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

REPORT OF THE PANEL

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Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – Auto Parts	Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R, Add.1 and Add.2 / WT/DS340/R, Add.1 and Add.2 / WT/DS342/R, Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, p. 119
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
China – Rare Earths	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
China – Rare Earths	Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, DSR 2014:IV, p. 1127
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
Colombia – Ports of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
Colombia – Textiles	Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
Colombia – Textiles	Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/R and Add.1, adopted 22 June 2016, as modified by Appellate Body Report WT/DS461/AB/R, DSR 2016:III, p. 1227
Dominican Republic – Safeguard Measures	Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
EC – Asbestos	Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, p. 3305
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bananas III (Guatemala and Honduras)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695

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EC – Bananas III (US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 943
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
EC – Sardines	Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R, DSR 2002:VIII, p. 3451
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EC – Seal Products	Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and Add.1 / WT/DS401/R and Add.1, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/R, DSR 2014:II, p. 365
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Tariff Preferences	Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS246/AB/R, DSR 2004:III, p. 1009
EC – Trademarks and Geographical Indications (Australia)	Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia*, WT/DS290/R, adopted 20 April 2005, DSR 2005:X, p. 4603
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
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EU – Biodiesel (Indonesia)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Indonesia*, WT/DS480/R and Add.1, adopted 28 February 2018, DSR 2018:II, p. 605
EU – Energy Package	Panel Report, *European Union and its member States – Certain Measures Relating to the Energy Sector*, WT/DS476/R and Add.1, circulated to WTO Members 10 August 2018, appealed 21 September 2018
India – Agricultural Products	Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R, adopted 19 June 2015, DSR 2015:V, p. 2459
India – Agricultural Products	Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R and Add.1, adopted 19 June 2015, as modified by Appellate Body Report WT/DS430/AB/R, DSR 2015:V, p. 2663
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
India – Solar Cells	Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R and Add.1, adopted 14 October 2016, as modified by Appellate Body Report WT/DS456/AB/R, DSR 2016:IV, p. 1941
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
Indonesia – Chicken	Panel Report, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*, WT/DS484/R and Add.1, adopted 22 November 2017, DSR 2017:VIII, p. 3769
Indonesia – Import Licensing Regimes	Appellate Body Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/AB/R, WT/DS478/AB/R, and Add.1, adopted 22 November 2017, DSR 2017:VII, p. 3037
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97

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Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, p. 1179
Japan – Semi-Conductors	GATT Panel Report, Japan – Trade in Semi-Conductors, L/6309, adopted 4 May 1988, BISD 35S/116
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, p. 2749
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Korea – Pneumatic Valves (Japan)	Appellate Body Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/AB/R and Add.1, adopted 30 September 2019, DSR 2019:XI, p. 5637
Korea – Radionuclides	Appellate Body Report, *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*, WT/DS495/AB/R and Add.1, adopted 26 April 2019, DSR 2019:VII, p. 3653
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
Korea – Various Measures on Beef	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, p. 59
Mexico – Taxes on Soft Drinks	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, p. 43
Philippines – Distilled Spirits	Appellate Body Reports, *Philippines – Taxes on Distilled Spirits*, WT/DS396/AB/R / WT/DS403/AB/R, adopted 20 January 2012, DSR 2012:VIII, p. 4163
Philippines – Distilled Spirits	Panel Reports, *Philippines – Taxes on Distilled Spirits*, WT/DS396/R / WT/DS403/R, adopted 20 January 2012, as modified by Appellate Body Reports WT/DS396/AB/R / WT/DS403/AB/R, DSR 2012:VIII, p. 4271
Russia – Railway Equipment	Appellate Body Report, *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WT/DS499/AB/R and Add.1, adopted 5 March 2020
Russia – Railway Equipment	Panel Report, *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WT/DS499/R and Add.1, adopted 5 March 2020, as modified by Appellate Body Report WT/DS499/AB/R
Russia – Tariff Treatment	Panel Report, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, WT/DS485/R, Add.1, Corr.1, and Corr.2, adopted 26 September 2016, DSR 2016:IV, p. 1547
Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
Thailand – Cigarettes (Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines*, WT/DS371/RW and Add.1, circulated to WTO Members 12 November 2018, appealed 9 January 2019
Turkey – Pharmaceutical Products (EU)	Final Panel Report as issued to the parties in *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, attached to Türkiye's notice of recourse to arbitration (WT/DS583/12 and Add.1)
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
US – 1916 Act	Panel Reports, *United States – Anti-Dumping Act of 1916*, WT/DS136/R and Corr.1 *(EC)* / WT/DS162/R and Add.1 *(Japan)*, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4593 / DSR 2000:X, p. 4831
US – Animals	Panel Report, *United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina*, WT/DS447/R and Add.1, adopted 31 August 2015, DSR 2015:VIII, p. 4085

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US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751
US – Clove Cigarettes	Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012:XI, p. 5865
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Continued Zeroing	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, as modified as Appellate Body Report WT/DS350/AB/R, DSR 2009:III, p. 1481
US – COOL	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – COOL (Article 21.5 – Canada and Mexico)	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015, DSR 2015:IV, p. 1725
US – COOL (Article 21.5 – Canada and Mexico)	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/RW and Add.1 / WT/DS386/RW and Add.1, adopted 29 May 2015, as modified by Appellate Body Reports WT/DS384/AB/RW / WT/DS386/AB/RW, DSR 2015:IV, p. 2019
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
US – Countervailing Measures (China) (Article 21.5 – China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China*, WT/DS437/AB/RW and Add.1, adopted 15 August 2019, DSR 2019:IX, p. 4737
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R, DSR 2000:IV, p. 1675
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
US – FSC (Article 21.5 – EC)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, p. 119
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Gasoline	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649
US – Origin Marking (Hong Kong, China)	Panel Report, *United States – Origin Marking Requirement*, WT/DS597/R and Add.1, circulated to WTO Members 21 December 2022, appealed 26 January 2023

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US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Ripe Olives from Spain	Panel Report, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WT/DS577/R and Add.1, adopted 20 December 2021
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007, DSR 2007:II, p. 425
US – Softwood Lumber VII	Panel Report, *United States – Countervailing Measures on Softwood Lumber from Canada*, WT/DS533/R and Add.1, circulated to WTO Members 24 August 2020, appealed 28 September 2020
US – Tax Incentives	Appellate Body Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/AB/R and Add.1, adopted 22 September 2017, DSR 2017:V, p. 2199
US – Tax Incentives	Panel Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/R and Add.1, adopted 22 September 2017, as modified by Appellate Body Report WT/DS487/AB/R, DSR 2017:V, p. 2305
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
US – Tuna II (Mexico)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/RW, Add.1 and Corr.1, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW, DSR 2015:X, p. 5409 and DSR 2015:XI, p. 5653
US – Tuna II (Mexico) (Article 21.5 – Mexico II)	Panel Reports, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States*, WT/DS381/RW/USA and Add.1 / *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/RW2 and Add.1, adopted 11 January 2019, as upheld by Appellate Body Report WT/DS381/AB/RW/USA / WT/DS381/AB/RW2, DSR 2019:III, p. 1315
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
US – Washing Machines	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R, DSR 2016:V, p. 2505
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

TABLE OF EXHIBITS REFERRED TO IN THIS REPORT

Panel Exhibit	Short Title (if applicable)	Title
EU-9	Directive 2003/30/EC	Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport, OJ L 123, 17.5.2003, p. 42–46 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV) [consolidated version]
EU-10	European Parliament Report, FINAL A5-0244/2002	Report of the Parliament on the proposal for a directive of the European Parliament and of the Council on the promotion of the use of biofuels for transport (COM(2001) 547 – C5-0684/2001 – 2001/0265(COD)), 20 June 2002, FINAL A5-0244/2002
EU-16	Fuel Quality Directive	Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC. [consolidated version]
EU-34	TNO Report 2013	TNO Report, "Options to increase EU biofuels volumes beyond the current blending limits", 2013
EU-36		Commission decision C(2015) 405 final of 23 January 2015 in Case M.7417 – Sime Darby/New Britain Palm Oil
EU-38		Austria's reporting under Article 7a of the Fuel Quality Directive for 2019
EU-39		Czech Republic's reporting under Article 7a of the Fuel Quality Directive for 2019
EU-40		Denmark's reporting under Article 7a of the Fuel Quality Directive for 2018
EU-41		Excerpt from the website of Preem, a Swedish fuel company
EU-42		Midttun, Knut Myrum Næss, and Proadpran Boonprasurd Piccini "Biofuel Policy and Industrial Transition—A Nordic Perspective" in Energies 2019, 12(14), 2740
EU-43	French Parliament Report n. 2609	Report of the French Parliament n. 2609 of 22 January 2020, p. 52
EU-44		French Parliament, Amendment 2267
EU-86		Eni press release of 15 April 2021: "Eni: New Systems Installed at the Venice Biorefinery to Eliminate Palm Oil Entirely"
EU-87		Press article from Argusmedia of 11 September 2020: "Spain's climate bill threatens biofuel projects: Repsol"
EU-88		Total's webpage (accessed on 22 April 2021): "GRANDPUITS: A ZERO-CRUDE PLATFORM BY 2024"
EU-89		Total's webpage (accessed on 22 April 2021): "LA MÈDE: A MULTIPURPOSE FACILITY FOR THE ENERGIES OF TOMORROW"
EU-90		Press article of 1 April 2021 from Le Monde "Total condamné à revoir son étude d'impact sur l'utilisation de l'huile de palme dans une raffinerie"
EU-120		Edward O. Wilson, "The loss of biodiversity is a tragedy", United Nations Educational, Scientific and Cultural Organization (unesco.org), 9 February 2010
EU-134		ETC/CME Eionet Report, Greenhouse gas intensities of road transport fuels in the EU in 2018 - Monitoring under the Fuel Quality Directive, November 2020
EU-135	UFOP Global Market Supply 2020/2021	UFOP, Global Market Supply 2020/2021, European and world demand for biomass for the purpose of biofuel production in relation to supply in food and feedstuff markets
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EU-147		Biodiesel Standards in various EU member States (website accessed 25 April 2021)
EU-170		Jukka Miettinen et al, From carbon sink to carbon source: extensive peat oxidation in insular Southeast Asia since 1990, Environ. Res. Lett., 12 024014, 2017

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EU-190		Hooijer, A., Page, S., Jauhiainen, J., Lee, W. A., Lu, X. X., Idris, A., and Anshari, G.: Subsidence and carbon loss in drained tropical peatlands, Biogeosciences, 9, pp. 1053–1071
EU-191		Page, S. E., Morrison, R., Malins, C., Hooijer, A., Rieley, J. O., and Jauhiainen, J.: Review of peat surface greenhouse gas emissions from oil palm plantations in Southeast Asia (ICCT White Paper 15), International Council on Clean Transportation, Washington, 2011
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EU-215	Consultation on Draft Implementing Regulation	European Commission, Consultation on the draft implementing regulation on rules to verify sustainability and greenhouse gas emissions saving criteria and low indirect land-use change-risk criteria
EU-218		ETC/CME Eionet Report, Greenhouse gas intensities of transport fuels in the EU in 2019 - Monitoring under the Fuel Quality Directive, October 2021
EU-219		Excerpt of USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021
EU-228		Guillaume, T., Kotowska, M.M., Hertel, D. et al. Carbon costs and benefits of Indonesian rainforest conversion to plantations. Nat Commun 9, 2388 (2018)
EU-233		Vijay V., Pimm S.L., Jenkins C.N., Smith S.J., The Impacts of Oil Palm on Recent Deforestation and Biodiversity Loss, Plos One, 27 July 2016
EU-271		RSPO GHG Assessment Procedure for New Development Version 3, 30 October 2016
EU-273		Gaveau D. &co., Slowing deforestation in Indonesia follows declining oil palm expansion and lower oil prices, Research Square, 15 January 2021
EU-283	European Commission website on voluntary schemes	European Commission website on voluntary schemes (23 February 2022)
IDN-2		T. Mielke, "World Markets for Vegetable Oils: Status and Prospects", in M. Kaltschmitt (ed.), Energy from Organic Minerals (Biomass), 2019
IDN-3		K. Azly Zahan and M. Kano, "Biodiesel Production from Palm Oil, Its By-Products, and Mill Effluent: A Review", Energies, Vol. 11 (2018), 2132
IDN-8		Y. Basiron, "Palm oil production through sustainable plantations", European Journal of Lipid Science and Technology, Vol. 109 (2007), 289
IDN-9		A. Karmakar, S. Karmakar and S. Mukherjee, "Properties of various plants and animals feedstocks for biodiesel production", Bioresource Technology, Vol. 101 (2010), 7201
IDN-11	UFOP Global Market Supply 2019/2020	UFOP, Global Market Supply 2019/2020, European and world demand for biomass for the purpose of biofuel production in relation to supply in food and feedstuff markets

