are fundamental drivers of a piece of legislation, it is reasonable to assert that these goals would be memorialized in the relevant regulation(s). It is Malaysia's position that objectives which are explicitly stated in relevant regulations (most typically set forth in preambular language), are therefore worthy of strong consideration in assessing the true and immediate objective(s) of a measure.

63. Based on the Preamble to the RED II and the Delegated Regulation, Malaysia contends that the expressed primary objective of the measures is the avoidance of additional GHG emissions by limiting direct and indirect land-use change.

64. With regard to the second intermediate question, namely, which objectives are "legitimate objectives", it is worth noting both that certain 'legitimate objectives' are explicitly enumerated in the third sentence of Article 2.2 (namely: (i) national security; (ii) the prevention of deceptive practices; (iii) the protection of human health and safety, and animal or plant life or health; and (iv) the protection of the environment), and that these enumerated objectives do not constitute an exhaustive list. The assessment of legitimacy is, obviously, closely tethered to what the panel determines the EU's objective(s) to be.

65. With regard to the third intermediate question, namely, when does a measure "fulfil" a legitimate objective, the Appellate Body ruled that "the question of whether a technical regulation "fulfils" an objective is concerned with the degree of contribution that the technical regulation makes towards the achievement of the legitimate objective".[19] That degree of contribution towards the achievement of the legitimate objective is of significant importance in both the "relational analysis" and the "comparative analysis" under the fourth element of the test of consistency.

66. Regarding the last intermediate question of how to establish whether, and, if so, to what extent, the measure at issue fulfils the legitimate objective pursued, the Appellate Body noted in *US – Tuna II (Mexico)* that the degree of fulfilment of the objective pursued (the degree of contribution towards the achievement of the objective), may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure.

67. In the present case, it is extremely difficult to determine the extent of any contribution that is made toward the achievement of the objective(s) of the measures. Much of this difficulty derives from the fact that the chosen metric for ascertaining the success or failure of the measures (*i.e.*, ILUC) can neither be observed nor measured and, therefore, it is impossible to attribute ILUC-risks exclusively to oil palm crop-based biofuel, from, *inter alia*, Malaysia. Similarly, it is impossible to precisely estimate to what extent, if at all, ILUC GHG emissions occur and the extent to which said emissions would be abated by the high ILUC-risk cap and the high ILUC-risk phase out.

68. The fourth and last element of the test of consistency with Article 2.2 relates to the question of whether the measure at issue is "not more trade-restrictive than necessary" to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Here, a panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of the consequences that would arise

[18] First Written Submission by the EU, para. 796 (emphases added).
[19] Appellate Body Report, *US – Tuna II (Mexico)*, para. 315

from non-fulfilment of the objective(s) pursued by the Member through the measure.[20] This balancing of factors constitutes the aforementioned "relational analysis".

69. The Appellate Body has emphasised that, in most cases, a comparison of the challenged measure and possible alternative measures should be undertaken. In other words, in addition to a "relational analysis", in most cases also a "comparative analysis" should be undertaken to establish whether a technical regulation is "more trade-restrictive than necessary". In the context of such "comparative analysis", it may be relevant to consider, in particular: (i) whether the proposed alternative measure is less trade-restrictive; (ii) whether it would make an equivalent contribution to the relevant legitimate objective(s), taking account of the risks non-fulfilment would create; and (iii) whether it is reasonably available.

70. As to the first factor to be considered in the relational analysis under Article 2.2, Malaysia has laid out that the measures at issue are highly trade restrictive.

71. As to the second factor to be considered in the relational analysis under Article 2.2, namely the contribution to the achievement of the primary objective of the measures at issue (*i.e.*, to avoid additional GHG emissions by limiting direct and indirect land-use change), Malaysia again notes that, this contribution would be very difficult, if not impossible, to be determined, whether in quantitative or qualitative terms, and would, in any case, be quite limited. Malaysia notes that the contribution made by the measures at issue to the primary objective is significantly undermined in its effectiveness by the fact that there is no certainty that the expansion of production into land with high-carbon stock will not continue, or even accelerate, in order to expand the production of feedstocks other than palm oil for the production of biofuel destined for the EU market.

72. As to the third factor to be considered in the relational analysis under Article 2.2, namely the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective pursued by the EU through the measures at issue, Malaysia submits that the risks and the gravity of consequences that non-compliance would create are, while not insignificant, rather limited. This is so because the measures at issue, at best, only make a limited contribution to the primary objective being pursued by the EU, and, therefore, the risks and consequences that non-compliance with these measures would create are also limited.

73. As relates to the aforementioned "comparative analysis" under Article 2.2, Malaysia considers that less trade-restrictive alternative measures are available and that examples of such measures are already successfully applied by the EU in other sectors and should have been employed by the EU vis-à-vis the production and use of biofuels, bioliquids, or biomass fuels associated with a high ILUC-risk in the transport sector. Malaysia contends that these measures would not be discriminatory and would be more effective in ensuring that the shortfall from the progressive reduction in the use of high ILUC-risk oil crops is not replaced by other crops that look poised to have similar or even worse effects on deforestation, encroachment onto land with high-carbon stock and related GHG emissions, or other negative environmental consequences (e.g., greater use of pesticides and fertilisers, lower yields, and/or the need for larger planted areas).

74. As an indicative and non-exhaustive description of the alternative measures that the EU should have considered and adopted, which is the only burden of proof falling on Malaysia, the following measures are of particular relevance:

    i) A legality scheme, such as the EU's Forest Law Enforcement, Governance and Trade (FLEGT) scheme;

    ii) The EU's approach applied in its deforestation-free initiative

[20] See, for example, Appellate Body Report, *US – Tuna II (Mexico)*, para. 322.

iii) Certification by public authorities, such as the catch certificate under the EU's Illegal, Unreported and Unregulated (IUU) fishing scheme;

iv) Certification by existing non-governmental organisations, such as under the International Sustainability and Carbon Certification (ISCC) and the Roundtable on Sustainable Palm Oil (RSPO) and the RSPO-RED;

v) Market access quotas; and

vi) Specific import requirements applied on a consignment basis.

75. On the basis of the above considerations, Malaysia contends that the 7% limit, the high ILUC-risk cap, and the high ILUC-risk phase out are inconsistent with Article 2.2.

E. The high ILUC-risk cap and the high ILUC-risk phase out are not based on the relevant international standards and, therefore, are inconsistent with Article 2.4 of the TBT Agreement

76. Article 2.4 of the TBT Agreement sets out a three-tier test of consistency. To determine whether or not a technical regulation is consistent with Article 2.4, a panel must examine:

i) whether there exists a relevant international standard (or its completion is imminent);

ii) whether the relevant international standard is "used as a basis" for the technical regulation at issue; and

iii) whether the relevant international standard is an effective and appropriate means for the fulfilment of the legitimate objectives pursued.

77. As to the first element of the three-tier test of consistency with Article 2.4, namely whether there exists a relevant international standard (or its completion is imminent), Malaysia submits that the relevant international standards are:

i) International Organization for Standardization (ISO) 14040 and ISO 14044 laying down international standards on life cycle assessment;

ii) ISO 14067 specifying the principles, requirements and guidelines for quantifying and communicating the carbon footprint of a product; and

iii) ISO 13065 concerning the sustainability criteria for bioenergy.

78. ISO standards are "international standards" within the meaning of Article 2.4.

79. As to the question whether these international standards are "relevant" international standards within the meaning of Article 2.4, the panel in *EC – Sardines* held, and the Appellate Body agreed, that, for an international standard to be "relevant", it must be an international standard that "bear[s] upon or relat[es] to the matter in hand" or is "pertinent" to the matter addressed by the technical regulation.

80. Malaysia submits that the ISO standards referred to above are "relevant" international standards within the meaning of Article 2.4. These ISO standards, and in particular ISO 14067:2018, read together ISO 14040:2016 and ISO 14044:2017, set out principles, requirements, and guidelines for determining the carbon footprint of products, including biofuel. As the measures at issue are measures, which first limit and then *de facto* exclude oil palm crop-based biofuel from being counted towards the EU renewable energy targets on the basis of, essentially, its carbon footprint, the ISO standards for determining the carbon footprint are "relevant" in the assessment of the consistency of the measures at issue with Article 2.4. Moreover, ISO 13065:2015, which relies also on ISO 14067:2018, is a standard applying to the entire supply chain and setting forth "principles, criteria and

indicators for the bioenergy supply chain to facilitate assessment of environmental, social and economic aspects of sustainability".[21]

81. The second element of the test of consistency with Article 2.4 relates to the question of whether the relevant international standard is "used as a basis" for the technical regulation at issue. The EU stipulated that it did not use the aforementioned standards as a basis for the technical regulations at issue.[22]

82. The third and last element of the test of consistency with Article 2.4 relates to the question of whether the relevant international standard is an effective and appropriate means for the fulfilment of the legitimate objective(s) pursued. Malaysia submits that the ISO standards referred to above are effective and appropriate means to fulfil the primary objective of the EU measures at issue, namely the avoidance of additional GHG emissions by limiting direct and indirect land use change.

83. On the basis of the above considerations, Malaysia contends that the high ILUC-risk cap and the high ILUC-risk phase out are inconsistent with Article 2.4 of the TBT Agreement.

F. The EU, in preparing, adopting or applying the measures at issue, notably the 7% limit, the high ILUC-risk cap and the high ILUC-risk phase out, has failed, upon the request of Malaysia, to explain the justification for those measures in terms of Articles 2.2 to 2.4 of the TBT Agreement and, therefore, acted inconsistently with Article 2.5 of the TBT Agreement

84. To assess whether a Member acted inconsistently with Article 2.5 of the TBT Agreement, in particular the first sentence, a panel must establish whether:

i) the Member is "preparing, adopting or applying a technical regulation";
ii) this technical regulation "may have a significant effect on trade of other Members";
iii) there was a "request of another Member" to explain the justification of the technical regulation at issue in terms of the provisions of Article 2.2 to 2.4; and
iv) the Member in question failed to "explain the justification for that technical regulation" in terms of the provisions of Article 2.2 to 2.4.

85. With regard to the first element of the four-tier test of consistency with the first sentence of Article 2.5, Malaysia submits that the EU measures at issue, namely the 7% limit, the high ILUC-risk cap and the high ILUC-risk phase out, are technical regulations.

86. With regard to the second element of the test of consistency with the first sentence of Article 2.5, Malaysia notes that, as the panel in *US – Clove Cigarettes* held, it suffices under Article 2.5 that the technical regulation at issue "may have a significant effect on trade". Malaysia submits, as discussed above, that the technical regulations at issue, namely the 7% limit, the high ILUC-risk cap and the high ILUC-risk phase out, not only "may have", but "have" an effect on the trade of Malaysia with the EU. Moreover, the effect on the trade of Malaysia, as discussed above, is clearly "significant" within the meaning given to this term in WTO case law, namely "sufficiently great or important to be worthy of attention; noteworthy", or "important, notable or consequential".[23]

87. With regard to the third element of the test of consistency with the first sentence of Article 2.5, namely whether there was a "request of another Member" to explain the justification of the technical regulation at issue in terms of the provisions of Article 2.2 to 2.4, the EU has already stipulated that Malaysia had made such a request.[24]

88. With regard to the fourth element of the test of consistency with the first sentence of Article 2.5, namely whether the Member in question failed to "explain the justification for that technical regulation" in terms of the provisions of Article 2.2 to 2.4, Malaysia emphasises

[21] ISO 13065:2015 (Sustainability criteria for bioenergy), para. 1.
[22] See EU Responses to Panel questions, para. 721.
[23] See, for example, Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 1052; and Panel Report, *Korea – Commercial Vessels*, para. 7.570 (in respect of Article 6.3(c) of the SCM Agreement).
[24] EU Responses to the Panel's Questions, para. 732.

that the first sentence of Article 2.5, requires from the Member concerned a "justification for the technical regulation". The mere provision of general information on the technical regulation is insufficient.

89. Malaysia further contends that the EU has not given any explanation of the justification for the technical regulations at issue in terms of the obligations assumed under Articles 2.2 and 2.4. In responding to the repeated requests by Malaysia and other Members to explain the justification for the technical regulations at issue, the EU did not go further than stating that the measures at issue were not technical regulations.

90. Based on the foregoing, Malaysia concludes that the EU acted inconsistently with Article 2.5 of the TBT Agreement.

G. The high ILUC-risk cap on and the high ILUC-risk phase out of oil palm crop-based biofuel are based on an abstract and unsubstantiated high-ILUC risk concept instead of the performance of such biofuel and, therefore, are inconsistent with Article 2.8 of the TBT Agreement.

91. The high ILUC-risk cap and the high ILUC-risk phase out are based on an abstract and unsubstantiated high-ILUC risk concept instead of the performance of such biofuels and, therefore, are inconsistent with Article 2.8 of the TBT Agreement.

92. Malaysia submits that the high ILUC-risk cap on and the high ILUC-risk phase out of oil palm crop-based biofuel are based on an abstract and unsubstantiated high-ILUC risk concept instead of the performance of such biofuel and, therefore, are inconsistent with Article 2.8.

93. The high ILUC-risk cap and the high ILUC-risk phase out are technical regulations determining which oil crop-based biofuels may be taken into account towards the EU renewable energy targets. First limited and eventually *de facto* excluded under the measures at issue is biofuel, which is high ILUC-risk. The high ILUC-risk cap and the high ILUC-risk phase out set out product requirements in terms of a descriptive characteristic, namely high ILUC-risk. Moreover, this descriptive characteristic is an abstract and unsubstantiated concept for which there is no scientific basis. High ILUC-risk does not relate to the environmental performance of biofuel.

94. In the context of its claim of inconsistency with Article 2.4, Malaysia submitted that there are international standards setting principles, criteria, and guidelines on how to determine the environmental performance of a product, such as biofuel, and the sustainability of bioenergy. These international standards are the ISO standards ISO 14067:2018, read together ISO 14040:2016 and ISO 14044:2017, and ISO 13065:2015. To identify biofuels that are not to be counted towards its renewable energy targets because of their negative environmental impact, the EU could and should have based the technical regulations at issue on these ISO standards which would have enabled it to specify product requirements in terms of performance.

95. Whereas Article 2.8 states that "Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics", Article 2.8 qualifies this obligation by stating "[w]henever appropriate". The panel in *US – Clove Cigarettes* held that the term "wherever appropriate" is to be understood as where it is "proper", "fitting" and "suitable" to specify the product requirements in terms of performance. Malaysia contends that, in the present case, it is "proper", "fitting" and "suitable", and thus "appropriate", to specify the product requirements for biofuel in terms of performance in line with the ISO standards referred to above.

96. In light of the above, Malaysia concludes that the high ILUC-risk cap and the high ILUC-risk phase out are inconsistent with Article 2.8 because these measures are based on product requirements in terms of descriptive characteristics instead of in terms of performance.

H. The 7% limit, the high ILUC-risk cap and the high ILUC-risk phase out were adopted without the required timely publication and notification of these measures and organising an adequate process for commenting and, therefore, are inconsistent with Article 2.9 of the TBT Agreement

97. Malaysia submits that the 7% limit, the high ILUC-risk cap, and the high ILUC-risk phase out are inconsistent with Article 2.9.2 and/or 2.9.4 of the TBT Agreement.

98. When no relevant international standard exists or when a proposed technical regulation is not in accordance with a relevant international standard and the proposed technical regulation may have a significant effect on trade of other Members, Article 2.9 imposes on Members detailed transparency, notification, and consultation requirements.

99. Malaysia contends that the 7% limit, the high ILUC-risk cap and the high ILUC-risk phase out are inconsistent with Article 2.9.2, because the EU did not notify the proposals of the RED II and of the Delegated Regulation, which set out the measures at issue. Malaysia also concludes that the high ILUC-risk cap and the high ILUC-risk phase out are inconsistent with Article 2.9.4, because the EU failed to organise a meaningful commenting process on the proposal for the Delegated Regulation.

I. Low ILUC-risk certification is a conformity assessment procedure within the meaning of Annex 1.3 of the TBT Agreement.

100. Malaysia submits that the low ILUC-risk certification, as set out in Articles 4 to 6 of the Delegated Regulation, is a conformity assessment procedure within the meaning of Annex 1.3 of the TBT Agreement.

101. Malaysia does not make a claim of inconsistency of the technical regulation that is directly relevant for the conformity assessment procedure at issue. Malaysia, by following the language of the Delegated Regulation and its underlying logic, considers "the exemption from the high ILUC risk cap and phase out" to be the technical regulation that is directly relevant for the conformity assessment procedure at issue.

102. Furthermore, Malaysia claims an indirect link between the conformity assessment procedure at issue, namely the low ILUC-risk certification on the one hand, and the high ILUC-risk cap and phase out on the other, to determine whether biofuels, in this case, oil palm crop-based biofuels, fulfil the requirements to be exempted from the limitations instituted by the high ILUC-risk cap and high ILUC-risk phase out.

103. Malaysia submits that low ILUC-risk certification, as set out in Articles 4 to 6 of the Delegated Regulation, is a conformity assessment procedure within the meaning of Annex 1.3 of the TBT Agreement, and thus subject to the disciplines set out in Article 5 of the TBT Agreement.

J. Low ILUC-risk certification is inconsistent with Article 5.1.1 of the TBT Agreement

104. Malaysia submits that low ILUC-risk certification is inconsistent with Article 5.1.1 of the TBT Agreement because it discriminates against Malaysian suppliers of oil palm crop-based biofuel as compared to the suppliers of the EU or other foreign origin of oil crop-based biofuel produced from feedstocks other than palm oil.

105. Article 5.1.1 provides for MFN treatment and national treatment obligations with regard to conformity assessment procedures.

106. The panel in *Russia – Railway Equipment* held that an importing Member would act inconsistently with Article 5.1.1 if three elements are established:

i) the suppliers of another Member who have been granted less favourable access are suppliers of products that are "like" the products of domestic suppliers or suppliers from any other country who have been granted more favourable access;

ii) the importing Member (through the preparation, adoption, or application of a covered conformity assessment procedure) grants access for suppliers of products from another Member "under conditions less favourable" than those accorded to suppliers of domestic products or products from any other country; and
iii) the importing Member grants access under conditions less favourable for suppliers of like products "in a comparable situation".

107. With regard to the first element of the test of consistency with Article 5.1.1, Malaysia has already shown that the products at issue, namely oil palm crop-based biofuel and other oil crop-based biofuels are "like" within the meaning of Article 2.1. They are, therefore, also "like" under Article 5.1.1.

108. With regard to the second element of the test of consistency with Article 5.1.1, Malaysia submits that conditions for access to low ILUC-risk certification granted by the EU modify the conditions of competition between, on the one hand, the Malaysian suppliers of oil palm crop-based biofuel and, on the other hand EU suppliers and suppliers of other countries of like oil crop-based biofuels, to the detriment of the Malaysian suppliers. This is so, because as a result of Article 3 of the Delegated Regulation, only oil palm crop-based biofuel is high ILUC-risk biofuel and, therefore, subject to low ILUC-risk certification. The like oil crop-based biofuels are not high ILUC-risk biofuels and, therefore, not subject to low ILUC-risk certification. The fact that Malaysian suppliers are subject low ILUC-risk certification if they would like their biofuel to be counted towards meeting the EU renewable energy targets, while EU and other suppliers of like biofuels are not, clearly distorts the conditions of competition to the detriment of Malaysian suppliers. By not being applicable to like biofuels from EU suppliers and suppliers from other countries, low ILUC-risk certification grants access to conformity assessment to Malaysian suppliers of oil palm crop-based biofuel under conditions less favourable.

109. With regard to the third element of the test of consistency with Article 5.1.1, namely, the determination of whether access is granted under conditions no less favourable "in a comparable situation", Malaysia submits that the Malaysian suppliers of oil palm crop-based biofuel, on the one hand, and EU suppliers and suppliers from other countries of like oil crop-based biofuels, on the other hand, are "in a comparable situation". All these suppliers are suppliers of like oil crop-based biofuels. The fact that the biofuels of EU suppliers and suppliers from other countries are not subject to low ILUC-risk certification does not mean that the Malaysian, EU, and other suppliers are not "in a similar situation". If this were the case, no conformity assessment procedure would ever be found to be inconsistent with Article 5.1.1.

110. In light of the above, Malaysia concludes that low ILUC-risk certification is inconsistent with the MFN treatment and the national treatment obligations enshrined in Article 5.1.1.

K. Low ILUC-risk certification is inconsistent with Article 5.1.2 of the TBT Agreement

111. Malaysia submits that low ILUC-risk certification is inconsistent with Article 5.1.2 of the TBT Agreement because the EU, by applying the conformity assessment procedure at issue, creates unnecessary obstacles to international trade.

112. Article 5.1.2 requires that conformity assessment procedures are not applied "with a view to or with the effect of creating unnecessary obstacles to international trade".

113. As under Article 2.2 with regard to technical regulations, the analysis required under Article 5.1.2 to establish whether a conformity assessment procedure is an "unnecessary obstacle to international trade", *i.e.*, is more trade-restrictive than necessary, involves, according to the Appellate Body, a holistic weighing and balancing of all relevant factors with respect to the challenged conformity assessment procedure (*i.e.*, the "relational analysis") and in comparison with proposed alternative measures (*i.e.*, "the comparative analysis").[25]

[25] Appellate Body Report, *Russia – Railway Equipment*, para. 5.186

According to the Appellate Body, relevant factors to be considered by a panel in its analysis under Article 5.1.2 are:

i) whether the conformity assessment procedure provides adequate confidence of conformity with the underlying technical regulation or standard;
ii) the strictness of the conformity assessment procedure or of the way in which it is applied; and
iii) the nature of the risks and the gravity of the consequences that would arise from non-conformity with the technical regulation or standard.

114. With regard to the first factor to be considered by the Panel in the relational analysis under Article 5.1.2, namely whether to examine whether low ILUC-risk certification, as set out in Articles 4 to 6 of the Delegated Regulation, provides adequate confidence of conformity with the underlying technical regulations, namely the high ILUC-risk cap and the high ILUC-risk phase out, Malaysia notes that low ILUC-risk certification obviously relates to ILUC and, as discussed above, ILUC can neither be observed nor measured. Hence, low ILUC-risk certification cannot provide adequate confidence that the certified biofuel is indeed low-ILUC risk. In fact, low ILUC-risk certification provides no confidence of conformity at all.

115. With regard to the second factor to be considered in the relational analysis, namely the strictness of low ILUC-risk certification, Malaysia points out that pursuant to Article 4 of the Delegated Regulation, biofuel produced from high ILUC-risk feedstock can be only certified as low ILUC-risk biofuel if three conditions are met:

i) the biofuel complies with the sustainability and GHG emissions saving criteria set out in Article 29 of the RED II;
ii) the biofuel has been produced from additional feedstock obtained through additionality measures that meet the specific criteria set out in Article 5 of the Delegated Regulation; and
iii) the evidence needed to identify the additional feedstock and to substantiate claims regarding the production of additional feedstock is duly collected and thoroughly documented by the relevant economic operators.

116. Regarding the second of these cumulative conditions, namely that the biofuel has been produced from additional feedstock obtained through additionality measures, Malaysia notes that Article 5(1)(a) of the Delegated Regulation provides, as discussed above, for three so-called "additionality pathways" and that each of these pathways shows the strictness of low ILUC-risk certification.

117. Moreover, there is a great deal of uncertainty about the efficacy of low ILUC-risk certification more broadly. These concerns have recently been confirmed by the results of a Pilot report on said certification in Malaysia in the context of an oil palm plantation.[26] Notably, the entire approach regarding "additionality measures" is put into question by the evidence regarding the influence of external events on the yield and the relevant "dynamic yield baseline" (DYB) with which additional yield of a given feedstock is measured. In simple terms, as the Pilot report notes, "Since yield is influenced by a large range of factors, including weather, tree density, fertilizer regime, etc., to disentangle the sole effect of an additionality measure from yield is a challenge". Furthermore, and relevant to the strictness of the conformity assessment procedure, the Pilot report finds that "only relatively small volumes of additional biomass can be certified as low ILUC-risk, and only in years in which the actual yield is above the DYB" and that "it is a large administrative burden for certification to certify low volumes of biofuel".

118. In addition to demonstrating the strictness of low ILUC-risk certification, Malaysia contends that the Pilot study is also probative of the third factor to be considered by the Panel in the relational analysis under Article 5.1.2, namely the nature of the risks at issue and the gravity of consequences that would arise from the non-conformity with the technical regulations. Indeed, contrary to what has been asserted by the EU, low ILUC-risk certification does not

[26] Low ILUC-risk certification: Pilot report and recommendations Malaysia, Oil palm yield increase, February 2021, 9 June 2021, available at https://iluc.guidehouse.com/images/reports/Phase1_Pilot_Report_Malaysia.pdf.

allow for a reliable pathway for conforming oil palm; rather it serves to further reinforce the most restrictive elements of the underlying technical regulations to which said conformity assessment procedure, both directly and indirectly, relates.

119. Malaysia submits that the Panel may, already on the basis of the relational analysis alone, come to the conclusion that low ILUC-risk certification is more strict, and definitely currently applied more strictly, than it is necessary to give the EU adequate confidence that oil palm crop-based biofuel conforms with the technical regulations at issue.

120. As noted above, in the context of the "comparative analysis" under Article 5.1.2, the Panel needs to determine whether an alternative measure to low ILUC-risk certification:

i) is reasonably available;

ii) is less strict or applied less strictly; and

iii) provides an equivalent contribution to giving the importing Member adequate confidence that products conform with the applicable technical regulations or standards.

121. Malaysia considers that less strict or less strictly applied alternative measures are available. These measures are already successfully applied by the EU in other sectors and could have easily been employed by the EU with respect to low ILUC-risk certification.

L. Low ILUC-risk certification is inconsistent with Article 5.2.1 of the TBT Agreement

122. Malaysia submits that low ILUC-risk certification is inconsistent with Article 5.2.1 of the TBT Agreement because the EU has failed to make available "as expeditiously as possible" the detailed implementing rules required to "undertake and complete" the conformity assessment procedure at issue, *i.e.*, low ILUC-risk certification.

123. The obligation under Article 5.2.1 to ensure that the conformity assessment procedures are "undertaken and completed as expeditiously as possible" relates to the timeframe within which a conformity assessment procedure must be undertaken and completed. The adverb "expeditiously" is understood to indicate that "the obligation relates to the speed and/or timing" of the performance of a conformity assessment procedure. The requirement to undertake and complete the conformity assessment procedure "as expeditiously as possible" indicates that the purpose of any conformity assessment procedure is to secure "a positive assurance of conformity with technical regulations".[27]

124. Malaysia submits that, due to the EU's failure to adopt implementing rules, it has not been possible to date to undertake, let alone undertake and complete expeditiously, low ILUC-risk certification. As such, Malaysia concludes that EU acts inconsistently with Article 5.2.1.

M. Low ILUC-risk certification is inconsistent with Article 5.6 of the TBT Agreement

125. Malaysia submits that low ILUC-risk certification is inconsistent with Articles 5.6.1, 5.6.2, and 5.6.4 of the TBT Agreement because the EU, with regard to low ILUC-risk certification, neither notified nor entered into meaningful consultations with other WTO Members or allowed for comments on this conformity assessment procedure, as required by those articles.

N. Low ILUC-risk certification is inconsistent with Article 5.8 of the TBT Agreement

126. Malaysia submits that low ILUC-risk certification is inconsistent with Article 5.8 of the TBT Agreement because the EU neither promptly published nor otherwise made available the

[27] *Ibid*.

measure at issue, namely low ILUC-risk certification, in such a manner as to enable interested parties in Malaysia to become acquainted with it.

O. The 7% limit, the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification are inconsistent with Articles 12.1 and 12.3 of the TBT Agreement

127. The TBT Agreement requires WTO Members to take into account the circumstances specific to developing countries and to provide differential and more favourable treatment to developing country Members. Malaysia submits that the EU acted inconsistently with Article 12.1 and 12.3 of the TBT Agreement.

128. Malaysia contends that the EU, in the preparation and application of the measures at issue, notably the 7% limit, the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification, failed to take into account the circumstances specific to developing countries, in particular Malaysia, where palm oil and oil palm crop-based biofuel are produced.

129. In connection with its claims, Malaysia submits that, simply engaging in communications and considering the inputs received, without "active and meaningful consideration" of the "special development, financial and trade needs" of developing country Members, must not be considered sufficient and cannot be regarded as a responsible attitude when trying to avoid or minimise trade effects and trade restrictions, especially if less trade restrictive and reasonably available alternatives are being suggested by affected developing country Members, as Malaysia did.

130. Malaysia, while cognizant of the seemingly lax requirements imposed upon developed countries heretofore under Article 12, requests that, as a baseline obligation, WTO Members must be able to evidence how the special development, financial, and trade needs of developing country Members have indeed been taken into account.

131. In summary, Malaysia contends that, in the preparation and application of the measures at issue, the EU failed to take into account the circumstances specific to developing countries, in particular Malaysia, and failed to provide differential and more favourable treatment to developing country Members, thereby acting inconsistently with Article 12.3 of the TBT Agreement.

CLAIMS UNDER THE GATT 1994 IN RESPECT OF THE EU MEASURES

A. Introduction

132. Malaysia submits that the measures at issue are inconsistent with the EU's obligations under Articles I:1, III:4, X:3(a), and/or XI:1 of the GATT 1994.

