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

### REQUEST FOR CONSULTATIONS BY MALAYSIA

The following communication, dated 15 January 2021, from the delegation of Malaysia to the delegations of the European Union, France and Lithuania, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the European Union, as well as France and Lithuania, pursuant to Article 4 of the DSU, Article XXII of the General Agreement on Tariffs and Trade 1994 ('GATT 1994'), Article 14 of the Agreement on Technical Barriers to Trade ('TBT Agreement') and Article 30 of the Agreement on Subsidies and Countervailing Measures ('SCM Agreement'), regarding certain measures imposed by the EU and EU Member States affecting palm oil and oil palm crop-based biofuels from Malaysia.

Malaysia considers that these measures are inconsistent with the obligations of the EU and the EU Member States concerned under the GATT 1994, the TBT Agreement, and the SCM Agreement.

#### A. Background

1. Malaysia is the world's second largest producer of palm oil. In 2019, Malaysia produced around 19.86 million metric tonnes of crude palm oil, accounting for 28% of world palm oil production and 33% of world palm oil exports.<sup>1</sup> In 2019, Malaysia exported around 1.9 million metric tonnes of palm oil to the EU. The palm oil industry directly employs more than one million Malaysians and 40% of all palm oil plantations in Malaysia are owned or farmed by smallholder farmers, who have benefited from oil palm cultivation.<sup>2</sup> Palm oil production and export has been a major factor in Malaysia reducing poverty from 50% in the 1960s, down to less than 5% today.

2. As one of the biggest producers and exporters of palm oil and palm oil products, 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 the lead in the continuous process of making palm oil production more sustainable and environmentally friendly. As of December 2020, nearly 90% of Malaysia's total oil palm cultivation has obtained Malaysian Sustainable Palm Oil (MSPO) certification. Additionally, as at that date, 428 of Malaysia's 452 oil palm mills, corresponding to around 95% of total milling capacity, received the MSPO certification. Most recently, on 1 January 2020, Malaysia made the MSPO certification mandatory.

3. It is important to recall Malaysia's commitment at the 1992 Rio Earth Summit, where it pledged to maintain at least 50% of the country's landmass under forest cover. On the basis of data from

<sup>1</sup> Malaysian Palm Oil Council (MPOC), Malaysian Palm Oil Industry. Available at: <http://mpoc.org.my/malaysian-palm-oil-industry/>. Malaysian Palm Oil Board, Production 2019. Available at <http://bepi.mpob.gov.my/index.php/en/production/production-2019/production-of-oil-palm-products-2019.html>.

<sup>2</sup> Malaysian Palm Oil Council (MPOC). Available at <http://theoilpalm.org/about/http://theoilpalm.org/about/>.

2018, about 55.3% of Malaysia's 33 million hectares (ha) land areas are under forest cover, exceeding the country's pledge made at the Rio Earth Summit.

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 crops.

5. While the measures taken by the EU and EU Member States under this policy pursue the reduction of greenhouse gas ('GHG') emissions and the achievement of commitments under international climate agreements, some of these measures contravene their WTO obligations. In 2018 and 2019, the EU adopted legislative measures that, in simple terms, define palm oil as an unsustainable feedstock for the production of biofuel. The EU further argues that only palm oil production entails a high risk of indirect land-use change ('ILUC'). On that basis, oil palm crop-based biofuels cannot be counted towards EU renewable energy targets.<sup>3</sup>

6. Generally speaking, the measures adopted by the EU, as well as the related measures adopted by EU Member States, confer unfair benefits to EU domestic producers of certain biofuel feedstocks, such as rapeseed oil and soy, and the biofuels produced therefrom, at the expense of palm oil and oil palm crop-based biofuels from Malaysia. These measures may also discriminate against Malaysian palm oil and oil palm crop-based biofuels in favour of 'like products' from third countries.

7. Malaysia submits that the measures adopted by the EU and its Member States currently already limit and will increasingly limit the volume of Malaysian palm oil and oil palm crop-based biofuels that can be counted towards reaching EU renewable energy targets and, consequently, that will be sold in the EU market.