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IDN-12		USDA FAS, "GAIN Biofuels Annual: European Union", 29 June 2020
IDN-14		European Technology and Innovation Platform, "Transesterification to biodiesel"
IDN-15		Refueling the Future, "Biofuels and Bioenergy - The First Generation"
IDN-16	Moser, "Biodiesel Production, Properties, and Feedstocks"	B.R. Moser, "Biodiesel Production, Properties, and Feedstocks", in D. Tomes, P. Lakshmanan, D. Songstad (eds), Biofuels: Global Impact on Renewable Energy, Production Agriculture, and Technological Advancement (Springer, 2011), pp. 285-287; 300-306
IDN-17		Arbeitsgemeinschaft Qualitätsmanagement Biodiesel e.V., "Cold Properties of Biodiesel"
IDN-18	RED I	Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ 2009 L 140, p. 16
IDN-19	RED II	Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ 2018 L 328, p. 82
IDN-24		Commission Regulation (EU) No 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, OJ 2013 L 141, p. 6
IDN-25	Council Implementing Regulation (EU) 1194/2013	Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, OJ 2013 L 315, p. 2
IDN-27		Commission Implementing Regulation (EU) 2018/1570 of 18 October 2018 terminating the proceedings concerning imports of biodiesel originating in Argentina and Indonesia and repealing Implementing Regulation (EU) No 1194/2013, OJ 2018 L 262, p. 40
IDN-28		Commission Implementing Regulation (EU) 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia, OJ 2019 L 212, p. 1
IDN-29		Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia, OJ 2019 L 317, p. 42
IDN-30		USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019
IDN-35		OECD/FAO, OECD FAO Agricultural Outlook 2020-2029 (OECD Publishing, 2020), pp. 138-141 and 200
IDN-38		USDA FAS, "GAIN Oilseeds and Products Annual: European Union", 17 April 2020
IDN-41		Eurostat, "Data on EU imports of biodiesel"
IDN-56	Status Report (2019)	Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the status of production expansion of relevant food and feed crops worldwide, COM(2019) 142 final (13 March 2019)
IDN-58		Law Nr. 41 of the year 1999 of the Republic of Indonesia concerning forestry, published on 30 September 1999, State Gazette of the Republic of Indonesia, 1999 167
IDN-86	ILUC Directive	Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources, OJ 2015 L 239, p. 1
IDN-87	Study Report (2017)	Wageningen Economic Research, Netherlands Environmental Assessment Agency (PBL), Wageningen Environmental Research, and National Renewable Energy Centre (CENER), Study Report on Reporting Requirement on Biofuels and Bioliquids stemming from the Directive (EU) 2015/1513 (European Commission, 2017)

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IDN-89	European Parliament Resolution of 4 April 2017	European Parliament, Resolution on palm oil and deforestation of rainforests (2016/2222(INI)), OJ 2018 C 298, p. 2
IDN-91	Letter of DG Trade to DG Energy	Letter of Jean-Luc Demarty Director-General of DG Trade to Dominique Ristori, Director-General of DG Energy, signed 23 March 2018, Ref. Ares (2018) 1615972 – 23/03/2018
IDN-92		Joint U.S.-EU Statement on 25 July 2018 following President Juncker's visit to the White House
IDN-93		Statement by President Jean-Claude Juncker at the joint press conference in the White House Rose Garden with Donald Trump, President of the United States, 25 July 2018
IDN-94	Commission Implementing Decision (EU) 2019/142	Commission Implementing Decision (EU) 2019/142 of 29 January 2019 on recognition of the "U.S. Soybean Sustainability Assurance Protocol" for demonstrating compliance with the sustainability criteria under Directives 98/70/EC and 2009/28/EC of the European Parliament and of the Council, OJ 2019 L 26, p. 10
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IDN-97	Delegated Regulation	Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels, OJ 2019 L 133, p. 1
IDN-99	Draft Delegated Regulation	Draft of the Commission Delegated Regulation …/… supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels, C (2019) 2055 final (13 March 2019)
IDN-102	Article 266 quindecies of the French Customs Code	Article 266 quindecies of the French Customs Code (Code des douanes)
IDN-103		Article 9 of Law No. 2020-935 of 30 July 2020 on amending finances for 2020 (Loi n° 2020-935 du 30 juillet 2020 de finances rectificative pour 2020)
IDN-104		Articles L. 661-1 to 661-9 of the French Energy Code (Code de l'énergie)
IDN-105		French Decree No. 2019-570 of 7 June 2019 relating to the incentive tax relating to the incorporation of biofuel (Décret n° 2019-570 du 7 juin 2019 portant sur la taxe incitative relative à l'incorporation des biocarburants)
IDN-106		French Decision of 23 November 2011 modified, in respect of the application of Order No. 2011-1105 of 14 September 2011 and Decree No. 2011-1468 of 9 November 2011, relating to the sustainability of biofuel and bioliquids (Arrêté du 23 novembre 2011 pris en application de l'ordonnance n° 2011-1105 du 14 septembre 2011 et du décret n° 2011-1468 du 9 novembre 2011 et relatif à la durabilité des biocarburants et des bioliquides)
IDN-107		French Decision of 2 May 2012 on the energy contents of biofuels and bioliquids (Arrêté du 2 mai 2012 relatif aux contenus énérgétiques des biocarburants et des carburants)
IDN-108	French Government Circular of 18 August 2020	Circular by the French Government of 18 August 2020 on the incentive tax relating to the incorporation of biofuels (TIRIB), NOR: ECOD2020901C (Circulaire du 18 août 2020 Taxe incitative relative à l'incorporation de biocarburants (TIRIB))

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IDN-109		Circular of 12 June 2019 – the incentive tax relating to the incorporation of biofuels (TIRIB), NOR: CPAD1917078C (Circulaire du 12 juin 2019 Tax incitative relative à l'incorporation de biocarburants (TIRIB)), pp. 1, 2, 19.
IDN-114		Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, OJ 2009 L 9, p. 12
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IDN-117		French parliamentary report, Working Group on Biofuels, "Tax regime of biofuels" ("Fiscalité des biocarburants")
IDN-119		Amendment nr. I-694 rect. bis. of 21 November 2020 to the French Finance Law for 2021 (Amendement N° I-694 rect. bis de 21 novembre 2020 de la loi de finances pour 2021)
IDN-122		Amendment nr. II-320 rect. ter. of 5 December 2018 to the French Finance Law of 2019 (Amendement N° II-320 rect. ter de 5 décembre 2018 de la loi de finances pour 2019)
IDN-126	Finkbeiner Expert Opinion	M. Finkbeiner, Report, Expert Opinion on Indonesia's WTO dispute – EU renewable energy targets, 15 December 2020
IDN-134		D. Laborde, Assessing the Land Use Change Consequences of European Biofuel Policies (International Food Policy Research Institute, 2011)
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IDN-148		M. Weisse and E.D. Goldman, "The World Lost a Belgium-sized Area of Primary Rainforests Last Year"
IDN-150		D.L.A. Gaveau et al., "Rise and fall of forest loss and industrial plantations in Borneo (2000–2017)", Conservation Letters, Vol. 12:3 (2018), 1
IDN-151		K.G. Austin et al., "What causes deforestation in Indonesia?", Environmental Research Letters, Vol. 14 (2019), 1
IDN-152		White Paper Nr. 17 by J. Miettinen et al., "Historical Analysis and Projection of Oil Palm Plantation Expansion on Peatland in Southeast Asia" (International Council on Clean Transportation, 2012)
IDN-153		J. Miettinen, C. Shi, and S.C. Liew, "Land Cover Distribution in the Peatlands of Peninsular Malaysia, Sumatra, and Borneo in 2015 with Changes since 1990", Global Ecology and Conversation, Vol. 6 (2016), 67

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IDN-156		J. Xu et al., "PEATMAP: Refining estimates of global peatland distribution based on a meta-analysis", Catena, Vol. 160 (2018), 134
IDN-157		Ecofys, Methodologies for the identification and certification of Low ILUC risk biofuels (European Commission, 2016)
IDN-181	Regulation (EU) 2018/1999	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
IDN-183	Commission Regulation (EC) 193/2009	Commission Regulation (EC) No 193/2009 of 11 March 2009 imposing a provisional anti-dumping duty on imports of biodiesel originating in the United States of America, OJ 2009 L 67, p. 26
IDN-184		Commission Implementing Regulation (EU) 2019/244 of 11 February 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Argentina, OJ 2019 L 40, p. 1
IDN-186	Moser, "Influence of Blending Canola, Palm, Soybean, and Sunflower Oil Methyl Esters on Fuel Properties of Biodiesel"	B.R. Moser, ""Influence of Blending Canola, Palm, Soybean, and Sunflower Oil Methyl Esters on Fuel Properties of Biodiesel", Energy & Fuels, Vol. 22 (2008), 4301
IDN-187		I. Barabás and I.-A. Todoruț, "Biodiesel Quality, Standards and Properties" in G. Montero, Biodiesel – Quality, Emissions and By-Products (IntechOpen, 2011)
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IDN-190		HS Nomenclature, 2017, Chapter 38
IDN-192		Eurostat, Energy from renewable sources - SHARES
IDN-193		European Parliament, Promotion of the use of energy from renewable sources, P8_TA(2018)0009, Amendment 307
IDN-194	European Parliament, Governance of the Energy Union (debate), 15 January 2019	European Parliament, Promotion of the use of energy from renewable sources - Energy efficiency - Governance of the Energy Union (debate), 15 January 2019
IDN-195		USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015
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IDN-201		Orders of the President of the Court of 15 February 2018 in Joined Cases C-602/16 P, and C-607/16 P to C-609/16 P, EU:C:2019:1148
IDN-202		Orders of the President of the Court of 16 February 2018 in Cases C-603/16 P, EU:C:2019:1040, to C-606/16 P, EU:C:2018:156
IDN-203		Notice concerning the judgments of the General Court of 15 September 2016 in Cases T-80/14, T-111/14 to T-121/14 and T-139/14 regarding Council Implementing Regulation (EU) No 1194/2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on Argentinian and Indonesian imports of biodiesel, and following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organisation in disputes DS473 and DS480 (EU — Anti-Dumping Measures on Biodiesel disputes), OJ 2018 C 181, p. 5
IDN-204		Notice of initiation of an anti-subsidy proceeding concerning imports of biodiesel originating in Indonesia, OJ 2018 C 439, p. 16
IDN-205		Commission Implementing Decision (EU) 2019/245 of 11 February 2019 accepting undertaking offers following the imposition of definitive countervailing duties on imports of biodiesel originating in Argentina, OJ 2019 L 40, p. 71