B. The high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification are inconsistent with Article I:1 of the GATT 1994

133. Malaysia submits that the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification discriminate among "like" oil crop-based biofuels and their feedstocks originating in third countries and, therefore, are inconsistent with Article I:1 of the GATT 1994. In particular, by limiting and phasing out the use of only oil palm crop-based biofuel for meeting EU renewable energy targets, the measures at issue discriminate between Malaysian oil palm crop-based biofuel and palm oil and like oil crop-based biofuels and their feedstocks of other foreign origin.

134. The principal purpose of the MFN treatment obligation of Article I:1 is to ensure all Members the equality of opportunity to import from, or to export to, other Members (or any other country).

135. The MFN treatment obligation of Article I:1 prohibits *de jure*, as well as *de facto*, discrimination. In other words, Article I:1 applies not only to "origin-based" measures (which

are discriminatory by definition), but also to measures which, on their face, appear "origin-neutral" but are, in fact, discriminatory.

136. Article I:1 sets out a four-tier test to determine whether a measure affecting trade in goods is consistent with the MFN treatment obligation. Based on this four-tier test, Malaysia submits that:

i) the measures at issue, namely, the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification, are measures covered by Article I:1;
ii) the measures at issue grant an "advantage";
iii) the products concerned are "like products"; and
iv) the advantage at issue is not accorded "immediately and unconditionally" to all like products concerned.

137. The MFN treatment obligation of Article I:1 concerns "any advantage, favour, privilege or immunity" granted by any Member to any product originating in, or destined for, any other country with respect to, *inter alia*, "the matters referred to in Article III:4 of the GATT 1994", *i.e.*, laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use of any product.

138. In the present case, the measures at issue, namely, the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification are, as discussed, national laws or regulations affecting internal sale and/or use of the products concerned and fall within the scope of Article III:4. Therefore, the measures at issue are also covered by Article I:1.

139. The second element of the test of consistency with the MFN treatment obligation of Article I:1 relates to the question of whether the measure at issue grants an "advantage". According to the Appellate Body, Article I:1 requires that:

> "any advantage … granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members".[28]

140. Malaysia submits that the EU measures at issue, namely the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification, grant advantages to oil crop-based biofuels and their feedstocks imported from some Members that are not granted to all Members, and in particular not to Malaysia.

141. As Malaysia has already demonstrated above, the high ILUC-risk cap and the high ILUC-risk phase out will not only limit and eventually exclude oil palm crop-based biofuel from the EU biofuel market, these measures will obviously also adversely affect demand for, and the importation of, palm oil, *i.e.*, the feedstock for oil palm crop-based biofuel. As a result of the measures at issue, palm oil will eventually be *de facto* excluded from the EU biofuel feedstock market and oil palm crop-based biofuel is overwhelmingly imported into the EU.

142. The third element of the test of consistency with the MFN treatment obligation of Article I:1 relates to the question of whether the products at issue are "like products". The concept of "like products" is not defined in Article I:1 and the case law on "likeness" within the meaning of Article I:1 is limited. However, the more extensive case law on "likeness" within the meaning of Article III of the GATT 1994 is of direct relevance.

143. The fourth element of the test of consistency with the MFN treatment obligation of Article I:1 relates to the question of whether the advantage granted by the measure at issue is accorded "immediately and unconditionally" to all "like" products irrespective of their origin or destination.

144. As noted above, none of the advantages available to oil crop-based biofuels and their feedstocks, such as soyabean oil and rapeseed oil, imported from some Members is granted

[28] Appellate Body Report, *Canada – Autos*, para. 79

to oil palm crop-based biofuel and palm oil imported from Malaysia. Thus, the advantages previously discussed have not been afforded immediately and unconditionally.

145. Malaysia therefore submits that the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification are inconsistent with the MFN treatment obligations of Article I:1 of the GATT 1994.

C. The high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification are inconsistent with Article III:4 of the GATT 1994

146. Malaysia submits that the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification accord less favourable treatment to imported oil palm crop-based biofuel and palm oil than they accord to "like" domestic feedstocks and derived biofuels and, therefore, are inconsistent with Article III:4 of the GATT 1994.

147. Article III:4 sets out the three-tier test of consistency with the national treatment obligation. Based on this three-tier test, Malaysia submits that:

i) the measures at issue, namely, the 7% limit, the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification, constitute a "law, regulation or requirement" covered by Article III:4;
ii) the imported and domestic products at issue are "like products"; and
iii) the imported products are accorded "less favourable treatment".

148. The national treatment obligation of Article III:4 thus applies, *inter alia*, to domestic laws and regulations affecting the sale and the use of products. The high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification are indisputably laws or regulations affecting the internal sale and use of the imported biofuels concerned and/or their feedstocks.

149. The term "affecting" in Article III:4 has been interpreted to cover not only laws and regulations which directly govern the conditions of sale or use but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products.[29] As discussed, the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification, each in their own way, limit or eventually even exclude imported biofuels from being counted towards meeting the EU renewable energy targets, thereby 'affecting' the market in the manner proscribed by Article III:4.

150. The second element of the test of consistency with the national treatment obligation of Article III:4 relates to the question of whether the imported and domestic products concerned are "like".

151. The third and last element of the test of consistency with the national treatment obligation of Article III:4 relates to the question of whether the measure at issue accords "treatment no less favourable". The Appellate Body's interpretation of "treatment no less favourable" focuses on the conditions of competition between imported and domestic like products. Under current case law, a measure gives rise to "treatment less favourable" inconsistent with Article III:4 when it modifies the conditions of competition in the relevant market to the detriment of the imported products.

152. With regard to the high ILUC-risk cap and the high ILUC-risk phase out, Malaysia has already demonstrated in the context of its claim under Article 2.1 of the TBT Agreement that these measures apply solely to oil palm crop-based biofuel and result in treatment less favourable than the treatment accorded to like domestic oil crop-based biofuels.

153. Similarly, with regard to low ILUC-risk certification, Malaysia has already demonstrated that this measure modifies the conditions of competition between, on the one hand, the

[29] Panel Report, *Canada – Autos*, para. 10.80.

Malaysian suppliers of oil palm crop-based biofuel and, on the other hand, EU suppliers of like oil crop-based biofuels to the detriment of the Malaysian suppliers.

154. Thus, the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification accord treatment less favourable to imported oil palm crop-based biofuel than the treatment accorded to like domestic oil-based biofuels.

D. The high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification are inconsistent with Article XI:1 of the GATT 1994

155. Article XI:1 of the GATT 1994 on "General Elimination of Quantitative Restrictions" sets out a general prohibition on quantitative restrictions.

156. Based on the text of Article XI:1, two elements must be demonstrated to establish an inconsistency with that provision. First, the measure must fall within the scope of application of Article XI:1. Second, the measure must be a prohibition or restriction on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member.

157. Article XI:1 applies to prohibitions or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licences or other measures. Malaysia notes that Article XI:1 does not refer to laws or regulations but more broadly to *measures*. Article XI:1 does not only prohibit de jure quantitative restrictions. A panel ruled in 2000 that "the disciplines of Article XI:1 extend to restrictions of a de facto nature".[30]

158. In previous disputes, the question has arisen whether Article XI:1 covers only border measures or also internal measures concerning, for example, the sale, offering for sale, transportation, distribution and use of products after they have been imported. A panel noted on the relationship between Article III:4 and Article XI:1 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 either of Article III:4 (where competitive opportunities on the domestic market are affected) or of Article XI:1 (where the opportunities for importation itself, *i.e.*, entering the market, are affected), or even that there may be a potential for overlap between the two provisions. Such overlap would not make either Article XI:1 or Article III:4 redundant. On the contrary, it would allow Members to challenge a measure both under Article XI:1 and under Article III:4 depending on the aspect of the measure the complainant focuses on.

159. In view of the scope of application of Article III:4 and Article XI:1, referred to above, Malaysia agrees with the panel in *India – Autos* that a measure may fall under both Articles III:4 and XI:1.

160. As to the question of how the limitation of the importation or exportation is to be demonstrated, the Appellate Body ruled that this limitation need not be demonstrated by quantifying the effects of the measure at issue, and that the limiting effects "can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context".

161. In the present case, each of the measures at issue, namely, the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification, have the effect of limiting *de facto* the quantities of the products at issue that are imported into the EU.

162. Malaysia submits that the measures at issue, namely the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification, affect the opportunities for importation into the EU as well as, as demonstrated above, the competitive opportunities on the domestic market of the EU.

[30] Panel Report, *Argentina – Hides and Leather*, para. 11.17. See also Panel Reports, *Colombia – Ports of Entry*, *US – Poultry (China)*, *China – Raw Materials*, and *EU – Energy Package*, currently under appeal.

163. Malaysia therefore concludes that the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification are inconsistent with the prohibition on quantitative restrictions under Article XI:1 of the GATT 1994.

E. The high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification are inconsistent with Article X:3(a) of the GATT 1994

164. Malaysia submits that the measures at issue, notably the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification, are administered in a manner that is not impartial and/or reasonable, and, therefore, are inconsistent with Article X:3(a) of the GATT 1994.

165. Under Article X:3(a) of the GATT 1994, one can challenge:

i) the manner in which legal instruments of the kind falling under Article X:1 are applied or implemented in particular cases; and
ii) legal instruments that regulate such application or implementation.

166. The measures at issue, namely the high ILUC-risk cap, the high ILUC-risk phase out and low ILUC certification, as set out in the RED II and the Delegated Regulation, are, as discussed above, regulations of general application pertaining to restrictions on imports of oil palm crop-based biofuel and of palm oil and affecting the sale or use of these products. They are, therefore, measures of the kind falling under Article X:1 and, thus, also within the scope of application of Article X:3(a).

167. As regards the high ILUC-risk cap and the high ILUC-risk phase out, Malaysia argues that these measures are administered in a manner that is neither impartial nor reasonable because they are based on/apply the concept of high ILUC-risk, for which there is insufficient scientific support and which cannot be directly observed, measured or otherwise established. The concept of high ILUC-risk does not allow these measures to be applied or implemented in an impartial, *i.e.*, fair, unbiased and unprejudiced manner.

168. As regards low ILUC-risk certification, Malaysia argues that this measure is administered in a manner that is not reasonable because, as discussed above, the EU failed to timely adopt implementing legislation, providing for detailed rules that would allow for products to be certified as having low ILUC-risk.

CLAIMS UNDER THE GATT 1994 IN RESPECT OF THE FRENCH MEASURE

A. Introduction

169. Malaysia claims that the French measure at issue, namely the French fuel tax reduction, which is a measure that reduces the tax on petrol and diesel fuels containing oil crop-based biofuels, but excludes from this reduction petrol and diesel fuels to the extent that they contain oil palm crop-based biofuel, violates the obligations of France under the GATT 1994. Malaysia's claims of GATT inconsistency focus in particular on the exclusion of petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel, from the French fuel tax reduction.

B. The exclusion of petrol and diesel fuels that contain oil palm crop-based biofuel from the French fuel tax reduction is inconsistent with Article I:1 of the GATT 1994

170. As already discussed above in the context of Malaysia's claims regarding the EU measures, Article I:1 of the GATT 1994 sets out a four-tier test to determine whether a measure affecting trade in goods is consistent with the MFN treatment obligation under Article I:1 of the GATT 1994. Based on this four-tier test, Malaysia provides the following analysis.

171. In the present dispute, the French fuel tax imposed on petrol and diesel, when they are released for consumption in France, together with the tax reduction that applies to petrol

and diesel fuels that contain certain types of biofuels, amount to an "internal tax or charge" within the meaning of Article III:2 of the GATT 1994.

172. Demonstrating that the exclusion of petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel, from the French fuel tax reduction is a "matter" referred to in Article III:2 of the GATT 1994, is sufficient to establish that the French measure at issue falls within the scope and is covered by Article I:1.

173. The second element of the test of consistency with the MFN treatment obligation of Article I:1 relates to the question of whether the measure at issue grants an "advantage".

174. Malaysia submits that the French measure at issue, namely the exclusion of petrol and diesel fuels, to the extent they contain oil palm crop-based biofuel, from the French fuel tax reduction grants an advantage to petrol and diesel fuels that contain oil crop-based biofuels imported from some Members that is not granted to all WTO Members, and in particular not to Malaysia. The French measure at issue, thus, indirectly discriminates among "like" biofuels and their feedstocks originating in some third countries, and this advantage is not granted to all WTO Members, and, in particular, not to Malaysia.

175. The third element of the test of consistency with the MFN treatment obligation of Article I:1 relates to the question of whether the products at issue are "like products". Malaysia refers to earlier "likeness" discussions with regard to the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification, and reiterates its contention that oil palm crop-based biofuel and palm oil as a biofuel feedstock, as well as other oil crop-based biofuels, such as biofuels made from rapeseed oil, soyabean oil, or sunflower oil, and their respective feedstocks, are "like products".

176. The fourth element of the test of consistency with the MFN treatment obligation of Article I:1 relates to the question of whether the advantage granted by the measure at issue is accorded "immediately and unconditionally" to all "like" products irrespective of their origin or destination. Malaysia submits that by excluding oil palm crop-based products from the classification of renewable energy sources, the French legislation fails to extend the advantage granted to petrol and diesel fuels that contain certain imported oil crop-based biofuels and their feedstocks "immediately and unconditionally" to petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel and palm oil.

177. In view of the foregoing, Malaysia concludes that the exclusion of petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel, from French fuel tax reduction amounts to an advantage benefitting petrol and diesel fuels that contain imported oil crop-based biofuels and their feedstocks, which is not granted immediately and unconditionally to petrol and diesel fuels, to the extent that they contain like imported products, such as oil palm crop-based biofuel and palm oil. Malaysia submits that the French measure is inconsistent with the MFN treatment obligation of Article I:1.

C. The exclusion of petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel, from the French fuel tax reduction is inconsistent with Article III:2 of the GATT 1994.

178. Malaysia submits that, by excluding petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel, from the French fuel tax reduction, France discriminates against such petrol and diesel fuels, favouring petrol and diesel fuels that contain other domestic "like" oil crop-based biofuel and their feedstocks of French origin. The French measure at issue, thus, indirectly discriminates against imported oil palm crop-based biofuel and its feedstock, while favouring other domestic "like" oil crop-based biofuels and their feedstocks of French origin. Malaysia, therefore, considers that the French measure is inconsistent with Article III:2 of the GATT 1994.

179. Malaysia contends that the exclusion of petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel, from the French fuel tax reduction is inconsistent with Article III:2, first sentence. To determine consistency of a measure with the first sentence of Article III:2, a panel must consider:

i) whether the measure at issue is an internal tax or other internal charge on products;

ii) whether the imported and domestic products are "like" products; and

iii) whether the imported products are taxed in excess of the domestic product.

180. Internal taxes are fiscal non-tariff measures applied at the border or within the territory of the relevant Member. With respect to Article III:2, first sentence, Malaysia argues that the tax on petrol and diesel fuels containing oil palm crop-based biofuel, which results from the exclusion of such petrol and diesel fuels from the French fuel tax reduction, amounts to an "internal tax".

181. The second element of the test of consistency with the national treatment obligation of Article III:2, first sentence, relates to the question of whether the imported and domestic products concerned are "like". In the context of its claims of inconsistency of the EU's measures at issue with Article I:1, Malaysia has already demonstrated that oil palm crop-based biofuel and other oil crop-based biofuels, made from rapeseed oil, soyabean oil, or sunflower oil and, thus, petrol and diesel fuels that contain oil palm crop-based biofuel and other oil crop-based biofuels, are "like products". Likewise, Malaysia has shown that palm oil and other oil crop feedstocks, such as rapeseed oil, soyabean oil, or sunflower oil are "like products". Malaysia submits that it follows that petrol and diesel fuels that contain oil palm crop-based biofuel and petrol and diesel fuels that contain other oil crop-based biofuels are also in a sufficiently close competitive relationship to be considered "like" within the meaning of Article III:2, first sentence.

182. The third and last element of the test under Article III:2, first sentence relates to the question of whether the imported products are taxed "in excess of" the like domestic products, which has been interpreted proscribe 'even the smallest amount'[31].

183. Notably, Malaysia formulates and makes two alternative claims under Article III:2. First, it argues that the exclusion of petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel, from the French fuel tax reduction, is inconsistent with Article III:2, first sentence because the tax, which France applies when the economic operators release for consumption in France petrol and diesel fuels that contain imported oil palm crop-based biofuel from, *inter alia*, Malaysia, is in excess of the tax that applies when such economic operators resort, instead, to oil crop-based biofuels made from "like" domestic feedstocks.

184. In the alternative, Malaysia challenges the exclusion of petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel, from the French fuel tax reduction under Article III:2, second sentence. According to Malaysia, the measure at issue results in dissimilar taxation that applies to the economic operators that release, for consumption in France, petrol and diesel fuels that contain imported oil palm crop-based biofuel from, inter alia, Malaysia, vis-à-vis those that contain directly competitive or substitutable oil crop-based biofuels made from domestic feedstocks. Malaysia contends that this dissimilar taxation affords protection to domestic production and is, therefore, inconsistent with Article III:2, second sentence. Malaysia submits, that by excluding petrol and diesel fuels, to the extent that they contain biofuel made from palm oil, from the French fuel tax reduction, France directly taxes petrol and diesel fuels that contain imported oil palm crop-based biofuel "in excess of" petrol and diesel fuels that contain other domestic like oil crop-based biofuels.

JUSTIFICATION UNDER ARTICLE XX OF THE GATT 1994

185. With respect to the EU's attempt to justify its measures, as well as the French measure, with respect to their inconsistency with the GATT 1994, under certain paragraphs of Article XX of the GATT 1994, Malaysia contends that the EU's interpretation of Article XX goes against decades of well-established case law and has no textual basis in Article XX. The EU attempts to justify its truly novel and erroneous approach to Article XX by arguing that this approach

[31] Appellate Body Report, *Japan – Alcoholic Beverages II*, p.27-28.

is 'embedded in the nature and operation of the composite objectives pursued by the measure at issue'. The EU errs.

186. The EU's misinterpretation of Article XX is most pronounced in its conflation of the 'necessary' test of Article XX(a) and (b) with that of the 'related to' test of Article XX(g). The EU believes these tests to be largely 'similar', but this is incorrect.

i) First, the EU's interpretation ignores the plain wording of Article XX. Article XX(a) and (b) require a measure to be 'necessary', while Article XX(g) requires a measure to be 'related to'.

ii) Second, in arguing that the 'necessity' test in Article XX(a) and (b) and the 'relate to' test in Article XX(g) seek in essence to establish whether the measures at issue are 'rational and reasonable' in their design, the EU is contending that any measure that is 'rational and reasonable' in its design would pass the 'necessity' test under Article XX(a) and XX(b). Malaysia contends that reducing the 'necessity' test to a 'rational and reasonable' test is a dramatic deviation of the well-established case law on the 'necessity' test under Article XX(a) and (b).

iii) Third, in arguing that the 'necessity' test in Article XX(a) and (b) and the 'relate to' test in Article XX(g) seek in essence to establish whether the measures at issue are 'rational and reasonable' in their design, the EU suggests that a measure would be justified under Article XX(g) when that measure is 'rational and reasonable'. This is incorrect. Article XX(g) further requires that the measure at issue be 'made effective in conjunction with restrictions on domestic production or consumption', but the EU's approach fails to acknowledge this second requirement.

187. In addition to the general conflation of Articles XX(a) and (b) standards with Article XX(g), the EU also fails to properly interpret other aspects of these sections. Consider, for example, the EU's expansive take on Article XX(a). For its part, Malaysia agrees with the EU that panels and the Appellate Body have – correctly – given this concept a broad meaning. However, Malaysia disagrees with the EU to the extent that the latter would argue that all matters that 'affect and concern us all' or matters with regard to which 'citizens are more and more concerned' are covered by the concept of public morals. Such an interpretation is an invitation to obviate any and all WTO obligations through an appeal to 'public morals'.

188. The EU's misinterpretation of Article XX also extends to the chapeau of Article XX. Here, the EU's presentation on the issue is suspiciously incomplete. Perhaps most notably in its omission is the Appellate Body's interpretation of the chapeau in *US-Shrimp*, where the Appellate Body found that the application of a provisionally justified measure would constitute 'arbitrary discrimination' within the meaning of the chapeau of Article XX when it imposes, as the US measure at issue in that case did, 'a single, rigid and unbending requirement … without inquiring into the appropriateness' of the measure 'for the conditions prevailing in the exporting countries'.[32]

189. Malaysia contends that, by not taking into account the conditions of biofuel production in Malaysia, the measures at issue are applied in a manner that constitutes 'arbitrary discrimination' within the meaning of the chapeau of Article XX.

190. Ultimately, the EU, in advancing arguments unfounded in text or legal interpretation, has failed to make a *prima facie* case under Article XX(a), XX(b), and/or XX(g).

CLAIMS UNDER THE SCM AGREEMENT IN RESPECT OF THE FRENCH MEASURE

A. Introduction

191. Malaysia submits that the French fuel tax reduction is a subsidy within the meaning of Article 1 of the SCM Agreement, inasmuch as it involves a "financial contribution" by the French Government or, alternatively, a form of "income or price support" conferring a "benefit".

[32] Appellate Body Report, *US – Shrimp*, para. 177

Secondly, Malaysia contends that the measure at issue is specific to certain enterprises, as provided for by Article 2 the SCM Agreement. Thirdly, Malaysia asserts that the French fuel tax reduction is an actionable subsidy under Article 5(c) of the SCM Agreement, as it causes adverse effects to the interests of Malaysia and, in particular, "serious prejudice" within the meaning of Articles 6.3(a) and (c) of the SCM Agreement.

192. The SCM Agreement defines four constituent elements of a "subsidy" subject to the disciplines of the SCM Agreement:

i) a financial contribution (or income or price support);
ii) a financial contribution by a government or any public body;
iii) a financial contribution (or income or price support) conferring a benefit; and
iv) the concept of "specificity".

193. For a measure to be a subsidy within the meaning of Article 1.1 of the SCM Agreement, it must constitute a "financial contribution" or take the form of an income or price support in the sense of Article XVI of the GATT 1994.

194. Malaysia contends, that the French fuel tax reduction is a financial contribution in the form of government revenue that is otherwise due is foregone under Article 1.1(a)(1)(ii).

195. The foregoing (or non-collection) of revenue otherwise due under Article 1.1(a)(1)(ii) implies that less (or no) revenue has been raised by the Government compared with the revenue that would normally be raised. In accordance with the case law, tax break estimates, have to be based on a conceptual view about "normal" benchmark taxation. Typically, the benchmark is defined to include normal features of the tax system, whereas exemptions that are intended to address objectives other than the basic function of the tax (e.g., internalizing externalities) may be considered to be deviations from the benchmark. For the purposes of "government revenue, otherwise due, that is foregone or not collected" analysis of this normative benchmark has to be compared with "the challenged tax treatment and the reasons for it".

196. Malaysia submits that the normative benchmark, as "applied to all comparable income of any comparably situated taxpayers", is, in the present case, the General Tax on Polluting Activities established by the French Government in 1999 and extended in 2005 to distributors of automotive fuels that do not meet annual biofuels targets. Under this benchmark treatment, the French Government is entitled to collect the tax and retain the amount of the tax paid. In this respect, the amount of the tax that could be generated constitutes what is "due" to the French Government under the benchmark treatment.

197. At the same time, an exception from the fuel tax can be considered as a combination of a binding incorporation mandate and a tax credit. The amount of the tax corresponds to the difference between the national target percentage (*i.e.*, the required level of incorporation of renewable biofuels in conventional fuels, namely petrol and diesel) and the actual level of eligible biofuel that is incorporated. The closer the level of eligible biofuel incorporation to the national target percentage, the lower the tax that must be paid by the economic operators releasing for consumption in France petrol and diesel fuels containing eligible (*i.e.*, renewable) biofuels. This tax may even reach zero.

198. Under this rather common scenario, *i.e.*, one in which the economic operators that incorporate and release for consumption in France petrol and diesel fuels containing eligible biofuels, the French Government does not collect at all or not in full the tax revenue, which it would normally collect.

199. Malaysia submits that the defining element of the French measure that may allow to develop a full and comprehensive understanding of its intended operation is the exclusion of petrol and diesel fuels, to the extent that they contain oil palm crop-based biofuel, which is not classified as a renewable energy source, from the French fuel tax reduction and, thus, all the benefits that emanate therefrom.

200. For all these reasons, Malaysia claims that the French Government has, by "its own choice", established "for itself"[33] the rules of taxation for petrol and diesel fuels released for consumption in France. More specifically, it does not collect revenue "otherwise due" through the provision of fiscal incentives to economic operators incorporating biofuels other than oil palm crop-based biofuel into petrol or diesel fuels and subsequently release those fuels for consumption in France. Alternatively, should the Panel find that the French fuel tax reduction is not captured by the concept of "financial contribution", Malaysia argues that the French measure at issue falls under the concept of "income or price support" enshrined in Article 1.1(a)(2) of the SCM Agreement.

201. For a financial contribution to be a subsidy within the meaning of Article 1.1, the financial contribution must be made by a government or a public body, including regional and local authorities as well as State-owned companies. Malaysia, hence, argues that in the present case, there is no discussion that the measure at issue, the French fuel tax reduction, is a financial contribution (in the form of government revenue, otherwise due, that is foregone) granted by the French Government.

202. The second element for demonstrating the existence of a subsidy under Article 1.1 is the conferral of a "benefit". An analysis of benefit under Article 1.1(b) requires consideration of whether the financial contribution in issue accords "[b]etter treatment to the recipient than the treatment available in the market". In the present case, the French measure at issue is a tax reduction that imposes a lower or no tax on the economic operators releasing for consumption in France petrol and diesel products incorporating biofuels other than oil palm crop-based biofuel.

203. Malaysia asserts that the French measure, being either a financial contribution or a form of income support, clearly confers a benefit to its recipients.

204. The WTO rules on subsidies do not apply to all financial contributions by a government that confer a benefit. Pursuant to Article 1.2, they apply only to specific subsidies. A subsidy that is widely available within an economy is presumed not to distort the allocation of resources within that economy and, therefore, does not fall within the scope of the SCM Agreement. In determining whether a subsidy is "specific" to an enterprise or industry or group of enterprises or industries (referred to in short as "certain enterprises"), the principles set out in subparagraphs (a), (b) and (c) of Article 2.1 of the SCM Agreement are to be applied.

205. In the present case, Malaysia contends that the measure at issue, *i.e.*, the French fuel tax reduction, is a de jure specific subsidy under Article 2.1(a) access to which is limited to certain enterprises, in particular, to the economic operators that release for consumption petrol and diesel fuels that contain biofuels other than oil palm crop-based biofuel for the following reasons.

206. First, the measure is enshrined in French legislation. Second, this legislation, pursuant to which the granting authority, *i.e.*, the French Government, operates, explicitly limits access to the subsidy to the economic operators that release for consumption in France petrol and diesel fuels containing biofuels other than oil palm crop-based biofuel. Third, most importantly, the economic operators that release for consumption in France petrol and diesel fuels incorporating oil palm crop-based biofuel are expressly deemed non-eligible for the purposes of the French fuel tax reduction. However, given the particularities of the blending process (*i.e.*, the possibility to incorporate different types of biofuels in the petrol and diesel fuels) these economic operators will benefit from a tax reduction, yet only commensurate to the amount of oil crop-based biofuel other than oil palm crop-based biofuel contained therein. In other words, France simply disregards and does not account for the share attributable specifically and solely to the oil palm crop-based biofuel in the petrol and diesel fuels released for consumption in France.

207. Under these circumstances, Malaysia concludes that the French fuel tax reduction is a specific subsidy within the meaning of Article 2.1(a), access to which is explicitly limited to and benefits solely and exclusively those economic operators that incorporate and release

[33] Appellate Body Report, *US - Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.1444.

for consumption petrol and diesel fuels incorporating biofuels other than oil palm crop-based biofuel.

208. Having established that the measure at issue is a specific subsidy within the meaning of Articles 1 and 2, Malaysia further submits that this measure is inconsistent with Article 5 of the SCM Agreement because it causes "serious prejudice" to the interests of Malaysia within the meaning of Article 5(c). Arguably, this trend will inadvertently persist in the future, thus perpetuating the adverse effects caused by the subsidy to the interests of Malaysia.

209. Pursuant to Article 6.3, "serious prejudice" may arise where the subsidy, *inter alia*, displaces or impedes imports of a "like" product (6.3(a)); or results in a significant price undercutting by the subsidised product in comparison to the "like" product of another Member in the same market, or significant price suppression, price depression or lost sales in the same market (Article 6.3(c)).

210. In connection with its claim and the legal standard related to Articles 5(c) and 6.3, in particular Articles 6.3 (a) and (c), Malaysia contends that:

i) the products in question are in actual or potential competition (*i.e.*, the relevant "product market" has been considered) with in the French market (*i.e.*, the "geographical market");
ii) the effect of the French fuel tax reduction is displacement imports of "like" products from Malaysia;
iii) the effect of the French fuel tax reduction is "significant" lost sales of the like products from Malaysia; and
iv) the displacement of imports is caused by the challenged subsidies.