## **B. The measures at issue**

### **a. EU measures**

#### *EU renewable energy target*

8. The EU Renewable Energy Sources Directive ('RED II') (2018) 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 minimiz(ing) unintended environmental impacts".<sup>4</sup> EU Member States are required to transpose this general renewable energy policy framework by 30 June 2021.<sup>5</sup>

9. The RED II also places a cap 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<sup>6</sup>) of total energy consumption in the transport sector. For the transport sector, the RED II sets an overall objective of achieving 14% of its energy consumption from renewable sources by 2030.<sup>7</sup>

10. After 1 January 2021, EU Member States' share of energy from renewable sources may not fall below certain specified thresholds.<sup>8</sup> 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

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<sup>3</sup> See European Commission, Factsheet, Indirect Land Use Change, 17 October 2012, available at [https://ec.europa.eu/commission/presscorner/detail/de/MEMO\\_12\\_787](https://ec.europa.eu/commission/presscorner/detail/de/MEMO_12_787) (accessed 13 January 2021). See also Recitals 80 and 81 of the RED II.

<sup>4</sup> Article 3(1) of and recital 8 in the preamble to the RED II.

<sup>5</sup> Article 36(1) of the RED II.

<sup>6</sup> Article 26(1) of the RED II allows Member States to set lower limits and, in so doing, to distinguish between biofuels, bioliquids and biomass fuels produced from food and feed crops and specifically from oil crops.

<sup>7</sup> Article 25(1) of the RED II.

<sup>8</sup> Article 3(4) of the RED II.

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.<sup>9</sup>

11. 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 risk of ILUC and produced from food and feed crops for which "a significant expansion of the production area into land with high-carbon stock is observed", must be below the consumption level of such fuels in that 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, unless they are certified to be 'low ILUC-risk' biofuels, bioliquids or biomass fuels. From 31 December 2023 and until 31 December 2030 at the latest, that limit is to gradually decrease to 0%.<sup>10</sup>

#### *ILUC-risk*

12. Commission Delegated Regulation (EU) 2019/807 supplements the RED II by laying down the criteria for determining the high ILUC-risk 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<sup>11</sup> biofuels, bioliquids and biomass fuels. The 'scientific basis' for these criteria is provided in the Production Expansion Report.

13. Under Article 3 of Commission Delegated Regulation (EU) 2019/807, for purposes of determining high ILUC-risk feedstock for which a significant expansion of the production area into land with high-carbon stock is observed, two cumulative criteria are applied: 1) 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 2) the share of such expansion into land with high-carbon stock must be higher than 10%, in accordance with a particular mathematical formula, which consists of the share of expansion into land with high-carbon stock, the share of expansion into land referred to in Article 29(4)(b) and (c) of the RED II, and the share of expansion into land referred to in Article 29(4)(a) of the RED II, including peatland. The Commission Delegated Regulation (EU) 2019/807, however, does not provide any explanation or guidance as to the scientific rationale of the factors and values taken into account for these criteria. The selected reference period, as well as the benchmark for annual expansion, appear to have been skilfully set so that only palm oil would be negatively affected by the measure.

14. The criteria for determining the high ILUC-risk feedstock and low ILUC-risk biofuels, bioliquids or biomass fuels were based on the alleged overall expansion with respect to each particular feedstock, and not on a transparent methodology based on the circumstances in a particular country or the particular circumstances of production, including the management of land. The mechanism does not, *inter alia*, take into account features unique to tropical regions, which have a considerably larger forest cover than other WTO Members, such as the EU.

15. Contrary to its intended purpose, the Production Expansion Report does not offer sound, accurate, and comprehensive scientific evidence to support the conclusions reached with respect to the respective commodities. As the Production Expansion Report itself admits, the available data has oftentimes either been selectively chosen or has been "assumed", because the actual data was often unavailable or not found.<sup>12</sup>

16. The certification as low ILUC-risk, as provided by Commission Delegated Regulation (EU) 2019/807, is possible for biofuels, bioliquids, and biomass fuels that are produced under circumstances that avoid ILUC effects, if all relevant criteria are met (i.e., such products comply with

<sup>9</sup> Article 7(1) of the RED II.