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IDN-206	European Parliament, Governance of the Energy Union (debate), 12 November 2018	European Parliament, Energy efficiency - Governance of the Energy Union - Promotion of the use of energy from renewable sources (debate), 12 November 2018
IDN-207		H. Escobar, "Brazil's deforestation is exploding—and 2020 will be worse", Science 22 (2019)
IDN-208		R. Rajao et al., "The rotten apples of Brazil's agribusiness", Science, Vol. 369:6501, 246
IDN-209		Communication by the European Commission, "EU and Mercosur reach agreement on trade", 28 June 2019
IDN-210		Communication by the European Commission, "European Commission publishes draft Sustainability Impact Assessment for the Trade part of the EU-Mercosur Association Agreement", 8 July 2020
IDN-215		R. Delzeit et al., "Land Use Change under Biofuel Policies and a Tax on Meat and Dairy Products: Considering Complexity in Agricultural Production Chains Matters", Sustainability, Vol. 10 (2018), 419
IDN-223	Finkbeiner Study	M. Finkbeiner, Indirect land use change (iLUC) within life cycle assessment (LCA) – scientific robustness and consistency with international standards (Association of the German Biofuel Industry, 2013)
IDN-226	ISO 14040:2016	ISO 14040:2016 (Environmental management – Life cycle assessment – Principles and framework)
IDN-227	ISO 14044:2017	ISO 14044:2017 (Environmental management – Life cycle assessment – Requirements and guidelines)
IDN-228	ISO 14067:2018	ISO 14067:2018 (Greenhouse gases – Carbon footprint of products – Requirements and guidelines for quantification)
IDN-229	ISO 13065:2015	ISO 13065:2015 (Sustainability criteria for bioenergy)
IDN-258		Extract from the TBT Information Management System (accessed 13 January 2021)
IDN-259		Letter, dated 22 March 2019, from Indonesian Minister of Trade, Mr Lukita, to EU Commissioner for Trade, Ms Malmström
IDN-261		Communication by the European Commission, "Published Initiatives, "High and low Indirect Land-Use Change (ILUC) - risks biofuels, bioliquids and biomass fuels"
IDN-270	ISO/IEC 17007:2010	ISO/IEC 17007:2010 (Conformity assessment – Guidance for drafting normative documents suitable for use for conformity assessment)
IDN-273		United Nations, "World Economic Situation and Prospects 2020 Statistical annex," (United Nations, 2020), Table C "Developing economies by region", pp. 163 – 171.
IDN-274		UNCTADSTAT, "Development status groups and composition: Developing economies"
IDN-283		Letter, dated 27 February 2018, from High Representative and Vice President of the European Commission, Ms. Mogherini, to Ms. Retno Marsudi
IDN-285		Letter, dated 20 March 2018, from Council President Tusk to President Widodo
IDN-286		Letter, dated 24 July 2018, from Commissioner Arias Cañete to President Widodo
IDN-287		Letter, dated 4 June 2019, from Mr Donald Tusk and Mr Jean-Claude Juncker to President Widodo and President bin Mohamad
IDN-288		Letter, dated 11 September 2019, from Commissioner Malmström to Minister Lukita
IDN-290		Deutsche Gesellschaft für Fettwissenschaft, "Physical properties of fats and oils"
IDN-302	DGEC, "Panorama 2019 - Biofuels incorporated in France"	DGEC, "Panorama 2019 - Biofuels incorporated in France" ("Panorama 2019 - Biocarburants incorporé en France"), 2019
IDN-317		Eurostat, Consumption of renewable energy in the transport sector in the EU-27 in 2011-2019
IDN-324		OilWorld, Consumption of palm oil, rapeseed oil and soybean oil per type of use for the years 2010-2020 in the EU-27
IDN-326		Excerpt of ISO/IEC Directives, Part 2 – Principles and rules for the structure and drafting of ISO and IEC documents, ninth edition, 2021, Section 3 - 7

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IDN-331		Guidehouse, Low ILUC-risk certification, Update and learnings from low ILUC pilots, Stakeholder webinar, 19 May 2021
IDN-337		IPCC, 2006 IPCC Guidelines for National Greenhouse Gas Inventories, Volume 4: Agriculture, Forestry and Other Land Use, Chapter 4. Forest Land, p. 4.53, Table 4.7
IDN-345		S. Pratt, "EU biofuel restrictions could benefit canola", 16 April 2021
IDN-346		APROBI, Statement of the Indonesian Industry (APROBI) and Factsheet, 30 June 2021
IDN-355		USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021
IDN-364		Minutes of the third session of 18 December 2018 of the National Assembly XV Legislature, Ordinary session of 2018-2019, p. 105
IDN-368		Commission Decision of 10 June 2010 on guidelines for the calculation of land carbon stocks for the purpose of Annex V to Directive 2009/28/EC (2010/335/EU), OJ L 151, 17 June 2010, pp. 19-41 (excerpts)
IDN-371	Delzeit et al, Kiel Working Paper No. 2203	R. Delzeit, T. Heimann, F. Schünemann and M. Söder, "Who benefits really from phasing out palm oil-based biodiesel in the EU", Kiel Working Paper No. 2203, Kiel Institute for the World Economy, December 2021
IDN-385		Wilmar Europe Trading B.V., Statement on the impact of RED II on the EU biofuel market, 7 December 2021
IDN-393	IPCC Report, "Climate Change and Land"	IPCC Report on "Climate Change and Land" (including the Summary for Policymakers)
IDN-403	Excerpt of ISO/IEC Directives, Part 2 (2021)	Excerpt of ISO/IEC Directives, Part 2, Principles and rules for the structure and drafting of ISO and IEC documents, ninth edition, 2021, Section 13 - 14
IDN-408		Overview of EU producers using palm oil, rapeseed oil and soybean oil for biodiesel (FAME) production
IDN-410	PHG Statement 2022	Permata Hijau Group (PHG), Statement on the impact of EU RED II and the Delegated Act on biodiesel market in the EU, 7 February 2022
IDN-411		Apical, Concerns about EU RED II and the Delegated Act and their effect on biodiesel market in the EU, 7 February 2022
IDN-421		Examples of EU member States' measures restricting oil palm crop-based biofuel – Updated version of Exhibits IDN-369, IDN-329, IDN-315 and IDN-313
IDN-424		Bioenergy International, "Total starts up La Mède Biorefinery", 4 July 2019
COL-12		Kalsom et al (Malaysian Palm Oil Board), The Effect of Soyabean Oil Price Changes on Palm Oil Demand in China

TABLE OF ABBREVIATIONS USED IN THIS REPORT

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

1 INTRODUCTION

1.1 Complaint by Indonesia

1.1. On 9 December 2019, Indonesia requested consultations with the European Union pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Article 14 of the Agreement on Technical Barriers to Trade (TBT Agreement) and Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) regarding the measures and claims set out below.[1]

1.2. Consultations were held on 19 February 2020 but failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 18 March 2020, Indonesia requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, Article 14.1 of the TBT Agreement and Article 30 of the SCM Agreement.[2] At its meeting on 29 July 2020, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Indonesia in document WT/DS593/9, in accordance with Article 6 of the DSU.[3]

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

> To examine, in light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Indonesia in document WT/DS593/9 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 2 November 2020, Indonesia requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 12 November 2020, Deputy Director-General Yonov Frederick Agah, acting in place of the Director-General, composed the Panel as follows:

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

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

1.3 Panel proceedings

1.3.1 General

1.7. After consulting with the parties, the Panel adopted its Working Procedures and timetable on 7 December 2020.[6] Both were modified as needed in the course of the proceedings.

1.8. The Panel held a first substantive meeting with the parties on 26-30 April 2021. A session with the third parties took place on 27 April 2021. The Panel held a second substantive meeting with the parties on 13-15 December 2021. For reasons related to the COVID-19 pandemic, as elaborated further below, both substantive meetings of the Panel with the parties and the third-party session

[1] Request for consultations by Indonesia, WT/DS593/1.
[2] Request for the establishment of a panel by Indonesia, WT/DS593/9 (Indonesia's panel request).
[3] DSB minutes of the meeting held on 29 July 2020, WT/DSB/M/443.
[4] Constitution note of the Panel, WT/DS593/10, para. 2.
[5] Constitution note of the Panel, WT/DS593/10, para. 5.
[6] See the Panel's Working Procedures in Annex A-1.

were held remotely. On 31 January 2023, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 29 September 2023. The Panel issued its Final Report to the parties on 15 December 2023.

1.3.2 Additional Working Procedures on Business Confidential Information (BCI)

1.9. At the request of Indonesia and after consultation with the parties, the Panel adopted Additional Working Procedures[7] on business confidential information (BCI) on 13 January 2021.

1.3.3 Additional Working Procedures for meetings with remote participation

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

1.11. On 29 March 2021, the Panel informed the parties that in light of the ongoing COVID-19 pandemic and the impact of the related sanitary measures on the conduct of the proceedings, it would hold its first substantive meeting with the parties through remote means. To that end, the Panel adopted Additional Working Procedures governing the modalities of meetings with remote participation.[8]

1.12. On 17 November 2021, for the same reasons, the Panel informed the parties that it would also hold its second substantive meeting with the parties through remote means.

1.3.4 Requests for enhanced third-party rights

1.13. Argentina, Brazil, Colombia and Malaysia presented requests to the Panel to be granted enhanced third-party rights in the proceedings.[9] The reasons provided in support of these requests included commercial, economic, and trade interests; systemic interests in the interpretation and application of the covered agreements; the applicability of the measures at issue to and their effects on the requesting Member(s); and providing assistance to the Panel in conducting its examination of highly technical and scientific questions at issue.

1.14. The Panel provided the parties and third parties with an opportunity to comment on these requests. The European Union and Indonesia noted that granting additional participatory rights to third parties rests within the Panel's discretion.[10] They considered that such additional rights are not warranted in this case, and noted that panels have denied such rights[11] or have been reluctant to grant them in the absence of an agreement of the parties to the dispute.[12] Indonesia added that it risked causing a delay in the proceedings and would result in an additional burden on the panel proceedings.[13] Argentina, Brazil, and China supported granting enhanced third-party rights whereas the United States expressed support subject to the agreement of both parties.[14]

1.15. In a communication of 5 March 2021, the Panel declined these requests for enhanced third-party rights. The Panel noted that panels have the discretion to grant third parties participatory rights beyond those guaranteed under Article 10 of the DSU, when circumstances so warrant,

[7] See the Panel's Additional Working Procedures on Business Confidential Information in Annex A-2.
[8] See the Panel's Additional Working Procedures on meetings with remote participation in Annex A-3.
[9] Malaysia submitted its request on 8 January 2021. The requests by Colombia, Argentina, and Brazil were received on 15, 22, and 25 January 2021, respectively.
[10] Indonesia's comments on the requests for enhanced third-party rights (2 February 2021), para. 7; European Union's comments on the requests for enhanced third-party rights (2 February 2021), para. 2.
[11] European Union's comments on the requests for enhanced third-party rights (2 February 2021), para. 4.
[12] Indonesia's comments on the requests for enhanced third-party rights (2 February 2021), para. 7.
[13] Indonesia's comments on the requests for enhanced third-party rights (2 February 2021), paras. 12-13.
[14] Letter from Argentina to the Panel regarding request for enhanced third-party rights (22 January 2021), cover page; Letter from Brazil to the Panel regarding request for enhanced third-party rights (25 January 2021), para. 6; China's comments on the requests for enhanced third-party rights (28 January 2021), para. 2; United States' comments on the requests for enhanced third-party rights (28 January 2021), para. 2.

provided that such rights are consistent with the provisions of the DSU and the requirements of due process.[15] The Panel also noted that panels have usually declined to grant additional third-party rights absent an agreement of the parties[16] and have granted such rights over the objection of one party only in exceptional circumstances.[17] The Panel was also mindful that the granting of further participatory rights to third parties may impose an additional burden on the parties and that the distinction drawn in the DSU between parties and third parties should not be blurred.

1.16. The Panel, having carefully considered the circumstances invoked in the requests for enhanced third-party rights, was not persuaded that they had identified the existence of circumstances warranting a greater level of participation than foreseen in Article 10 of the DSU. The fact that the Panel may consider issues of systemic interest was not sufficient in its view to justify according enhanced third-party rights.[18] In addition, the requesting third parties had not, in the Panel's view, demonstrated the existence of specific economic interests or other compelling circumstances that would require the granting of additional third-party rights over the objection of both parties.[19] In light of the above, the Panel considered that the rights guaranteed under Article 10 of the DSU were sufficient to take account of the third parties' views and interests in the present dispute at that stage. The Panel noted that these rights included the opportunity to present a written submission to the Panel, to make a statement at a session reserved for that purpose during the first substantive meeting with the parties, and to respond to questions from the Panel. Accordingly, the Panel declined the requests by Argentina, Brazil, Colombia, and Malaysia for enhanced third-party rights.

1.17. Malaysia renewed its request on 28 April 2021, citing "new compelling circumstances" that would affect its ability to obtain the establishment of a panel in DS600 and added that "[s]hould the Panel decide not to grant Malaysia enhanced third-party rights, Malaysia respectfully requests that the Panel take the new circumstances related to the impasse of the Dispute Settlement Body into consideration and adjust its timetable in DS593 to allow the arguments made by Indonesia in DS593 and the arguments made by Malaysia in DS600 to be considered concurrently, and for Panel reports in both cases to be issued at the same time."[20] In a communication of 1 June 2021, the Panel noted that on 28 May 2021, the DSB agreed to establish a panel in DS600 as requested by Malaysia[21] and that the circumstance motivating Malaysia's requests had therefore ceased to exist. Accordingly, the Panel maintained its decision of 5 March 2021 and declined Malaysia's renewed request for enhanced third-party rights.[22]

1.3.5 The establishment of a separate panel in DS600

1.18. On 29 July 2021, the panel in *EU and certain member States – Palm Oil (Malaysia)* (DS600) was composed, consisting of the same panelists as this Panel. On 5 August 2021, Malaysia, acting as the complainant in DS600 and as a third party in DS593, requested harmonization of the two Panels' timetables. Following that request, the Panel solicited comments from Indonesia and the European Union.[23] The Panels in both disputes then invited the parties to participate in a joint organizational meeting in order to seek further views of the parties on the possible harmonization

[15] Appellate Body Reports, *US – 1916 Act*, para. 150; *EC – Hormones*, para. 154; and *US – FSC (Article 21.5 – EC)*, para. 243. Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.166.