MALAYSIA'S REQUEST FOR FINDINGS AND RECOMMENDATIONS

211. For the reasons set out, Malaysia respectfully requests the Panel to make the corresponding findings of inconsistency with the relevant obligations under the TBT Agreement, the GATT 1994, and the SCM Agreement with respect to the EU's measures, the French measure, as well as Lithuania's measures, in line with Malaysia's claims.

212. Malaysia respectfully requests the Panel to recommend that the EU, France, and Lithuania take the appropriate steps to bring the measures at issue into consistency with their obligations under the TBT Agreement, the GATT 1994, and/or the SCM Agreement.

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 intertwined phenomena 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 these intertwined objectives.

2. The "EU Biofuels regime" promotes the use of renewable energy sources, specifically certain biofuels, bioliquids and biomass fuels, in the European Union as part of a strategy to decarbonise the European Union's transport sector. The EU Biofuels regime 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 the cultivation of crops used to produce biofuels, both direct (DLUC) and indirect (ILUC).

5. RED II also 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 refers to the situation when non-agricultural land is brought into agricultural production as a consequence of land previously being used for non-fuel demand being diverted to the production of feedstock used for biofuels. ILUC is a global phenomenon that is 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 to meet the EU's objectives.

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 a maximum share of the renewable energy target in the transport sector to which conventional biofuels may contribute (7% maximum share) and by incentivising the use of advanced biofuels by imposing a minimum share ("advanced biofuels obligation"). RED II also caps and progressively limits the contribution of those 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) to the transport renewable energy target (high ILUC risk cap and high ILUC risk phase-out).

8. The three measures identified by Malaysia, the 7% maximum share, the high ILUC risk cap and the high ILUC risk phase out, all 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 driven by the EU renewable energy policy.

9. RED II also establishes a system to certify biofuels as low ILUC-risk (low ILUC-risk certification). 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, namely up to the 7 % maximum share.

10. Malaysia only challenges certain elements of the EU biofuels regime. It brings claims under a plethora of WTO provisions. Malaysia also challenges the methodology used by the EU to identify high ILUC risk feedstock.

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 set down in Article 3 of Delegated Regulation 2019/807. They are met when:

- 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 a formula, whose variable have been set by the European Union on the bases of the available scientific literature and a study based on satellite information (the GIS-based assessment), as set out in details in the Status Report.

13. "Land with high-carbon stock" refers to wetlands, including peatland, and continuously forested areas within the meaning of Article 29(4)(a), (b) and (c) of the 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. The 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 the light of new data (Article 7 of the Delegated Regulation).

16. The criteria for identifying ILUC-risk seek to determine 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. This conclusion is based on observed crop expansion and takes account of the known characteristics of certain types of land as well as the characteristics (yield and by-products) of individual crops.

17. 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. 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.

18. However, high ILUC risk feedstock used to produce biofuels may be cultivated in conditions minimising the risk of 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

19. As regards the high ILUC risk cap, the high ILUC risk phase out and the 7 % maximum share, Malaysia has not shown that any of these measures are technical regulations within the meaning of Annex 1.1 to the TBT Agreement.

20. These measures concern the potential eligibility of certain biofuels to contribute to a "renewable energy target" but they leave discretion to Member States to determine their respective fuel mix. They do not "provide for" or "stipulate" the "composition of the products" to which they apply, either positively or negatively. They identify certain products on the basis that they are composed of certain inputs and define 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 within the scope of this dispute.

21. Malaysia has also failed to show that low ILUC risk certification is a conformity assessment procedure within the meaning of Annex 1.3 to the TBT Agreement. Malaysia has not shown that this measure establishes procedures to assess conformity with a technical regulation. Malaysia claims that the relevant technical regulation is the "exemption from the high ILUC risk cap and phase out" but Malaysia has not sought to demonstrate that the said exemption is a technical regulation within the meaning on Annex 1.1 of the TBT Agreement. Indeed, there is no reference in Malaysia's Panel request either to that technical regulation or to it constituting the legal basis of Malaysia's claim that low ILUC risk certification is a conformity assessment procedure. Consequently, none of Malaysia's claims based on this premise are properly before the Panel.

22. It follows, that Malaysia has not established that the TBT Agreement is applicable to this dispute.

2.2. Order of Analysis of Malaysia's claims

23. If the Panel were to consider that the TBT Agreement is applicable, the Panel should address Malaysia's claims under Article 2.2 of the TBT Agreement before considering whether Malaysia has demonstrated that the high ILUC risk cap or the high ILUC risk phase out are de facto discriminatory and hence violate Article 2.1 of the TBT Agreement.

24. Given that Malaysia 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 measures "eliminate" the use of palm oil, this implies that there has already been an evaluation of the degree of trade restrictiveness that the measures in fact entail. As that assessment is to be conducted under Article 2.2 of the TBT Agreement, the European Union submits that the Panel should start by assessing the claims under that provision. Moreover, this order of analysis is consistent with the exercise that a Panel must undertake when considering the claims under the GATT 1994.

2.3. Article 2.1 of the TBT Agreement

25. Malaysia claims that there is a violation of Article 2.1 of the TBT Agreement on the basis that two of the measures it has identified, namely the high ILUC risk cap and the high ILUC risk phase out, are de facto discriminatory and hence accord less favourable treatment to palm-oil based biofuel.

26. To establish a violation of Article 2.1 of the TBT Agreement, it is not sufficient for Malaysia to identify differentiation in treatment. Members may, in the exercise of regulatory autonomy, introduce distinctions provided they are linked to legitimate objectives and applied in an even-handed manner. Whilst Malaysia bears the burden of showing that any distinction between different feedstock used to produce biofuels cannot be rationally linked to the objectives pursued by the measures, Malaysia effectively invites the Panel to conduct its analysis on the assumption that there is less favourable treatment because palm oil is categorised as a high ILUC risk feedstock. This approach is flawed.

27. Moreover, there is no obligation under the TBT Agreement for Members to protect specific volumes in trade. Therefore, Malaysia's arguments that there have been campaigns against palm oil and that stable access to the EU market is necessary for Malaysia's development are not relevant to its claims. The Panel must focus on the architecture and design and intended operation of the measures at issue. That requires the Panel to evaluate the measures as part of their broader context, namely the EU Biofuels regime.

28. As to the assessment of "like" products, whilst the products identified by Malaysia are the starting point for the Panel's analysis, 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. Malaysia has failed to demonstrate that PME, RME, and SME are like products under of Article I, III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement.

29. First, as regards the products' properties, these 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 include only up to 20% of PME. This indicates that PME has a limited substitutability with other biofuels.

30. Second, regarding 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.

31. Third, regarding consumer tastes and habits, due to the high requirements on the CFPP, predominantly FAME blends with rapeseed methyl ester as a 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 manifesting in the fuels sector.

32. Fourth, regarding tariff classification, biodiesel products are classified under code 3826 00. This includes biodiesel made from waste oils, animal fats and various biodiesel mixtures. The lack of detail in the tariff classification undermines Malaysia's claim that the products it identified are "like".

33. Finally, with regard to input products, Malaysia has failed to prove that the vegetable oils it refers to are "like". Theses oils have different physical characteristics (such as different cloud points, iodium values, melting points and "unsaponification in g" values), different end-uses and customers' preferences and different tariff classifications.

34. In any event, were the Panel to consider that Malaysia has demonstrated that PME, RME, and SME are like products because they are partially substitutable, Malaysia's definition of the products that it claims to be like is flawed because it does not include the entire universe of like biofuel products, which are partially substitutable and therefore should have been included.

35. First, there is no reason to excluded other oil crop-based biofuels (e.g. made from sunflower oil) and focus only on PME, RME and SME.

36. Second, Malaysia itself argues that HVO and FAME are like products. There is therefore no justification to exclude HVO from the group of like products for the purposes of Malaysia's GATT and TBT claims.

37. Third, if the Panel were to accept that PME, RME and SME other biofuels, such as biofuels made from waste oil or animal fat should also be considered as "like products".

38. Malaysia has not demonstrated less favourable treatment. Malaysia rightly acknowledges that there is no import prohibition, given that the measures only address the eligibility of biofuels to count towards renewable energy targets. However, Malaysia has not substantiated its claims as regards the alleged distortive effects on competition.

39. First, Malaysia relies on evidence relating to the market shares of biofuels which did not meet the certification requirements under RED I as demonstrating that the measures at issue in these proceedings will have the result that there will be no market for palm oil-based biofuel. The European Union accepts that RED I had an impact in the sense that market penetration of renewables would have been lower in the face of price competition from fossil fuels. However, that does not sustain the conclusion that, absent incentivisation, renewable energy would have no market share at all. This assertion presumes that the only parameter relevant to market share is price. However, consumer demand is increasingly driven by other concerns, including environmental and climate change considerations. Therefore, the existence of eligibility criteria for a renewable energy target does not determine whether a market for biofuels exists at all.

40. In addition, RED II is not structured in the same way as RED I. The nature of the obligations on the Member States is different. One cannot extrapolate based on the operation of RED I that RED II will have the same competitive effects. Under RED II, the sectoral transport target does not guarantee any enhanced degree of market penetration for any specific "conventional biofuel" and it does not guarantee any specific market share for an oil-crop based biofuel. Nor does it guarantee that any specific conventional biofuel will be eligible for subsidisation.

41. Second, when considering which renewable fuels to promote, the European Union is, in the exercise of its regulatory autonomy, entitled to select those fuels which best meet its legitimate policy objectives. It is not because one type of energy was subsidised historically that there is an indeterminate obligation to continue to incentivise that source of energy.

42. When assessing the alleged effects on the conditions of competition, Malaysia's case reposes on a definition of the "relevant market" which is excessively narrow. By the same token, the Panel must conduct the appropriate comparative exercise. Once the "like" products have been identified, the Panel is required to examine the competitive opportunities afforded to the group of imported like products compared with those afforded to the group of domestic (or other foreign products) products.

43. Thus, Malaysia must show that the measure (or measures) complained of "modifies the conditions of competition" to the detriment of the group of imported like products compared to the group of domestic products (or the group of like imported products of non-Malaysian origin). This analysis is absent, and Malaysia's arguments are essentially limited to bare assertions about the effects of the challenged measure on Malaysian palm oil-based biofuels. In any event, Malaysia's has not conducted this analysis on the whole group of like products given that its own definition of "like product" is partial.

44. Even if the Panel accepts that Malaysia has established distortive effects to the detriment of palm oil, this is not dispositive of a breach of Article 2.1 TBT precisely because Members are not precluded from adopting regulatory distinctions per se. There is no dispute that at present, on application of the formula established in the Delegated Regulation, only palm oil is identified as a feedstock associated with a high ILUC risk of significant expansion into areas of high carbon stock.

45. Malaysia essentially argues that there is no legitimate regulatory distinction between palm oil and other oil crop-based biofuels because it disputes the validity of the concepts of ILUC, high ILUC-risk and low ILUC risk certification. However, Malaysia has re-characterised the policy objectives pursued by the EU in an excessively narrow manner and sought to integrate a hierarchy between them. The EU biofuels regime and the specific measures identified by Malaysia pursue several intertwined objectives simultaneously.

46. Equally, Malaysia claims that ILUC lacks sufficient scientific basis but has limited its arguments to generalised assertions without clearly identifying what it considers the relevant legal standard against which that scientific evidence falls to be assessed is. ILUC is a real phenomenon. The methodology applied by the European Union to identify high ILUC risk feedstock is supported by a body of scientific evidence and other information based on the data available at the time the measures were adopted. Malaysia has not shown that this provides an insufficient basis for the regulatory choices reflected in the EU biofuels regime.

47. Malaysia argues that the concept of high ILUC risk cannot be regarded as having been applied in an even-handed manner because it has not been calibrated to the risk. Malaysia also appears to contend that the degree of contribution to an objective is a relevant factor for the assessment under Article 2.1 of the TBT Agreement. However, when looking at 'arbitrariness' or 'even-handedness' in the context of a claim under Article 2.1, the Panel is not asked to determine the degree of contribution a measure can make to the objective it pursues. Indeed, the degree of protection a Member seeks to accord its legitimate policy objectives is a matter for it to decide.

48. The European Union has applied a formula, built on a body of scientific evidence, which, when applied, results in the classification of palm oil as high ILUC risk of expansion into high carbon stock land. At present, when the same formula is applied, other crops are not identified as presenting the same degree of risk. This is not probative of discrimination or arbitrariness.

2.4. Article 2.2 of the TBT Agreement

49. Malaysia agrees that the EU has the right to act for the purposes of reducing GHG emissions, to protect the environment, to respond to climate change and biodiversity loss, which are moral concerns of the highest importance.

50. Indeed, the 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.

51. 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.

52. 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.

53. 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.

54. The EU also disagrees with the contention that a measure can only pursue one objective (the primary objective) whereas all the rest are accessory considerations, which should play no role in the Panel assessment. This contention does not find any support in the text of covered agreements and is simply illogical and counterintuitive.

55. Malaysia argues that, according to the EU, any measure adopted by any WTO Member that has any environmental or sustainability dimension could be considered as necessary to protect public morals. But this is not the EU position. Indeed, the objectives pursued by the EU are not concerned with "any" environmental or sustainability issue". They 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.

56. 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.

57. The focus at the stage of the "design" of the measure means to ascertain whether the measure is apt to, or "not incapable" of contributing to its objective(s). Thus, for the "legitimate objective" stage of the analysis the EU considers that it is sufficient to have demonstrated that the 7% maximum share, the high ILUC-risk cap, and the high ILUC-risk phase out are each apt to making a contribution to the achievement of the intertwined objectives of these measures.

58. 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.

59. 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.

60. The EU has demonstrated the existence of the climate breakdown and biodiversity collapse and these phenomena are not questioned by Malaysia. 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.

61. 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 Art 2.2 of TBT Agreement.

62. Malaysia has failed to prove the trade restrictiveness of the measures at issue within the meaning of Article 2.2 and in any event has not made any appreciation of the degree of alleged restrictiveness. Malaysia raises the same arguments to demonstrate the trade restrictiveness of all the measures it challenges notwithstanding that each measure operates in a different manner. For instance, Malaysia contends that having contributed to establishing the biofuel market, the EU has suspended the legal framework thereby restricting international trade. However, it is not clear to which measure Malaysia refers.

63. 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.

64. 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.

65. 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.

66. Fourth, the use of palm oil in the EU is below 4% of total palm oil production. The EU measures challenged by Malaysia are not capable of significantly affecting global trade in palm oil and palm oil biofuels or putting out of business Malaysia's producers. As abundantly explained, these EU measures 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. Therefore, given that EU consumption of palm oil is small in comparison to the worldwide production and consumption of the same product, it is clear that the degree of trade restrictiveness of the measure can only be limited, as it can only affect a minor part of the world trade in that product. The fact that palm oil prices continue to mount is a clear indicator that the EU measures do not have the effect of materially restricting global trade in palm oil.

67. 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. Malaysia'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.

68. Sixth, if one follows Malaysia, 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.

69. Seventh, to the extent that the Panel finds that Malaysia 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.

70. Eighth, the EU recalls that a panel may consider "both import-enhancing and import-reducing effects on the trade of other Members".

71. Finally, with regard to the 7% maximum share, Malaysia has never disputed the EU argument that by putting an overall limit to the eligibility of conventional biofuel (which broadly reflects the level of EU consumption of conventional biofuels when that limit was introduced) the 7% maximum share has very limited trade distortive effects because it tends to preserve the status quo at the time of the introduction of the measure, without affecting investments in the biofuel production chain regardless of where they have been realised.

72. Moreover, regarding the high ILUC risk cap and the high ILUC risk phase-out Malaysia has underlined that by allowing economic operators sufficient time to adapt to the new measures, the European Union minimised the trade restrictiveness (if any) of those measures.

73. Malaysia 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.

74. 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.

75. 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"..

76. 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.

77. 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.

78. 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.

79. 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.

80. 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 destruction), and considering the associated EU public morals, a qualitative analysis is more suitable than a quantitative one in the present case. Moreover, Malaysia's approach to assessing the contribution to the objectives for each measure in isolation is unwarranted and 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.

81. 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.

82. With regard to the nature of the risks concerned and the gravity of the consequences of non-fulfilment, Malaysia 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.

83. 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.

84. The EU further notes that Article 2.2 employs a photographing technique and 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 two provisions are separate and to give meaning to each, one should not merge them. Malaysia has raised no claims under Article 2.3, but it has also acknowledged that the characterisation of a certain feedstock as

high ILUC risk may evolve over time. This is at odds with its constant criticism that the measures at issue do not adapt to changing circumstances. In fact, Malaysia wants adaptation that would suit its trade needs, but criticises adaptation which follows an objective methodology.

85. Malaysia identified first five, then six possible alternative measures in respect of the high ILUC-risk cap, the high ILUC phase-out and the 7 % maximum share. They all 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.

86. 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 in how the sustainability criteria and the ILUC methodology consider that factor. Indeed, Recital 81 of RED II also explains that the biofuels sustainability criteria "do not cover the issue of indirect land-use change".

87. According to the sustainability criteria, in order to be eligible a given amount of biofuel must not have been produced by crops grown on high carbon stock land. Hence, rather than looking at expansion into carbon stock land that has occurred, under the sustainability criteria there is a requirement that any amount of biofuel is not the direct result of such expansion. On the other hand, biofuel crop production may take place on cropland that was previously used for growing the same or another crop for food or feed. Those crops would comply with the sustainability criteria.

88. However, when this agricultural production for food or feed is still necessary, it may lead to the extension of agriculture into non-cropland, possibly including areas with high carbon stock such as forests, wetlands and peatlands. This process is referred to as indirect land use change (ILUC). As this may cause the release of CO2 stored in trees and soil, ILUC risks negating the greenhouse gas savings that result from increased use of biofuels. To address the issue of ILUC, the RED II introduces a new approach. This approach looks at the expansion area of each biofuel crop that has actually occurred, be it for satisfying food, feed, or biofuel demand.

89. With regard to the first alternative proposed by MAlaysia (a legality scheme modelled on the EU's FLEGT scheme), it has to be noted that a simple legality check is not enough. Climate responds to emissions, not to legality of production. Much deforestation in the world is legal and policy-driven.

90. Avoiding expansion onto land with high-carbon stocks is already a requirement under the sustainability criteria. Hence, the proposed alternative is in reality a suggestion to remove the measure at issue altogether. Moreover, in this respect, the fitness check conducted has found that certain VPAs concluded under the EU FLEGT regime are not so effective in preventing illegal destruction of forests (and its associated effects on climate change, biodiversity loss and public morals). Further explanations are provided in the impact assessment for minimising the risk of deforestation and forest degradation associated with products placed on the EU market.

91. Malaysia adds a new alternative in its second written submission: the EU deforestation-free initiative. However, there are differences in scope and approach between that newly proposed instrument and the measures at issue: the EU Biofuel Regimes stimulates demand for biofuel crops that would not otherwise exist and in that context, the measures at issue seek to limit the demand for biofuels crops with a high ILUC risk. On the other hand, the deforestation-free proposal addresses demand for certain goods that exists irrespective of a particular EU policy.

92. The third alternative suggested by Malaysia refers to certification by public authorities, like the catch certificate under the EU's IUU fishing scheme.

93. However, the IUU framework offers a complex toolbox of instruments working together but Malaysia isolates the part of the IUU "toolbox" that it finds convenient (catch certificates) and ignores the rest.

94. The fourth alleged alternative is the application of enhanced certification by existing non-governmental organisations, such as under the ISCC and the RSPO and the RSPO-RED. The EU notes that those schemes address only DLUC.

95. Malaysia's proposed enhanced certification requirements for all crops (hundreds of them) does not take into account the different ILUC risk of each feedstock, and in particular the degree of the risk of expansion of each crop in high carbon stock land. It is therefore not an equivalent to the challenged measures. This proposed alternative is also not available because it would place an undue administrative burden on economic operators and authorities, not substantiated by scientific information justifying identical treatment of all agricultural products in a different situation with regard to the impact on the values protected.

96. With regard to Malaysia's fifth alternative, concerning market access quotas capping imports of high ILUC-risk feedstocks at certain levels, the EU notes that Malaysia is proposing a system of quantitative restrictions which would be WTO incompatible under Article XI of the GATT 1994.

97. Malaysia's sixth alternative is about specific import requirements applied on a consignment basis. This alternative relies on sustainability criteria and does not attempt to account for the ILUC emissions and hence fails to reflect the ILUC methodology.

98. In light of the EU's detailed explanations, there is no doubt that the alternatives suggested by Malaysia 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.

99. In conclusion, Malaysia'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. Article 2.4 of the TBT Agreement

100. The ISO standards referenced by Malaysia are partially relevant in the present case because they relate to the estimation of direct greenhouse gas emissions on the basis of a life cycle analysis. Malaysia does not take issue with this aspect of the case.

101. On the other hand, ILUC risks and ILUC emissions are neither an integral part of the ISO standards mentioned by Malaysia, 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, Malaysia 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 Malaysia has failed to make its case under Article 2.4 of the TBT Agreement.

2.6. Articles 2.5, 2.9 and 2.9.4 of the TBT Agreement

102. The European Union was not subject to the procedural requirements enshrined in these provisions because the "measures" identified by Malaysia cannot be properly characterised as "technical regulations" within the meaning of Annex 1 to the TBT Agreement. In any event, the European Union has engaged with Malaysia on multiple occasions and in multiple fora as regards the EU Biofuels regime, including prior to its adoption.

2.7. Article 2.8 of the TBT Agreement

103. The concept of high ILUC risk does not lack sufficient substance to form the basis of any distinctions introduced by the measures. On application of the formula, the differences as between palm oil and other oil crops are not minor or marginal but significant in terms of the risks they present.

104. Malaysia fails to show that the concept of high ILUC risk is "unrelated" to the environmental performance of biofuel. While the ISO standards do not currently provide for a standardised methodology to quantify ILUC emissions, this does not mean that ILUC has no relationship to

environmental performance. Malaysia has also not explained why the ISO standards should be used to address the European Union's legitimate policy concerns over the effects of ILUC when those ISO standards only recognise the existence of ILUC but do not currently recommend any specific methodology to account for those emissions. Since the respective ISO standards are irrelevant, inappropriate and ineffective for the fulfilment of the legitimate objectives pursued by the challenged measures, Malaysia's premise for its Article 2.8 claim falls.

2.8. The Low ILUC-Risk Certification is not a conformity assessment procedure within the meaning of Annex 1.3 of the TBT Agreement

105. Malaysia has not demonstrated that low ILUC-risk certification can be characterised as a "conformity assessment procedure".

106. First, Malaysia has failed to clearly identify the relevant technical regulation which it contends this measure assesses conformity with.

107. Second, in its second written submission it has clarified that the relevant technical regulation is the "exemption from the high ILUC risk cap and phase out". However, Malaysia has not sought to demonstrate that this "exemption" is a technical regulation within the meaning on Annex 1.1 of the TBT Agreement.

108. Third, there is no reference in Malaysia's Panel request either to that technical regulation or to it constituting the legal basis of the claim that low ILUC risk certification is a conformity assessment procedure. Consequently, none of Malaysia's claims based on this premise are properly before the Panel. The European Union's submissions on the substance of the claims are without prejudice to the above.

2.9. Article 5.1.1 of the TBT Agreement

109. When assessing whether suppliers are in a comparable situation, the scope of the assessment is between different suppliers of "like"' products which are subject to the "conformity assessment" procedure. Malaysia conflates the legal standard with a different issue, namely that of equal access to the market as such. Under the EU Biofuels regime, "access" to the conformity procedures is only relevant to producers of biofuels produced from high ILUC-risk feedstock.

2.10. Articles 5.1.2 and 5.2.1 of the TBT Agreement

110. The absence of detailed certification rules falls outside the scope of Article 5.1.2. Malaysia has not claimed that the certification rules are prepared with a view to or with the effect of creating an unnecessary restriction to international trade. In any case, the absence of detailed certification rules does not prevent low-ILUC risk certification and there was sufficient time for setting-up voluntary schemes before RED II became applicable. Malaysia's criticism is rather directed against the low-ILUC risk certification rules set out in Delegated Regulation. Those arguments have been addressed elsewhere. In any event, the European Union does not accept the premise that any form of verification amounts to an obstacle to trade.

111. Second, regarding Article 5.2.1, the phrase "undertaken and completed" shows that this provision covers approval procedures after receiving an application. Malaysia's claim falls outside the scope of this provision because it complains only about the absence of certification rules. Moreover, the recognition procedure of voluntary schemes by the European Commission falls outside the Panel's terms of reference and, in any event, outside the definition of conformity assessment procedures.

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

112. The European Union considers that, in any event, it complied with the procedural obligations contained in these provisions through an expert workshop, a four-week feedback period and a stakeholder meeting.

2.12. Article 5.8 of the TBT Agreement

113. Malaysia incorrectly asserts that the European Union 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 implementing act was published on 27 June 2022.

2.13. Articles 12.1 and 12.3 of the TBT Agreement

114. 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.

115. Moreover, Malaysia has not established that RED II would affect its "development, financial and trade needs". In any event, the EU has demonstrated that it gave meaningful and active consideration to Malaysia's relevant needs and adjusted some aspects of the measures at issue.

3. MALAYSIA'S CLAIMS UNDER THE GATT 1994

3.1. Article I:1 of the GATT 1994

116. Malaysia has not established a violation of Article I.1 of the GATT 1994. With regard to "likeness" of the products, the EU refers to its arguments above. Malaysia has also not demonstrated that the measures at issue "affect" the internal sales of biofuels. Nor has it demonstrated that the measures at issue "affect" the internal sales of palm oil as an input for biofuels. Any possible limitation of demand for palm oil is not the result of any treatment imposed by the challenged measures.

117. Malaysia's claims are premised on the same misconceptions as to the design and operation of the measures that undermine the claims brought in respect of Article 2.1 of the TBT Agreement. The measures at issue do not differentiate between oil crop-based biofuel on grounds of origin. All palm oil, whether imported from Malaysia, another member or produced in the European Union, is equally eligible to contribute to the European Union's renewable energy target. Moreover, the measures at issue do not operate to guarantee that there will be any "advantage". Member States frame obligations on their fuel carriers in such a way as to ensure that the overall transport target is met but are free to determine their respective fuel mix and have no obligation to incentivise any conventional biofuel at all.

118. Article I:1 of the GATT 1994 does not require WTO Members to extend an "advantage" which is subject to certain conditions to all Members in cases where their products do not meet those specified conditions. 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 subset of "like" products (regardless of their origin) which meet the prescribed conditions in terms of overall GHG emissions.

3.2. Article III:4 of the GATT 1994

119. Malaysia claims that the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification accord less favourable treatment to imported oil palm crop-based biofuel and palm oil than they accord to "like" domestic feedstocks and derived biofuels. Malaysia asserts, on essentially identical grounds to those advanced in respect of its claims under Article 2.1 of the TBT Agreement, that the European Union has accorded less favourable treatment to palm oil.

120. 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.

121. The comparison is to be conducted at the level of the group of like products. However, because Malaysia bases its "less favourable treatment" analysis on a skewed analysis and partial definition of the group of "like products", Malaysia's arguments are incapable of demonstrating that the challenged measures have an asymmetrical impact on imported products vis-à-vis domestic products, when the whole group of products is considered.

3.3. Article XI of the GATT 1994

122. Malaysia's claim implies that any internal regulatory measure which is at odds with Article III of the GATT 1994 (because it negatively affects the competitive opportunity of imported products) would also automatically be at odds with Article XI of the GATT 1994 (because it would decrease internal demand for imported products and then create a disincentive to importation).

123. However, it follows from the text of Articles XI and III as well as the jurisprudence, that only prohibitions or restrictions on importation or measures that 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, least Article III and XI would substantially coincide and one of those two provisions would be inutile.

124. The high ILUC-risk cap, the high ILUC risk phase-out and the low ILUC-risk certification regulate within the EU internal market the eligibility of high ILUC risk biofuels for the purpose of EU renewable energy targets. Therefore, any detrimental impact on commercial opportunities for imported products that might result from the application of these internal regulations is neither an import restriction nor a measure through which an import restriction is instituted or maintained within the meaning of Article XI of the GATT 1994.

125. It follows that the high ILUC-risk cap, the high ILUC-risk cap phase-out do not fall within the purview of Article XI.

126. Also low ILUC-risk certification does not constitute a measure that falls within Article XI of the GAT 1994, because it is a measure favourable to the producers of high-ILUC risk crops.

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

127. Malaysia'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. Malaysia's claim relates to alleged flaws of these measures that can be examined for consistency with other provisions of the GATT 1994.

128. 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 criteria set out in the Delegate Regulation for that purpose are already sufficiently detailed. Moreover, the Commission's recognition of three voluntary schemes before the adoption of the detailed certification rules shows that they are not indispensable for the set-up and operation of voluntary schemes.

3.5. Article XX of the GATT 1994

129. 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.

130. 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.

131. 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).

132. 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.

133. 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.

134. 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.

135. 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.

136. 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.

137. 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.

138. 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. Moreover, the ILC Guidelines on the protection of the atmosphere express the obligation incumbent on States to "protect the atmosphere".

139. In any event, the very text of Article XX supports the European Union'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.

140. 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.