<sup>10</sup> Article 26(2) of the RED II.

<sup>11</sup> Low ILUC-risk biofuels, bioliquids and biomass are defined in Article 2(37) of RED II as "biofuels, bioliquids and biomass fuels, the feedstock of which was produced within schemes which avoid displacement effects of food and feed-crop based biofuels, bioliquids and biomass fuels through improved agricultural practices as well as through the cultivation of crops on areas which were previously not used for cultivation of crops, and which were produced in accordance with the sustainability criteria for biofuels, bioliquids and biomass fuels laid down in Article 29".

<sup>12</sup> Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the status of production expansion of relevant food and feed crops worldwide, COM(2019) 142 final (13 March 2019), pp. 8, 13, 14.

the sustainability and GHG emissions saving criteria set out in Article 29 of the RED II, such products have been produced from additional feedstock obtained through additionality measures that meet the specific criteria set out in Article 5 of Commission Delegated Regulation (EU) 2019/807, and 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).<sup>13</sup>

17. Although the RED II does not single out any particular fuels as carrying high-ILUC risk, it follows from Commission Delegated Regulation (EU) 2019/807 that only oil palm crop-based biofuels must be certified as low ILUC-risk in order to be used for meeting the EU renewable energy targets and benefit from EU Member States' support schemes. It appears that the conditions set out in Articles 4 and 5 of Commission Delegated Regulation (EU) 2019/807 are designed in a manner so as to effectively preclude any oil palm crop-based biofuels from meeting them.

18. EU Member States will still theoretically allow the importation of high ILUC-risk feedstocks or biofuels, bioliquids, and biomass fuels produced therewith. Between 31 December 2023 and 31 December 2030, however, the share of fuels produced from feedstocks considered by the EU as high ILUC-risk feedstocks is to gradually decrease to 0 for the calculation of an EU Member State's gross final consumption of energy from renewable sources referred to in Article 7 of the RED II and the minimum share referred to in the first sub-paragraph of Article 25(1) of the RED II. As a result, 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.<sup>14</sup>

#### *The sustainability and GHG emission savings criteria*

19. To be taken into account for the purpose of contributing towards the EU's renewable energy targets and being eligible for financial support under the relevant support schemes put in place by EU Member States, energy from biofuels, bioliquids, and biomass fuels must also satisfy the sustainability and GHG emission savings criteria.<sup>15</sup>

20. The GHG emission savings criteria provide that the greenhouse gas emission savings from the use of biofuels, bioliquids and biomass fuels shall be either 50%, 60%, or 65% of total emissions from the use of the biofuel, depending on the age of the installation in which that fuel is produced.<sup>16</sup>

21. The European Commission may decide on the eligibility of the voluntary national or international schemes setting standards for the production of biofuels, bioliquids or biomass fuels, or other fuels. To this end, the European Commission may adopt implementing legislation laying down rules regarding, *inter alia*, adequate standards of reliability, transparency and independent auditing that must be satisfied by all voluntary schemes.<sup>17</sup> However, the same opportunity is not provided as regards the mandatory systems of sustainability standards, such as the government-imposed MSPO standard, which arguably should be recognised by the EU and reflected in the measures at stake.

22. Malaysia understands that the measures at issue are set up and implemented through, *inter alia*, the following legal and other instruments, considered alone and in combination:

- i. Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), OJ 2018 L 328, p. 80 ('RED II');
- ii. Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination

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<sup>13</sup> Articles 4 and 5 of the Delegated Regulation 2019/807, identify the cumulative criteria that must be met in order to certify biofuels, bioliquids and biomass fuels as low ILUC-risk. These criteria include the sustainability and GHG emissions saving criteria and the need to comply with additionality requirements.

<sup>14</sup> 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. 26 *Id.* article 26.2

<sup>15</sup> Article 29(1) of the RED II.

<sup>16</sup> Article 31 of and Annex V to the RED II lay down rules for calculating the GHG impact of biofuels, bioliquids and their fossil fuel comparators.