[16] See Panel Reports, *EC and certain member States – Large Civil Aircraft*, para. 7.167; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 1.8; *Dominican Republic – Safeguard Measures*, para. 1.8; *China – Rare Earths*, para. 7.9; *Argentina – Import Measures*, para.1.24; *India – Solar Cells*, para. 7.35; *US – Washing Machines*, para. 1.12; and *EU – Biodiesel (Indonesia)*, Annex D-2.

[17] Communication from the panel in *Australia – Anti-Dumping Measures on A4 Copy Paper*, WT/DS529/13, para. 1.7.

[18] See Panel Reports, *US – Large Civil Aircraft (2nd complaint)*, para. 7.17; *EC and certain member States – Large Civil Aircraft*, para. 7.167; and *China – Rare Earths*, paras. 7.8-7.9.

[19] The Panel took note of the fact that Malaysia had requested consultations with the European Union, as indicated in the European Union's comments on the requests for enhanced third-party rights (2 February 2021), para. 10. See Request for consultations by Malaysia, WT/DS600/1. The Panel considered that this circumstance did not, in itself, modify its assessment of Malaysia's request for enhanced third-party rights in the present proceedings.

[20] Letter from Malaysia to the Panel regarding its request for enhanced third-party rights (28 April 2021), pp. 1-2.

[21] Request for the establishment of a panel by Malaysia, WT/DS600/6.

[22] Communication from the Panel to the parties (1 June 2021).

[23] Panel communication to the parties regarding panel proceedings in DS593 and DS600 (12 August 2021).

of the two proceedings and the possibility and extent of any exchange of information between the parties.[24] This joint organizational meeting with remote participation was held on 1 September 2021.

1.19. In its written communications and in the statement made at the joint organizational meeting, Malaysia submitted that the appointment by the Director-General of the same panelists to serve on the two Panels established to examine complaints relating to the same matter calls, by virtue of Article 9.3 of the DSU, for harmonization of these Panels' timetables.[25] In Malaysia's view, harmonization of the Panels' timetables would ensure, as far as possible, consistency between the Panel reports and that both complaints are "dispensed with by the Panels effectively and expediently".[26] In practical terms, Malaysia proposed postponing the second substantive meeting in DS593 until it could be held together with the second substantive meeting in DS600.[27] According to Malaysia, harmonizing the timeframes of the two proceedings would not cause undue delays to the proceedings in DS593 and would be fully in line with the letter and the spirit of Article 9.3 of the DSU.[28] Malaysia also considered that granting enhanced third-party rights to the parties to the two disputes would allow exchange of information between the two proceedings.[29]

1.20. The European Union, the respondent in both disputes, expressed support for the request by Malaysia to harmonize the panel proceedings in DS593 and DS600.[30] The European Union pointed out that such harmonization efforts would allow Malaysia and the European Union the time necessary to present and defend their positions and ensure consistency in the outcomes of the two disputes, which relate to the same matter.[31] According to the European Union, the phrase "to the greatest extent possible" in Article 9.3 of the DSU expresses a preference for harmonizing the timetables of disputes that concern the same matter and where the same persons serve as panelists.[32] The European Union observed that "the fact that there might not be a situation in which harmonization was decided which is identical to the present situation" does not preclude harmonizing the proceedings in DS593 and DS600, especially given the disruptive impact of the COVID-19 pandemic on the work of the World Trade Organization (WTO) and its Members.[33] In the European Union's view, "[i]t would be appropriate for the Panels in DS593 and DS600 to delay issuing their final Reports in either case until such time as they have sufficient knowledge of the arguments of the parties in both cases so as to ensure that no inconsistency arises between the two Reports and both proceedings are conducted effectively and in an efficient way."[34] Finally, the European Union reiterated its objection to granting enhanced third-party rights in DS593 to Malaysia, as this, in the European Union's view, would give Malaysia "an unfair advantage against the European Union in DS600".[35]

1.21. Indonesia objected to the request for harmonization of the two proceedings and to providing a possibility for an exchange of information between the parties to the two disputes. Indonesia recognized that panels enjoy a margin of discretion in deciding whether and how timetables should and can be harmonized.[36] Indonesia observed, however, that such a decision should balance various interests, including the need for the prompt settlement of disputes, protecting due process rights of the parties, ensuring an objective assessment of the matter, as well as the preference for efficiency and ensuring consistent rulings where separate panels are established to examine complaints related to the same matter.[37] Indonesia relied on the practice of previous panels and the fact that 10 months separate the establishment of the two Panels to argue that, on balance, harmonizing the two proceedings would unduly interfere with Indonesia's right to a prompt resolution of the dispute, as

[24] Panel communication to the parties regarding the joint virtual meeting in DS593 and DS600 (19 August 2021).
[25] Malaysia's communication (25 August 2021), para. 7; Malaysia's statement at the joint meeting with the Panel, paras. 4-5.
[26] Malaysia's communication (25 August 2021), para. 10; Malaysia's statement at the joint meeting with the Panel, para. 5; and Malaysia's communication (6 September 2021), para. 2.
[27] Malaysia's statement at the joint meeting with the Panel, para. 6.
[28] Malaysia's communication (6 September 2021).
[29] Malaysia's statement at the joint meeting with the Panel, para. 7.
[30] European Union's communications (5 August 2021 and 3 September 2021).
[31] European Union's communication (3 September 2021).
[32] European Union's communication (6 September 2021), para. 1.
[33] European Union's communication (6 September 2021), para. 2.
[34] European Union's communication (6 September 2021), para. 6.
[35] European Union's communication (5 August 2021).
[36] Indonesia's communication (16 August 2021), paras. 8-9.
[37] Indonesia's communication (16 August 2021), paras. 8-9; Indonesia's statement at the joint meeting with the Panel, para. 17; and Indonesia's communication (2 September 2021), para. 3.

reflected in Articles 3.3, 12.8, and 12.9 of the DSU.[38] Indonesia also observed that ordering the exchange of information between the parties to both disputes, or holding a joint meeting would, in effect, result in granting enhanced third-party rights to Malaysia in DS593, to which both Indonesia and the European Union objected.[39] Indonesia argued in this regard that "Article 9.3 of the DSU does not envisage the exchange of information between parties in different disputes concerning a similar matter and being heard by more than one panel".[40]

1.22. Following a careful consideration of the parties' views and after weighing the relevant considerations relating to the possibility of harmonizing the timetables of the proceedings in DS593 and DS600, the Panel considered that under the circumstances, a degree of coordination could at that stage be assured by having the second substantive meeting in DS593 follow the filing of the first written submissions in DS600, without prejudice to any later decisions of the Panels in both disputes relating to further harmonization. In exercising its discretion in this respect, the Panel sought to balance the various objectives of the dispute settlement system, including all parties' due process rights, the objective of prompt settlement of disputes expressed in Article 3.3 of the DSU and the objective of promoting, as relevant, consistency in rulings relating to the same matter, consistent with the spirit of Article 9.3 of the DSU.[41]

1.3.6 Admissibility of Exhibit IDN-91

1.23. In its first written submission, the European Union requested the Panel to issue a preliminary ruling to "order Indonesia to withdraw Exhibit IDN-91 and any reference to that document from Indonesia's first written submission", or, in the alternative, to "discard this document from the Panel's record and in any event … not base any of its findings on that document".[42] The European Union's request was premised on the allegation that the exhibit in question contained internal legal advice not authorized for disclosure and had been obtained in an unlawful manner.[43] Indonesia asked the Panel to reject the European Union's request and contended that the document was fully disclosed by the European Commission in 2018 and has since remained in the public domain.[44]

1.24. Having considered the arguments and evidence presented by both parties, the Panel informed the parties in its communication of 25 May 2021 that it had decided not to exclude Exhibit IDN-91 from the record. In the Panel's view, the European Union had not demonstrated the factual premise of its request, namely that the document in Exhibit IDN-91 was obtained illegally. The Panel observed that at the time it was obtained by Indonesia, Exhibit IDN-91 was lawfully available in the public domain.[45] The Panel further noted that its decision on the admissibility of Exhibit IDN-91 and the information contained therein did not prejudge in any way whether or how the Panel would use that information, or its relevance to the matter before the Panel.

1.3.7 Admissibility of *amicus curiae* brief

1.25. On 25 April 2022, the Panel received from the Veblen Institute an unsolicited *amicus curiae* brief, which had been sent to the director of the Legal Affairs Division of the WTO and then transmitted to the Panel. On 28 April 2022, the Panel forwarded the document to the parties, inviting them to share any views they had in relation to the relevance and admissibility of the brief.[46]

1.26. In its reply, Indonesia noted that individuals and organizations which are not WTO Members have no legal right to make submissions and that panels have no legal duty to accept or consider

[38] Indonesia's communication (16 August 2021), paras. 11-14; Indonesia's statement at the joint meeting with the Panel, paras. 18-21.
[39] Indonesia's statement at the joint meeting with the Panel, para. 25.
[40] Indonesia's statement at the joint meeting with the Panel, para. 25.
[41] Panel communication to the parties regarding the possible harmonization of the panel proceedings in DS593 and DS600 (13 September 2021).
[42] European Union's first written submission, para. 1696.
[43] European Union's first written submission, paras. 1683-1684 and 1688-1693.
[44] Indonesia's comments on the European Union's request for preliminary ruling regarding Exhibit IDN-91, para. 2.
[45] Panel communication to the parties (25 May 2021).
[46] Panel communication to the parties regarding the *amicus curiae* brief (28 April 2022).

unsolicited *amicus curiae* briefs filed by parties other than Members of the WTO.[47] Indonesia recognized that prior panels and the Appellate Body considered Articles 12.1 and 13 of the DSU to afford panels a measure of discretion regarding the acceptance of *amicus curiae* briefs.[48] It observed, however, that a panel should reject such a brief where accepting it "would interfere with the 'fair, prompt and effective resolution of trade disputes', such as where the brief is submitted at a very late stage of the proceedings" and that no *amicus curiae* brief submitted later than the first substantive meeting had been accepted by prior panels.[49] Against this backdrop, the Panel should not, in Indonesia's view, accept the *amicus curiae* brief from the Veblen Institute, because it was submitted at a late stage of the proceedings and considering it would lead to further delays to those proceedings.[50] Indonesia also noted that the content of the brief is not reflected in the parties' submissions or the evidence submitted by the parties to this dispute.[51]

1.27. The European Union emphasized the "comprehensive nature" of a panel's authority to seek information under Article 13 of the DSU, which includes the discretion to accept or reject information and advice submitted in *amicus curiae* briefs.[52] The European Union also pointed out the importance of the Panel consulting the parties to a dispute in the exercise of this discretionary power.[53] In the European Union's view, given that the interim report was still pending at the time of the submission of the *amicus curiae* brief and considering the benefit of harmonizing as much as possible the timetables in this dispute and in *EU and certain member States – Palm Oil (Malaysia)*, accepting the brief would not unduly delay the proceedings.[54] The European Union submitted that the *amicus curiae* brief received from the Veblen Institute addressed some of the delicate and complex legal issues and, given its pertinence to the dispute, should be admitted by the Panel.[55]

1.28. On 25 July 2022, having considered the parties' arguments, the Panel informed them of its decision not to admit the *amicus curiae* brief submitted by the Veblen Institute, given its late filing and in the interest of avoiding undue delays to the panel process as prescribed in Article 12.2 of the DSU.[56] The Panel observed that Article 13 of the DSU provided it with discretionary authority to accept and consider or to reject information and advice submitted in the *amicus curiae* brief. The Panel further noted that the timing of an *amicus curiae* brief has been an important consideration in prior adjudicators' decisions on whether to admit or reject such briefs, taking into account the opportunities for the parties and third parties to comment on such briefs. Turning to the facts of the case, the Panel noted that it had received the *amicus curiae* brief after the filing of all submissions and more than four months after the second substantive meeting of the Panel with the parties. The Panel considered that admitting the brief at that point would require providing each party with a further opportunity to comment on the arguments contained therein and that this was not justified in the case at hand.

2 FACTUAL ASPECTS

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

[47] Indonesia's communication (6 May 2022) (referring to Appellate Body Reports, *US – Shrimp*, para. 101; *US – Lead and Bismuth II*, paras. 40-41).
[48] Indonesia's communication (6 May 2022) (referring to Appellate Body Reports, *US – Shrimp*, paras. 104-105; and *EC – Sardines*, para. 160).
[49] Indonesia's communication (6 May 2022) (referring to Appellate Body Reports, *EC – Sardines*, para. 167; and *EC – Seal Products*, para. 1.15; and Panel Reports, *EC – Seal Products*, para. 1.17; and *Australia – Tobacco Plain Packaging*, para. 1.48).
[50] Indonesia's communication (6 May 2022).
[51] Indonesia's communication (6 May 2022).
[52] European Union's communication (6 May 2022) (referring to Appellate Body Report, *US – Shrimp*, paras. 104 and 108).
[53] European Union's communication (6 May 2022).
[54] European Union's communication (6 May 2022).
[55] European Union's communication (6 May 2022).
[56] Panel communication to the parties regarding the *amicus curiae* brief (25 July 2022).