141. Second, the treaty drafters put an express territorial limitation when they considered necessary to do so, such as in the SPS Agreement.

142. 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.

143. Fourth, Malaysia 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".

144. Fifth, the EU is not regulating what is happening in Malaysia. 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.

145. 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.

146. 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 occurs or where biodiversity is affected. Likewise, where the GHG emissions occurs 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 Malaysia, the EU or elsewhere it still impacts the EU public morals.

147. 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 Malaysia 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.

148. Malaysia's has identified certain aspects of the EU Biofuels Regime as the measures at issue. However, the various EU measures challenged by Malaysia 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.

149. 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 Malaysia 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.

150. 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.

151. 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 Malaysia in the context of Article 2.2 of the TBT Agreement, Malaysia has failed to propose any appropriate less trade restrictive alternative in the context of Article XX.

152. 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.

153. 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.

154. 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.

155. 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

156. 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.

157. 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.

158. 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. Malaysia's GATT claims against the TIRIB

159. Malaysia 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. While initially the EU understood

that Malaysia was arguing that the TIRIB discriminates among "like" or "directly competitive or substitutable" imported and domestic (or from another WTO Member) biofuels and their feedstocks, Malaysia clarified in its second written submission that the discrimination it complains about is between domestic (or from another WTO Member) petrol and diesel fuels that contain oil crop-based biofuels (other than palm oil biofuels) and imported petrol or diesel fuels that contain oil palm crop-based biofuels. These are the products that Malaysia considers to be "like" or "directly competitive or substitutable" and whose treatment should be compared for the purposes of the Malaysia's GATT claims against the TIRIB.

160. However, Malaysia's Panel request does not mention any claim based on Article I or III of the GATT 1994 against the TIRIB based on an alleged discrimination between those "like" or "directly competitive or substitutable" products. Therefore, Malaysia's GATT claim against the TIRIB are not properly before the Panel.

161. Moreover, Malaysia has demonstrated neither that petrol and diesel fuels that contain oil crop-based biofuels (other than palm oil biofuels) and petrol and diesel fuels that contain oil palm crop-based biofuels are like product, nor that the first are domestic/or originate in a country other than Malaysia, while the latter are imported/or originate in Malaysia. Malaysia has neither argued (let alone demonstrated) that it produces petrol and diesel fuels that contain oil palm crop-based biofuel, nor that it exports to France petrol and diesel fuels that contain oil palm crop-based biofuels. As a consequence, Malaysia has not demonstrated that it could be de facto discriminated by an origin neutral measure that allegedly affects petrol and diesel fuels that contain oil palm crop-based biofuel. In a nutshell, Malaysia has failed to make any prima facie case that the requirements for the application of Article I:1 and III:2 of the GATT 1994 are met.

162. In light of the foregoing, the EU asks the Panel to reject Malaysia's claims against the TIRIB based on Article I:1 and III:2 of the GATT 1994. Were the Panel to find that any of the GATT claim against the TIRIB is well founded (quod non), the European Union considers that the exclusion from the TIRIB reduction of palm oil-based biofuel is justified on the basis of Article XX of the GATT 1994. The arguments developed by the EU under Article XX of the GATT 1994 with respect to the EU measures challenged by Malaysia apply mutatis mutandis to the TIRIB.

4.3. Malaysia's claims under the SCM Agreement

163. Malaysia argues that the French measure constitutes a (i) financial contribution or (ii) income or price support by a government or a public body, that (iii) it confers a benefit, and that (iv) it is a specific subsidy.

164. With regard to (i) Malaysia contends that the General Tax on Polluting Activities is the normative benchmark, and that the TIRIB reduction is the exception. Malaysia claims that the exclusion from the TIRIB reduction of petrol and diesel fuels to the extent that they contain palm oil-based biofuels is the tax treatment that should instead apply to the income of the alleged subsidy recipients.

165. Malaysia 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 Malaysia'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.

166. 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.

167. 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.

168. With regard to (ii), a Member that wants to demonstrate that a measure is a form of income or price support that falls within Article 1 of the SCM Agreement must necessarily refer to Article XVI of the GATT 1994 to make its case. Such a reference is however absent from Malaysia's Panel Request. Malaysia's claim that the TIRIB reduction is an income or price support is therefore not properly before the Panel.

169. In any event, the measure does nothing to maintain "the value of prices or the income received by an industry/undertaking(s)" and notably of domestic producers, as argued by Malaysia. Indeed, there is no industry incorporating only biofuels other than palm oil, because all relevant economic operators mix different types of biofuels in order to meet the national fuel standard. Second, the TIRIB does not lower the biofuel production costs or the costs of acquiring biofuels, which must still be integrally borne by the economic operators. The measure simply encourages the incorporation and release for consumption of different source of renewable energy, whatever their origin.

170. In any event, the TIRIB reduction cannot be described as "an income support policy insulating such economic operators from the true costs that they would have to face in the absence of the measure at issue." Without the TIRIB reduction there would be no TIRIB altogether as the whole regime of the TIRIB would lack purpose. Hence, the "true costs" that operators would have to face in the absence of the measure would be no TIRIB altogether. Accordingly, the TIRIB exemption does not constitute a mechanism to support the income of domestic producers.

171. Malaysia's arguments concerning the existence of a benefit are purely consequential to the Panel finding that the TIRIB reduction is a financial contribution of a form of income support. Given that the latter set of arguments are not well founded the Panel should conclude that Malaysia has not demonstrated that the TIRIB reduction confers a benefit.

172. In any event, Malaysia has not demonstrated that the TIRIB is a specific subsidy as required by Article 2 of the SCM Agreement. Whilst Malaysia'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 , Malaysia itself denies this assumption and explains that in reality there is no such a group of enterprises. .

173. Malaysia admits 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, Malaysia 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.

174. Finally, Malaysia has not demonstrated that the TIRIB reduction has caused serious prejudice to Malaysia under Article 6.3(a) and 6.3(c) of the SCM Agreement. First, Malaysia has considered data pertaining to a partial and incorrect definition of 'like products' in its assessment of whether the effect of the TIRIB reduction was to displace imports of the 'like products' from Malaysia, or to cause lost sales of the 'like product' from Malaysia. Second, Malaysia claims that the "lost sales" occur in the EU market, whereas the only market where the TIRIB applies is the French market: therefore, the potential impact of the TIRIB reduction on the overall sales of Malaysian palm oil-based biofuel and feedstock into the entire EU market remains undemonstrated. Third, Malaysia does not show the occurrence of any significant lost sales. Fourth, Malaysia has not provided sufficient evidence to demonstrate any displacement

effect. Finally, Malaysia has failed to demonstrate a genuine and substantial relationship of cause and effect between the TIRIB reduction and the alleged displacement and lost sales.

5. LITHUANIA'S MEASURES

175. Malaysia's claims regarding Lithuania's measures fall outside the Panel's terms of reference. First, Malaysia neither identifies the Lithuanian provisions implementing the relevant parts of the EU measures it challenges, nor does it make clear which provisions of Lithuania's legal order are allegedly inconsistent with which WTO obligation.

176. In any event, Malaysia has failed to make a prima facie case against the Lithuanian measure(s) because it has not properly submitted to the Panel the evidence which allegedly contain the measure(s) it wishes to challenge (in violation Rule 5(1) and Rule 6(1) of the Panel Working Procedure) and therefore it has not demonstrated what this(these) measure(s) consist of, thereby making it impossible for the EU to defend this(these) measure(s) and for the Panel to make any finding in that respect. In light of the above, Malaysia' claims should be rejected by the Panel in their entirety.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA*

1. Australia welcomes the opportunity to present its views on the legal issues raised in these proceedings, which concern WTO Members' obligations under the TBT Agreement[1] and the GATT 1994.[2]

2. At the outset, Australia would like to emphasise that it recognises the right of WTO Members to take measures necessary for protecting legitimate public policy objectives such as environmental protection. However, it is Australia's firmly held view that WTO Members should not, under the guise of environmental protection, implement trade protectionist measures.

3. WTO rules recognise a WTO Member's right to regulate to address legitimate public policy objectives. These rules, expressed in the WTO Agreements and interpreted in numerous WTO disputes, provide ample guidance for this panel to determine whether the measures at issue in this dispute meet those standards. In this statement, Australia makes no comment on the factual issues in this dispute or the merits of either party's case but provides views on the legal standards that must be met.

4. To that end, this statement will focus first on the correct legal standard for determining 'trade restrictiveness', 'contribution' and 'less trade restrictive alternatives' under Article 2.2 of the TBT Agreement; and second on the meaning of 'necessary' and 'relating to' in certain paragraphs of Article XX of the GATT 1994.

5. Australia recalls that it has previously provided similar observations to the members of this panel in its submission in the proceedings for DS593,[3] and our views remain unchanged. Australia thanks the panel for the advance questions to the third parties in this dispute, and will provide written responses in due course.

Trade Restrictiveness of the Technical Regulation

6. First, Australia provides some observations on determining the 'trade restrictiveness' of a technical regulation.

7. In Australia's view, to determine the extent of 'trade restrictiveness', the panel should be guided by what the Appellate Body said in *Australia – Tobacco Plain Packaging*. That is, it should examine the structure, design, and operation of the measure, as well as take into account all relevant evidence adduced by the parties.[4]

8. In its first written submission, the EU contended that the trade impact of the measures at issue is 'not very important' because they do not prevent market access.[5] Australia does not agree with this contention. The prevention of market access is not the appropriate legal standard for determining the degree of 'trade restrictiveness' under Article 2.2.

9. It is well established that Article 2.2 of the TBT Agreement recognises trade restrictiveness is permissible. What is actually prohibited are those restrictions on international trade that go beyond what is necessary to achieve the degree of contribution that a technical regulation makes to a legitimate objective.

10. In determining the degree of 'trade restrictiveness,' a panel should not limit its examination to a subset of the evidence, such as market access. Rather, qualitative or quantitative arguments

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* Australia requested that its oral statement serves as its executive summary.
[1] The Agreement on Technical Barriers to Trade.
[2] The General Agreement on Tariffs and Trade 1994.
[3] EU — Palm Oil (Indonesia).
[4] Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.392-6.393.
[5] See eg, European Union's First Written Submission, para 842.

and evidence *demonstrating the complete prevention of market access*, could be probative to the extent that such evidence demonstrates the degree to which the measures have a limiting effect on trade. The relevant question is whether the trade restrictiveness is beyond what is required for a legitimate objective, not whether there is market access.

11. Second, Australia recalls that, in addition to claims under Article 2.2, this dispute involves claims under Article 2.1 of the TBT Agreement. In Australia's view, a finding of less favourable treatment by the Panel in relation to Malaysia's claims under Article 2.1[6] may have probative value in the Panel's assessment of 'trade restrictiveness' under Article 2.2.

12. In support of this view, Australia recalls that the Appellate Body in *Australia – Tobacco Plain Packaging* indicated that, when assessing a claim under Article 2.1 of the TBT Agreement, a measure modifying the conditions of competition for a group of imported products – as compared to a group of domestic products – may suffice to indicate that the technical regulation is 'trade restrictive' within the meaning of Article 2.2.

Degree of Contribution that the Technical Regulation makes to the Achievement of a Legitimate Objective

13. Next Australia will provide views on the degree of contribution that a technical regulation makes to the achievement of a legitimate objective. Australia's comments concern consideration of 'evidence' relating to the application of the measure.

14. The EU contends that the Panel, while considering the *scientific evidence* related to the measure, should limit its examination to whether the measures at issue have adequate support from qualified scientific opinions.[7] This is irrespective of whether the scientific opinions represent the majority view.[8] Australia disagrees with the EU's characterisation of the limited role for the Panel in examining scientific evidence.

15. In Australia's view, it is appropriate for a panel to consider the extent to which the body of evidence before it collectively provides a reasonable basis in support of the proposition.[9] 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.'[10]

16. Furthermore, as recognised by the Panel in *Australia – Tobacco Plain Packaging*, Australia submits that limitations on, or the lack of, available evidence in demonstrating 'contribution' has probative value and should also be considered by the Panel.[11]

Less Trade Restrictive Alternatives

17. Australia will now turn to the comparative analysis that should be undertaken when considering whether the technical regulation is 'more trade restrictive than necessary'. Australia recalls that the Appellate Body has said that it does not expect a 'complainant…to provide detailed information on how a proposed alternative would be implemented by the respondent in practice… .'[12]

18. In Australia's view, while the complainant must establish a *prima facie* case, it is for the respondent to establish that a proposed alternative measure is not reasonably available.[13]

[6] Malaysia's First Written Submission, paras 522 – 585.
[7] European Union's First Written Submission, para 362.
[8] Ibid, para 781.
[9] Panel Reports, Australia – Tobacco Plain Packaging, para. 7.627.
[10] Panel Reports, Australia – Tobacco Plain Packaging, para. 7.516.
[11] Panel Reports, *Australia – Tobacco Plain Packaging*, paras 7.938 - 7.943.
[12] Appellate Body Reports, US – COOL (Article 21.5 – Canada and Mexico), para 5.338
[13] Ibid.

Article XX of GATT 1994

19. Finally, Australia would like to provide some comments on the meaning of 'necessary' and 'relating to' in certain paragraphs of Article XX of the GATT 1994.

20. Paragraphs (a) and (b) of Article XX require that the measures at issue be 'necessary', while the standard under paragraph (g) requires that the measures at issue are 'relating to' the conservation of exhaustible natural resources. Both standards have been interpreted by the Appellate Body.

21. 'Necessary' involves a holistic weighting and balancing of a number of factors, such as the importance of the interest furthered by the measure, its contribution to the objectives pursued, and the trade restrictiveness of the measure at issue. It also involves comparing the measure to possible alternative measures that achieve the same level of protection while being less trade restrictive.[14] By comparison, 'relating to' requires 'a close and genuine relationship of ends and means' between the measure at issue and the conservation objective.[15]

22. These two are considerably different legal standards. Relying 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 instead requires a holistic weighting and balancing of a range of factors. These two legal standards should not be conflated.

Conclusion

23. Australia thanks the Panel for the opportunity to present these views.

[14] Appellate Body Report, *Brazil – Retreaded Tyres,* para 178 - 182; Appellate Body Report, *US – Gambling,* para. 307; Appellate Body Report, *Korea – Various Measures on Beef,* para. 164; Appellate Body Report, *Colombia – Textiles*, paras. 5.71-5.74.

[15] Appellate Body Reports, *China – Rare Earths*, para. 5.90.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. INTRODUCTION

1. Brazil welcomes the opportunity to take part in these proceedings as a third party. This dispute will require the Panel to address systemic issues of undeniable importance, relating to the balance between a Member's right to pursue legitimate policy goals and the need to prevent abuses that could result in trade restrictions that are inconsistent with the WTO agreements.

II. ARGUMENTS

A. High-ILUC does not constitute a legitimate regulatory distinction for the purposes of Article 2.1 of the TBT Agreement

(i) High ILUC-risk is not a reliable and appropriate regulatory distinction.

2. As part of the analysis under Article 2.1 of the TBT Agreement, the Panel will likely have to determine whether the challenged measures accord a less favourable treatment to products imported from Malaysia in comparison to the treatment accorded to domestic products or to products imported from other countries.

3. As recognized by the EU, there are widely acknowledged parametric uncertainties associated with modelling ILUC emissions in the relevant scientific literature.[1] Such uncertainties stem, fundamentally, from the fact that ILUC cannot be directly observed or measured and must be estimated according to models.

4. There is, however, no widely recognized model for the estimation of ILUC risk in connection with specific crops. Nevertheless, the model adopted by the EU is not complex at all, as it only takes two criteria into account. The absence of other variables in the model chosen by the EU is conspicuous. Additionally, there is a very real possibility that the pressure in demand resulting from the repurposing of a certain crop to the biofuel market may be compensated by the expansion of a different crop, including in areas of high- carbon stock.

5. The EU argues that "the question for the panel is therefore, whether these environmental (of which climate change and biodiversity) and moral objectives are legitimate, not purely whether or not the notion of ILUC risk is 'legitimate' as such".[13] Brazil respectfully disagrees.

6. In Brazil's view, the Appellate Body was clear in determining that, in an analysis under Article 2.1 of the TBT Agreement, a Panel must ascertain whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction. In the measures challenged in this dispute, the regulatory distinction elected by the EU is ILUC-risk, calculated according to the formula established in Article 3 of the Delegated Regulation.

(ii) The challenged measures are not applied in an even-handed manner.

7. As an alternative argument, Malaysia claims that the challenged measures are incompatible with Article 2.1 of the TBT Agreement because they are not applied in an even-handed manner and are not calibrated to the risk that they seek to address.[2]

8. In Brazil's view, the notion of ILUC risk pertaining to individual crops iscurrently unreliable, because such risk may only be estimated based on arithmetical models that lack sufficient scientific robustness. There are no internationally agreed parameters regarding which variables should be taken into account in designing models such as the one applied by the EU. This means

[1] First Written Submission of the European Union, para. 748.
[2] First Written Submission of Malaysia, para. 578.

that any such model could easily lend itself to a high degree of manipulation.

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 because they are more trade-restrictive than necessary to fulfill a legitimate objective.

(i) Relational and Comparative Analyses

9. Brazil recalls that, in applying the necessity test under Article 2.2 of the TBT Agreement, Panels are expected to consider three factors: i) the degree of contribution made by the measure to the legitimate objective at issue; ii) the trade-restrictiveness of the measure; and iii) the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure.[3] The balancing of these three elements is known as "relational analysis".

10. Moreover, in most cases, Panels should also undertake a "comparative analysis" between the challenged measures and possible alternative measures that are reasonably available to the respondent and that could make an equivalent contribution to the relevant legitimate objectives.[4]

11. With regard to the "comparative analysis" with alternative, less trade-restrictive measures that are reasonably available to the EU, Brazil encourages the Panel to analyze each of the 5 examples presented by Malaysia[5] in light of, *inter alia*, the Appellate Body's findings in *US – COOL (Article 21.5 – Canada and Mexico)*.

12. In Brazil's view, the Appellate Body's finding that an equivalent degree of contribution may be achieved in different ways from the technical regulation at issue could be read to mean that alternative measures do not necessarily have to be based on the elusive notion of crop-specific ILUC emissions.

13. Additionally, Brazil considers that, based on the nature, quantity and quality of the evidence available in this dispute, it is not possible to measure the degree of contribution (if any) of the challenged measures.

(ii) Assumptions in the formula chosen by the EU

14. Brazil notes that the EU seeks to respond to an argument by Malaysia that builds on elements which Brazil submitted as a third party in the *EU – Palm Oil (Indonesia)* dispute.[6] In response to the argument relied on by Malaysia, the EU effectively concedes that it makes most of the assumptions that were pointed out by Brazil.

15. The EU disingenuously asserts that the argument of Brazil (and Malaysia)"seems to assume the possibility that all the increase in demand [for biofuel] can and will be met without a significant expansion into high carbon stock land".[36] This is a mischaracterization of Brazil's argument. This is because the savings arising from fossil fuel replacement with biofuels could be greater than the GHG emissions resulting from the induced expansion into high carbon stock land.

16. As is clear from the above, it is the EU that assumes that all the increase in demand for biofuel will be met through a significant expansion into high carbon stock land.

III. Conclusion

17. Brazil appreciates the opportunity to comment on some of the important issues raised in this dispute, and hopes that the arguments presented in this submission will prove helpful to the

[3] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322.
[4] Ibid.
[5] First Written Submission by Malaysia, para. 635.
[6] First Written Submission by the European Union, paras. 860-866; First Written Submission of Malaysia, para. 610. Brazil's third party submission in the EU – Palm Oil (Indonesia) dispute is incorporated to this submission as exhibit BRA-001.

Panel in assessing the matter before it.

Executive Summary of the Oral Statement

1. Brazil would like to use this opportunity to present its views on the characterization of a technical regulation under of Annex 1.1 of the TBT Agreement. This is an important issue in contention in the present case.

2. Brazil cautions against an overly narrow interpretation of the concept of technical regulations, in particular with regard to the understanding of production methods. This may result in a finding that such measures would fall outside the scope of the TBT Agreement, potentially preventing the otherwise correct application of specific obligations in the Covered Agreements.

3. The Appellate Body[7] established a three-tier test that a document must meet to fall within the definition of "technical regulation". If the Panel is to undertake such an analysis, it will need to evaluate whether the production of goods in a supposedly more environmentally friendly manner has a sufficient nexus to the identified product characteristics. This is particularly relevant when the object and purpose of the measures being scrutinized are precisely curbing GHG emissions, as it is the case in the present dispute.

Executive Summary of Brazil's Responses to the Panel's Questions

QUESTION 2:

1. The legal inquiries under Article III:4 of the GATT and Article 2.1 of the TBT Agreement – as these provisions have been interpreted by panels and the Appellate Body – are *not* the same.

2. With respect to Article III:4 of the GATT 1994, GATT panels found that "the 'no less favourable' treatment requirement set out in Article III:4 [is] unqualified. Article 2.1 of the TBT Agreement, in turn, entails a different assessment as far as technical regulations are concerned. The Appellate Body found that, specifically in the context of Article 2.1, the context and object and purpose of the TBT Agreement weigh in favor of a further inquiry.

QUESTION 3:

3. In light of the standard set out by the Appellate Body[8], the fact that Malaysia "happens to only produce palm oil based biofuel from the group of like products" is highly relevant to the comparison to be conducted under Articles 2.1 of the TBT Agreement and III:4 of GATT 1994. It appears therefore that, as far as oilcrop-based biofuels are concerned, taken as a whole, the group of like products imported from the complaining Member (i.e. palm oil based biofuel) is treated less favourably than the group of domestic like products taken as a whole.

QUESTION 4:

4. Brazil disagrees with the European Union's description of the applicable legal test under Article 2.1 of the TBT Agreement. If the Panel is to apply this legal test, it bears noting that its key element revolves around the concept of a "legitimate *regulatory distinction*", rather than the professed *objectives* of the technical regulation

QUESTION 7:

Response:

5. Brazil has not found any support for the European Union's assertion regarding "trade enhancing effects" of the measures at issue towards other WTO Members. To Brazil's knowledge, such effects (if any) are therefore unspecified. Brazil agrees with Australia that "a finding of less favourable treatment by the Panel in relation to Malaysia's claims under Article 2.1 may have

[7] Appellate Body Report, *EC – Sardines*, para. 176.
[8] Appellate Body Report, *US – Clove Cigarettes*, para. 194 (underlining added).

probative value in the Panel's assessment of 'trade restrictiveness' under Article 2.2".[9]

QUESTION 17:

6. In Brazil's view, if the evidence indicates that a measure is "trade restrictive" in the sense of the TBT Agreement, this evidence could have probative value in a panel's assessment of whether the measure would amount to a "restriction" under Article XI:1 of the GATT 1994, on the basis of the plain meaning of the terms of Article XI:1 of the GATT 1994

QUESTION 19:

7. Brazil sees no justification for the Panel to depart from the understanding of Article XX that has been established by decades of case law in the GATT in the WTO, in favor of such a lax and vague standard as the one advocated by the European Union. In Brazil's view, the understanding consolidated in the case law flows from the text of Article XX as it should be properly interpreted. The legal test under each of the invoked paragraphs must be assessed on its own merits, on the basis of the relevant facts and the applicable legal standard.[10] Brazil fails to see why, in assessing a given measure, the interpretation and application of one subparagraph (say Article XX(b)) and the chapeau should be different depending on whether the respondent has also invoked other subparagraphs.

QUESTION 22:

Response:

8. It is not clear how any "spill-over" effects of R&D activities aided by subsidies are to be considered. The inquiry the Panel should undertake is not whether such subsidies ensure or harm "the proper functioning of the market", but rather whether the subsidies contribute, in a "genuine" and "substantial" way, to producing or bringing about one or more of the effects, or market phenomena, enumerated e.g. in Article 6.3 of the SCM Agreement. In any event, in the context of this dispute, Brazil does not disagree that the Panel may have to consider the nature, design, and operation of the French fuel tax reduction when considering the effect of the subsidy.

[9] Third Party Oral Statement of Australia, para. 11.

[10] If the Panel decides to begin its assessment with one of the invoked subparagraphs (and the chapeau) and finds that the measure is justified thereunder, this should be sufficient to conclude the assessment.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. ARTICLE 2.1 OF THE TBT AGREEMENT

A. The legal standard for "less favourable treatment" under Article 2.1 of the TBT Agreement

1. Canada disagrees with the European Union's position that Article 2.1 of the TBT Agreement disciplines only origin-based discrimination. In Canada's view, the non-discrimination obligations are intended to capture situations where imported products that are "like" domestic products face inequality of competitive conditions, regardless of whether the inequality is origin-based or not.

2. The European Union refers to *EC – Approval and Marketing of Biotech Product*[1] to support its position that the scope of less favourable treatment under Article 2.1 of the TBT Agreement (and Article III:4 of the GATT 1994) is limited to scenarios where the detrimental impact is related to the foreign origin of the product. However, the Appellate Body subsequently clarified that it would be incorrect for a panel, in determining less favourable treatment, to base that finding on whether the detrimental impact is related to the foreign origin of the product[2]. This view has been repeatedly affirmed by panels and the Appellate Body[3].

B. The Legitimate Regulatory Distinction test under Article 2.1 of the TBT Agreement

3. The parties to the dispute propose a two-step analysis when applying the legitimate regulatory distinction (LRD) test under Article 2.1 of the TBT Agreement[4]. According to the parties, the first step in the analysis is for the Panel to determine whether the regulatory distinction at issue is legitimate. Further, the European Union submits that Article 2.1 requires a panel to consider the legitimacy of the objective pursued by the WTO Member[5].

4. Canada disagrees with the disputing parties that the LRD test involves a two-step analysis. The legal standard adopted by the Appellate Body to determine whether a detrimental impact stems exclusively from a legitimate regulatory distinction is whether the measure is even-handed[6]. There are various ways to show even-handedness. These include whether the measure is designed or applied in an arbitrary or unjustifiable manner that constitutes a means of discrimination (AUD)[7], and whether the regulatory distinction is calibrated to the risks against which the measure aims to protect[8].

5. An assessment of whether the measure is designed or applied in an arbitrary or unjustifiable manner to determine whether a regulatory distinction is even-handed, must be "made in the light of the objective of the measure"[9]. The Appellate Body has noted that, "the form and content of the calibration test must be appropriately informed by the objectives pursued by the measure, and the calibration test should itself be applied taking account of the measure's objectives"[10]. Under either example (AUD or calibration), there must be a rational relationship between the regulatory distinction and the objective of the measure for the distinction to stem exclusively from a LRD[11].

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[1] Panel Reports, *EC – Measures Affecting Approval and Marketing of Biotech Products*, para. 7.2514.
[2] Appellate Body Report, *US – Clove Cigarettes*, para. 1879, at fn 37.
[3] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 215; *US – COOL*, para. 271; and *EC– Seal Products*, paras. 5.104-5.105.
[4] Malaysia's first written submission, paras. 573-577 and European Union's first written submission, para. 697.
[5] Ibid.
[6] Appellate Body Reports, *US – Clove Cigarettes*, paras. 182 and 215; *US – Tuna (Mexico),* para. 216.
[7] Appellate Body Reports, *US– COOL,* para 340.
[8] Appellate Body Report, *US – Tuna II (Mexico),* para. 297.
[9] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.92.
[10] Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.47.
[11] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – US)*, para. 6.13.

6. A panel therefore needs to assess the relationship between the objectives of the measure and the regulatory distinctions. In making this assessment, a panel might inquire into the nature of the objectives pursued by the technical regulation, including whether the objectives are legitimate objectives under the TBT Agreement. Where an objective is not legitimate, a panel could consider this factor in the LRD analysis. The presence of this factor may even support a finding that the detrimental impact on imported products does not stem exclusively from a legitimate regulatory distinction under Article 2.1. However, an assessment of an objective's legitimacy is not a specific element in the LRD analysis in Article 2.1 compared to Article 2.2. Under Article 2.2, the legitimacy of the objective is a specific determination that must be made by a panel before it can assess whether a technical regulation is more trade-restrictive than necessary.

II. ARTICLE 5.1 OF THE TBT AGREEMENT

A. The proper scope of the non-discrimination obligation under Article 5.1.1

7. Malaysia argues that Article 5.1.1 of the TBT Agreement applies to a situation where suppliers of a product are subject to a conformity assessment procedure (CAP) while suppliers of like products are not. Canada disagrees.

8. In Canada's view, for Article 5.1.1 to apply, there must be suppliers of products imported into the territory of a WTO Member that imposes a conformity assessment procedure on those products, and suppliers of like domestic products (or like products imported from a third country) to which the conformity assessment procedure also applies. Hence, the scope of potentially like products of the suppliers under Article 5.1.1 is limited to those products for which assurance of conformity is required. The suppliers of such like products must be in a comparable situation under Article 5.1.1[12].

9. The focus of Article 5.1.1 is on the conditions for access to a conformity assessment granted to suppliers[13]. A violation of Article 5.1.1 occurs if the conditions that apply to the supplier of imported products are less favourable than the conditions for suppliers of domestic like products/like products from a third country (i.e. if the conditions for access modify the conditions of competition to the detriment of suppliers of imported like products)[14].