<sup>17</sup> Article 30(8) of the RED II.

of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels, OJ 2019 L 133, p. 1 ('Delegated Regulation 2019/807');

- iii. Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ 2009 L 140, p. 16 ('RED I'), as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources, OJ 2015 L 239, p. 1;
- iv. Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, OJ 2018 L 328, p. 1 ('Regulation 2018/1999');
- v. European Parliament Resolution of 4 April 2017 on palm oil and deforestation of rainforests (2016/2222(INI)), OJ 2018 C 298, p. 2 ('Resolution of 4 April 2017');
- vi. Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the status of production expansion of relevant food and feed crops worldwide, COM(2019) 142 final (13 March 2019) ('Production Expansion Report'); and
- vii. Any annexes thereto, amendments, supplements, replacements, renewals, extensions, implementing measures or any other related measures, and any exemptions applied.

#### **b. EU Member States' measures**

23. The RED II envisages that the renewable energy targets be reached by adopting at the EU Member States' level various support schemes, including tax refunds, reductions, or exemptions.<sup>18</sup> Two EU Member States, namely France and Lithuania, have already adopted measures that transpose the RED II into national legislation. Malaysia requests consultations regarding these measures. However, Malaysia also notes that other EU Member States are in the process of adopting their respective national transposition measures that are inconsistent with their WTO obligations.<sup>19</sup> Malaysia reserves the right to raise matters regarding the measures of other EU Member States during the consultations.

#### *French 'General Tax on Polluting Activities – Fuel Tax'*

24. In view of the provisions of the RED II and Commission Delegated Regulation (EU) 2019/807, France has introduced a General Tax on Polluting Activities, which includes a tax on the consumption of petrol and diesel (the 'the French fuel tax'). The French fuel tax provides incentives for the

<sup>18</sup> Article 2(5) of the RED II.

<sup>19</sup> We note in this regard the draft *Besluit tot wijziging van het Besluit energie vervoer in verband met de implementatie van Richtlijn (EU) 2018/2001 van het Europees Parlement en de Raad van 11 december 2018 ter bevordering van het gebruik van energie uit hernieuwbare bronnen en ter uitvoering van het Klimaatakkoord* (draft *Decision amending the Transport Energy Decree in connection with the implementation of 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 and in implementation of the Climate Agreement*) (unofficial translation from Dutch) published by the Government of the Netherlands. This draft decision provides that, already from 2022, only biofuels supplied from food and feed crops that are certified as having a 'low risk of indirect land use change (ILUC)' may be counted towards the relevant threshold in the Netherlands. We also note the forthcoming measures by the Government of Denmark, as laid out in its *Klimahandlingsplan* (climate action plan), which notes that: "As early as 2021, biofuels based on palm oil will be excluded from being included in the blending requirement, and from 2022, both biofuels based on palm oil and soybean oil will be excluded from being able to be included in the target fulfillment of the CO2 displacement requirement" (unofficial translation from Danish).

consumption of petrol and diesel that contain certain oil crop-based biofuels in order to meet EU renewable energy targets. More specifically, the tax rate for petrol and diesel is reduced depending on the volume of biofuels included.<sup>20</sup>

25. The French Customs Code expressly states that palm oil-based products are not considered as biofuels.<sup>21</sup> The practical implication of this provision is that petrol and diesel that contain oil palm crop-based biofuels cannot benefit from the lower tax rate. Oil palm crop-based biofuels are, therefore, deprived of any benefit that would accrue as a result of those tax measures and will be at a competitive disadvantage vis-à-vis competing 'like products'.

26. By reducing the tax rate on petrol and diesel containing biofuels other than oil palm crop-based biofuels, France foregoes government revenue that is otherwise due and thereby confers a benefit to the producers of those biofuels. By specifically excluding oil palm crop-based biofuels from those tax reductions, the French fuel tax expressly discriminates against oil palm crop-based biofuels and operates so as to impede and displace imports of oil palm crop-based biofuels from Malaysia into the French market.