2.2. The measures at issue comprise measures adopted by the European Union and by France. The EU measures challenged by Indonesia[57] are part of the European Union's renewable energy policy, and, in particular what the European Union refers to as its "Biofuels regime" (EU Biofuels regime).[58] The Panel therefore first describes below this regulatory context in which these measures were adopted, before turning to a description of the specific aspects challenged by Indonesia.[59] Finally, the Panel briefly describes some of the key concepts relevant to an understanding of these measures.

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

2.1 Overall EU-wide regulatory context

2.4. The European Union identifies several legal instruments as comprising the EU Biofuels regime, including[60]:

a. Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), OJ 2018 L 328, p. 80 (RED II)[61];

b. Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, OJ 2018 L 328, p. 1 (Regulation (EU) 2018/1999)[62]; and

c. Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high-carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels, OJ 2019 L 133, p. 1 (Delegated Regulation).[63]

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

2.2 Background to the specific measures at issue

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

2.6. The European Parliament and the Council adopted Directive 2003/30/EC "on the promotion of the use of biofuels or other renewable fuels for transport" on 8 May 2003.[64] Directive 2003/30/EC established the legal framework in relation to biofuels and other renewable fuels in the transport sector.[65]

[57] See Indonesia's panel request, paras. 13, 18, and 31.
[58] European Union's first written submission, para. 25.
[59] The descriptions contained in this section are without prejudice to any of the Panel's subsequent determinations with respect to the identification or contents of the specific measures at issue in this dispute.
[60] European Union's first written submission, para. 26.
[61] RED II, (Exhibit IDN-19).
[62] Regulation (EU) 2018/1999, (Exhibit IDN-181).
[63] Delegated Regulation, (Exhibit IDN-97).
[64] Directive 2003/30/EC, (Exhibit EU-9).
[65] European Union's first written submission, para. 196. The European Union refers to it as the "first 'biofuels' directive".

2.7. Directive 2003/30/EC stated that there is a link between energy consumption in the transport sector and greenhouse gas (GHG) emissions and that increased use of biofuels is a means to address those concerns.[66] Moreover, it contained indicative targets for EU member States as regards the quantities of biofuels that should be placed on their energy markets[67] and established that mandatory targets would be considered if the national indicative targets were not achieved.[68]

2.8. Directive 2003/30/EC was replaced by Directive 2009/28/EC on the promotion of the use of energy from renewable sources (RED I).[69] RED I was adopted by the European Parliament and the European Council on the basis of a proposal submitted by the European Commission.[70]

2.9. RED I introduced overall binding targets for the share of energy from renewable sources in the gross final consumption of energy in EU member States, including in the transport sector.[71]

2.10. In RED I, "biofuel" is defined as "liquid or gaseous fuel for transport produced from biomass" and "energy from renewable sources" is defined as "energy from renewable non-fossil sources".[72] RED I introduces a 20% mandatory target for the overall share of energy from renewable sources in the European Union's gross final consumption of energy by 2020[73],and a 10% mandatory target for energy from renewable sources in the final consumption of energy in all forms of transport in an EU member State by the same date.[74]

2.11. RED I also established, in respect of each EU member State, a national overall target for the share of energy from renewable sources in 2020.[75] RED I prescribed that EU member States adopt national renewable energy action plans for the purpose of meeting those targets.[76]

2.12. Under RED I, biofuels were only eligible to be taken into account in achieving these targets if they met certain sustainability criteria and GHG emissions savings levels.[77] The introduction of the sustainability criteria is explained in Recital 69 of RED I, partially reproduced below:

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

2.13. Article 17 of RED I set out the sustainability criteria for biofuels and bioliquids. In order to meet the sustainability criteria, biofuels were required to represent a 35% reduction in GHG emissions as compared with fossil fuels.[78] In addition, raw material obtained from land with high biodiversity value could not be taken into account for the purposes of meeting the targets.[79] Article 17(3) stated that land with "high biodiversity value" is land with the status of either forest or

[66] Directive 2003/30/EC, (Exhibit EU-9), Recitals (3) to (6), and (22).
[67] European Union's first written submission, para. 199; Directive 2003/30/EC, (Exhibit EU-9), Article 3(1).
[68] Directive 2003/30/EC, (Exhibit EU-9), Article 4(2); Indonesia's second written submission, para. 402.
[69] RED I, (Exhibit IDN-18).
[70] European Union's first written submission, para. 205; European Parliament Report, FINAL A5-0244/2002, (Exhibit EU-10).
[71] Articles 3(1) and 3(4), Annex I, RED I.
[72] Article 2(i) and (a) of RED I.
[73] Article 3(1) of RED I.
[74] Article 3(4) of RED I.
[75] Article 3(1) of and Annex I to RED I.
[76] Article 4(1) of RED I.
[77] Article 17(2) of RED I.
[78] Article 17(2) of RED I.
[79] Article 17(3) of RED I.

other wooded land, areas designated by law for nature protection purposes and highly biodiverse grassland meeting certain criteria. Pursuant to Article 17(4) of RED I, biofuels may not be counted towards the targets if produced from raw materials from land with high-carbon stock. Lastly, Article 17(5) provided that biofuels would not be counted if made from raw material obtained from land that was peatland.

2.14. In 2009, the European Council and the Parliament adopted Directive 2009/30/EC (Fuel Quality Directive). The Fuel Quality Directive aimed at addressing the GHG intensity of different fuels by obliging EU member States to require suppliers to reduce life cycle GHG emissions per unit of energy from fuel and energy supplied by up to 10% by 31 December 2020.[80] Furthermore, the biofuels covered by the Fuel Quality Directive are subject to the same sustainability criteria as under RED I. Similarly, compliance with the criteria was a precondition for biofuels to count towards the GHG emissions reductions targets.[81]

2.15. In 2015, RED I and the Fuel Quality Directive were amended by Directive 2015/1513 (ILUC Directive).[82] One of the stated purposes of the ILUC Directive was to "address the impact of indirect land-use change given that current biofuels are mainly produced from crops grown on existing agricultural land".[83] The ILUC Directive also implemented the outcomes of a review of ILUC risk contemplated by Article 19 of RED I.[84] The preamble of the ILUC Directive stated that when indirect land use change involves the conversion of land with high-carbon stock, it can lead to significant GHG emissions and as such it could negate some or all of the GHG emission savings of individual biofuels.[85]

2.16. In addition, RED I contemplated addressing GHG emissions relating to ILUC at a later stage, following a review of the impact of ILUC on GHG emissions.[86] A review was conducted in 2012, which included an impact assessment for different policy options to address ILUC in the context of the European Union's policy promoting renewable energy sources and limiting GHG emissions.[87] This was the main objective of the ILUC Directive, which amended RED I and defined ILUC for the purposes of the EU Biofuels regime.[88] ILUC was described as follows in the ILUC Directive:

> Where pasture or agricultural land previously destined for food and feed markets is diverted to biofuel production, the non-fuel demand will still need to be satisfied either through intensification of current production or by bringing non-agricultural land into production elsewhere. The latter case constitutes [ILUC] and when it involves the conversion of land with high carbon stock it can lead to significant greenhouse gas emissions. […][89]

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

> To *prepare for the transition towards advanced biofuels and minimise the overall indirect land-use change impacts*, it is appropriate to limit the amount of biofuels and bioliquids

[80] Fuel Quality Directive, (Exhibit EU-16), Article 1(5), p. 12.
[81] European Union's first written submission, para. 226; Fuel Quality Directive, (Exhibit EU-16), Article 1(6), p. 18.
[82] ILUC Directive, (Exhibit IDN-86).
[83] ILUC Directive, (Exhibit IDN-86), Recital (4), p. 2.
[84] European Union's first written submission, para. 228; see also ILUC Directive, (Exhibit IDN-86), Recitals (16) and (28), pp. 4 and 6.
[85] ILUC Directive, (Exhibit IDN-86), Recitals (4) and (5), p. 2.
[86] Indonesia's first written submission, para. 133; European Union's first written submission, para. 221. See also RED I, (Exhibit IDN-18), Article 19(6), p. 41, which states in relevant part as follows:
> The Commission shall, by 31 December 2010, submit a report to the European Parliament and to the Council reviewing the impact of indirect land-use change on greenhouse gas emissions and addressing ways to minimise that impact. The report shall, if appropriate, be accompanied, by a proposal, based on the best available scientific evidence, containing a concrete methodology for emissions from carbon stock changes caused by indirect land-use changes, ensuring compliance with this Directive, in particular Article 17(2).

[87] Impact Assessment (2012), (Exhibit IDN–135).
[88] Indonesia's first written submission, para. 135; European Union's first written submission, para. 228.
[89] Indonesia's first written submission, para. 227 (referring to ILUC Directive (Exhibit IDN-86), recital (4), p. 2).

> produced from cereal and other starch-rich crops, sugars and oil crops and from crops grown as main crops primarily for energy purposes on agricultural land that can be counted towards targets set out in this Directive, without restricting the overall use of such biofuels and bioliquids. […][90]

2.18. The ILUC Directive also envisaged that "provisional mean values of estimated ILUC emissions" should be included in the reporting of GHG emissions from biofuels and bioliquids under RED I[91] and that the European Commission should review the effectiveness of the measures introduced by the ILUC Directive "based on the best and latest available scientific evidence, in limiting the impact of indirect land-use change greenhouse gas emissions and addressing ways to further minimize that impact".[92]

2.19. The ILUC Directive introduced an amendment to RED I to require EU member States to limit the amount of biofuels and bioliquids produced from cereal and other starch-rich crops, sugars and oil crops and from crops grown as main crops primarily for energy purposes on agricultural land to 7% of the final consumption of energy in transport in the EU member State in 2020.[93] Furthermore, additional definitions were established, including for "low indirect land-use change-risk biofuels".[94]

2.20. In November 2016, the European Commission presented a proposal for a "recast" Directive. This proposal includes an impact assessment, in which various policy options are envisaged, "to promote the decarbonisation and energy diversification of transport fuels, while addressing Indirect Land Use Change (ILUC) associated to food-based biofuels".[95]

2.21. In 2017, a study report (Study Report (2017)) was submitted by the European Commission pursuant to RED I as amended by the ILUC Directive, "to gather comprehensive information on, and to provide systematic analysis of the latest available scientific research and the latest available scientific evidence on indirect land use change (ILUC) greenhouse gas emissions associated with production of biofuels and bioliquids".[96]

2.2.2 RED II

2.22. RED II is a "recast" of RED I.[97] As RED I did, RED II establishes a common framework for the promotion of renewable energy in the European Union.[98]

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

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

[90] Recital 17 to the ILUC Directive. (emphasis added) The same text is also found in Recital 80 to RED II, with the addition of a reference to "direct and indirect" land-use change impacts. (See also Indonesia's first written submission, para. 136).
[91] Recital 21 to the ILUC Directive.
[92] Recital 34 to the ILUC Directive.
[93] Article 2(2)(b)(iv) of the ILUC Directive.
[94] Article 2(1)(w) of the ILUC Directive.
[95] RED II Proposal, (Exhibit IDN-88), pp. 16-17.
[96] Study Report (2017), (Exhibit IDN-87).
[97] European Union first written submission, para. 246.
[98] RED II, (Exhibit IDN-19).

2.2.2.1 General requirements

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

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

2.25. RED II requires EU member States to ensure that at least 32% of the energy consumed in the European Union by 2030 is energy from renewable sources.[99] Member States are to achieve this target collectively through national contributions set out in integrated national energy and climate plans.[100] Article 3(1) of RED II provides that:

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

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

(a) gross final consumption of electricity from renewable sources;

(b) gross final consumption of energy from renewable sources in the heating and cooling sector; and

(c) final consumption of energy from renewable sources in the transport sector.

2.27. With regard to (a), (b) and (c) above, gas, electricity and hydrogen from renewable sources shall be considered only once for the purposes of calculating the share of gross final consumption of energy from renewable sources.[101]

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

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

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

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

[99] Article 3(1) of RED II.
[100] Article 3(2) of RED II.
[101] Article 7(1) of RED II.