10. Article 5.1.1 does not apply to a situation where just one group of like products is subject to the conformity assessment procedure and those products happen to be imported like products. Domestic like products and those originating in other countries would not be subject to the conformity assessment procedure. Therefore, the conditions of access to the conformity assessment procedure do not apply to suppliers of like products of domestic or third country origin. Access to the procedure is not at issue because those products are not required to conform to the technical regulation. As a result, no comparison of the conditions of access to the procedure between different suppliers of like products can be made and Article 5.1.1 does not apply.

B. The application of Article 5.2.1 of the TBT Agreement to conformity assessment procedures in the absence of rules implementing the procedure

11. Article 5.2.1 is not triggered until an application for assessment of conformity with a technical regulation is received in accordance with the requirement that the product in question must be assessed for conformity before it can be placed on the market. The obligation begins to apply upon the regulating Member's receipt of an application for conformity and extends to the completion of the conformity assessment process[15]. Upon the receipt of the application, a WTO Member is required to undertake and complete a conformity assessment procedure as expeditiously as possible.

12. The fact that the conformity assessment procedure cannot be undertaken due to the absence of implementing rules for the procedure is not necessarily determinative of whether the obligation under Article 5.2.1 applies. The date when a measure comes into force is "not the correct benchmark against which the time taken for the undertaking and completion of the CAP is to be judged"[16].

[12] Appellate Body Report, *Russia – Railway Equipment,* para. 5.125.
[13] Panel Report, *Russia – Railway Equipment*, para. 5.123.
[14] Appellate Body Report, *Russia – Railway Equipment*, para. 5.123.
[15] Panel Reports, *EC – Seal Products*, paras. 7.563 and 7.579.
[16] Ibid. para. 7.579.

13. What determines whether Article 5.2.1 is engaged is if an application of the conformity assessment procedure has commenced, which, according to the Panel, is triggered upon the "receipt of an application"[17] for conformity. The Panel should make a specific finding regarding when an application for conformity was received by the European Union under Article 5.2.1 rather than focussing its assessment on whether the European Union's implementing rules for the conformity assessment procedure are in place.

III. ARTICLE 12.3 OF THE TBT AGREEMENT

14. The nature of the evidence needed by the complainant to show that the responding member did not "take account of the special development, financial and trade needs of developing country Members"[18], will depend on the factual context of the dispute. However, Article 12.3 does not prescribe specific actions, or the manner in which "active and meaningful" consideration to the special development, financial, and trade needs of developing countries must take place[19].

15. Canada disagrees with Malaysia's statement in paragraph 877 of its first written submission that a WTO Member must provide evidence of "special provisions in the measures at issue, which are tailored to address the special needs of developing country Members and to provide differential and more favourable treatment to developing country Members". Evidence of specific actions is not needed for a respondent to successfully rebut a claim under Article 12.3. An example of a specific action that is not needed would include special provisions in the measure at issue that take account the needs of developing country Members and provide differential and more favourable treatment. Therefore, a failure of a WTO Member to include specific provisions in its technical regulations, such as the exception requested by Indonesia in *US – Clove Cigarettes*[20], would not be sufficient to establish a violation of Article 12.3.

IV. ARTICLE XI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

16. In determining whether Article XI:1 is also applicable to the measures 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, high ILUC-risk phase out, and low ILUC-risk certification, or from the explanation provided, that these measures are also governed by Article XI:1. They indicate that these measures are imposed to regulate biofuel in the European Union's internal market, rather than to restrict the quantity of palm oil imported into the European Union.

17. 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.

V. ARTICLE XX OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE (1994)

A. The analytical structure under Article XX for measures pursuing multiple objectives

18. The European Union submits that the "[E]U Biofuels Regime and the measures challenged by Malaysia are designed to pursue at the same time multiple intertwined, legitimate objectives, none of which can be assessed in isolation"[21]. The European Union adds that its interlinked measures "pursue the composite objectives of combating climate change, biodiversity loss and protection of

[17] Ibid.

[18] TBT Agreement, Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, Annex 1A, 1869 U.N.T.S. 14, Article 12.3.

[19] Panel Reports, *US – COOL*, para. 7.788. See also para. 7.7877, where the panel stated: "As to what such active and meaningful consideration means in practical terms, we do not read Article 12.3 of the TBT Agreement as prescribing any specific way."(emphasis added).

[20] Panel Report, *US – Clove Cigarettes*, para. 7.646.

[21] European Union's first written submission, para. 280.

the EU public morals"[22]. As the objectives of the Biofuels Regime are intertwined, the European Union advances what it refers to as a "composite defence"[23], and argues that it requires the concurrent application of Articles XX (a), (b) and (g).

19. In other words, given the design of the Biofuels Regime, which pursues several objectives, the European Union is asking the Panel to consider the interrelationship of the individual paragraphs, with the result that, in the European Union's view, a single test for all of the paragraphs should be applied[24]. Canada respectfully disagrees with the European Union's position. Such an approach disregards the structure of Article XX as a whole, and the textual and contextual differences between the individual paragraphs in Article XX. Following the European Union's proposed approach would also upset the analytical structure of Article XX reflected in the case law. A WTO Member must still demonstrate that the required elements under each paragraph in Article XX have individually been met. The intertwined nature of the objectives of a measure does not change this.

20. In cases where more than one exception has been invoked by a complainant, the Appellate Body has been able to apply different legal tests under the paragraph that pertains to each particular objective. So long as the inquiry into the degree of connection or relationship between the challenged measure and the state interest or policy to be promoted or realized aligns with the language used in each paragraph under Article XX, there is nothing inherently problematic with a panel considering multiple objectives in the defence of a measure.

B. The importance of maintaining distinct legal tests under the paragraphs in Article XX

21. The European Union asserts that the "necessity" test under Articles XX(a) and XX(b) and the "relating to" test under Article XX(g) are "very similar in practice"[25]. The European Union emphasizes that both tests include a consideration of a close and genuine relationship of ends and means between the objectives pursued and the measure. As a result of this similarity, the European Union argues that both tests should be boiled down to an assessment by the Panel to determine whether the measures at issue as designed are "rational and reasonable"[26].

22. It is well established that whether a measure is provisionally justified under one of the Article XX paragraphs involves an examination of the degree of connection or relationship between the disputed measure and the state interest or policy to be promoted or realized[27]. However, the degree of such a connection depends on the terms used in each paragraph of Article XX[28].

23. While the term "relating to" under Article XX(g) is defined to require a "close and genuine relationship of ends and means[29], the relationship between the measure and the policy of the WTO Member plays only a partial role in a determination of whether a measure is necessary under paragraphs (a) and (b) of Article XX. The relationship between the measure and its objectives (i.e. how much the measure contributes to the objective) is one factor to be weighed and balanced along with other factors (i.e. importance of values and interests and the degree of a measure's trade-restrictiveness)[30]. As an assessment of the close and genuine relationship between ends and means plays a different role in the "necessity" and "relating to" tests, it follows that the tests should not be collapsed into a single "rational and reasonable" test that would eliminate this distinction.

24. The European Union argues that the "necessity" and "relating to" tests differ in intensity[31]. Although Canada agrees there are significant differences in the wording and context in each paragraph under Article XX, this does not equate to varying levels of intensity. If a WTO Member chooses to put forward defences under the Article XX paragraphs in which there are different legal tests, this would be their prerogative – a prerogative that can be exercised based on a self-held

[22] European Union's first written submission, para. 793.
[23] Ibid. para. 1329.
[24] Ibid. para. 1273.
[25] Ibid. para. 1265.
[26] Ibid. paras. 1265 and 1272.
[27] Appellate Body Report, *US – Gasoline*, p. 18.
[28] Ibid.
[29] Appellate Body Reports, *China – Rare Earths,* para. 5.90.
[30] Appellate Body Report, *Brazil – Retreaded Tyres,* para. 145.
[31] European Union first written submission, paras. 1267 and 1268.

perception about those differences. But in order to successfully invoke the paragraphs of Article XX, a WTO Member must meet the requisite elements of the tests that apply to each paragraph[32].

[32] Canada's responses to Panel's questions to the third parties, para 75.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA

Colombia recognizes Members' sovereign right to implement measures for the legitimate objective of protecting the environment, subject to the full compliance of WTO rules and, 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.

In its relevant procedural acts, Malaysia focused on the inconsistency of the challenged measures with Articles 2.1, 2.2, 2.4, 2.5, 2.8, 2.9, 5.1, 5.6, 5.8, and 12 of the Agreement on Technical Barriers to Trade ("TBT Agreement"), Articles I:1, III:2, III:4, X:3, and XI:1 of the General Agreement on Tariffs and Trade of 1994 ("GATT 1994"), and Articles 6.3(a) and 6.3(c) of the Agreement on Subsidies and Compensatory Measures ("SCM Agreement").

The EU, for its part, alleged that the TBT Agreement is not applicable and rebutted the claims 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. Furthermore, the EU considered unfounded Malaysia's arguments regarding a supposed breach of articles 6.3(a) and 6.3(c) of the SMC Agreement.

Colombia has presented its views on the following:

- The challenged measures are inconsistent with Article I:1 of the GATT 1994
- The challenged measures are inconsistent with Article III:2 and III:4 of the GATT 1994
- The challenged measures are not justified under Article XX of the GATT 1994
- Article XX of the GATT 1994 has a territorial limitation
- The TBT Agreement is fully applicable
- The challenged measures are inconsistent with Article 2.1 of the TBT Agreement
- The challenged measures are inconsistent with Article 2.2 of the TBT Agreement
- The challenged measures are inconsistent with articles 5.1.2
- The challenged measures are inconsistent with articles 12.1 and 12.3 of the TBT Agreement

Colombia agrees with Malaysia that the challenged measures adopted by the European Union ("EU") discriminate against palm oil and oil palm crop-based biofuels, thereby breaching the EU's multilateral obligations and nullifying and impairing the WTO rights of Malaysia, Indonesia, Colombia, and other Members of the World Trade Organization ("WTO"). Colombia notes that Malaysia explicitly claims that the challenged measures are *de facto* establishing a trade barrier and influencing competition conditions in the EU market. Article 2.1 and III:4 of the GATT 1994. Colombia underscores that Article XX does not provide a valid justification for the measures. Finally, Colombia asserts that Articles 12.2 and 12.3 are breached by the EU's measures.

This summary divides Colombia's arguments in three parts: 1. Colombia provides its views on the issue of discrimination, focusing in this document for brevity on Article 2.1 of the TBT Agreement. 2. Colombia provides its views on Article XX as an untenable justification for the measures. 3. Colombia asserts that articles 12.2 and 12.3 of the TBT Agreement are independently breached. Then, Colombia concludes.

1. First, concerning the issue of discrimination

Colombia submitted a deep explanation of what it considers the correct reading of **Article 2.1 of the TBT Agreement** provision. The explanation on article 2.1 of the TBT provides the main reasoning to understand Colombia's views on the discriminatory aspect of the EU measures. Assertions for Article III.1, III.2 of the GATT Agreement, and for 2.2 of the TBT Agreement, follow the same systemic line of reasoning. For purposes of space, we focus here on the argumentation that Colombia provided under article 2.1, under its general interpretation of what considers discrimination.

Some main issues to that regard, as submitted by Colombia either in its First Written submission and/or in its responses to the panel questions:

i. Article 2.1 of the TBT Agreement prohibits measures that "give" or "grant" a "less advantageous" type of treatment to imported products, as compared to national products. The terms "accorded" or "*dé*," in the Spanish language, indicate that Article 2.1 concerns measures *effectively* giving or granting less favourable treatment to imported products, **regardless of the existence of factors or circumstances related to the foreign origin of the product**. It is Colombia's opinion that measures by which a member is "giving" or "granting" a "less favourable" treatment to imported products, *vis-à-vis* national products, are inconsistent with Articles 2.1 of the TBT Agreement and III:4 of the GATT. Thus, it seems irrelevant whether the measure at issue was based on origin or non-origin-related motives.

ii. Concerning the question of discrimination of "like products", not only in the context of Article 2.1 of the TBT Agreement, but also in the context of Article III:4 of GATT 1994, Colombia has submitted that both panels and the Appellate Body have concluded that, in determining the relevant domestic and imported products for conducting the likeness analysis, the first step in a likeness examination is to identify the domestic and imported products that must be compared.[1] Additionally, the Appellate Body has stated that a likeness analysis is essentially about determining the extent to which two products are in a "competitive relationship" in a given market.[2] It has also recognized 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.[3] It is essentially about determining the extent to which two products are in a "competitive relationship" in a given market.[4]

In this sense, the Republic of Colombia submitted that the products that must be compared are first-generation biofuels from palm oil crops and other crops, such as rapeseed and soybean. In fact, biofuels from palm oil crops and biofuels from other crops, such as rapeseed and soybean, are in a competitive relationship, meaning that they are like products under Article III:4 of the GATT and under Article 2.1 of the TBT Agreement. Moreover, as explained in the Third-Party Submission of Colombia, palm oil crop-based biofuels and other oil crop-based biofuels share the same end-uses (a transport fuel) and have the same tariff classification (382600)[5]. Furthermore, from the consumers' perspective, 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.

In this regard, the EU states that Malaysia "exaggerates" the magnitude of the effects on the conditions of competition in the relevant market. However, such statement is irrelevant and must not be taken into account by the Panel since no quantitative threshold needs to be exceeded for there to be a violation of Article 2.1 of the TBT Agreement. For a measure to be inconsistent with Article 2.1 of the TBT it is only required that less favourable treatment is accorded to a foreign product that is in a competitive relationship with a local product. It is important to highlight that the EU subdivides the oil-crop based biofuels market in several categories that fit under the criteria of their questioned measures. This, in an effort to rebut the likeness of the products under consideration.[6]

[1] *Panel Report, US – Clove Cigarettes,* para. 7.227.
[2] *Appellate Body Report, US - Clove Cigarettes*, para. 120.
[3] *EC - Asbestos*, para. 101.
[4] *Appellate Body Report, US - Clove Cigarettes*, para. 120.
[5] Third-Party Submission of Colombia, para. 3.13.
[6] First Written Submission of the EU, paras. 707 – 708.

As to a potential difference on the standard of proof between articles 2.1 of the TBT Agreement and III:4 of GATT 1994 suggested by the UE on its First Written Submission[7], Colombia considers that such difference is non-existent, as the substantial non-discrimination obligation set forth on both articles is essentially identical, and therefore by no means the TBT Agreement considers a more demanding standard of proof as compared to article III:4 of GATT 1994, regarding the concept of discrimination.

iii. Colombia also submitted comments on the legal standard under Article 2.1 of the TBT Agreement. Colombia explained:

- That the Appellate Body has considered that in order to review whether the detrimental impact on competitive opportunities "stems exclusively from a legitimate regulatory distinction", it is necessary to carefully examine the measure's design, architecture, revealing structure, operation, application, including whether the measure is *even-handed*.[8]
- That under the legal standard in Article 2.1, if a measure has a "detrimental impact on imports", a panel must assess whether that impact on imports "stems exclusively from a legitimate regulatory distinction".[9] The focus of a panel's assessment is, therefore, the regulatory distinction, and not the objective.
- That an assessment of a measure's objective informs this analysis but is not decisive. The adjudicator should consider whether the objective is, in principle, legitimate. The mere fact that a measure's objective is, in principle, legitimate does not, however, mean that the specific regulatory distinction at stake is legitimate. A Member may pursue a legitimate objective but may do so through a regulatory distinction that lacks legitimacy. Further, even if a regulatory distinction is legitimate, the detrimental impact on imports may not stem exclusively from the legitimate regulatory distinction, whether or not the objective is legitimate.
- That a regulatory distinction lacks legitimacy if the adopting Member did not respect the due process interests of affected stakeholders, including exporting governments, in drawing the distinction.[10] In this case, the EU's formula relied on crop expansion data for different oil crops, in each producing country, including Colombia. In Colombia's view, when an adopting Member seeks to distinguish between goods using data relating to events in the country of production (e.g. crop expansion), that Member must give the exporting country, and its producers, an appropriate opportunity to provide, and comment on, data relating to their own production in their own country; and the adopting Member should, in principle, use such data.
- That **t**he word "exclusively" means that there cannot be *additional* factors that contribute to the detrimental treatment. To assess whether the detrimental impact stems exclusively from a legitimate regulatory distinction, a panel should assess the relationship between the detrimental impact on imports and the legitimate regulatory distinction. Among others, adjudicators have examined whether the relationship is rational, and whether the detrimental impact on imports is properly calibrated with the risks that the regulatory distinction seeks to address (here, the level of ILUC risk).[11] If the relationship is not rational, or not properly calibrated with the risks that the distinction seeks to address, the detrimental impact on imports does not stem exclusively from the regulatory distinction.

[7] First Written Submission of the EU, paras. 704 and 724.

[8] *Appellate Body Report, US – Clove Cigarettes*, para. 182; The Appellate Body has compared Article 2.1 and the Article XX of the GATT, finding some similarities, but also differences: "We recognize that there are important parallels between the analysis under Article 2.1 of the TBT Agreement and the chapeau of Article XX. In particular, we note that the concepts of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and of a "disguised restriction on trade" are found both in the chapeau of Article XX of the GATT 1994 and in the sixth recital of the preamble of the TBT Agreement, which the Appellate Body has recognized as providing relevant context for Article 2.1 of the TBT Agreement. Moreover, both Article 2.1 and the chapeau of Article XX do not "operate to prohibit a priori any obstacle to international trade." Instead, as interpreted by the Appellate Body, Article 2.1 "permit[s] detrimental impacts on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions," while under the chapeau of Article XX, discrimination is permitted if it is not arbitrary or unjustifiable". *EC –Seal Products*, para. 5.310 (footnotes omitted).

[9] *Appellate Body Report, US – Clove Cigarettes*, para. 215 (emphasis added). See also *US – Tuna II (Mexico)*, para. 215.

[10] *US – Shrimp*, paras. 178-184.

[11] *US – Tuna (Mexico)*, para. 297; *US – Tuna II (Mexico) (Article 21.5 DSU)*, para. 6.13.

iv. Colombia provided comments with extensive detail and graphic formulations on the application of the legal standard to the current case. Colombia explained, in turn, that (1) the EU formula used to draw a regulatory distinction between low and high ILUC risk oil crops lacks legitimacy; and that (2) the EU criteria for distinguishing low-ILUC risk production of oil palm, which is otherwise high ILUC risk, through low ILUC risk certification, lack legitimacy. For both reasons, the measure is inconsistent with Article 2.1 of the TBT Agreement

In addition, on the issues of discrimination, Colombia used the same line of reasoning following systemic interests, and found that, in its view, Article 2.2 of the TBT Agreement, was also breached by the EU measures, as these exceed the degree of restrictiveness necessary to achieve the allegedly pursued goal. Articles III.1 and III.4 of the GATT were also discussed, with similar representations and final assertions.

Finally thus, Colombia concluded with the assertion that the measures are discriminatory and inconsistent with the different rules against discrimination provided by the GATT Agreement and by the TBT Agreement (which is, by the way, fully applicable). The EU measure is botched from origin to end, and no complex argumentation can disguise it.

Simply put, after dissection of the complex formulae and legalese, a fact jumps to view: **the restriction only applies to palm oil, no matter where it is grown** (and there are no non-negligible palm oil producers in local EU market, if at all); **and not to all other similar products** (of which there are quite a few non-negligible producers in the EU market) which will be able to continue to trade and contribute to renewable energy targets – because the entire global crop production is deemed to be low ILUC risk.[12]

2. Second, Colombia provided its analysis of Article XX as a justification.

Colombia focused its interventions on Article XX of the GATT on the following main arguments: (i) the territorial scope of the Article XX exception; (ii) the necessity test enshrined in paragraphs (a) and (b) of Article XX; (iii) the contribution of the measure to the alleged legitimate objective and the analysis of alternative measures; (iv) the analysis of Article XX (g); and (v) the analysis of the *chapeau* of Article XX.

Colombia concluded: that the legal interpretations advanced by the EU to justify the measures are far-fetched and present systemic risks; that its reasoning for the implementation of the provision to the specific case was erroneous as well; and that the Article XX has intrinsic territorial limitations whose de-estimation could again, pose systemic risks. In sum, Colombia concluded that the EU challenged measures are not justified -nor justifiable- under Article XX of the GATT 1994

3. Third, Colombia addressed the question on the special and differential treatment for developing countries provided for in Articles 12.1 and 12.3 of the TBT Agreement.

Colombia fully supported Malaysia's request for a more stringent enforcement of the obligation to take into account developing countries' needs, as required by the text of the Agreement. The term " to take account", further developed with the qualifiers *"of the special development, financial and trade needs of developing country members"* shall be interpreted in good faith in accordance with its ordinary meaning in the context of the TBT Agreement and in light of its object and purpose. Moreover, according to the interpretive principle of effectiveness, a treaty must be interpreted in a way that gives meaning to all its terms and provisions, harmoniously. Therefore, to consider the term "take into account", and then a specific and enumerated set of needs, as a mere formality would deprive the term of any meaning and, therefore, would contravene customary rules of interpretation that are mandatory through Article 3.2 of the DSU.

Colombia notes that Article 12.3 provides no specific guidance on the kind of evidence required to demonstrate the compliance with the obligations therein. In any event, the inclusion of Article 12.3 in the Agreement should effectively mean something in practice. An additional procedural discipline

[12] For the same reasons, the measure does not meet the requirements of the subparagraphs (i.e., (a), (b) and (g), and the chapeau, of Article XX of the GATT 1994.

was negotiated, and this implies a specific activity from the part of Members establishing TBT measures.

Although the way to offer specific evidence could be quite open and left to the Member States, some meaningful examples to comply with the provision could be: to enter into meaningful consultations with the developing Member; to afford adequate and non-general opportunity for engagement regarding the design, implementation or modification of the measures; to provide a dedicated dialogue regarding any representations made by the regulating Member concerning the facts on the ground of a developing Member, as well as deference to its own factual representations; and to take notice of differences and specificities of the affected developing Members, be them geographical or in terms of development, and not just conflating them as if developing Members were one and only one.

Under this understanding, Colombia considers that the EU did not demonstrate compliance with Article 12.3 by pointing to its engagement with Malaysia as per the European Union's first written submission[13], nor by merely claiming that it undertook its regulation "with a view to" assess developing country needs. Simply, Colombia is unclear on how developing countries enumerated needs of development were actively considered in the preparation and application of the measure at issue.

In particular, finally, the exigence of a "financial non-attractiveness" as a requisite for certification (as thoroughly discussed in Colombia's answer to question 4 of the panel), is as simple a case can be of blatantly "not taking account of the […] financial … needs of developing country Members", and a violation of Article 12.3 in itself; as well as additional evidence of not compliance with the provision during the general regulatory process.

4. Finally, as a general conclusion, Colombia supported Malaysia's claims, without prejudice of Malaysia's claims and arguments.

Colombia supports Malaysia's claim that the challenged measures are inconsistent with both the GATT 1994, the TBT Agreement and the SCM Agreement. Colombia highlighted particularly only the following particular issues:

- The EU and EU members challenged measures are in breach of Article I:1 of the GATT 1994
- The EU challenged measures are in breach of Article III:4 of the GATT 1994
- The EU challenged measures are not justified under Article XX of the GATT 1994
- The EU challenged measures are in breach of Article 2.1 of the TBT Agreement
- The EU challenged measures are in breach of Article 2.2 of the TBT Agreement
- The EU challenged measures are in breach of article 12.1 and 12.3 of the TBT Agreement;
- The EU Members challenged measures are in breach of article III:2 of the GATT 1994. (Section 3.6)

[13] Second written submission of the EU, paras. 1.111-1.115

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF COSTA RICA

General remarks

1. Costa Rica is participating as a Third Party in this dispute since it has a trade interest as a producer and exporter of palm oil. In general terms, Costa Rica is concerned about the spillover effects that the measures applied by the European Union may have in the international markets for palm oil, which may affect our exports to third markets.

2. Our particular concerns regarding the measures in question can be summarized as follows.

3. First of all, we would like to say that we share a common understanding with the European Union that the use of alternative energies is an indispensable means to achieve the reduction of greenhouse gas (GHG) emissions and compliance with the objectives of the Paris Agreement.

4. However, we are concerned about the particular approach adopted by the European Union in terms of limiting the use of biofuels that use palm and palm oil as raw materials. These products are important to my country, given the employment opportunities that they generate in low-income rural areas.

5. We understand that the purpose of limiting the use of biofuels is to respond to the potential damaging effects of the indirect land use, which occurs when the production of crops for biofuels displaces the traditional production of foodstuffs. It is assumed that the additional demand for land would lead to an extension of the land area dedicated to agriculture, to the detriment of forests and wetlands, and resulting in additional GHG emissions.

6. However, this approach does not recognize the particular situations prevailing in different countries and regions. The actual situation of the lands dedicated to the production of palm in Costa Rica certainly does not correspond to the definition of high risk of changes in indirect land use put forward by the European Union.

7. Costa Rica considers that there are other less trade restrictive measures that are reasonably available to the European Union and that would make similar contributions to the objectives pursued by the measures in question. For example, Costa Rica has proposed to the European Union that it should take into account the existence of international environmental certifications, such as the Roundtable on Sustainable Palm Oil (RSPO), that aim to guarantee that the production of palm is compatible with the objectives of sustainable development.

8. We take note that Malaysia has included the RSPO as part of the proposed alternative measures that it argues the European Union should have considered and adopted.[1] Costa Rica agrees with this approach.

The determination of policy objectives under Article 2.2 of the TBT Agreement and Article XX of GATT 1994

9. Costa Rica notes that there are some areas of convergence between the Parties in relation to the interpretation and application of Article 2.2 of the TBT Agreement and of Article XX of the GATT 1994, and, in particular, to the determination of the objectives pursued by the challenged measures.

10. Both Parties seem to agree on the following fundamental issues:

[1] Malaysia's first written submission, paragraphs 658-666.

- That it is for each WTO Member to set its own policy objectives within the scope of the public interest areas enumerated in these provisions;

- That it is up to each Member to select the level of protection it seeks to obtain through the measures or policies they choose to adopt;

- That panels are not bound by a Member's characterization of the objectives it pursues through the measures, and that panels must make an objective and independent assessment of the objectives pursued by a Member, taking into account all the evidence put before them in this regard.[2]

11. Costa Rica also agree with these principles.

12. Regarding the objectives identified in the dispute, we do note, however, that there are some important differences between the Parties. The European Union has identified what it considers to be *"multiple, intertwined, legitimate objectives, none of which can be assessed in isolation."* These objectives include achieving climate change mitigation through the reduction of GHG emissions, the protection and preservation of biodiversity, and addressing the European Union's related public moral concerns.[3]

13. While Malaysia does not contest the possibility that a measure may pursue multiple objectives, it considers that the specific measures challenged in this dispute point to one primary objective, which is *"the avoidance of additional GHG emissions by limiting direct and indirect land-use change".* [4]

14. As indicated above, it will be up to the Panel to make an objective and independent assessment of the objectives pursued by the measures in this dispute. Costa Rica does not have a particular view on this issue. However, it is important to mention that a proper identification of the objectives in question is key to determine if the challenged measures comply with the requirements provided in Article 2.2 of the TBT Agreement and Article XX of the GATT 1994.

15. In addition, Costa Rica note that the European Union has relied on subparagraphs a), b) and g) of Article XX of GATT 1994 in order to justify its measures. Since the European Union has taken an intertwined objectives approach, it has indicated that it relies concurrently on these provisions. This means that if its composite defense fails, the three justifications should fail altogether.[5] This is consistent with the European Union's views that the "necessary" and "relate to" tests included in these provisions are very similar.

16. While Costa Rica acknowledges the fact that a WTO Member may rely on several different policy objectives under Article XX to justify a contested measure, this does not mean that an aggregate test of these objectives would be appropriate or legally justified under the requirements of Article XX. Article XX clearly uses different terms for each of the different policy objectives that may be pursued under the individual subparagraphs. These differences in wording were clearly chosen for a reason and should be subjected to a separate and distinct test in order to determine whether a defending Member's measure satisfies the language of each relevant subparagraph.

17. In this regard, the WTO Appellate Body has clearly stated that "*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.*"[6]

18. Therefore, the analysis required in relation to paragraphs (a) and (b) of Article XX would differ from that required under paragraph (g). Paragraphs (a) and (b) would require WTO Members invoking Article XX to justify that the contested measure is "necessary to" (a) protect public

[2] European Union's first written submission, paragraphs 763 and 776; Malaysia's second written submission, paragraphs 34 and 53.
[3] European Union's first written submission, paragraph 159.
[4] Malaysia's second written submission, paragraphs 38-39.
[5] European Union's first written submission, paragraph 1329.
[6] Appellate Body Report, *United States –Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, paragraph.17.

morals and (b) protect human, animal or plant life or health; whereas paragraph (g) would require WTO Members to justify that the contested measure is "related to" the conservation of exhaustible natural resources.

The issue of territorial or jurisdictional limitation in Article 2.2 of the TBT Agreement and Article XX of GATT 1994

19. The European Union has stated in its written submissions that, contrary to what is provided in the SPS Agreement, there are no jurisdictional limitations in Article 2.2 of the TBT Agreement or in Article XX of GATT 1994.[7]

20. Costa Rica notes that the European Union does not elaborate on its arguments related to this issue. However, it is our understanding that the challenged measures were taken by the European Union mainly to address its concerns with respect to biodiversity loss and GHG emissions that may occur as a result of indirect land use that happens *outside the territory of the EU's member States*.