27. Malaysia understands that the French fuel tax measure is set up and implemented through the following legal instruments:

- i. Article 266 quindicies of the French Customs Code, as modified by Article 192 of the Law no 2018-1317 on 28 December 2018 for 2019 finances;
- ii. Article L. 661-2 of the French Energy Code;
- iii. French Decree no 2019-570 of 7 June 2019 on the incentive tax relating to the incorporation of biofuels, JORF no 0133 of 9 June 2019, no. 13;
- iv. French Decision of 23 November 2011 modified taking into account the application of the order n° 2011-1105 of 14 September 2011 and Decree no 2011-1468 of 9 November 2011, relating to the sustainability of biofuels and bioliquids;
- v. French Decision of 2 May 2012 relating to the energy content of biofuels and fuels;
- vi. French Circulaire of 12 June 2019 – Tax relating to the incorporation of biofuels ('TRIB'), NOR: CPAD1917078C; and
- vii. Any annexes thereto, amendments, supplements, replacements, renewals, extensions, implementing measures or any other related measures, and any exemptions applied.

*Lithuania's Law No XI-1375 on renewable energy*

28. In view of the provisions of the RED II and Commission Delegated Regulation (EU) 2019/807, Lithuania has amended its law on renewable energy to reflect the revised EU rules on ILUC.

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

<sup>20</sup> Article 266 *quindicies* of the French Customs Code, as modified by Article 192 of Loi n° 2018-1317 du 28 décembre 2018 de finances pour 2019. See also Décret no 2019-570 du 7 juin 2019 portant sur la taxe incitative relative à l'incorporation de biocarburants, JORF no 0133 of 9 June 2019, no. 13; Ministère de l'Action et des Comptes publics, Circulaire du 12 juin 2019 – Taxe incitative relative à l'incorporation de biocarburants (TRIB). Available at [https://www.douane.gouv.fr/sites/default/files/bod/src/dana/da/Energie-environnement-loi%20de%20finances\\_19-023.pdf](https://www.douane.gouv.fr/sites/default/files/bod/src/dana/da/Energie-environnement-loi%20de%20finances_19-023.pdf) and Annexes. Available at [https://www.douane.gouv.fr/sites/default/files/bod/src/dana/da\\_annexes/Energie-environnement-loi%20de%20finances\\_19-023\\_1.pdf](https://www.douane.gouv.fr/sites/default/files/bod/src/dana/da_annexes/Energie-environnement-loi%20de%20finances_19-023_1.pdf).

<sup>21</sup> Article 266 *quindicies* V B 2. (3°) of the French Customs Code, as modified by Article 192 of Loi n° 2018-1317 du 28 décembre 2018 de finances pour 2019.

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.

30. Malaysia understands that the Lithuanian measure is set up and implemented through the following legal instruments:

- i. Lithuania's Law No XI-1375 on renewable energy, as amended by Law No XIII-2869 amending Articles 1, 2, 3, 4, 5, 6, 11, 13, 14, 16, 17, 20, 20(1), 22, 25, 28, 29, 35, 37, 38, 39, 46, 48, 49, 55, 58, 59, 60, 61, 62, 63, 63, 64 and the Annex of Law No XI-1375 on renewable energy, repealing Article 11(1) and adding Article 20(2) of 28 April 2020; and
- ii. Any annexes thereto, amendments, supplements, replacements, renewals, extensions, implementing measures or any other related measures, and any exemptions applied.

### **C. Legal basis for the complaint in respect of the EU measures**

31. With regard to the EU measures, as embodied and developed in the respective legal instruments as specified in para. 22 herein and as applied by the relevant authorities, Malaysia considers that these measures are inconsistent with the EU's obligations under the GATT 1994 and the TBT Agreement. In particular, the measures are inconsistent with:

#### *GATT 1994*

- i. Article I:1 of the GATT 1994, because the measures at issue, which limit and will progressively phase out oil palm crop-based biofuels from being counted towards reaching EU renewable energy targets and which provide criteria for certifying low ILUC-risk biofuels, discriminate among 'like' feedstocks and derived biofuels originating in third countries;
- ii. Article III:4 of the GATT 1994, because the measures at issue, which limit and will progressively phase out oil palm crop-based biofuels from being counted towards reaching EU renewable energy targets and which provide criteria for certifying low ILUC-risk biofuels, accord less favourable treatment to imported palm oil and oil palm crop-based biofuels than they do to 'like' domestic feedstocks and derived biofuels, thereby modifying the conditions of competition to the detriment of the imported palm oil and oil palm crop-based biofuels, in particular from Malaysia;
- iii. Article X:3(a) of the GATT 1994, because the measures at issue, which limit and will progressively phase out oil palm crop-based biofuels from being counted towards reaching EU renewable energy targets and which provide criteria for certifying low ILUC-risk biofuels, are administered in a manner that is not uniform, impartial and/or reasonable; and
- iv. Article XI:1 of the GATT 1994, because the measures at issue, which limit and will progressively phase out oil palm crop-based biofuels from being counted towards reaching EU renewable energy targets, and which provide criteria for certifying low ILUC-risk biofuels, restrict the importation of palm oil and oil palm crop-based biofuels.

#### *TBT Agreement*

- v. Article 2.1 of the TBT Agreement, because the measures at issue, which limit and will progressively phase out oil palm crop-based biofuels from being counted towards reaching EU renewable energy targets, being technical regulations within the meaning of Annex 1.1 of the TBT Agreement, have a detrimental impact on the competitive conditions in the EU market of Malaysia's imports of oil palm crop-based biofuels compared with 'like products' imported into the EU from other countries and compared with 'like' domestic products;
- vi. Article 2.2 of the TBT Agreement, because the measures at issue, which limit and will progressively phase out oil palm crop-based biofuels from being counted towards reaching EU renewable energy targets, being technical regulations within the meaning of Annex 1.1 of the TBT Agreement, are more trade-restrictive than necessary to achieve the objectives pursued by the measures;

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- vii. Article 2.4 of the TBT Agreement, because the measures at issue, which limit and will progressively phase out oil palm crop-based biofuels from being counted towards reaching EU renewable energy targets, being technical regulations within the meaning of Annex 1.1 of the TBT Agreement, are not based on the relevant international standards;
- viii. Article 2.5 of the TBT Agreement, because the EU, in preparing, adopting or applying the measures at issue, which limit and will progressively phase out oil palm crop-based biofuels from being counted towards reaching EU renewable energy targets, being technical regulations within the meaning of Annex 1.1 of the TBT Agreement, 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;
- ix. Article 2.8 of the TBT Agreement, because the measures at issue, which limit and will progressively phase out oil palm crop-based biofuels from being counted towards reaching EU renewable energy targets, being technical regulations within the meaning of Annex 1.1 of the TBT Agreement, are based on an abstract and unsubstantiated high-ILUC risk concept instead of the performance of such biofuels;
- x. Article 2.9 of the TBT Agreement, because the measures at issue, which limit and will progressively phase out oil palm crop-based biofuels from being counted towards reaching EU renewable energy targets, being technical regulations within the meaning of Annex 1.1 of the TBT Agreement, were adopted without the required timely publication and notification of these measures and organising an adequate process for commenting;
- xi. Article 5.1.1 of the TBT Agreement, because the EU, by preparing, adopting or applying the measures at issue, which provide criteria for certifying low ILUC-risk biofuels, being conformity assessment procedures within the meaning of Annex 1.3 of the TBT Agreement, treats suppliers of oil palm crop-based biofuels from Malaysia less favourably than domestic suppliers of 'like' biofuels or suppliers from other WTO Members in a comparable situation;
- xii. Article 5.1.2 of the TBT Agreement, because the EU, by preparing, adopting or applying the measures at issue, which provide criteria for certifying low ILUC-risk biofuels, being conformity assessment procedures within the meaning of Annex 1.3 of the TBT Agreement, creates unnecessary obstacles to international trade;
- xiii. Article 5.2 of the TBT Agreement, because the EU failed to make available the conformity assessment procedures to certify low ILUC-risk;
- xiv. Article 5.6 of the TBT Agreement, because the EU, with regards to the measures at issue, which provide criteria for certifying low ILUC-risk, being conformity assessment procedures within the meaning of Annex 1.3 of the TBT Agreement, neither notified nor enter into meaningful consultations, or allowed for comments on such conformity assessment procedures;
- xv. Article 5.8 of the TBT Agreement, because the EU neither promptly published nor otherwise made available the measures at issue, which provide criteria for certifying low ILUC-risk biofuels, being conformity assessment procedures within the meaning of Annex 1.3 of the TBT Agreement; and
- xvi. Articles 12.1 and 12.3 of the TBT Agreement, because the EU, in the preparation and application of the measures at issue referred to above, failed to take into account the circumstances specific to developing countries, in particular Malaysia, where palm oil and oil palm crop-based biofuels are produced.