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

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

2.30. Biofuels are defined as "liquid fuel for transport produced from biomass".[102] Bioliquids are defined as "liquid fuel for energy purposes other than for transport, including electricity and heating and cooling, produced from biomass".[103] Biomass fuels are defined as "gaseous and solid fuels produced from biomass".[104]

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

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

2.2.2.3 Requirements applicable to biofuels, bioliquids and biomass fuels

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

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

a. shall not be made from raw material obtained from land with a high biodiversity value, namely land that has the status of either a primary forest and other wooded land, highly biodiverse forest and other wooded land which is species-rich and not degraded and areas designated for nature protection purposes; or for the protection of rare, threatened or endangered ecosystems or species recognised by international agreements unless evidence is provided that the production of that raw material did not interfere with those nature protection purposes.[105]

b. shall not be made from raw material obtained from land with high-carbon stock, namely land that had one of the following statuses in January 2008 and no longer has that status[106]:

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

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

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

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

c. shall not be made from raw material obtained from land that was peatland in January 2008, unless evidence is provided that the cultivation and harvesting of that raw material does not involve drainage of previously undrained soil.[107]

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

> 10. The greenhouse gas emission savings from the use of biofuels, bioliquids and biomass fuels taken into account for the purposes referred to in paragraph 1 shall be:
>
> (a) at least 50 % for biofuels, biogas consumed in the transport sector, and bioliquids produced in installations in operation on or before 5 October 2015;
>
> (b) at least 60 % for biofuels, biogas consumed in the transport sector, and bioliquids produced in installations starting operation from 6 October 2015 until 31 December 2020;
>
> (c) at least 65 % for biofuels, biogas consumed in the transport sector, and bioliquids produced in installations starting operation from 1 January 2021;
>
> (d) at least 70 % for electricity, heating and cooling production from biomass fuels used in installations starting operation from 1 January 2021 until 31 December 2025, and 80 % for installations starting operation from 1 January 2026.
>
> An installation shall be considered to be in operation once the physical production of biofuels, biogas consumed in the transport sector and bioliquids, and the physical production of heating and cooling and electricity from biomass fuels has started.
>
> The greenhouse gas emission savings from the use of biofuels, biogas consumed in the transport sector, bioliquids and biomass fuels used in installations producing heating, cooling and electricity shall be calculated in accordance with Article 31(1).

2.36. To determine the GHG emission savings of biofuels, the European Union applies a life cycle analysis (LCA). Annex V of RED II details the LCA methodology for calculating GHG emissions from the production and use of biofuels.[108] This methodology includes consideration of the GHG emissions from carbon stock changes caused by land use change (LUC).[109] These LUC-related emissions are calculated by considering: (1) the carbon stock per unit area associated with the reference land use (prior to the land use change); (2) the carbon stock per unit area associated with the actual land

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

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

[109] See Annex V of RED II.

use; (3) the productivity of the crop (measured as biofuel energy per unit area); and (4) whether biomass is obtained from restored degraded land.[110]

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

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

and that:

> For those purposes, they shall require economic operators to use a mass balance system […][111] The mass balance system shall ensure that each consignment is counted only once in point (a), (b) or (c) of the first subparagraph of Article 7(1) for the purposes of calculating the gross final consumption of energy from renewable sources and shall include information on whether support has been provided for the production of that consignment, and if so, on the type of support scheme.

2.38. RED II further distinguishes between "advanced biofuels", defined as biofuels that are produced from the feedstock listed in Part A of Annex IX of RED II[112], and those biofuels not produced from feedstock listed in Part A of Annex IX of RED II. Biofuels made from food and feed crops are not listed in Part A of Annex IX. These are so-called "conventional" biofuels.

2.39. The calculation rules for biofuels include:

a. a minimum target share of advanced biofuel set at 0.2% of the final consumption of energy in the transport sector in 2022, 1% by 2025 and 3.5% by 2030[113]; and

b. a maximum share for biofuels made from food and feed crops.[114]

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[110] See Annex V(C)(7) of RED II. See also below section 2.6 on Conventional biofuel production and land use change.

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

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

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

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

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

2.3 The specific EU measures at issue

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

2.42. Food and feed crops are defined as "starch-rich crops, sugar crops or oil crops produced on agricultural land as a main crop excluding residues, waste or ligno-cellulosic material and intermediate crops, such as catch crops and cover crops, provided that the use of such intermediate crops does not trigger demand for additional land".[115]

2.43. These rules set limits on the contribution that such biofuels can make to the consumption targets described above.[116] The rules described below are the main subject-matter of this dispute.

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

2.44. The limit on the contribution that biofuels made from food or feed crops may be counted as making to meeting EU renewable energy targets was first introduced in the ILUC Directive[117] and was maintained in RED II.

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

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

2.46. These rules are referred to by Indonesia as "the 7% limitation"[118] and by the European Union as a "7% maximum share".[119]

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

[116] See para. 2.28 above.

[117] See para. 2.16 above.

[118] Indonesia's first written submission, para. 137.

[119] European Union's first written submission, para. 432.

2.3.2 The high ILUC-risk cap and phase-out

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

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

2.49. Indonesia refers to these two rules together as "the high ILUC-risk cap and phase-out"[120] or "the cap and phase-out".[121]

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

> For the calculation of a Member State's gross final consumption of energy from renewable sources referred to in Article 7 and the minimum share referred to in the first subparagraph of Article 25(1), the share of high indirect land-use change-risk biofuels, bioliquids or biomass fuels produced from food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed shall not exceed the level of consumption of such fuels in that Member State in 2019, unless they are certified to be low indirect land-use change-risk biofuels, bioliquids or biomass fuels pursuant to this paragraph.
>
> From 31 December 2023 until 31 December 2030 at the latest, that limit shall gradually decrease to 0%.
>
> By 1 February 2019, the Commission shall submit to the European Parliament and to the Council a report on the status of worldwide production expansion of the relevant food and feed crops.
>
> By 1 February 2019, the Commission shall adopt a delegated act in accordance with Article 35 to supplement this Directive by setting out the criteria for certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels and for determining the high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high-carbon stock is observed. The report and the accompanying delegated act shall be based on the best available scientific data.
>
> By 1 September 2023, the Commission shall review the criteria laid down in the delegated act referred to in the fourth subparagraph based on the best available scientific data and shall adopt delegated acts in accordance with Article 35 to amend such criteria, where appropriate, and to include a trajectory to gradually decrease the contribution to the Union target set in Article 3(1) and to the minimum share referred to in the first subparagraph of Article 25(1), of high indirect land-use change-risk biofuels, bioliquids and biomass fuels produced from feedstock for which a significant expansion of the production into land with high-carbon stock is observed.

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

> Article 3
>
> Criteria for determining the high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed

[120] Indonesia's first written submission, para. 121.
[121] Indonesia's first written submission, para. 179.

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

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

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

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

where

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

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

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

PF = productivity factor.

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

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

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

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

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

Source: The Delegated Regulation.

2.53. A Status Report presented together with the Delegated Regulation provides information linked to the criteria set out in the Delegated Regulation.[122] In particular, the Status Report explains the data on feedstock expansion and the sources of this data, contained in the Annex of the Delegated Regulation, and elaborates upon the methodology used and the design of the formula.[123]

2.54. Palm oil-based biofuel is currently the only conventional biofuel that, on the application of the formula, qualifies as "high-ILUC-risk".[124] This result was obtained by considering the double threshold of the average annual expansion of the global production area as per Article 3(a) of the Delegated Regulation, and by applying the formula as per Article 3(b) of the Delegated Regulation.[125] The data on feedstock expansion can be found in the Annex of the Delegated Regulation. Table 2, prepared by the Panel based on information contained in the Delegated Regulation, illustrates these calculations by applying the formula to each feedstock.

Table 2: Illustration of calculations under the Delegated Regulation

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

Source: The Delegated Regulation

[122] Status Report (2019), (Exhibit IDN-56).
[123] The parties disagree on the scientific basis on which the Status Report relies.
[124] European Union's first written submission, paras. 115 and 602; Indonesia's first written submission, para. 178.
[125] When the formula is applied, the data on feedstock expansion, reported in the Status Report, are considered as variables that are combined with the fixed values and constants (the productivity factor and the 2.6 peat multiplier).

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

> Article 7
>
> Monitoring and Review
>
> The Commission shall, by 30 June 2021, review all relevant aspects of the report on feedstock expansion, in particular the data on feedstock expansion, as well as the evidence on the factors justifying the small holders provision in Article 5(1), and, if appropriate, amend this Regulation. This revised report shall be submitted to the European Parliament and the Council and become the basis for the application of the criteria set out in Article 3.
>
> The Commission shall review thereafter the data included in the report in light of evolving circumstances and latest available scientific evidence.

2.56. Article 7 of the Delegated Regulation thus provides that the list of crops that are considered as "high ILUC-risk" is reviewed based on newly collected scientific data to be included in a revised and updated report. The monitoring and review mechanism establishes the commitment to collect and use the latest available scientific data[126], and to update the variables in the calculation of the formula in Article 3 and the criteria for low ILUC-risk certification under Article 5(1). In other words, Article 7 establishes the commitment to collect the newest available scientific data, based on which the list of crops that are qualified as "high ILUC-risk" following the application of the formula may be updated, as well as the criteria for low ILUC-risk certification for smallholders.

2.3.3 Low ILUC-risk certification

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

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

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

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

> Article 4
>
> General criteria for certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels
>
> 1. Biofuels, bioliquids and biomass fuels may only be certified as low indirect land-use change-risk fuels if all the following criteria are met:

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

(a) the biofuels, bioliquids and biomass fuels comply with the sustainability and greenhouse gas emissions saving criteria set out in Article 29 of Directive (EU) 2018/2001;

(b) the biofuels, bioliquids and biomass fuels have been produced from additional feedstock obtained through additionality measures that meet the specific criteria set out in Article 5;

(c) the evidence needed to identify the additional feedstock and substantiate claims regarding the production of additional feedstock is duly collected and thoroughly documented by the relevant economic operators.

2. The evidence in point (c) of paragraph 1 shall at least include information on the additionality measures taken to produce additional feedstock, the delineated areas on which these measures have been applied and the average yield achieved from the land where these measures have been applied over the 3-year period immediately preceding the year when the additionality measure was applied.

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

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

Article 5

Additionality measures

1. Biofuels, bioliquids and biomass fuels may only be certified as low indirect land-use change-risk fuels if:

(a) the additionality measures to produce the additional feedstock meet at least one of the following conditions:

(i) they become financially attractive or face no barrier preventing their implementation only because the biofuels, bioliquids and biomass fuels produced from the additional feedstock can be counted towards the targets for renewable energy under Directive 2009/28/EC or Directive (EU) 2018/2001;

(ii) they allow for cultivation of food and feed crops on abandoned land or severely degraded land;

(iii) they are applied by small holders;

(b) the additionality measures are taken no longer than 10 years before the certification of the biofuels, bioliquids and biomass fuels as low indirect land-use change-risk fuels.

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

Article 6

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

1. For the purpose of certifying low indirect land-use change-risk biofuels, bioliquids and biomass fuels, economic operators shall:

(a) submit reliable information substantiating their claims ensuring that all requirements set out in Articles 4 and 5 have been duly fulfilled;

(b) arrange for an adequate standard of independent auditing of the information submitted and an adequate level of transparency reflecting the need for public scrutiny of the auditing approach; and

(c) provide evidence that audits are conducted.

2. The auditing shall verify that information submitted by economic operators is accurate, reliable and protected against fraud.

3. In order to demonstrate that a consignment is to be considered as a low indirect land-use change-risk biofuel, bioliquid or biomass fuel, economic operators shall use the mass balance system set out in Article 30(1) of Directive (EU) 2018/2001. Voluntary schemes may be used to demonstrate compliance with the criteria set out in Articles 4 to 6 in accordance with Article 30 of Directive (EU) 2018/2001.

2.63. On 14 June 2022, the European Commission, in accordance with Article 30(8) of RED II, adopted Implementing Regulation (EU) 2022/996 on rules to verify sustainability and GHG emissions saving criteria and low ILUC-risk criteria.[127] The absence of an implementing regulation on low ILUC-risk certification (or other specific implementing rules necessary to make low ILUC-risk certification operational) up until this date is one ground on which Indonesia challenges low ILUC-risk certification.