21. As we mentioned before, Costa Rica agrees that it is up to each WTO Member to select the level of protection it seeks to achieve through the measures or policies it chooses to adopt. Certainly, national authorities of WTO Members in charge of designing those measures or policies are bound by jurisdictional and territorial limitations when setting up that level of protection. It is understood, in our view, that those limitations are embodied in WTO law, including the provisions in Article 2.2 of the TBT Agreement and Article XX of GATT 1994. WTO Members cannot and should not be able to affect other WTO Members' sovereignty by imposing measures that tend to substitute WTO Member's rights to set up *their own* level of protection related to *their* biodiversity and natural resources in *their own* territories.

22. As Indonesia rightly mentions in its Third Party submission, the principles of territoriality and sovereignty of natural resources are primary features of international law.[8] Silence, ambiguity, or simple references to other WTO Agreements should not serve as a basis for an interpretative departure from these core principles. Any interpretation regarding the territorial or jurisdictional limitations of Article 2.2 of the TBT Agreement or Article XX of GATT 1994 should follow the interpretative rules of the Vienna Convention of the Law of the Treaties, including Article 31 (3) (c), taken together with Article 3.2 of the DSU, and considering the context in which these Agreements were drafted.

23. Having said this, it is Costa Rica's view that the discussion related to the territorial or jurisdictional limitations of Article 2.2 of the TBT Agreement and Article XX of GATT 1994 in the current proceedings should be limited to the interpretation and implementation of paragraphs (b) and (g) of Article XX of GATT 1994 and the related legitimate objectives provided in Article 2.2 of the TBT Agreement.

24. Regarding public morals under paragraph (a) of Article XX of GATT 1994, this jurisdictional discussion does not appear to be relevant, in our view, as the protection of public morals in the present case relates to the values of the citizens *within* the territory of the WTO Member that designed the measures, that is, the European Union.

25. Public morals cannot be assessed in abstract. Evidently, public morals arise from particular concerns related to a variety of issues, including concerns related to global challenges such as biodiversity loss or climate change. In this regard, Costa Rica agrees with the European Union that these related objectives may be linked to public morals. However, as we have previously explained, this does not mean that an aggregate test of these objectives would be appropriate or legally justified under the requirements of Article XX of GATT 1994. In our view, given the territorial limitations that seem to exist under paragraphs (b) and (g) of Article XX of GATT 1994, it would be appropriate to make one single analysis of these related objectives under paragraph (a) of Article XX of GATT 1994, which would mean that the "necessary to" standard would be applicable.

[7] European Union's first written submission, paragraphs 825 and 1345.
[8] Indonesia's third party submission, paragraphs 122 and 125.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ECUADOR

I. Ecuador's Oral statement

As stated in similar cases where Ecuador has participated as a third party, Ecuador states that:

The rules and procedures of the international trade system are established with the voluntary agreement of all participants and, therefore, the imposition of technical regulations adopted unilaterally by a country or group of States may violate this principle, provoke discrimination and even a restriction. In the same way, it can affect third parties and eventually end in a chain reaction of unilateral actions that affect everyone.

In the event that unilateral decisions discriminate against some countries and also some products against similar ones; if these decisions lead to unnecessary or discriminatory technical barriers to products; and if they did not emerge from international and transparent consultations prescribed by multilateral trade rules, those decisions are not aligned with the rules of the international trading system.

If a Member adopts unilateral measures such as the ILUC-risk certification procedure, not issued by or according to a recognized international organization that establishes international standards, it 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. The use of international standards, or their relevant parts, as a basis for technical regulations.

Ecuador believes that the EU has not used international standards, which according to the Article 2.4 of the TBT Agreement three main aspects can be identified: (i) the existence or imminent completion of international standards; (ii) the fact that such international standards -or parts of them- have been used as a basis for the technical regulation; and (iii) whether such international standards are ineffective or inappropriate to fulfill the legitimate objective pursued by the Member State.

it is evident that there are internationally accepted standards used to ensure the protection not only of the environment in general, but also that cover the side effects typical of the palm oil industry. This standard could have been used by the European Union to base, in whole or in part, the measure at issue. Thus, in the present case -assuming that the European Union can demonstrate that its measure is covered by an international standard- the Panel must analyze whether said international standard is the principal constituent or fundamental principle for enacting the technical regulation.

Therefore, the Panel must analyze - assuming that the EU can prove that the ILUC risk analysis method is an international standard - he Panel must analyze if the manner in which the European Union measures ILUC risk is relevant to achieve the objective sought.

b. Ensuring that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.

It is not the objective of Ecuador to determine whether or not the European Union measure is more restrictive to trade than others, but to emphasize the importance of verifying the existence of other less restrictive measures that have the ability to achieve the ultimate goal. of the European Union, which is, from what Ecuador can infer, the preservation of the environment. In this sense, Ecuador calls on the Panel to carry out an analysis that considers the possible trade restrictive measures presented by Malaysia.

Ecuador finds three main elements that the Panel must take into account when conducting this analysis: i) whether the alternative measure is less trade restrictive than the measure at issue; ii)

whether the proposed measure will make at least an equivalent contribution to the objective that is being pursued through the measure at issue; and iii) whether the alternative measure is "reasonably available" to the Member as an alternative to the measure at issue.

Ecuador would like consider the RSPO Certification. This internationally accepted standard used to preserve the environment is not only a measure that is specifically directed to the palm growing sector, but it also complies with the three elements in question: i) it is a less restrictive measure of trade since it does not establish qualitative limitations in terms of product characteristics. In fact, 19% of the palm oil produced worldwide is certified by the RSPO; ii) it is a measure that contributes in an equivalent way to the European Union's objective; as mentioned above, it provides its members with a greenhouse gas emission calculator so that it can be constantly monitored. In addition, it provides consumers with certainty knowing it is under constant audit processes that have strong consequences in case of non-compliance, ensuring safe palm oil for the environment at ALL levels of the value chain. ; and, iii) it is a measure that is entirely at the disposal of the European Union; in fact, it is a measure used in 92 countries with more than 4,000 members worldwide.

c. Ensuring that imported products shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country.

Ecuador believes that the Panel must analyze whether the measure in dispute affects similar products - the latter being understood in terms of the nature and scope of their competitive relationship. In order to do so, the Panel must follow the steps that previous panels and appellate bodies have laid out on this matter. Once the Panel determines whether the products are similar or not, it can determine whether the measure imposed by the European Union grants less favorable treatment to imported products - in this case, palm oil.

Ecuador strongly feels that, in the present case, the Panel shall examine: (i) whether the measures at issue, distort the conditions of competition on the EU market of oil crop-based biofuels to the detriment of oil palm crop-based biofuel imported from Malaysia; and (ii) if the measures at issue are de facto, rather than de jure, discriminatory, whether the detrimental impact of these measures stems exclusively from a legitimate regulatory distinction.

d. Establishment of technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.

The Panel must review whether the measure established by the European Union complies with the spirit of Article 2.8 of the TBT Agreement, or, on the contrary, is creating unnecessary technical barriers to trade by establishing product requirements in terms of product characteristics and not in terms of performance.

At Ecuador's view, the ILUC risk analysis fully responds to the composition of the product rather than to its performance. The EU has failed to demonstrate how the final product "oil palm crop-based biofuel" has a different performance or characteristic (other than its source) than "rapeseed oil-based biofuel" or "soybean oil-based biofuel". In this way, the European Union would be creating an unnecessary technical barrier to trade which might afford indirect protection to domestic and certain imported like products.

e. Special and Differential Treatment of Developing Country Members

It is a fact that not all Member States have the same conditions in terms of financing, trade, and development. For this reason, the Article 12 of the TBT Agreement, establishes certain considerations that must be taken into account when adopting a measure that has an impact on trade between States.

Ecuador would like to emphasize that, the Panel must review whether or not the European Union has fulfilled its obligation to take into account the special needs in terms of financing, trade and development of all developing Member State from the moment it was formulated. If the special needs of developing countries have not been taken into account, the European Union would be in breach of its multilateral obligations.

In conclusion, Ecuador sustains that the European Union 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. Additionally, Ecuador sustains 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 through the use of other international standards. The measure applied by the European Union establishes product requirements in terms of the characteristics of the product such as the production methods, instead of its performance characteristics. Lastly, the European Union has not demonstrated how it has taken into account 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 3.

i. Ecuador observes that Article 2.1 of the TBT Agreement contains a national treatment (NT) and a most-favored nation treatment (MFN) obligation. On one hand, the most favored nation treatment prohibits discrimination through technical regulations imposed on similar products imported from different Members, while the national treatment obligation prohibits discrimination between similar imported products from national products. Therefore, it determines that, " in order to achieve a satisfactory analysis, the Panel needs to establish, in the first place, whether the products that are the subject of these disputes are similar or not".

ii. Ecuador reaffirms that in this dispute, the Panel must examine: (i) whether the measures at issue, distort the conditions of competition on the EU market of oil crop-based biofuels to the detriment of oil palm crop-based biofuel imported from Malaysia; and (ii) if the measures at issue are de facto, rather than de jure, discriminatory, whether the detrimental impact of these measures stems exclusively from a legitimate regulatory distinction.

b. Question 5.

i. Ecuador understands that part of the evaluation elements under Article 2.2 of the TBT Agreement is that the measures adopted or applied do not pursue the purpose or object of creating unnecessary obstacles to international trade and ensure that that its technical regulations are not more trade restrictive than necessary to fulfill a legitimate objective, taking into account the risks non-compliance would create.

ii. Ecuador believes that while Article 2.1 of the TBT Agreement requires evaluating the existence of impartiality as a fundamental element for the design of a regulatory distinction so that a measure does not constitute arbitrary and unjustified discrimination in light of Article 2.1, paragraph 2 of the article supra requires that the legitimacy of its objectives be evaluated under criteria such as: the identification of the objective, the means to achieve the objective, the legality of the objective, and the adequacy and justification of the objective.

c. Question 7.

i. Regarding this question, Ecuador agrees with Malaysia in the context of 'trade restrictiveness', the relevant discussion does not revolve around the existence/absence of a ban, nor in unsubstantiated claims of trade enhancement, but rather, whether the offending measures restricts (i.e., limits) trade. The measures at issue, (i.e., the 7% limit, the high ILUC-risk cap, and the high ILUC-risk phase out) clearly do so, and are, therefore, trade-restrictive"[1].

[1] (DS600). Second Written Submission of Malaysia, Par. 103

d. Question 8.

i. Regarding the level of detail that the WTO Member countries must provide when justifying the application of the disputed measures in compliance with the obligation of Article 2.4 of the TBT Agreement, Ecuador reminds the Parties that the Appellate body in the EU – Sardines case, it determined that at least 3 main components must be evaluated: : (i) the existence or imminent completion of a relevant international standard; in other words, the international standard used is relative or pertinent to a technical regulation; (ii) whether the international standard has been used as a basis for the technical regulation, That is, verify that there is a very close link and a non-contradictory relationship between the international standard and the technical regulation and; (iii) whether the international standard is an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, taking into account fundamental climatic or geographical factors or fundamental technological problems.

e. Question 13.

i. Ecuador recognizes that there is no evidence in WTO jurisprudence that can be sufficiently considered in order to demonstrate that a Member adopting or applying a technical regulation or conformity assessment procedure has taken into account the needs of developing country Members under Article 12.3 of the TBT Agreement, except for the "voluntary notification for notification of technical assistance needs and responses to those needs" adopted by the TBT Committee in November 2005.

ii. In this context, the existence of a possible notification regarding the special needs issued in this case by Malaysia or the economic, labor and other factors data available that cause an impact on the country's economy, and whose precepts have served as inputs at the time of preparing a certain technical regulation, would serve as proof at the time when the regulatory country, (the European Union) in the present case, must find compliance with the provisions of Article 12 of the TBT Agreement.

f. Question 17.

i. Ecuador affirms that it may be easy to assume that the term "relating to" implies the same care that Members must take when applying the "necessity" test. That is, considering the relative importance of the interest or social value at stake, the degree of contribution and the degree of trade restriction to determine whether the measure is necessary to protect the legitimate objective selected by the regulatory country.

ii. In addition, Ecuador concludes that according the analyzed jurisprudence that market characteristics could be important in determining the scope of a measure in the light of Article XX (g) of the GATT, and that unlike GATT-inconsistent measures that could be justified under Article XX (a) and (b), a measure imposed under the exception in paragraph (g) of the same article is of a precautionary nature. Similarly, Ecuador concludes that while the analysis of a measure must take into account certain evaluation criteria such as those described above, it is also important to remember that the legitimate objectives to be protected and the effects on trade of a measure challenged under the exceptionality of GATT Article XX must be observed on a case-by-case basis.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

I. INTRODUCTION

1. In DS593, Indonesia has challenged similar measures under similar claims. However, the arguments and evidence presented by Indonesia in DS593 are not the same as those put forward by Malaysia in DS600. Indonesia asks the Panel to be mindful of those differences.

2. In the past decade, Indonesia has taken effective actions on sustainable development, deforestation prevention and climate change mitigation. Those actions include a permanent moratorium on the conversion of primary forest and peatland which has resulted in the protection of 66 million ha of primary forest and peatland. Despite high prices of palm oil, deforestation in Indonesia in 2021 declined to less than 5 % of historical levels. By 2030, Indonesia also seeks to restore 2 million ha of peatland and rehabilitate 5.3 million ha of degraded land. Indonesia's actions have already resulted in significantly reducing greenhouse gas ("GHG") emissions from land and forest use by 40.9 % in 2019 as compared to the 2015 level of GHG emissions and in the lowest rate of deforestation in the last 20 years. In adopting the measures at issue in these proceedings, the European Union disregards the significant commitments made by developing country Members, such as Indonesia, and the effective achievements obtained as a result.

II. THE MEASURES LACK AN OBJECTIVE AND COHERENT EXPLANATION

3. As a result of the 7 % limitation and the high indirect land use change ("ILUC") risk cap and phase-out, the European Union limits and even excludes the use of biofuel made from food and feed crops, especially oil palm crop-based biofuel, in the EU transport sector.

4. Indonesia agrees with Malaysia that the measures at issue lack an objective and coherent explanation, including of their scientific basis. The Panel should also give due effect to the European Union's admissions as to the flaws of ILUC modelling and its inability to offer an objective and coherent basis for the determination of ILUC GHG emissions and their attribution to biofuel used in the European Union.

5. Indonesia submits that Article 11 of the Understanding on rules and procedures governing the settlement of disputes ("DSU") requires the Panel to consider whether *all* of the evidence before it, considered as a whole, provides a reasonable basis in support of the proposition advanced by either party. This can include, but is not limited to, scientific evidence. In respect of scientific evidence, the task of the Panel is to consider the necessary scientific and methodological rigor to be considered reputable science' according to the standards of the relevant scientific community, as well as the extent to which its use in support of the measures at issue is "objective and coherent". It is not sufficient that the respondent might have presented some scientific evidence reflecting a minority view for the Panel to be satisfied that that evidence supports that party's allegations.

6. First, Indonesia fully agrees with Malaysia that the specific measures at issue serve EU protectionist interests. If the Panel nonetheless considers that they pursue a legitimate objective, at best, their sole rationale is concerned with alleged ILUC GHG emissions offsetting net GHG emission savings. Thus, the alleged rationale of the specific measures at issue is a GHG emission savings rationale. It is *not* about ILUC, in the sense of indirect effects, as such. The measures at issue concern the alleged ILUC GHG emissions the European Union attributes to oil palm crop-based biofuel. However, the European Union accepts that ILUC GHG emissions cannot be causally linked or otherwise correlated with EU biofuel demand. Nor can they be measured or quantified. Only direct land use change ("DLUC") GHG emissions exist in real and practical terms.

7. Second, the European Union accepts a significant risk of ILUC GHG emissions – no mitigation is needed for ensuring that emissions related to using, for example, rapeseed oil-based biofuel within the 7 % limitation exceed the emissions of using fossil fuel. All oil crop-based biofuel presents, according to the European Union, a significant ILUC-risk. Up to 7 % of that biofuel, *other than* oil palm crop-based biofuel, can be used. That 7 % does not bear any connection with that risk; instead,

it is apparently based on the need to protect investments. Moreover, in determining the risk of ILUC GHG emissions in respect of palm oil, there is no explanation of how the high ILUC-risk cap and phase-out takes into account the risk that might already be addressed through the 7 % limitation.

8. Third, contrary to the approach taken in the Delegated Regulation to look at each crop separately, there is no causal link between the crop used to produce EU biofuel and the displaced crop for which new land might be cleared. The alleged ILUC GHG emissions are thus DLUC GHG emissions relating to the cultivation of other agricultural commodities, *not* used for meeting (EU) biofuel demand, grown anywhere in the world. Whether or not those DLUC GHG emissions and the assumed displacement occurs may depend on various factors. Moreover, there is no causal link between the country in which the crop used to produce biofuel is cultivated, and the country in which new land might be cleared. Likewise, there is no causal link between the crop used to produce biofuel destined for the EU market and the crop for which new land might be cleared. In fact, the European Union's logic implies that if EU-grown rapeseed is redirected to produce rapeseed methyl ester ("RME") for use in the European Union, it can no longer be used for food purposes or for producing biofuel destined for non-EU States. To meet that demand, DLUC might occur anywhere to grow another crop, such as oil palms, or the same crop for a different use. GHG emissions resulting from this land use change are, according to the European Union, ILUC GHG emissions. According to the European Union's logic, they should be attributed to RME consumed in the European Union, not RME consumed or produced elsewhere, or food products consumed or produced anywhere. In this example, RME resulting in DLUC GHG emissions relating to growing oil palms should be considered high ILUC-risk. Furthermore, land use change caused by demand in other sectors than food and feed crops, such as timber or cattle grazing, is frequently an intermediary step before starting to use land that was previously covered by primary forest for cultivating food and feed crops. If any displacement occurs, there is no basis to assume that oil palm will be grown in Indonesia (or other tropical countries) to meet food or feed demand.

9. Fourth, the specific measures at issue are taken in total disregard of the European Union's historical climate debt and on the blind assumption that countries like Malaysia and Indonesia, also parties to the Paris Agreement, take no action to prevent deforestation, protect and restore peatlands and reduce GHG emissions.

10. Fifth, the European Union fails to explain how ILUC modelling, instead of the European Parliament's preferences and its interest in protecting investments at home, offers a basis for the 7 % limitation. The rejection of the scientific basis of the 7 % limitation is implied in the European Union's adoption of a new methodology for imposing the high ILUC-risk cap and phase-out. In fact, the impossibility of accurately modelling ILUC due to parametric uncertainty was already recognised by the European Commission in the impact assessment for Directive 2015/1513. Indonesia submits that if the European Union seeks to address ILUC GHG emissions in adopting the 7 % limitation and then subsequently admits that the basis for that measure is flawed, prompting it to seek another methodology, then the 7 % limitation should not be maintained.

III. THE OPERATION OF THE MEASURES AT ISSUE AND THE EU BIOFUEL MARKET

11. The EU renewable energy targets have essentially created the market for biofuel in the European Union. There is no demand for biofuel that cannot be counted towards the targets. In the absence of EU mandatory renewable energy targets, biofuel will remain uncompetitive in the transport fuel market for the foreseeable future. The European Union has not presented evidence showing the contrary. The 14 % target creates opportunities for biofuel to be placed on the EU market for renewable energy in the transport sector. The European Union admits this. The 7% limitation limits those competitive opportunities for food and feed crop-based biofuel. Moreover, as a result of the high ILUC-risk cap and phase-out, those competitive opportunities must disappear for oil palm crop-based biofuel. This is the regulatory model chosen by the European Union.

12. Indonesia submits that an assessment of the scope of like products must focus on the products *in the market of the regulating Member*. That market is the market in which the measures are issue are applied. The choice of the like products by the complainant is directly linked to that relevant market.

13. Given that the 7 % limitation "delimits when any incentive for biofuels from the EU renewable energy policy should stop" and that there are no competitive opportunities for biofuel in the EU

market without those incentives, both the 7 % limit and the high ILUC-risk cap and the high ILUC-risk phase-out affect the competitive opportunities for food and feed crop-based biofuel, and specifically oil palm crop-based biofuel which is gradually being eliminated from the EU market.

IV. THE DEFINITION OF A TECHNICAL REGULATION AND A CONFORMITY ASSESSMENT PROCEDURE

A. The 7 % limitation and the high ILUC-risk cap and phase-out lay down product characteristics of biofuel

14. The parties disagree on whether the 7 % limitation and the high ILUC-risk cap and phase-out are technical regulations.

15. First, Indonesia agrees with Malaysia's position and submits that the composition of (bio)fuel is a product characteristic. A document laying down the composition of (bio)fuel is covered by the definition of a technical regulation. In the present case, Article 26 of RED II and the Delegated Regulation prescribe that biofuel *not* made out of food or feed crops is not subject to the 7 % limitation and the high ILUC-risk cap and phase-out. These provisions lay down requirements that apply only because of and in function of the composition of the product, namely biofuel. As a result, the Panel need not further address Malaysia's alternative argument that the high ILUC-risk cap and phase-out lays down related processes and production methods. Indonesia also agrees with Malaysia that, in determining whether a measure constitutes a technical regulation, it is irrelevant whether or not these measures prevent the products concerned to enter the EU market. Indonesia further submits that no condition may apply that would effectively place the burden on the complainant to show how a measure affects trade, to demonstrate that that measure is a technical regulation.

16. Second, assuming the Panel would disagree that the high ILUC-risk cap and phase-out lays down a product characteristic, the Panel would need to consider Malaysia's alternative argument. In particular, Malaysia appears to argue that even where a process and production method does not alter the *physical* characteristics of the product concerned, it can still be "related" to *other* characteristics of that product. Indonesia submits that the available case-law signals that the term "product characteristics" is to be given a broad meaning and is not strictly limited to physical characteristics of a product. If the Panel would identify a process and production method and agree with this interpretation of the term "product characteristics", the Panel could consider that there exists a sufficient nexus because the high ILUC-risk cap and phase-out determines whether biofuel may be used based on the manner of production of palm oil, which is alleged to have a link with the GHG emissions related to that production of that product and the biofuel made from it.

B. Low ILUC-risk certification is a conformity assessment procedure that is incomplete

17. The high ILUC-risk cap and phase-out and the 7 % limitation in Article 26 of RED II are technical regulations. The first technical regulation limits and eventually excludes from the EU market oil palm crop-based biofuel because of its composition, namely because it contains palm oil. Oil palm crop-based biofuel made from (solely) additional yield of oil palm can be exempted from that measure, and thus become eligible to be used for the 7% limitation (the second technical regulation), provided that the criteria in Articles 4 and 5 of the Delegated Regulation are fulfilled and positive assurance of conformity is established. Certification is the mandatory procedure to be used for this purpose. The conformity assessment procedure at issue remains incomplete and, contrary to what the European Union argues, no low ILUC-risk certification can be obtained.

V. THE LEGAL STANDARD UNDER ARTICLE 2.1 OF THE TBT AGREEMENT

18. Indonesia considers that the legal standard to be applied when assessing the measures at issue under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 is not exactly the same. In particular, unlike what is the case under Article 2.1 of the TBT Agreement there is no need, for the purpose of Article III:4 of the GATT 1994, to assess whether a detrimental impact on competitive opportunities of like imported products stems exclusively from a legitimate regulatory distinction. The European Union's argument that, under Article 2.1 (similar to Article III:4), a measure does not accord "less favourable treatment" if it modifies conditions of competition for reasons other than origin has been previously rejected by the Appellate Body in *US – Clove Cigarettes* and *US – Tuna II (Mexico)*. Indonesia submits that there are no grounds to revisit the

well-established interpretation of the no less favourable treatment standards under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

19. Indonesia also submits that the essence of the legitimate regulatory distinction test under Article 2.1 is that, where a technical regulation has a detrimental effect on the conditions of competition for imported products in the market, it is appropriate for protecting the right of each WTO Member to regulate, to verify whether that detrimental impact nonetheless *exclusively stems* from a legitimate regulatory distinction applied in an even-handed manner. In other words, a detrimental impact on conditions of competition *that cannot be entirely explained* on the basis of the alleged legitimate regulatory distinction must be eliminated. The European Union appears to read the test under Article 2.2 into Article 2.1, and essentially merges the two tests. Indonesia disagrees with this approach. Under Article 2.1 of the TBT Agreement, even-handedness is the central concept. As part of the examination of the even-handedness of the measure, a panel *may* consider the objective of the measure. Even where the objective is considered legitimate within the meaning of Article 2.2 of the TBT Agreement, it is not determinative of the issue of the legitimacy of the regulatory distinction. In the present case, the lack of a coherent and objective explanation of the distinctions made by the European Union, without necessarily examining in great detail the alleged objective(s) of these measures, provides a very strong indication that the measures at issue are not even-handed within the meaning of Article 2.1 of the TBT Agreement.

VI. THE SCOPE OF APPLICATION OF ARTICLE XI:1 OF THE GATT 1994 AND THE RESTRICTIONS ON IMPORTS OF PALM OIL INTO THE EUROPEAN UNION

20. Putting aside the need for the Panel to be mindful of the important differences between Malaysia's case under Article XI:1 in these proceedings and Indonesia's case in DS593, Indonesia submits that where an internal measure is the measure through which a WTO Member makes effective a prohibition or restriction on importation of a product that is not and *cannot be produced* domestically, it falls within the scope of Article XI:1. First, previous WTO panels have recognised that "there may be circumstances in which specific measures may have a range of effects" and that "[i]n appropriate circumstances they may have an impact both in relation to the conditions of importation of a product and in respect of the competitive conditions of imported products on the internal market within the meaning of Article III:4". Second, it is also not disputed that, as confirmed by WTO case law, a Member's measure may have aspects falling within the scope of Article XI and other aspects falling within the scope of Article III and that particular circumstances may justify applying both Article III and Article XI to the same measure. Such particular circumstances exist in the present case, given that palm oil *cannot be produced domestically and is exclusively imported* into the European Union.

21. Indonesia disagrees with the European Union that the fact that palm oil is imported also for other uses is a relevant consideration under Article XI:1. Indonesia submits that the fact that palm oil will no longer be imported for use *in the biofuel sector*, as a result of the high ILUC-risk cap and phase-out, is sufficient to establish a breach of Article XI:1. In the present case, evidence shows that the high ILUC-risk cap and phase-out will lead "to lower net imports of palm oil into the EU".

VII. THE EUROPEAN UNION'S DEFENCES OF THE MEASURES AT ISSUE MUST FAIL

22. Indonesia submits that 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. In past cases, a respondent has sometimes argued that a measure is justified under, for example, both paragraphs (b) and (g). In those cases, panels separately considered each defence.

23. The European Union asks the Panel to carry out a single assessment under paragraphs (a), (b) and (g) of Article XX because the same test for scrutinising the required nexus between the measures and their objective(s) applies under each paragraph. Indonesia objects to this interpretation. 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. Moreover, the European Union's position is not based on a proper interpretation of the ordinary meaning to be given to the phrase "necessary to" in its context and in the light of its object and purpose. It is the European Union's strategy in this dispute that causes concerns about circumvention of the conditions under Article XX. The European Union is also wrong

to pretend that the meaning of "necessary" and "relating to" has been conflated in the case-law, as evidenced by the fact that the Appellate Body has considered other actions that could have been taken under the chapeau. In sum, necessity includes an assessment of whether a different measure could have been taken whereas the chapeau focuses on whether the measure taken could have been applied differently. These tests should not be conflated.

24. The European Union argues that there is no explicit or implicit territorial limitation in Article XX and that, because climate change and biodiversity are global phenomena, each Member has a legitimate interest in fighting climate change so as to preserve predictable weather patterns and biodiversity. Indonesia submits that the Panel need not take a general position on whether or not there is a territorial or jurisdictional limitation in Article XX of the GATT 1994 or Article 2.2 of the TBT Agreement. Instead, this question must be considered in the context of the specific objectives on which the European Union relies in these proceedings. Moreover, in the context of Article XX of the GATT 1994, the question must be addressed in respect of the specific paragraphs of Article XX invoked by the European Union. Each of those paragraphs must be interpreted based on its ordinary meaning read within its context and in light of the object and purpose of Article XX of the GATT 1994 and taking into account other principles of treaty interpretation in international law. Relevant rules of international law recognise that it is for each WTO Member to account for the GHG emissions and removals taking place within its own territory and to act for the protection of the natural resources in its territory. As international law stands today, the concept of common concerns of humankind invoked by the European Union cannot be resolved by States acting independently and instead require cooperation. It is the exact opposite of unilateral uncoordinated actions directed at such concerns.

25. It is for the Panel to make an independent and objective assessment of the objective(s) of the measure and consider all the evidence presented to it. The protectionist objective of the high ILUC-risk cap and phase-out, as well as the 7 % limitation, 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 measures, and (iv) the measures taken to preserve market access for important EU trading partners exporting soybean products.

26. Indonesia also agrees with Malaysia that the measures do not seek to address biodiversity loss and protect EU public morals. The general description of the legitimacy of the European Union's policy objectives bears no connection with the 7 % limitation nor the high ILUC-risk cap and phase-out. In particular, the European Union has not demonstrated that the high ILUC-risk cap and phase-out is designed to protect human, animal or plant life or health from risks that might result from biodiversity loss, nor if or how the measures act to protect EU public morals. In fact, 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, does not even take into account that a carbon-rich area can be also non-biodiverse. Finally, the European Union has not established the content of the EU public morals on which it relies. Nothing in the text of RED II refers to the protection of EU public morals.