#### **D. Legal basis for the complaint in respect of the EU Member States' measures**

##### **a. France**

32. The set of advantages granted by France for oil crop-based biofuels, as embodied and developed in the respective legal instruments, as specified in paragraphs 24 to 27 herein, and as applied by the relevant authorities, are inconsistent with the obligations of France under the GATT 1994 and

the SCM Agreement. In particular, the set of advantages described above, as contained in the mentioned legal instruments, are inconsistent with:

*GATT 1994*

- i. Article I:1 of the GATT 1994, because the measures at issue, under which the tax on petrol and diesel is only reduced when they contain biofuels other than oil palm crop-based biofuels, discriminates against 'like' biofuels by granting an advantage, in the form of a tax reduction, to biofuels of some countries, that is not granted to all WTO Members, and in particular not to Malaysia, and
- ii. Article III:2 of the GATT 1994, because the measures at issue, under which the tax on petrol and diesel is only reduced when they contain biofuels other than oil palm crop-based biofuels, indirectly applies a tax on imported oil palm crop-based biofuels: (1) in excess to 'like' domestic biofuels; or (2) which is not similar to the tax on 'directly competitive and substitutable' domestic biofuels, and affords protection to the production of these domestic biofuels.

*SCM Agreement*

- iii. Articles 3 and 5 of the SCM Agreement, because the measures at issue, under which the French Government reduces the tax on petrol and diesel containing crop-based biofuel other than oil palm crop-based biofuels and excludes petrol and diesel containing oil palm crop-based biofuels from this tax reduction, amount to a subsidy within the meaning of Article 1 of the SCM Agreement which is: (1) a prohibited import substitution subsidy within the meaning of Article 3.1(b); and/or (2) an actionable subsidy causing an adverse effect on the interests of Malaysia within the meaning of Article 5(c) of the SCM Agreement.

**b. Lithuania**

33. Concerning Lithuania's measures (including any annexes thereto, amendments, supplements, replacements, renewals, extensions, implementing measures or any other related measures, and any exemptions applied), as implemented and/or applied by the latter in line with its obligations as a EU Member State regarding the transposition of the RED II, Malaysia claims that those measures are inconsistent with the same WTO obligations as provided for in paragraph 31 and/or 32 herein.

**c. Other EU Member States**

34. Malaysia contends that to the extent that any other EU Member State transposes the RED II and further implement and/or apply any measure(s) according to its obligations as regards the limitation and/or phasing out of oil palm crop-based biofuels from being counted towards reaching renewable energy targets, regardless of whether the said measures are explicit or implicit in their treatment of oil palm crop-based biofuels, such measure(s) shall be inconsistent with the same WTO obligations as provided for in paragraph 31 and/or 32 herein.

**E. Conclusion**

35. Malaysia considers that the measures at issue nullify or impair the benefits accruing to it directly or indirectly under the cited covered agreements.

36. Malaysia reserves the right to raise additional matters during the course of the consultations and in any future request for the establishment of a panel.

37. Malaysia suggests holding the consultations as soon as possible and looks forward to a prompt reply by the European Union, France and Lithuania in order to set a mutually convenient date and venue for these consultations.