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

2.4 Summary of main relevant rules in RED II

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

a. an EU-wide binding consumption target of at least 32% renewable energy by 2030, to be achieved collectively by EU member States[128];

b. an overall target for the share of renewable energy to be used in the transport sector is set at 10% by 2020 and 14% by 2030[129];

c. biofuels, bioliquids and biomass fuels can only be taken into account in the calculation of this target if they fulfil certain sustainability and GHG emission savings criteria[130];

d. the contribution of biofuels made from food and feed crops (i.e. "crop-based" or "conventional" biofuels) to meeting these targets shall not exceed 1 percentage point more than the share of such fuels in the final consumption of energy in the transport sector in

[127] C/2022/3740, OJ L 168, 27.6.2022, p. 1–62. Indonesia provided this information in its comments on the draft descriptive part of this Report but did not submit the document itself.
[128] Article 3(1) of RED II; European Union's first written submission, para. 28.
[129] Article 25(1) of RED II.
[130] Article 7(1) of RED II.

the relevant EU member State in 2020, up to a maximum contribution of 7% of the total energy consumed in the transport sector ("7% limitation" or "7% maximum share")[131];

e. where the share of biofuels, bioliquids, and biomass fuels produced from food and feed crops consumed in transport in a member State is limited to less than 7% or a member State decides to limit it further, that member State may reduce the overall target described at b. above accordingly, by a maximum of 7%[132];

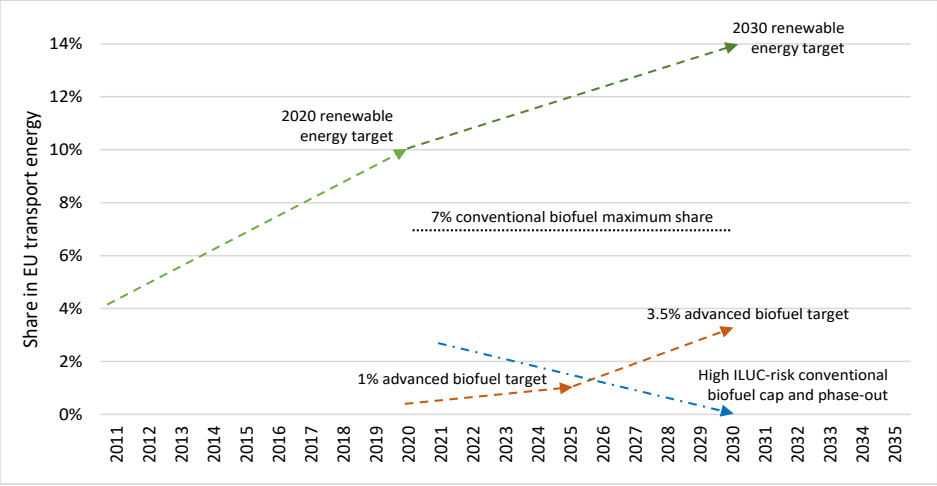
f. a minimum target share of "advanced" biofuel as a percentage of the total energy consumed in the transport sector is also established, which is set at 0.2% in 2020, 1% by 2025 and 3.5% by 2030[133];

g. the contribution to the targets of biofuels made from food or feed crops for which a significant expansion of the production area into land with high carbon stock is observed ("high ILUC-risk biofuels") shall not exceed the level of consumption of such fuels in that member State in 2019 (the high ILUC-risk cap); as of 31 December 2023, this contribution will have to be gradually reduced to 0% by 2030 at the latest (the high ILUC-risk phase-out)[134];

h. high ILUC-risk biofuels meeting certain requirements may be certified as low ILUC-risk ("low ILUC-risk certification") are not subject to the cap and/or phase-out otherwise applicable to biofuels produced from high ILUC-risk crops.[135]

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

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



Source: Based on the provisions of RED II

2.5 French TIRIB measure

2.67. The specific French measure challenged by Indonesia concerns an annual tax payable by entities that release fuel for consumption within the territory of France.[136] The tax is known as the

[131] Article 26(1) of RED II.
[132] Article 26(1) of RED II.
[133] Article 25(1) of RED II.
[134] Article 26(2) of RED II; Status Report (2019), (Exhibit IDN-56), p.5.
[135] Status Report (2019), (Exhibit IDN-56), p.5.
[136] Indonesia's panel request, paras. 41-46.

TIRIB (*Taxe Incitative Relative à l'Incorporation de Biocarburant,* meaning: incentive tax concerning the incorporation of biofuels).[137]

2.68. As described by the parties, the TIRIB is set out in the following legal instruments[138]:

a. Article 266 *quindecies* of the French Customs Code, as modified by Articles 60, 212 and 213 of the Law No. 2019-1479 on 28 December 2019 on 2020 finances;

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

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

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

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

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

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

2.69. Entities that release fuel for consumption within the territory of France are liable to pay the TIRIB as an additional tax that varies in relation to the extent to which the energy content of the fuel released achieves established incorporation targets for qualifying energy sources, as detailed below.[139] The TIRIB is applied in addition to the value added tax (VAT) and the internal consumption tax on energy products (TICPE).[140] Unlike the TIRIB, which taxes fuel released for consumption at a variable rate according to the fuel energy source content, the TICPE is directly proportional to the volume of taxed fuel regardless of content and the VAT is directly proportional to the total value of the fuel released for consumption.[141]

2.70. The amount of the TIRIB depends on the amount and composition of the fuel released by the entity and is determined according to the following formula[142]:

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

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

rate is a periodically adjustable amount of euros per hectolitre

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

[137] Indonesia's first written submission, para. 189; European Union's first written submission, para. 1362.

[138] Indonesia's first written submission, paras. 191-192 (referring to Exhibits IDN-102, IDN-103, IDN-104, IDN-105, IDN-106, IDN-107, IDN-108.

[139] Indonesia's first written submission, paras. 197-199; European Union's first written submission, para. 1379.

[140] Indonesia's first written submission, paras. 194-195; European Union's first written submission, para. 1371 (referring to Exhibit IDN-117). Prior to releasing fuel for consumption in France, and entity may purchase and store fuels from various sources to be blended into a fuel mix to be released for consumption without incurring these fuel taxes under a regime in which fuel in designated warehouses is suspended from tax prior to release for consumption. Indonesia's first written submission, paras. 194-195 (referring to Exhibits IDN-114, IDN-115, IDN-116).

[141] European Union's first written submission, paras. 1371-1373.

[142] Indonesia's first written submission, paras. 198-199; European Union's first written submission, para. 1379.

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

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

2.71. The rate and the incorporation target percentages are specified in Part IV of Article 266 *quindecies* of the Customs Code.[143] In 2020, the applicable rate was EUR 101 per hectolitre, and this was increased to EUR 104 per hectolitre in 2021.[144] In 2020, the incorporation target was 8% for diesel and 8.2% for petrol, and the petrol incorporation target was increased to 8.6% in 2021.[145]

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

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

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

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

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

2.73. Article 266 *quindecies* of the French Customs Code provides that, for the purposes of the TIRIB, qualifying sources of energy in the fuel mix for achieving the incorporation target are renewable energy sources and that energy from biofuels is renewable if it meets the sustainability and GHG emission savings criteria that are in line with RED II and the Delegated Regulation.[146]

2.74. Article 266 *quindecies* of the French Customs Code, provides that "palm oil-based products are not considered to be biofuels" starting from 1 January 2020.[147] The Circular of 18 August 2020 states that palm oil-based products are excluded, from 2020, from the full benefit of the tax advantage regardless of their mode of production.[148] The Circular of 12 June 2019, which preceded and was replaced by the Circular of 18 August 2020, stated that this was to exclude products based on palm oil not only from the scope of biofuels but also from that of renewable energy.[149] The exclusion of palm oil-based biofuel from qualifying sources of energy for TIRIB purposes was presented as a measure taken for environmental purposes.[150]

2.75. Additionally, Law No. 2020-935 of 30 July 2020 on amending finances for 2020 provided that the energy derived from certain biofuel (FAME with a cold-filter plugging point (CFPP) of at most -

[143] Indonesia's first written submission, para. 197; Article 266 quindecies of the French Customs Code (Code des douanes), (Exhibit IDN-102).

[144] Indonesia's first written submission, para. 197, Table No. 10.

[145] Ibid.

[146] Indonesia's first written submission, para. 201; European Union's first written submission, para. 1366, European Union's response to Panel question No. 9, para. 40; Indonesia's second written submission, paras. 1412-1413.

[147] Indonesia's first written submission, para. 210 (referring to Exhibit IDN-102, p.2).

[148] Indonesia's first written submission, para. 210 (referring to Exhibit IDN-108).

[149] Indonesia's first written submission, para. 214 (referring to Exhibit IDN-109).

[150] Indonesia's first written submission, para. 218; European Union's first written submission, paras. 1387-1388 (referring to Exhibit EU-44).

10°C) would be counted at 120% of its actual value for the purposes of contributing to the incorporation target with respect to the calculation of the TIRIB payable between 1 August 2020 and 31 December 2020.[151] The Circular of 18 August 2020 states that to qualify for the 120% of actual value treatment the certificates of incorporation "must indicate that the biofuels received are not produced from palm oil or meet a CFPP of not more than -10°C for FAME".[152]

2.6 Conventional biofuel production and land use change

2.76. A key concept underlying the definitions of "high ILUC-risk" and "low ILUC-risk" used in the EU measures described above is land use change (LUC).[153] Land use change can be *direct* (DLUC) or *indirect* (ILUC).[154]

2.6.1 Land use change (LUC)

2.77. According to a Report on "Climate Change and Land" by the Intergovernmental Panel on Climate Change (IPCC) the term "land use" refers to "[t]he total of arrangements, activities and inputs applied to a parcel of land."[155] This IPCC Report, furthermore, describes the term "land use change" as "[t]he change from one land use category to another".[156]

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

> human use or management of land within the relevant boundary.
>
> Note 1 to entry: In this document, the relevant boundary is the boundary of the system under study.
>
> Note 2 to entry: Land use is often referred to as 'land occupation' in life cycle assessment (LCA).[157]

2.6.2 Direct land use change (DLUC)

2.79. ISO 14067:2018 defines Direct Land Use Change (DLUC) as: a "change in the human use of land within the relevant boundary" where "the relevant boundary is the boundary of the system under study". It also notes that "land use change happens when there is a change in the land-use category as defined by the IPCC (e.g., from forest land to cropland)."[158]

2.6.3 Indirect land use change (ILUC)

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

2.81. ILUC is described as follows in Recital 81 of RED II: "Indirect land-use change occurs when the cultivation of crops for biofuels, bioliquids and biomass fuels displaces traditional production of crops for food and feed purposes. Such additional demand increases the pressure on land and can

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[151] Indonesia's first written submission, para. 216 (referring to Exhibits IDN-119, IDN-103, IDN-108).
[152] Indonesia's first written submission, para. 217 (referring to Exhibit IDN-108). In addition, Amendment nr. I-694 rect. bis. of 21 November 2020 to the French Finance Law for 2021 (Amendement N° I-694 rect. bis de 21 novembre 2020 de la loi de finances pour 2021), (Exhibit IDN-119) by which the described treatment was extended to March 2021, states this would extend a support measure for the biodiesel sector.
[153] Indonesia's first written submission, paras. 3, 133.
[154] Indonesia's first written submission, para. 229; European Union's first written submission, para. 40.
[155] IPCC Report, "Climate Change and Land", (Exhibit IDN-393), p. 817.
[156] IPCC Report, "Climate Change and Land", (Exhibit IDN-393), p. 817.
[157] ISO 14067:2018, (Exhibit IDN-228), Clause 3.1.7.4.
[158] ISO 14067:2018, (Exhibit IDN-228), Clause 3.1.7.5.

lead to the extension of agricultural land into areas with high-carbon stock, such as forests, wetlands and peatland, causing additional greenhouse gas emissions."

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

> change in the use of land which is a consequence of direct land use change (3.1.7.5), but which occurs outside the relevant boundary.
>
> Note 1 to entry: In this document, the relevant boundary is the boundary of the system under study.
>
> Note 2 to entry: Land use change happens when there is a change in the 'land-use category' as defined by the IPCC (e.g. from forest land to cropland).
>
> EXAMPLE If land use on a particular parcel of land changes from food production to biofuel production, land use change might occur elsewhere to meet the demand for food. This land use change elsewhere is indirect land use change.[159]

2.83. The IPCC Report on "Climate Change and Land" defines ILUC as "Land use change outside the area of focus, that occurs as a consequence of change in use or management of land within the area of focus, such as through market or policy drivers. For example, if agricultural land is diverted to biofuel production, forest clearance may occur elsewhere to replace the former agricultural production."[160]

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

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. With regard to the EU measures at issue, Indonesia requests[161] the Panel to find that the European Union:

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

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

c. violates Article 2.4 of the TBT Agreement by imposing the 7 % limitation and the high ILUC-risk cap and phase-out without using relevant international standards as a basis;

d. violates Article 2.5 of the TBT Agreement by failing to explain the justification for preparing, adopting or applying the high ILUC-risk cap and phase-out[162] in terms of Articles 2.2 to 2.4 of the TBT Agreement;

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

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[159] ISO 14067:2018, (Exhibit IDN-228), Section 3.1.7.6.
[160] IPCC Report, "Climate Change and Land", (Exhibit IDN-393), p. 817.
[161] Indonesia's first written submission, para. 1431.
[162] In response to Panel question No. 119, Indonesia clarifies and confirms that, in accordance with the terms of the panel request, its claim under Article 2.5 of the TBT Agreement is not made in respect of the 7 % limitation.