ANNEX C-8

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. Japan welcomes the opportunity to present its views as a third party in this dispute. Japan is participating in this dispute because of its systemic interest in the correct and consistent interpretation and implementation of the Agreement on Technical Barriers to Trade ("TBT Agreement"), the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and the Agreement of Subsidies and Countervailing Measures ("SCM Agreement"). Japan does not take a specific position on the particular facts presented by the parties.

II. RELATED PPMS ARE THOSE THAT RELATE TO PRODUCT CHARACTERISTICS

2. The term "related processes and production methods" in the first sentence of Annex 1.1 of the TBT Agreement must be understood to refer to processes and production methods ("PPMs") that relate to product characteristics. The term "related" establishes a nexus between the PPMs and the product characteristics. Only PPMs that relate to characteristics of the product are covered by the term "related processes and production methods". As confirmed in *EC – Seal Products*, related PPMs must have a sufficient nexus to the characteristics of a product.[1] Moreover, the Panel should consider to what extent the second sentence of Annex 1.1 would be necessary if all PPMs were allowed to fall under the first sentence of Annex 1.1. This is because terminology, symbols, packaging, marking, or labelling requirements applicable to a process or production method would already be covered by the first sentence of Annex 1.1.

3. If the Panel ultimately finds that the challenged measures do not prescribe PPMs or that, if they do, such PPMs do not have a sufficient nexus to the characteristics of the biofuels or feedstocks, it would have to conclude that the measures do not lay down "related processes and production methods".

III. THE ASSESSMENT OF THE LEGITIMACY OF THE REGULATORY DISTINCTION UNDER ARTICLE 2.1 OF THE TBT AGREEMENT

4. The assessment under the two-step test[2] for Article 2.1 of the TBT Agreement includes consideration of the legitimacy of the regulatory distinction drawn by the technical regulation. In articulating this test, the Appellate Body has consistently referred to regulatory distinctions that are "legitimate". This requirement is consistent with Article 2.2, which refers to "legitimate objectives". It is also consistent with the Preamble of the TBT Agreement, which provides context for the interpretation of Article 2.1. The object and purpose of the TBT Agreement, which is to strike a balance between the objective of trade liberalization and Member's right to regulate,[3] further supports that the regulatory distinction under the two-step test should be "legitimate".

5. If Article 2.1 did not require an assessment on the legitimacy of the regulatory distinctions, Members could adopt regulatory distinctions for arbitrary reasons, such as to protect their domestic industry. As a result, technical regulations which draw arbitrary distinctions between imported products and the like products of national origin could evade the disciplines of Article 2.1. That would be an unreasonable outcome.

6. Therefore, in applying the two-step test for less favourable treatment, panels may examine whether the objectives pursued by the regulatory distinctions drawn by the technical regulation are legitimate, particularly where the legitimacy is contested by the complainant.

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[1] Appellate Body Reports, *EC – Seal Products*, para. 5.12.
[2] Appellate Body Report, *US – Clove Cigarettes*, paras. 166-182.
[3] Appellate Body Report, *US – Clove Cigarettes*, para. 174.

IV. FACTORS TO BE TAKEN INTO CONSIDERATION IN EXAMINING WHETHER A TECHNICAL REGULATION ACCORDS "LESS FAVOURABLE" TREATMENT UNDER ARTICLE 2.1 OF THE TBT AGREEMENT

7. 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. The parties agree that, for purposes of determining whether the EU measure accords less favourable treatment to palm oil biofuels from Malaysian origin, the Panel should follow the two-step test articulated by the Appellate Body in *US – Clove Cigarettes*. 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-á-vis the like products of domestic origin or originating in any other country. If the Panel answers this question in the affirmative, the Panel must then "further analyze" whether any detrimental impact stems exclusively from a legitimate regulatory distinction. In making this assessment, the Panel "must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue".[4] Japan agrees with this approach.

8. Malaysia contests the legitimacy of the regulatory distinction drawn by the EU measure (i.e., high ILUC-risk), arguing that ILUC cannot be observed or measured, and additionally argues that the measures at issue are designed and applied in a manner that constitutes arbitrary and unjustifiable discrimination.[5] 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'". [6] 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 Malaysia's arguments on the nexus between the regulatory distinction found in the measure and the measure's policy objectives.

9. Japan recalls 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"[7], although "consideration of other factors … may also be relevant to the analysis". [8] As Malaysia recognizes in its submission, the actual trade effects on certain countries resulting from imposition of the measure are not one of the "other factors" to be considered. [9]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.

10. In light of the above, 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.

11. In addition to this point, Japan wishes to address the factors that should be considered when determining whether "less favourable" treatment has been accorded. Japan recalls that, to determine whether the U.S. measure was "even-handed" in *US – Tuna II (Mexico)*, the Appellate Body considered whether the different labelling conditions were "calibrated" to the risks to dolphins, even if it accepted that the fishing technique the measure was designed to combat "is particularly harmful to dolphins".[10] Subsequently, the Appellate Body in *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)* explained that "calibration is *the means* to assess whether the detrimental impact of the measure at issue in this dispute stems exclusively

[4] Appellate Body Report, *US – Clove Cigarettes*, paras. 166-182. (in particular, para. 182)
[5] Malaysia's first written submission, paras. 575-576 and 583.
[6] Appellate Body Reports, *US – COOL*, para. 340.
[7] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.97.
[8] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.95.
[9] Malaysia's first written submission, para. 562.
[10] Appellate Body Report, *US – Tuna II (Mexico)*, para. 297.

from a legitimate regulatory distinction…"[11] The calibration analysis should consider the rational relationship between the regulatory distinctions and the objectives of a measure; if calibrated properly, the regulatory distinctions "will not amount to arbitrary or unjustifiable discrimination…"[12]

12. Thus, the key factor for the Panel to consider is whether there is a rational connection between regulatory distinctions drawn by the measure (taking into account the measure's design, structure, and operation), on the one hand, and the policy objectives of the measure, on the other. For measures concerning environmental protection, this analysis should take into account various relevant factors, such as the circumstances of each country, as the situation may differ depending on where, what, and how products are made. In this connection, Japan wishes to stress that this assessment should be firmly based on objective factors and evidence, including the design, structure, and operation of the measure, and not on the subjective intent of the Member imposing the measure.

V. ARTICLE 2.2 DOES NOT ALLOW THE REGULATING MEMBER TO OFFSET THE TRADE-RESTRICTIVE EFFECTS ON IMPORTS FROM SOME MEMBERS AGAINST ANY TRADE-ENHANCING EFFECT ON IMPORTS FROM OTHER MEMBERS

13. In general, the assessment of trade restrictiveness for purposes of Article 2.2 should begin with the objective structure of the measures and only in limited circumstances has relevance been given to the trade effect. The Appellate Body clarified that "a detrimental modification of competitive opportunities may be self-evident in respect of certain *de jure* discriminatory measures, whereas supporting evidence and argumentation of actual trade effects might be required to demonstrate the existence and extent of trade-restrictiveness in respect of non-discriminatory internal measures that address a legitimate objective".[13] This is because trade effects will vary depending on market conditions. Moreover, as noted in *Australia – Tobacco Plain Packaging*, "it will not always be possible to quantify a particular factor analysed under Article 2.2, or to do so with precision".[14]

14. If a measure is trade restrictive with regard to products imported from some Members, that trade restrictiveness is not offset by any trade enhancing effects on the products imported from some other Members. The obligation of Article 2.2 is owed to each WTO Member and applies in respect of products imported from each WTO Member. This position is consistent with the approach taken in *Australia – Tobacco Plain Packaging*. Those panels found that "the 'trade restrictiveness' of a technical regulation need not be assessed only on the basis of the effect of the measure on trade between *all* WTO Members, in *all products* that are the subject of the technical regulation".[15] Instead, they considered that a Member could demonstrate the existence of a trade restriction on a particular product in which it trades, even if the trade of other Member(s) has increased.

VI. ARTICLE XX OF THE GATT 1994

15. A question was raised in this case about the similarities and differences between the legal tests implicated by the term "necessary" in subparagraphs (a) and (b) of Article XX of the GATT 1994, and the terms "relate to"[sic] in subparagraph (g) of the same provision.

16. First of all, Japan believes that the legal tests should be deduced from the interpretation based on the ordinary meaning of the terms of the provisions in accordance with the Vienna Convention on the Law of Treaties, and that categorizing and comparing the terms solely in the light of their function is not productive.

17. While the "necessary" and "relate to" tests both have in common that they have the function of distinguishing measures that may be justified under Article XX of the GATT 1994, the two concepts are distinct. Therefore, subparagraphs (a) and (b) of Article XX, on the one hand, and subparagraph (g), on the other hand, should be interpreted as requiring a different relationship between the policy

[11] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – US) /US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, para. 6.13.

[12] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – US) /US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, para. 6.13.

[13] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, footnote 643 to para. 5.208. (original emphasis)

[14] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1076.

[15] Panel Reports, *Australia – Tobacco Plain Packaging*, para 7.1088. (original emphasis)

objective and the measure sought to be justified. Indeed, in *US – Gasoline*, the Appellate Body observed that "[i]t 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".[16]

18. Subparagraph (g) of Article XX uses the terms "relate to," which ordinarily means "to have some connection with,"[17] and its meaning has been construed by the Appellate Body.[18] On the other hand, the assessment of "necessity" involves a weighing and balancing a series of factors, including the importance of the societal interest or value at stake, the contribution of the measure to the objective it pursues, and the trade-restrictiveness of the measure.

19. While there may be some overlap in the factors analysed and the outcome of the assessment may be similar in certain cases, the two tests are not identical. Therefore, Japan is of the view that the Panel is invited to examine the grounds of justification by each subparagraph of Article XX, including the nexus between the measure at issue and the interest pursued therein, separately based on specific argument and evidence for each case.

VII. REVENUE FOREGONE THAT IS OTHERWISE DUE UNDER ARTICLE 1.1(A)(1)(II) OF THE SCM AGREEMENT

20. Prior panel and Appellate Body reports have found that exempting certain industrialized products from generally applicable taxes, provided that certain conditions are satisfied, constitutes a financial contribution. For example, in *Canada – Autos*, the panel and the Appellate Body considered a measure that exempted motor vehicles from import duties, when imported into Canada by car manufacturers that fulfilled certain conditions, such as a "ratio requirement" to domestically produce a certain minimum ratio of motor vehicles sold in Canada, as well as a Canadian value-added ("CVA") requirement to maintain or decrease the prior year's level of domestic value added in the production of motor vehicles.[19] The Appellate Body found that this conditional exemption from import taxes constituted a financial contribution within the meaning of Article 1 of the SCM Agreement, stating:

> … Canada has established a normal MFN duty rate for imports of motor vehicles of 6.1 per cent. Absent the import duty exemption, this duty would be paid on imports of motor vehicles. Thus, through the measure in dispute, the Government of Canada has, in the words of *United States – FSC*, "given up an entitlement to raise revenue that it could 'otherwise' have raised." More specifically, through the import duty exemption, Canada has ignored the "defined, normative benchmark" that it established for itself for import duties on motor vehicles under its normal MFN rate and, in so doing, has foregone "government revenue that is otherwise due".[20]

21. Thus, if a tax that otherwise is due is foregone if certain domestic production and/or value-added targets are met, this constitutes a financial contribution by a government within the meaning of Article 1.

22. In a subsequent dispute, the Appellate Body set out the following three analytical steps when comparing between the tax treatment that applies to the alleged subsidy recipients and the tax treatment of comparable income of comparably situated taxpayers: (1) Identify the tax treatment that applies to the income of the alleged recipients; (2) Identify a benchmark for comparison – that is, the tax treatment of comparable income of comparably situated taxpayers; and (3) Compare the reasons for the challenged tax treatment with the benchmark tax treatment identified after scrutinizing a Member's tax regime.[21]

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[16] Appellate Body Report, *US – Gasoline*, p. 17.

[17] Oxford English Dictionary, www.oed.com, "relating [to]", verb, meaning 6.a.

[18] Appellate Body Reports, *China – Rare Earths*, para. 5.90 ("for a measure to 'relate to' conservation in the sense of Article XX(g), there must be 'a close and genuine relationship of ends and means' between that measure and the conservation objective of the Member maintaining the measure.").

[19] See Appellate Body Report, *Canada – Autos*, para. 9.

[20] Appellate Body Report, *Canada – Autos*, para. 91. (footnotes omitted)

[21] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 811-814.

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

23. Malaysia claims that the French fuel tax reduction is an actionable subsidy within the meaning of Article 5(c) of the SCM Agreement. In particular, Malaysia argues that the effect of the French fuel tax reduction is significant lost sales of palm oil as a biofuel feedstock, as well as of oil palm crop-based biofuel from Malaysia within the meaning of Article 6.3(c) of the SCM Agreement.[22] The EU argues that the French measure is neither a subsidy nor is it specific under Article 2 of the SCM Agreement and, moreover, Malaysia has failed to demonstrate that the measure has caused adverse effects on Malaysia in the form of serious prejudice to its interests within the meaning of Articles 6.3(a) and 6.3(c) of the SCM Agreement.[23]

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

25. 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 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.

26. On the contrary, if evidence shows that actors need not 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.

27. Thus, the Panel should consider the nature, design, and operation of the French fuel tax reduction when considering the effect of the subsidy and, in particular, in determining whether the effect of the challenged subsidy is *significant* lost sales within the meaning of Article 6.3(c) of the SCM Agreement.

IX. CONCLUSION

28. Japan hopes that its contribution to the present dispute is helpful to the Panel in its assessment of the matter before it and in developing legal interpretations of the relevant provisions of the TBT Agreement, GATT 1994 and the SCM Agreement.

[22] Malaysia's first written submission, para. 1167.
[23] EU's first written submission, paras. 1677-1679.
[24] Appellate Body Report, *US – Upland Cotton*, para. 450.
[25] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1376.

ANNEX C-9

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

I. Introduction

1. Mr. Chairperson and distinguished Members of the Panel, the Republic of Korea ("Korea") appreciates the opportunity to participate as a third party in this dispute and to present its views to the Panel.

2. Before Korea's oral statement in this dispute, Korea would like to express deep concern on Ukraine's inability to fully participate in the WTO dispute settlement system, including as a third party. The Korean government joins others in strongly condemning Russia's armed invasion against Ukraine as a violation of principles of the UN Charter and international law. The use of force that causes innocent casualties cannot be justified under any circumstances. Ukraine's sovereignty, territorial integrity and independence should be respected. We also share deep concerns the international community has over the unfolding humanitarian situation in Ukraine.

3. Now, I'll turn to Korea's statement. 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.

4. In today's statement, Korea will address the issues concerning the Article 2.2 of the TBT Agreement. However, we would like to emphasize that Korea will limit itself to commenting on legal issues and does not take a position on the overall dispute between Malaysia and the European Union.

II. Article 2.2 of the TBT Agreement

5. Malaysia asserts that certain EU measures are inconsistent with Article 2.2 of the TBT Agreement in that: (i) the 7% limit, the high Indirect Land-use Change ("ILUC") - risk cap and the high ILUC-risk phase-out are "technical regulations"; (ii) these measures are trade-restrictive; (iii) they fulfill their alleged objectives to an extent that is very difficult, if not impossible, to determine, and is, any case quite limited; and (iv) finally, in any case, they are "more trade-restrictive than necessary". [1]

6. The European Union submits that even if the Panel found that the measures at issue are technical regulations, Malaysia's claim under Article 2.2 of TBT Agreement fails because the measures at issue pursue legitimate objectives and they are not more trade restrictive than necessary.[2]

7. Prior panels have found that (i) whether the measures at issue pursue the legitimate objective and (ii) whether they are not more trade-restrictive than necessary (i.e., the necessity test) should be considered in assessing the inconsistency with Article 2.2.[3] Korea will discuss them one by one.

8. With regard to legitimate objectives, Korea notes that the Panel should firstly identify the objective pursued by a measure put forth by the Member, and determine whether such objective is "legitimate" thereafter.[4]

9. In this connection, Korea concurs with Malaysia and the EU[5] that the Panel should "independently and objectively assess" the objective pursued by the challenged measures, while the Member's characterization of the objective can still be a starting point.[6] In conducting such

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* The Republic of Korea requested that its oral statement serves as its executive summary.

[1] Malaysia's FWS, para. 591.

[2] EU's FWS, paras. 770-771.

[3] Panel Report, *US – Clove Cigarettes*, para. 7.133; Panel Report, *US – Tuna II (Mexico)*, para. 7.387.

[4] Appellate Body Report, *US - Tuna II (Mexico)*, para. 314; Appellate Body Report, *US - COOL*, paras. 371-372.

[5] EU's FWS, paras. 776, 790; Malaysia's FWS, para. 600.

[6] Appellate Body Report, *US – Tuna II (Mexico*), para.314; Appellate Body Report, *US-COOL*, paras. 371-372.

independent and objective assessment, the Panel may take into account the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure at issue.[7]

10. In *US- Tuna II (Mexico*), the Appellate Body explained that the meaning of the term "legitimate objective" is an aim or target that is lawful, justifiable or proper.[8] In this respect, Korea notes that Article 2.2 of the TBT Agreement contains a list of "legitimate objectives" and provides examples thereof, such as national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.

11. Korea understands that the use of "*inter alia*" in the Article 2.2 indicates that the list of examples is non-exhaustive and thereby provides a reference point for other objectives that may be considered.[9] Further, the objectives recognized in the provisions of other covered agreements may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective under Article 2.2 of the TBT Agreement.[10]

12. In this regard, Korea recalls that Article 2.2 of the TBT Agreement provides guidance on how to interpret Article 2.1.[11] Specifically, a "legitimate objective" under Article 2.2 will be considered when the *de facto* discrimination is discussed and the legitimate regulatory distinction ("LRD") test is assessed under Article 2.1 of the TBT Agreement. [12]

13. This is because, in assessing the LRD test by way of determining the "less favorable treatment", the Panel must base its determination on the totality of facts and circumstances before it, including the design, architecture, revealing structure, operation and application of the technical regulation at issue.[13] Lastly, the reviewing body asks if the regulatory distinction at issue is being implemented in a legitimate manner considering the objective sought.[14] The legitimate objective in the context of Article 2.2 plays a role here.

14. Next, Korea addresses the second issue pertaining to the necessity test, which is the assessment of "not more trade-restrictive than necessary". When discerning unnecessary obstacles to international trade under Article 2.2 of the TBT Agreement, the following three factors have been considered in prior cases to determine whether a technical regulation is "more trade-restrictive than necessary":

> (i) the degree of contribution made by the measure to the legitimate objective at issue;
>
> (ii) the trade-restrictiveness of the measure; and
>
> (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. [15]

15. In most cases, a comparison of the challenged measures and possible alternative measures should be undertaken.[16] In the spirit of consistent application of the TBT Agreement, Korea understands that the Panel should carefully consider whether the proposed alternatives "would make an equivalent contribution to the relevant legitimate objective, taking account of the risks that non-fulfillment would create, and whether it is reasonably available". [17]

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[7] Appellate Body Report, *US – Tuna II (Mexico*), para.314; Appellate Body Report, *US-COOL*, para. 395.
[8] Appellate Body Report, *US – Tuna II (Mexico*), para.313.
[9] Appellate Body Report, *US – Tuna II (Mexico*), para.313.
[10] Appellate Body Report, *US – Tuna II (Mexico),* para. 313.
[11] Appellate Body Report, *US - Tuna II (Mexico)*, para. 212.
[12] Appellate Body Report, *US - Tuna II (Mexico)*, para. 212.
[13] Appellate Body Report, *US - Tuna II (Mexico)*, paras. 216, 347-350.
[14] Appellate Body Report, *US - Clove Cigarettes*, para. 225; Appellate Body Reports, *US – COOL*, para. 349.
[15] Appellate Body Report, *US - Tuna II (Mexico)*, para. 322; Appellate Body Reports, *US - COOL*, para. 471.
[16] Appellate Body Report, *US – Tuna II (Mexico),* para. 322.
[17] Appellate Body Report, *US – Tuna II (Mexico),* para. 322.

III. Conclusion

16. This concludes Korea's oral statement. Thank you for your attention.

ANNEX C-10

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION*

Introduction

1. Thank you for providing an opportunity for the Russian Federation to present its views in this dispute. We emphasize that we will not take any specific position concerning particular factual aspects of the case and we will limit our intervention solely to certain interpretative issues concerning Article XX of the GATT 1994.

2. First, we would like to address the EU's threshold argument on cumulative justification under Article XX (a), (b) and (g) of the GATT 1994. Second, we will touch upon the relevant and appropriate legal tests under each of the invoked subparagraphs of Article XX of the GATT 1994. Finally, we will close with the views on territorial limitation in Article XX of the GATT 1994.

Certain aspects of the EU's interpretation of Article XX of the GATT 1994

3. The EU in this dispute concurrently relies on three subparagraphs of the GATT general exceptions and claims that the measures at issue are "cumulatively justified under Article XX (a), (b) and (g) of the GATT 1994".[1] It argues that 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 European Union"[2]. According to the EU, such composite objectives are closely intertwined and, therefore, the Panel shall proceed with a single analysis.

4. In the view of the Russian Federation, such approach is neither in line with the letter and the spirit of Article XX of the GATT 1994 nor with the well-established WTO jurisprudence.

5. The claims in this dispute are relatively straightforward. Malaysia does not contest the overall environmental policy (the whole EU Biofuels Regime) stipulated by the EU, but specific separate measures. Each of these measures shall be assessed individually in accordance with the Panel's terms of reference. The fact that such measures might be taken in the context of certain national policy regime is not determinative for its assessment. Therefore, the Panel shall not extend its analysis beyond the measures provided in the request for establishment of the panel as urged by the complainant.

6. It was the task of the EU to establish whether each measure at issue falls within the scope of one or another subparagraph of Article XX of the GATT 1994 and may be deemed justified. However, the so-called "three-pillar exceptions" approach does not expose the due relationship between each contested measure and the concrete objective it protects. Nevertheless, Russia does not exclude the possibility that a measure can address multiple objectives. In this case we believe that the defending Member shall separately establish and substantiate the relationship between the measure and each of the objectives pursued.

7. However, in this dispute the EU engages in extensive discussions on correlation of subparagraphs of Article XX of the GATT 1994. The EU, in particular, believes that protection of human, animal or plant life or health (Article XX(b)) and conservation of exhaustible natural resources (Article XX(g)) are similar values, and in the absence of subparagraph (g), subparagraph (b) would also cover rare and endangered species.[3] It believes as well that these values are also intertwined with public moral protection, as they "trigger moral concerns".[4] Therefore, according to the EU, "to apply a different intensity test to the same values" would be strange and misplaced. This logic put forward by the EU is flawed.

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* The Russian Federation requested that its oral statement serves as its executive summary.
[1] Second Written Submission by the EU, paras. 1328 – 1329.
[2] Ibid, para. 1296.
[3] Ibid, paras. 1259-1264.
[4] Ibid, paras. 1325 – 1333.

8. The relevant subparagraphs of Article XX of the GATT 1994 provide for different requirements. If the EU's "cumulative justification" approach succeeds, it would mean that every measure introduced for public morals protection would also protect plant life, for example. It is obviously not the case.

9. Moreover, subparagraphs invoked by the EU contain different types of connection between different values protected and the measure adopted, i.e. "necessity" test for (a) and (b) and "relating to" test for (g). This was confirmed by the Appellate Body in *US – Gasoline*. It concluded explicitly that due to different terms in respect of different categories used in Article XX it seems unreasonable to believe that the same kind or degree of connection or relationship between the measure and the state interest or policy sought to be promoted or realized is required.[5]

10. According to well-established WTO practice, "necessity" test involves a process of weighing and balancing a series of factors, including the extent to which the measure contributes to the realization of the end pursued, the relative importance of the interests at stake, trade-restrictiveness of the challenged measure.[6] Furthermore, the Appellate Body in *Korea – Various Measures on Beef* clarified that "necessary" refers closer to "indispensable" than to the opposite pole in the continuum, i.e. "making contribution to".[7] Thus, "contribution" is a minimum degree of necessity test in subparagraphs (a) and (b).

11. "Relating to" test requires to establish "a close relationship of ends and means", i.e. to assess whether the measure is aimed at a conservation objective.[8]

12. The EU tried to explain that the tests are in essence the same, referring, *inter alia*, to certain explanations of the Appellate Body that in both cases there should be a relationship of ends and means between the measure and objective pursued.[9] This argument is pointless. Both words "necessary to" and "relating to" in fact require "a relationship of ends and means", as they are designed to establish a connection between the chapeau and the subparagraphs. However, the nature/character of this connection is different based on different meaning of the words used. In this regard, Russia relies on the previously cited jurisprudence and the different meaning of the words "contributes to" (used for "necessity" test) and "aimed at" (used for "relating to" test).

13. According to Merriam Webster dictionary, the word "contribute" means "to play a significant part in making something happen". Meanwhile, transitive form of the verb "aim" means "to direct toward a specified object or goal". In this vein, "necessary to" establishes the kind of provision where the result is determinative, i.e. the measure taken leads to protection of a certain kind of policy. While "relating to" argues in favor of a certain degree of intention to influence on the final result.

14. Therefore, it is unclear how the European Union arrived at its allegations about no difference "in practice" between these two tests.[10]

15. Further, the EU claims that it does not request a "revolutionary leap in case law".[11] Meanwhile, it *de facto* asks the Panel to reduce both "necessary to" and "relating to" tests, totally ignoring the letter of the Article and to boil down its assessment "to determining whether the measure is rational and reasonable both in its design and its application".[12]

16. In light of the above, Russia believes that there is no reason to conflate the legal standards under Article XX of the GATT 1994, the new vision of the EU on the Panel's course of action has no basis in the text. Therefore, in our opinion, the Panel shall consistently assess each

[5] Appellate Body Report, *US – Gasoline*, pp.17

[6] See, for example, Appellate Body Report, *India – Solar Cells*, para. 5.59; Appellate Body Reports, *Colombia – Textiles*, paras. 5.67-5.70; Panel Report, *US – Tariff Measures*, para. 7.125.

[7] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

[8] See, for example, Appellate Body Reports, *China – Rare Earths*, para. 5.90.

[9] Second Written Submission by the EU, para. 1266.

[10] Ibid, para. 1265.

[11] Ibid, para. 1333.

[12] Ibid. paras. 1265 – 1272.

challenged measure under each subparagraph involved. If a measure, in the whole or in part, is inconsistent with subparagraph under consideration, then the Panel shall proceed with the assessment under the next subparagraph on consistency of such inconsistent part, etc. In this way, the Panel will sift the measure through the exceptions. If after such exercise every measure or every part of the measure at issue will be protected by a certain policy objective, only then the overall conclusion of its consistency could be made.

17. Lastly, Russia would like to briefly comment on the alleged "exterritorial" application of Article XX of the GATT 1994.[13]

18. In this regard, we refer to *EC – Seals*, in which the Appellate Body emphasized the importance of determining jurisdictional limitation of Article XX of the GATT 1994 as well as its nature and extent.[14] Thus, the Appellate Body at minimum considered the option of territorial limitation in the said Article. It is logical, as the absence of such limitations creates room for different sorts of abuses. Looking beyond the wording of the Article (we agree with the EU that there is no territorial indications in the Article), and guided by the principles of treaty interpretation, as provided in VCLT, the Marrakesh Agreement as a whole and the GATT in particular are not designed in a manner to circumvent the Members' rights and obligations. Exceptions provided in the Agreements serve to balance between Members' sovereign policies and their right to free trade.

19. Moreover, it should be noted that even if previous jurisprudence did not explicitly address the issue, it provided some useful guidance on this matter. In particular, the Appellate Body in *US – Shrimp* established "a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)", as some of the turtles species were known to swim through waters subject to United States' jurisdiction.[15] In *EC – Seals* the Appellate Body also established such nexus between the measure and the territory, as it pointed out that "EU Seal Regime is designed to address seal hunting activities occurring within and outside the Community".[16]

20. Thus, in light of the previous jurisprudence it seems that Article XX of the GATT 1994 requires a territorial link. In this particular case we believe that it is the task of the EU to show particular environmental effects on its territory depending on palm oil production in Malaysia.

Conclusion.

21. This concludes the oral statement by the Russian Federation. We would like to thank you for your attention.

[13] Ibid. para. 1345.
[14] Appellate Body Report, *EC – Seals*, para. 5.173.
[15] Appellate Body Report, *US – Shrimp*, para. 133.
[16] Appellate Body Report, *EC – Seals*, para. 5.173.

ANNEX C-11

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE*

Third-party submission

1. INTRODUCTION

1. Ukraine welcomes the opportunity to participate as a third party in *DS600 European Union and Certain Member States — Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels* and to present its views on certain issues raised by the parties in this dispute.

2. The issues raised in this dispute have important implications for Ukraine because of its systemic interest in the correct and consistent interpretation and application of the World Trade Organization ("WTO") covered agreements. Ukraine would like to focus on some issues related to the analyses and application of Articles I:1, III:4 and XX of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

3. Ukraine clarifies that it will not comment on the specific factual aspects presented by the parties in this dispute and will not take a specific position. Ukraine would also like to reserve the right to raise other issues at the third-party session with the Panel.

