

the perspective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.1459. Those conclusions, taken together, lead me to conclude that the high ILUC-risk cap and phase-out (a) does not have an exclusively "legitimate objective", and is therefore fundamentally inconsistent with Article 2.2 of the TBT Agreement; (b) results in a detrimental impact on palm oil-based-biofuel that does not stem "exclusively from a legitimate regulatory distinction", and is therefore fundamentally inconsistent with Article 2.1 of the TBT Agreement; and (c) is applied in a manner that constitutes "arbitrary or unjustifiable discrimination" and a "disguised restriction on trade" within the meaning of the *chapeau* of Article XX of the GATT 1994. This analysis extends *mutatis mutandis* to the assessment of the French TIRIB measure under Article XX of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATION

8.1. With regard to the EU measures at issue, the Panel finds that¹⁷⁰⁴:

- a. the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations within the meaning of Annex 1.1 to the TBT Agreement;
- b. Malaysia has failed to establish that the high ILUC-risk cap and phase-out is inconsistent with the obligation in Article 2.4 of the TBT Agreement to use relevant international standards as a basis for technical regulations;
- c. Malaysia has failed to establish that the 7% maximum share and the high ILUC-risk cap and phase-out are inconsistent with the obligation in Article 2.2 of the TBT Agreement to ensure that technical regulations are not more trade-restrictive than necessary to fulfil a legitimate objective;
- d. the European Union has administered the high ILUC-risk cap and phase-out inconsistently with Article 2.1 of the TBT Agreement by failing to conduct a timely review of the data used to determine which biofuels are high ILUC risk, and because there are deficiencies in the design and implementation of the low ILUC-risk criteria, which results in arbitrary or unjustifiable discrimination between countries where the same conditions prevail;
- e. Malaysia has not established that the European Union has acted inconsistently with Article 2.5 of the TBT Agreement by failing to explain the justification for preparing, adopting or applying the 7% maximum share and the high ILUC-risk cap and phase-out in terms of Articles 2.2 to 2.4 of the TBT Agreement;
- f. Malaysia has not established that the high ILUC-risk cap and phase-out is inconsistent with the obligation in Article 2.8 of the TBT Agreement to whenever appropriate specify technical regulations in terms of performance rather than design or descriptive characteristics;
- g. regarding the claims under Article 2.9 of the TBT Agreement, the European Union has acted inconsistently with:
 - i. Article 2.9.2 by failing to notify the proposed 7% maximum share and the proposed high ILUC-risk cap and phase-out measures; and
 - ii. Article 2.9.4 by having failed to organize a commenting process in respect of the proposed 7% maximum share and the proposed high ILUC-risk cap and phase-out measures in accordance with the requirements of that provision;
- h. the low ILUC-risk certification procedure is a "conformity assessment procedure" within the meaning of Annex 1.3 to the TBT Agreement;

¹⁷⁰⁴ The Panel sets out its conclusions in accordance with the order of analysis of the claims followed in section 7. The Panel recalls that the basis for following this order of analysis is elaborated in section 7.1.1.2 of this Report.

- i. Malaysia has failed to establish that the low ILUC-risk certification procedure is inconsistent with the obligation in Article 5.1.1 of the TBT Agreement to ensure that conformity assessment procedures grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country;
- j. the low ILUC-risk certification procedure, as set out in Article 6 of the Delegated Regulation, is inconsistent with Article 5.1.2 of the TBT Agreement since deficiencies in the implementation of the low ILUC-risk procedure have created unnecessary obstacles to international trade;
- k. Malaysia has failed to establish that the European Union has acted inconsistently with the obligation in Article 5.2.1 of the TBT Agreement to ensure that conformity assessment procedures are undertaken and completed as expeditiously as possible;
- l. regarding the claims under Article 5.6 of the TBT Agreement, the European Union has acted inconsistently with:
 - i. Article 5.6.1 of the TBT Agreement by failing to publish a notice of the proposed low ILUC-risk certification procedure at an early appropriate stage in such a manner as to enable interested parties in Malaysia and other WTO Members to become acquainted with it;
 - ii. Article 5.6.2 of the TBT Agreement by failing to notify the proposed low ILUC-risk certification procedure; and
 - iii. Article 5.6.4 of the TBT Agreement by having failed to organize a commenting process in respect of the proposed low ILUC-risk certification procedure in accordance with the requirements of that provision;
- m. Malaysia has not established that the European Union has acted inconsistently with the obligation in Article 5.8 of the TBT Agreement to ensure that conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them;
- n. Malaysia has failed to establish that the European Union has acted inconsistently with Article 12.3 of the TBT Agreement, as informed by Article 12.1 of the TBT Agreement;
- o. Malaysia has not established that the high ILUC-risk cap and phase-out or the low ILUC-risk certification procedure is inconsistent with the obligation in Article XI:1 of the GATT 1994 to not institute or maintain any prohibitions or restrictions on the importation of any product of the territory of another Member;
- p. the high ILUC-risk cap and phase-out is inconsistent with Article III:4 of the GATT 1994 because it accords less favourable treatment to palm oil-based biofuel from Malaysia than that accorded to like products of EU origin;
- q. the high ILUC-risk cap and phase-out is inconsistent with Article I:1 of the GATT 1994 because it does not accord an advantage to palm oil-based biofuel from Malaysia that is accorded to like products imported from third countries;
- r. insofar as Malaysia challenges the low ILUC-risk certification procedure as a separate measure under Article III:4 and Article I:1 it has not established any inconsistency with these obligations;
- s. the European Union has acted inconsistently with Article X:3(a) of the GATT 1994 by administering the high ILUC-risk cap and phase-out in Article 26 of RED II in a manner that is not reasonable, to the extent that deficiencies in the design and implementation of the low ILUC-risk criteria and procedure do not provide for the elements needed for palm oil-based biofuel to be certified as low ILUC-risk;