2. CLAIMS REGARDING ARTICLES I:1 AND III:2 OF THE GATT 1994 IN RESPECT OF THE EUROPEAN UNION'S MEASURES

> In its First Written Submission Malaysia stated that the regulatory framework that the European Union ("EU") is currently establishing, and that is partially based on the concept of indirect land-use change ("ILUC"), is blatantly discriminatory and by far not the least trade restrictive measure that is available to the EU and, therefore, not in line with the EU's commitments under various WTO agreements.[1]

4. As Malaysia mentioned, the EU's Renewable Energy Directive ("RED II") introduces a new approach to address the risk of ILUC that has been identified for biofuels, bioliquids, and biomass fuels produced from feedstock for which a significant expansion of the production area into land with high-carbon stock is observed. To this end, the RED II requires EU Member States to set a specific and gradually decreasing limit for high ILUC-risk biofuels.[2] Malaysia assumes that some EU Member States have taken measures that already significantly reduce the use of oil palm crop-based biofuel in the transport sector well-ahead of the 2030 phase out provided under the RED II.[3]

5. Malaysia's main argument that its palm oil cultivation does not bear an ILUC-risk is that Malaysia has implemented important procedures to ensure the protection of its forests and other natural environments. Most notably, Malaysia's laws require the undertaking of an Environmental Impact Assessment as part of the authorisation procedure for most economic activities.[4] Therefore, in Malaysia's opinion, given that the oil palm cultivated area may no longer be significantly increased, the EU's requirements related to ILUC and low ILUC-risk certification should not be imposed on Malaysia.

6. Consequently, Malaysia submits that the measures at issue, *inter alia*, are inconsistent with the EU obligations under Article I:1.[5]

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* Pursuant to paragraph 27 of the Panel's Working Procedures, the third-party submission and oral statement of Ukraine serve as the executive summary of its arguments.

[1] Malaysia's First Written Submission, para. 3.

[2] Ibid, para. 42.

[3] Malaysia's First Written Submission, para. 12.

[4] Ibid, para. 24.

[5] Ibid, para. 886.

7. According to Malaysia's First Written Submission and the Appellate Body Report in *EC – Seal Products*, the following elements must be demonstrated to establish an inconsistency with the Article I:1 of the GATT 1994:

(a) that the measure at issue falls within the scope of application of Article I:1;

(b) that the imported products at issue are "like" products within the meaning of Article I:1;

(c) that the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country;

(d) that the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members.[6]

8. Building a position Malaysia emphasizes the "likeness" of foreign origin products and products produced from EU feedstocks. Therefore, Ukraine would like to pay attention to this criterion in the determining compliance with the provisions of Article I:1 of the GATT 1994.

9. According to Malaysia, the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification discriminate among "like" oil crop-based biofuels and their feedstocks originating in third countries and, therefore, are inconsistent with Article I:1 of the GATT 1994. In particular, by limiting and phasing out the use of only oil palm crop-based biofuel for meeting EU renewable energy targets, the measures at issue discriminate between Malaysian oil palm crop-based biofuel and palm oil and like oil crop-based biofuels and their feedstocks of other foreign origin.[7]

10. Moreover, Malaysia submits that the EU measures at issue, namely the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification, grant advantages to oil crop-based biofuels and their feedstocks imported from some Members that are not granted to all Members, and in particular not to Malaysia.[8] At the same time, the measures at issue do not limit and eventually exclude "like" biofuels, namely other oil crop-based biofuels, such as biofuels made from rapeseed oil, soyabean oil or sunflower oil.[9] In addition, Malaysia assumes that these biofuels are not subject to certification in order to be counted towards meeting the EU renewable energy targets.[10]

11. For the purposes of Article I:1 of the GATT 1994 Malaysia believes that oil palm crop-based biofuel and other oil crop-based biofuels are "like products", as well as their respective feedstocks are "like products".

12. In its First Written Submission, the EU stated that Malaysia has not demonstrated its case on "like" products' above. It refers to those submissions and further maintains its position that Malaysia has not adequately substantiated its claims in this respect.[11] Furthermore, the EU notes that, in any event, its measures are justified under Article XX of the GATT 1994.[12]

13. Article I:1 of the GATT 1994 states, *inter alia*, that any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

14. The Panel in *US – Poultry (China)* indicated that the concept of like product has been abundantly interpreted in the prior decisions of panels and the Appellate Body. Whatever the provision at issue, the Appellate Body has explained that a like product analysis must always be done on a case-by-case basis.[13]

[6] Appellate Body Report, *EC – Seal Products*, para. 5.86.
[7] Malaysia's First Written Submission, para. 890.
[8] Ibid, para. 898.
[9] Ibid, para. 899.
[10] Ibid, para. 900.
[11] The European Union's First Written Submission, para. 1133.
[12] Ibid. 1128.
[13] Panel Report, *US – Poultry (China)*, para. 7.424.

15. Ukraine adheres to this view and therefore, it is convinced that each case within the WTO must be considered by a panel step-by-step and in detail due to the unique nature of each case. According to this, the Panel should carefully analyze the criteria or factors that can determine the compliance of the EU measures with Article I:1 of the GATT 1994, including the "likeness" of the oil crop-based biofuels and their respective feedstocks that may bear ILUC-risk and not bear ILUC-risk.

16. The last element of demonstration to establish an inconsistency with the provision of the Article I:1 of the GATT 1994 requires that the advantage so accorded is extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members. Ukraine believes that the Panel firstly should found if the EU measures can be considered as a violation of the Article I:1 of the GATT 1994 as a whole and only then begin to consider how immediately the same advantages were accorded or not accorded to Malaysia.

17. In its turn, Ukraine holds certain beliefs that in this dispute the Panel should use the traditional approach for determining "likeness" that, in the main, consists of employing four general criteria:

(a) the properties, nature and quality of the products;

(b) the end-uses of the products;

(c) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and

(d) the tariff classification of the products.[14]

18. According to Malaysia, the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification accord less favourable treatment to imported oil palm crop-based biofuel and palm oil than they accord to "like" domestic feedstocks and derived biofuels and, therefore, are inconsistent with Article III:4 of the GATT 1994.[15]

19. As was explained in Appellate Body Report in *Korea – Various Measures on Beef* for a violation of Article III:4 of the GATT 1994 to be established, three elements must be satisfied: that the imported and domestic products at issue are "like products"; that the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and that the imported products are accorded "less favourable" treatment than that accorded to like domestic products.[16]

20. As the issue of the determination of the "likeness" of the product was overviewed above, Ukraine would like to pay attention at the second element of the test.

21. Referring to the provision of the Article III:1 of the GATT 1994 that reads "the contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production", Ukraine suggests the Panel to take into account the following.

22. Malaysia in its First Written Submission quoted the Panel Report in *Canada – Autos*, namely that the term "affecting" in Article III:4 of the GATT 1994 has been interpreted to cover not only laws and regulations which directly govern the conditions of sale or use but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products.[17]

[14] Panel Report, *US – Poultry (China)*, para. 7.425.
[15] Malaysia's First Written Submission, para. 921.
[16] Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.
[17] Malaysia's First Written Submission, para. 924.

23. Furthermore, Malaysia in its First Written Submission pointed out an important fact that there is no market in the EU for biofuel or biofuel feedstock that is not eligible to be counted towards the EU renewable energy targets.[18]

24. The EU doesn't agree with the opinion that the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification accord less favourable treatment to imported oil palm crop-based biofuel and palm oil than they accord to "like" domestic feedstocks and derived biofuels and submits that Malaysia has not demonstrated that the "measures" identified have the alleged discriminatory effect. Further and in any event, the measures are justified under Article XX of the GATT 1994.[19]

25. In our opinion, the Panel should carefully analyze the current situation on the domestic market of the EU as to whether there is fair competition in the market or the EU trying to protect biofuels made from domestic feedstocks by such measures, taking into account the EU Biofuels regime, including the RED II and the Delegated Regulation.

26. The next element of the test and arguments of Malaysia relate to the imported products that are accorded "less favourable" treatment than that accorded to like domestic products, namely the 7% limit, the high ILUC-risk cap, the high ILUC-risk phase out, and low ILUC-risk certification treats imported oil palm crop-based biofuel and palm oil from Malaysia less favourably than like products of EU origin.

27. Malaysia assumes that when establishing whether there is "treatment less favourable", what is to be compared is the treatment given to the group of imported products as a whole and the treatment given to the group of like domestic products as a whole. A measure, which does not accord treatment less favourable to some products in the group of imported products, may still be found to accord "treatment less favourable" to the whole group of imported products.[20]

28. The EU, in its turn, believes that 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.[21]

29. In Ukraine's opinion, in order to correctly determine whether products receive "less favourable treatment", the Panel should first determine whether mentioned imported and domestic products could be considered as "like".

30. Ukraine assumes that the primary task of the Panel under the specified Articles of the GATT 1994 lies in determining the "likeness" of products exported to the EU from Malaysia with products made from feedstocks grown in the EU. This conclusion can help the Panel to specify if the EU measures are consistent with the Articles I:1 and III:4 of the GATT 1994 in particular.

3. THE EU JUSTIFICATION BY ARTICLE XX OF THE GATT 1994

31. In its First Written Submission, the EU justifies its measures by Article XX of the GATT 1994.

32. The Article XX of the GATT 1994 reads in particular that subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health; […]

[18] Ibid, para. 624.
[19] The European Union's First Written Submission, paras. 1140 and 1142.
[20] Malaysia's First Written Submission, para. 933.
[21] The European Union's First Written Submission, para. 1159.

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; […].

33. According to the EU, the EU Biofuels regime is designed to contribute to achieving the climate change mitigation objectives of the EU in terms of the reduction of greenhouse gas emissions, whilst at the same time contributing to wider environmental objectives, and in particular the prevention of biodiversity loss. Contributing to these objectives is necessary to protect the EU public morals, as the fight against climate change and biodiversity destruction constitute deep and longstanding moral concerns for the EU public and the EU legislator.[22]

34. The Appellate Body in the Report in *US — Tariff Measures* noted that WTO Members can resort to Article XX as an exception to justify measures that would otherwise be inconsistent with their GATT 1994 obligations. Specifically, the subparagraphs of Article XX list various categories of policies that WTO Members may invoke to justify the potential inconsistency of their (challenged) measures with the substantive obligations of the GATT 1994.[23]

35. The Panel mentioned that traditionally, panels have analysed claims of justification under Article XX using a two-tiered analysis: panels have first examined whether the measure at issue provisionally falls under one of the exceptions listed in the subparagraphs of Article XX, before considering whether the application of the challenged measure satisfies the requirements of the chapeau of Article XX.[24]

36. Therefore, Ukraine believes that firstly the Panel should found if the EU measures, the EU Biofuels regime in particular, were introduced in accordance with the provision of the Article XX of the GATT 1994, namely to protect public morality, human, animal or plant life or health or relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. Moreover, Ukraine assumes that the Panel should investigate in detail whether the EU evidence provided is in fact in line with the provisions of this Article. If these measures may be justified by mentioned provision, the Panel should explore if they satisfies the requirements of the chapeau of Article XX of the GATT 1994.

4. CONCLUSIONS

37. Ukraine thanks the Panel for the opportunity to share its views and hopes that its contribution in the present dispute will be helpful to the Panel in objectively assessing the matter before it and in developing the respective legal interpretations of the WTO agreements.

Oral statement

1. Mr Chairman, distinguished Members of the Panel, Ukraine appreciates the opportunity to participate as a third party in this dispute and, more generally, in the WTO's system of peaceful settlement of disputes between Members.

2. Ukraine has a systemic interest in ensuring the coherent interpretation of the covered WTO agreements and has already addressed some issues in its third-party submission and will not repeat them.

3. But today, while Members work together to support multilateral trading system and maintain WTO's system of peaceful settlement of disputes, russia in its turn commits a blatant act of aggression against Ukraine through its brutal, unprovoked and unjustifiable military invasion.

4. Ukraine is convinced that a military aggression of one WTO Member towards another WTO Member puts the multilateral trading system in an unprecedented situation. Russia's actions do not fall under the fundamental principles of the organization, and the exercise of its rights in today's

[22] The European Union's First Written Submission, para. 4.
[23] Panel Report, *US – Tariff Measures*, para. 7.103.
[24] Ibid, para. 7.107.

circumstances when Ukraine is forced to be deprived of its right to fully participate in the dispute settlement procedures, should not be ignored.

5. We understand the legal nature of WTO disputes and the importance for the parties to the dispute timely consideration of the merits therefore Ukraine respects any decision of the Panel and positions of the parties to the dispute.

6. However, we would like to ask to think whether position of country which started war against WTO Member, could be taken into account within the organization, one of the main principles of which is to act in a good faith.

7. We are very grateful to all Members who don't stay apart and condemn Russia's aggression against Ukraine.

Thank you.

ANNEX C-12

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED KINGDOM

1. An integrated executive summary of the United Kingdom's third party submission and response to certain Panel questions is provided below.

1. GENERAL EXCEPTIONS UNDER ARTICLE XX

2. Article XX of the GATT 1994 provides exceptions for measures taken to pursue certain policy objectives. An otherwise GATT-inconsistent measure may be justified under Article XX where it: (a) meets the specific requirements of one of the subparagraphs; and (b) satisfies the conditions of the *chapeau*.

3. The European Union seeks to justify its measures through the cumulative application of subparagraphs (a), (b), and (g) of Article XX. According to the European Union, the challenged measures are part of a comprehensive set of policies that address climate change, environmental protection (including the preservation of biodiversity), moral concerns, and the pursuit of sustainable energy. The European Union argues that the objectives of the challenged measures are "intertwined", and submits that if its defence were to fail "the three justifications should fail together".[1] The United Kingdom addresses the European Union's "composite" defence and provides some observations on the legal standard to be applied under subparagraphs (a), (b), and (g).

a. ARTICLE XX – "COMPOSITE" LEGAL STANDARD

4. The subparagraphs of Article XX provide distinct routes to defend a measure, each grounded in a different policy objective. This is reflected in the differing legal standards between the subparagraphs. For example, the subparagraphs use different terms to describe the degree of connection required between the measure in question and the interest or policy objective. As noted by the Appellate Body in *US – Gasoline*:

[i]t 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.[2]

5. Considering the subparagraphs invoked by the European Union in this dispute, subparagraphs (a) and (b) require that a measure be "necessary to" protect the relevant policy objective, while subparagraph (g) requires a measure to "relat[e] to" the same. The Appellate Body has found that the necessity analysis involves "weighing and balancing" several factors,[3] and, in most cases, will require a comparison of the measure with other possible, less trade restrictive, alternatives.[4] In contrast, under subparagraph (g), "relating to" has been found to require the measure be "primarily aimed at"[5] the conservation of natural resources – there is no "weighing and balancing" and there are no less trade restrictive alternatives to consider.

6. Moreover, a composite defence would conflate the legal standards and thus deprive the specific terms of each of the individual subparagraphs of Article XX of their *effet utile*. Taking the example outlined above, it would effectively lower the standard imposed by the term "necessary" or increase the standard imposed by the term "relating to". Thus, the subparagraphs of Article XX should not be cumulatively invoked. For the avoidance of doubt, the United Kingdom recognises that multiple subparagraphs may be invoked to justify a measure, providing that the requirements of each subparagraph are fully met.

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[1] European Union's first written submission, para. 1329.
[2] Appellate Body Report, *US – Gasoline*, p. 18.
[3] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178. See also Appellate Body Reports, *US – Gambling*, para. 306; *Korea – Various Measures on Beef*, para. 164.
[4] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178.
[5] Appellate Body Report, *US – Gasoline*, p. 18.

b. ARTICLE XX(A) – PUBLIC MORALS

7. To provisionally justify a measure under this subparagraph, a respondent must demonstrate that its measure: (i) is "designed" to protect public morals; and that it (ii) is "necessary" to achieve its public moral objective.

8. **Interpretation of "Public Morals"**. WTO panels have interpreted the term "public morals" to denote "standards of right and wrong conduct maintained by or on behalf of a community or nation".[6] Whether a social interest amounts to a "standard of right and wrong" in a particular community or nation is ultimately a fact-specific determination.[7] The content and scope of "public morals" will therefore be informed by the "prevailing social, cultural, ethical and religious values" in that community or nation.[8] A Member must be afforded latitude to define public morals "in its territory, according to its own system and scales of values".[9]

9. The United Kingdom considers that concerns about climate change, environmental destruction, and/or biodiversity loss may be characterised as a public moral for the purposes of subparagraph (a). As noted, whether these interests reach the level of a public moral in any given Member must be determined based on the prevailing values in that Member, keeping in mind the latitude afforded to Members to define their own public morals.

10. **"Contribution" Element of the Necessity Test**. The "necessity" analysis involves "weighing and balancing" a series of factors, including the contribution of the measure to the objectives pursued, the importance of the values pursued by the measure, and the trade restrictiveness of the measure.[10] If a panel makes a preliminary conclusion that the measure is necessary, it must confirm this result by comparing the measure with reasonably available less trade-restrictive alternatives.

11. When assessing the contribution of a measure to the objectives pursued, the Appellate Body has recognised that tackling complex environmental problems may require comprehensive policies with a "multiplicity of interacting measures" and that it may therefore be difficult, in the short-term, to isolate the contribution of a specific measure from the contribution of the wider policy.[11]

12. The Appellate Body accepted that contribution to the objective may be demonstrated in different ways. Members may demonstrate that the measure "brings about" a contribution by resorting to evidence or data, pertaining to the past or present. But Members may equally demonstrate that a measure "is apt to" produce a contribution to the objective pursued (i.e., in the future).[12] Importantly, the Appellate Body recognised that Members have discretion as to how to evidence this contribution.[13]

13. In doing so, the Appellate Body "left open the possibility that a 'necessary' measure could contribute to" the objective "as part of a policy framework comprising different measures, resulting in possible synergies between those measures".[14] These findings are of particular importance to measures adopted to combat climate change, which will necessarily form part of wide-ranging policy frameworks, with action required across a range of complex and interconnected sectors and systems, and which may not have immediately observable effects.

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[6] Panel Report, *US – Gambling*, para. 6.465. See also Panel Reports, *EC – Seal Products*, paras. 7.380, 7.631; and *Brazil – Taxation*, para. 7.520.

[7] Panel Report, *US – Gambling*, para. 6.461.

[8] Panel Report, *US – Gambling*, para. 6.461. See also Panel Reports, *EC – Seal Products*, paras. 7.380-7.381, 7.631; and *Brazil – Taxation*, para. 7.520.

[9] Panel Reports, *EC – Seal Products*, para. 7.383; and *Brazil – Taxation*, para 7.520 (drawing on Panel Report, *US – Gambling*, para. 6.461).

[10] Appellate Body Report, *Korea – Various Measures on Beef*, para. 164 (addressing Article XX(d)); see also Appellate Body Reports, *China – Publications and Audiovisual Products,* para. 240; and *Colombia – Textiles*, para 5.70 (addressing Article XX(a)).

[11] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

[12] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

[13] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

[14] Panel Reports, *China – Rare Earths*, para. 7.146, citing Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

c. ARTICLE XX(B) – PROTECTION OF HUMAN, ANIMAL OR PLANT LIFE OR HEALTH

14. To provisionally justify a measure under this subparagraph, a respondent must demonstrate both that its measure: (i) is "designed" to protect human, animal or plant life or health; and (ii) that it is "necessary".

15. **"Protect Human, Animal or Plant Life or Health"**. To demonstrate that a measure is designed to protect human, animal or plant life or health, a panel must, first, establish "the existence of a risk to human, animal or plant life or health" before, second, examining "whether the policy underlying the measure aims to reduce such risk".[15] It is well-established that "Members have the right to determine the level of protection that they deem appropriate".[16] In determining whether a measure is aimed at reducing the identified risk to life or health, a panel should assess evidence relating to the design, structure, and application of the measure.[17]

16. A range of environmental policies have been recognised as protecting human, animal, or plant life or health.[18] For example, in *US – Gasoline*, the panel agreed that "a policy to reduce air pollution resulting from the consumption of gasoline" was a policy within the range of those concerning the protection of human, animal, or plant life or health.[19] More recently, the panel in *Brazil – Taxation* found that a set of policies aimed at reducing CO_2 emissions as part of a transport plan for "Climate Change Mitigation and Adaptation" pursued policy objectives that fell "within the range of policies that protect human life or health" and were therefore covered by subparagraph (b) of Article XX.[20]

17. The United Kingdom observes that the Intergovernmental Panel on Climate Change ("IPCC") has found that higher global temperatures will result in environmental changes that threaten plant, animal, and human life and health. Climate change impacts have been found to threaten "health, livelihoods, food security, water supply, human security and economic growth".[21]

18. The submissions on the necessity test and contribution analysis under Article XX(a) apply equally to the necessity analysis under Article XX(b).

d. ARTICLE XX(G) – CONSERVATION OF EXHAUSTIBLE NATURAL RESOURCES

19. To provisionally justify a measure under this subparagraph, a respondent must demonstrate that its measure: (i) seeks to conserve "exhaustible natural resources", (ii) is "relating to" the conservation of such resources, and (iii) is "made effective in conjunction with restrictions on domestic production or consumption".

20. **Meaning of "Exhaustible Natural Resources"**. This term has been interpreted to include living and non-living resources, both of which are "finite" to the extent that they are susceptible to depletion, exhaustion, or extinction.[22] Notably, in *US – Gasoline*, the panel recognised that "clean air" is an exhaustible natural resource because it is capable of being depleted.[23] The fact that the resource was renewable, and defined with respect to its qualities (i.e. the cleanliness of the air), did not prevent it from being an exhaustible natural resource.[24]

21. When interpreting the term "exhaustible natural resources", the United Nations Framework Convention on Climate Change ("UNFCCC"), the Paris Agreement, and the Glasgow Climate Pact are relevant. These international conventions and decisions confirm that a global atmosphere with safe levels of greenhouse gases is a resource that is at risk of being depleted. For example, the UNFCCC highlights that the substantial increase in the "atmospheric concentrations of greenhouse gases" will result "on average in an additional warming of the Earth's surface and atmosphere" and that its

[15] Panel Report, *Brazil – Taxation*, para. 7.859.
[16] Panel Report, *Brazil – Taxation*, para. 7.859.
[17] Panel Report, *Brazil – Taxation*, para. 7.884.
[18] Panel Report, *China – Raw Materials*, para. 7.479.
[19] Panel Report, *US – Gasoline*, para. 6.21. The panel findings in respect of Article XX(b) were not appealed.
[20] Panel Report, *Brazil – Taxation*, paras. 7.878–7.881. The panel findings in respect of Article XX(b) were not appealed.
[21] IPCC Special Report, Summary for Policymakers, 2018, B.5.
[22] Appellate Body Report, *US – Shrimp*, paras. 128 and 131.
[23] Panel Report, *US – Gasoline*, para. 6.37. The panel findings on this issue were not appealed.
[24] Panel Report, *US – Gasoline*, paras. 6.36-6.37. The panel findings on this issue were not appealed.

objective is "to achieve […] stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".[25] The Paris Agreement[26] and the Glasgow Climate Pact[27] support pursuit of this objective via their goal of holding the increase in the global average temperature to well below 2°C, and pursuing efforts to limit the temperature increase to below 1.5°C, above pre-industrial levels, by securing sustained reductions in global greenhouse emissions.

22. Based on the above, the United Kingdom submits that a global atmosphere with safe levels of greenhouse gases, i.e., a safe atmospheric composition, is an exhaustible natural resource within the meaning of Article XX(g). In the same way that air quality may be depleted by pollution, so too a safe atmospheric composition will be depleted by excess greenhouse gases.

[25] UNFCCC, Preamble and Article. 2, available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en (accessed 27 June 2022).

[26] Paris Agreement, Articles. 2.1 and 4.1, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (accessed 27 June 2022); The 2013-2015 Review, Decision 10/CP.21 of the Conference of the Parties serving as the meeting of the Parties to the UNFCCC, U.N. Doc FCCC/CP/2015/10/Add.2, para. 4, available at https://unfccc.int/resource/docs/2015/cop21/eng/10a02.pdf#page=23 (accessed 27 June 2022).

[27] Glasgow Climate Pact, including Decision 1/CP.26 of the Conference of the Parties serving as the meeting of the Parties to the UNFCCC, paras. 15-17, available at: https://unfccc.int/documents/310475 (accessed 27 June 2022) and Decision 1/CMA.3 of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, paras. 20-22, available at: https://unfccc.int/documents/310497 (accessed 27 June 2022).

ANNEX C-13

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. Malaysia claims that the High ILUC Risk Cap breaches Article 2.1 of the TBT Agreement because it accords "to Malaysia's oil palm crop-based biofuel imported into the EU treatment less favourable than that accorded to 'like products' imported into the EU from other countries and to domestic 'like products'." 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. The Appellate Body's approach in essence imposes an obligation on the complainant to demonstrate the degree of trade restrictiveness of the measure in question. However, 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 limit climate change, protect biodiversity, and address public morals concerns. If, taking into account all the facts, the Panel finds that the impact on Malaysian imports is not origin-based, then the Panel should conclude that Malaysia 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. Malaysia 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. 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." According to Malaysia, the European Union adopted the measure to address "the expressed primary objective of … the avoidance of additional GHG emissions by limiting direct and indirect land-use change." The European Union argues that the measures at issue are meant to address the "composite" objectives of "combating climate change, biodiversity loss and protecting the EU public morals," claiming that these objectives are "interlinked." 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 Malaysia 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 Malaysia 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. Malaysia 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. WHETHER ARTICLE XX DEFENSES ARE AVAILABLE IN CONNECTION WITH EXTRATERRITORIAL HARM

20. According to Malaysia and Colombia (arguing as a third party), 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.

II. CONFIDENTIALITY

21. In this dispute, Malaysia has filed several documents and excerpts of documents from DS593, the Indonesia/EU-Palm Oil case. Those documents—including an expert report, and portions of Indonesia's submission and a third-party submission—were to be treated as confidential per Article 18.2 of the DSU. While these disputes both deal with the same EU measures, the two disputes are distinct. Further, the third parties in DS593 (the Indonesia/EU-Palm Oil case) and DS600 (the Malaysia/EU-Palm Oil case) are not identical, and thus, the disclosure of confidential documents from DS593 (the Indonesia/EU-Palm Oil case) in the present DS600, Malaysia/EU-Palm Oil case, is more than theoretical.

22. The United States takes its confidentiality obligations in WTO dispute settlement very seriously, and we rely on other Members to do the same. We caution Members to remain aware of, and abide by, their obligations, and to maintain strict confidentiality protocols at all times. This includes instances such as the present situation, where multiple disputes are ongoing that involve overlapping factual and legal issues.

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

23. Response to Question 3: Article 2.1 of the TBT Agreement prohibits measures that accord less favorable treatment to imported products as compared to like domestic products *based on origin*. Thus, the European Union is correct that the proper exercise is *not* to compare the impact of the measure on imports from various countries. The proper exercise is to examine the measure at issue to determine if that measure affords less favorable treatment to like products based on origin. 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." Thus, if a panel determines 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.

24. Response to Question 4: We agree in part, and disagree in part, with the European Union's description of the proper analysis under Article 2.1, as quoted in Question 4 from the Panel. We do not agree that it is the Panel's role to "examine the nature of the objectives pursued by the measures" to determine if they are "legitimate." The Panel's analysis in this respect should be limited to a determination of whether the detrimental impact is based on the origin of the product in question. We agree with the European Union that a panel must examine "the relationship between the legitimate objectives of the measure and the detrimental effects." To complete this examination, a panel must take 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.

25. Response to Questions 8 and 9: Article 2.2 does not require that a WTO Member must, as the Panel's questions suggest, continually update its regulations to reflect the most recent "scientific and technical information." The context provided by Article 2.3 also does not suggest such a requirement. Under Article 2.3, WTO Members must monitor existing measures, and may need to alter those measures if "circumstances or objectives giving rise to their adoption" change. While it may be the case that the "latest available" information on a given issue will affect the circumstances or objectives of a technical regulation, it does not follow that it always must.

26. Response to Question 16: Article 12.3 of the TBT Agreement only requires that Members take account of the needs of developing country Members in the "preparation and application" of a measure, "*with a view*" to ensuring that these measures do not create unnecessary obstacles to trade. The ordinary meaning of the phrase "with a view" is "with the aim of attaining or accomplishing" or "with the hope or intention of." In this sense, Article 12.3 does not require the developed country Member to accept every recommendation presented by the developing country Member but rather to proceed with the aim of ensuring that its measure does not create an unnecessary obstacle to exports.

27. Response to Question 17: GATT Article XI:1 relates only to "prohibitions or restrictions" on the importation or exportation of products. Furthermore, Article XI:1 proscribes restrictions "on the importation" or "on the exportation" of any product, but not restrictions on the level of imports or exports. Instead, the terms used— "importation" and "exportation"—reach the *process* of importing or exporting.

28. Response to Question 19: 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 in its application." 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. That the language at issue in those subparagraphs—*i.e.*, "necessary to" versus "relating to"—differs, suggests that these provisions do articulate different requirements.