- t. with respect to Article XX of the GATT 1994:
- i. the high ILUC-risk cap and phase-out is a measure relating to the conservation of exhaustible natural resources that is made effective in conjunction with restrictions on domestic production or consumption within the meaning of Article XX(g);
 - ii. the high ILUC-risk cap and phase-out is a measure necessary to protect human, animal or plant life or health within the meaning of Article XX(b);
 - iii. it is unnecessary to rule on whether the high ILUC-risk cap and phase-out is a measure necessary to protect public morals under Article XX(a); and
 - iv. the high ILUC-risk cap and phase-out has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail because the European Union failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk, and because there are deficiencies in the design and implementation of the low ILUC-risk criteria and certification procedure.

8.2. With regard to the French TIRIB measure, the Panel finds that¹⁷⁰⁵:

- a. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is inconsistent with Article III:2, first sentence, of the GATT 1994, because it results in the application of internal taxes to imported palm oil-based biofuel in excess of those applied to the like domestic rapeseed and soybean oil based biofuels;
- b. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is inconsistent with Article III:2, second sentence, of the GATT 1994, because it results in dissimilar taxation between imported palm oil-based biofuel and the directly competitive or substitutable domestic rapeseed and soybean oil based biofuels, and this dissimilar taxation is applied so as to afford protection to domestic production;
- c. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is inconsistent with Article I:1 of the GATT 1994, because it grants an advantage to imported rapeseed and soybean oil based biofuels that is not immediately and unconditionally accorded to like palm oil-based biofuel imported from Malaysia;
- d. with respect to Article XX of the GATT 1994:
 - i. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure relating to the conservation of exhaustible natural resources that is made effective in conjunction with restrictions on domestic production or consumption within the meaning of Article XX(g);
 - ii. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure necessary to protect human, animal or plant life or health within the meaning of Article XX(b);
 - iii. it is unnecessary to rule on whether the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure necessary to protect public morals under Article XX(a); and

¹⁷⁰⁵ The Panel sets out its conclusions in accordance with the order of analysis of the claims followed in section 7 of this Report. The Panel recalls that the basis for following this order of analysis is explained in section 7.2.1.2.

- iv. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, because the European Union has failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk, and has failed to demonstrate the existence of any provisions or flexibilities for palm oil-based biofuels to be certified as low ILUC-risk;
- e. Malaysia has failed to establish that the French TIRIB measure provides a specific subsidy that causes adverse effects in the form of serious prejudice under Articles 5(c), 6.3(a) and 6.3(c) of the SCM Agreement.

8.3. The Panel finds that Malaysia has failed to establish a *prima facie* case of violation under the TBT Agreement or the GATT 1994 with respect to any Lithuanian measure(s) that fall within its terms of reference.

8.4. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures at issue are inconsistent with the TBT Agreement and the GATT 1994, they have nullified or impaired benefits accruing to the Malaysia under those agreements.

8.5. Pursuant to Article 19.1 of the DSU, the Panel recommends that the European Union bring its measures into conformity with its obligations under the TBT Agreement and the GATT 1994 to the extent that it has not already done so.