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

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

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

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

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

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

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

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

n. violates Article I:1 of the GATT 1994 because the high ILUC-risk cap and phase-out discriminates between Indonesian palm oil and oil palm crop-based biofuel and like products imported from other WTO Members;

o. violates Article III:4 of the GATT 1994 because the high ILUC-risk cap and phase-out discriminates between palm oil and oil palm crop-based biofuel originating in Indonesia and like products of EU origin; and

p. violates Article X:3(a) of the GATT 1994 because it administers RED II in an unreasonable manner by setting out the criteria for certification of low ILUC-risk biofuels in the Delegated Regulation without providing for the necessary elements that enable certification to be obtained.

3.2. With regard to the French measures, Indonesia requests[163] the Panel to find that the European Union:

a. violates Article I:1 of the GATT 1994 because the French biofuel tax reduction discriminates among like biofuel originating in different third countries;

b. violates the first sentence of Article III:2 of the GATT 1994 because the French biofuel tax reduction, by excluding oil palm crop-based biofuel from the tax reduction mechanism while making it available to other like oil crop-based biofuel of EU origin, discriminates between imported oil palm crop-based biofuel and other like biofuel of EU origin, by

[163] Indonesia's first written submission, para. 1431.

subjecting imported oil palm crop-based biofuel to internal taxes in excess of those applied to like domestic products;

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

d. violates Articles 3.1(b) and 3.2 of the SCM Agreement because the French biofuel tax reduction constitutes a prohibited subsidy within the meaning of Article 3.1(b) of the SCM Agreement; and

e. violates, in the alternative to Indonesia's claims under Articles 3.1(b) and 3.2 of the SCM Agreement, Article 5(c) of the SCM Agreement because the French biofuel tax reduction is an actionable subsidy which causes adverse effects to the interests of Indonesia, 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, or a threat thereof.

3.3. The European Union requests the Panel to reject all the claims brought by Indonesia against both the EU and French measures.[164]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries provided to the Panel in accordance with paragraph 25 of the Working Procedures adopted by the Panel.[165]

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Brazil, Canada, Colombia, Ecuador, Japan, the Republic of Korea, Malaysia and the United States are reflected in their executive summaries, provided in accordance with paragraph 27 of the Working Procedures adopted by the Panel (see Annexes C-1 through C-9). Argentina, China, Costa Rica, Guatemala, Honduras, India, Norway, the Russian Federation, Singapore, Thailand and Türkiye reserved their rights to participate in these proceedings as a third party, but did not make a written submission or present oral arguments to the Panel.[166]

6 INTERIM REVIEW

6.1 Introduction

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

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

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

[164] European Union's first written submission, para. 1697.
[165] See Annexes B-1 and B-2.
[166] Costa Rica, Norway and Thailand submitted responses to questions from the Panel.

6.2 General considerations

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

6.5. Certain typographical or formatting errors have been corrected.[167] Additionally, certain editorial improvements have been made to ensure greater consistency, precision and clarity in terminology.[168] A number of paragraphs referencing party arguments on particular points have been adjusted where a party requested revisions to more precisely and/or fully reflect its position on the point being summarized.[169] The Panel has also sought to accommodate requests by a party to supplement certain footnote citations with additional references to other relevant paragraphs from its submissions.[170] In some instances, consideration of a party's proposed adjustments has resulted in certain other consequential changes to ensure consistency throughout the Report. The Panel has also included several additional cross-references, among interrelated findings and subsections of this Report, to ensure clarity and coherence.[171]

6.6. In its Report, the Panel has followed the approach of introducing each claim and defence with an overview of the parties' positions in a manner that serves to concisely identify the issues in dispute; additional, brief summaries of one or both parties' arguments on particular points have been included in the course of its analysis where the Panel deems it necessary and appropriate to facilitate an understanding of the Panel's own assessment and reasoning on the issue being addressed.[172] Therefore, while the Panel has sought to accommodate any request from a party to adjust the wording of existing argument summaries to more precisely and/or fully reflect the arguments made on the point being summarized, the Panel has generally refrained from inserting substantial amounts of new text, including whole new paragraphs, setting out more detailed argument summaries.[173]

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

[167] These include but are not limited to the changes suggested by the parties, in their interim review comments, to the table of exhibits, paras. 7.6 (the accompanying fn), 7.13, 7.14, 7.41, 7.56, 7.63 , 7.71, 7.72, 7.93 (accompanying fn), 7.278, 7.336, 7.418, 7.659, 7.1115, 7.1158, 7.1166, 7.1168, and 7.1232.

[168] These include but are not limited to the changes suggested by the parties, in their interim review comments, to paras. 7.56, 7.96, 7.130, 7.185, 7.245, 7.246, 7.493, 7.1445, 7.1450, 7.1458.

[169] These include but are not limited to the changes suggested by the parties, in their interim review comments, to paras. 7.73, 7.35, 7.38 (accompanying fn), 7.76 (accompanying fn), 7.109, 7.121, 7.161 (accompanying fn), 7.165, 7.174 (and accompanying fn), 7.181, 7.192, 7.246, 7.278, 7.300, 7.318 (accompanying fn), 7.348, 7.421 (accompanying fn), 7.435, 7.440 (accompanying fn), 7.436, 7.447, 7.483-7.485, 7.534, 7.641, 7.824, 7.977, 7.1038, and 7.1230.

[170] These include additions to footnotes accompanying paras. 7.35, 7.55, 7.71, 7.89, 7.158, 7.181, 7.209, 7.278, 7.297, 7.362, 7.366, 7.534, 7.793, 7.1183, and 7.1225. The Panel has made such changes without prejudice to its understanding that, when a panel elects to include footnote citations referencing one or both parties' submissions on a particular point, a panel is free to provide a pinpoint citation to the paragraph(s) the Panel considers relevant, as opposed to exhaustively referencing all relevant paragraphs from the parties' written submissions, oral statements, responses to Panel questions, and/or associated comments.

[171] These include additions to paras. 7.269 and 7.1307.

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

[173] While certain argument summaries proposed by Indonesia on various points are not necessarily unhelpful, the Panel has not inserted the additional argument summaries as proposed by Indonesia to paras. 7.29 (accompanying fn), 7.109, 7.174, 7.208, 7.245, 7.278 (accompanying fn), or the proposed new paragraphs as proposed by Indonesia to follow para. 7.95, to follow para. 7.119, and to follow heading 7.1.2.2.4.

6.3 Claims in respect of the EU measures

6.3.1 Preliminary considerations

6.8. In the context of the Panel's discussion at **paragraphs 7.25 to 7.27** of why it refers to the high ILUC-risk "cap" and "phase-out" in the singular and analyses it as a single measure, the European Union observes that neither party submitted that a different approach should be taken in this dispute.

6.9. Indonesia does not consider it necessary to give effect to the European Union's comment, taking into account that the European Union does not object to paragraph 7.25, including the statement that whether two measures may be treated as a single measure "is a question to be determined by a panel".

6.10. The Panel considers that its discussion already clearly reflects and takes into account the manner in which the parties approached this issue. It is not clear if the European Union is requesting the Panel to adjust the existing text to further emphasize the manner in which the parties approached this issue, or if the European Union is taking issue with some aspect (and if so, which aspect) of the Panel's own reasoning on this issue. In these circumstances, the Panel sees no reason to make any change to paragraphs 7.25 to 7.27.

6.11. Indonesia suggests that the Panel revise its initial description of low ILUC-risk certification set out at **paragraph 7.29**. Specifically:

a. Indonesia suggests that the Panel should supplement its statement that low ILUC-risk certification operates as an exemption to the high ILUC-risk cap and phase-out with the statement that that low ILUC-risk certification also operates "as a requirement for biofuel to qualify towards the EU renewable energy target within the 7% maximum share."

b. Indonesia suggests reformulating the description, in the accompanying footnote (and several similar formulations elsewhere in the Report), of low ILUC-risk certification applying to "individual consignments of biofuels". In its reformulation here and elsewhere, Indonesia refers to low ILUC-risk certification being available only to biofuel produced from e.g. "additional feedstock".

6.12. The European Union disagrees with Indonesia's proposed revisions.

6.13. The Panel has not made the changes proposed by Indonesia for the following reasons:

a. It is not correct to say that low ILUC-risk certification is a requirement for biofuels classified as high ILUC-risk to count towards the EU renewable energy targets within the 7% maximum share. Biofuels classified as high ILUC-risk are still eligible to count towards the EU renewable energy targets within the 7% maximum share, up to the amount of the cap and phase-out. Low ILUC-risk certification is or will become a requirement for such biofuels to count towards the EU renewable energy targets within the 7% maximum share only in respect of imports above the "cap", and/or once the "phase-out" of such biofuels has been completed i.e. no later than 2030.

b. Indonesia has not indicated whether and if so why it takes issue with certain references to low ILUC-risk certification applying to "individual consignments of biofuels", and the Panel sees no issue with this terminology. Among other things, the Delegated Regulation employs this terminology, referring (see e.g. Article 6) to low ILUC-risk certification applying to "consignments" of biofuels.

6.3.2 Annex 1.1 – Existence of a "technical regulation"

6.14. In the context of the Panel's findings on whether the measures "lay down product characteristics", Indonesia requests that the Panel delete its statement, at **paragraph 7.100**, that "there may be more than one way of identifying the 'group of products' to which the 7% maximum share and the high ILUC-risk cap and phase-out apply". According to Indonesia, this statement does not reflect the arguments of the parties, nor the content of the applicable legal provisions.

6.15. The European Union is of the view that this is not a question of ensuring "accuracy", but rather concerns a request to modify a finding. It objects to this request which is not sufficiently motivated.

6.16. The Panel notes that while Indonesia's comment is directed at paragraph 7.100, the latter merely recalls the conclusion reached in paragraph 7.94, which is in the previous subsection of this Report. In paragraph 7.94, the Panel states that "while there may be more than one way of identifying the 'group of products' to which the 7% maximum share and the high ILUC-risk cap and phase-out apply, it is clear that both measures apply to 'biofuel produced from food and feed crops'". The Panel's observation that there may be more than one way of identifying the group of products to which the measures apply is accompanied by a footnote, which offers further elaboration and illustration of that statement. The Panel does not agree with Indonesia's suggestion that the Panel's statement somehow deviates from the arguments of the parties, let alone the content of the applicable legal provisions. The Panel has not made any change to paragraphs 7.94 or 7.100.

6.17. In the context of the Panel's findings on whether the measures "lay down product characteristics", the European Union comments on **paragraph 7.105**. In this paragraph, the Panel agrees with the European Union that the criteria for determining high ILUC-risk feedstocks covers matters relating to the observed impacts of cultivation of specific feed and food crops and that these criteria do not, in and of themselves, relate to any intrinsic or extrinsic characteristic of the biofuels produced from feedstocks. The European Union observes that in paragraph 452 of its first written submission, which the Panel refers to in this connection, the European Union submitted not only that these criteria do not relate to any intrinsic or extrinsic characteristic of the biofuels produced from feed and feedstocks, but that they "do not prescribe, positively or negatively any requirements in that respect". The European Union requests that this "second element" of its submission "is reflected and addressed".

6.18. Indonesia requests that the Panel reject the European Union's suggestion because paragraph 7.105 does not deal with the European Union's position as such, but rather expresses the Panel's assessment of the European Union's position and the fact that it only partly agrees with the European Union. In particular, the first sentence of that paragraph reflects the Panel's agreement with the European Union that the criteria for determining high ILUC-risk feedstocks, in and of themselves, do not relate to any intrinsic or extrinsic characteristics of the biofuels produced from feedstocks. The next sentence makes it clear that the Panel *disagrees* with the second element of the European Union's submission, when it notes that "it is not the criteria for the determination of high ILUC-risk crops that the Panel considers to be the relevant product characteristic in this context". This is consistent with the Panel's conclusion, in the same paragraph, that "[t]he quality of being produced from a specific crop is thus the product characteristic that ultimately dictates the application of the high ILUC-risk cap and phase-out to a particular group of biofuels".

6.19. The Panel notes that it has already reflected and addressed this second element of the European Union's submission. The Panel has structured its assessment of whether the measures "lay down product characteristics" into what the Panel regards as two analytically distinct issues. The first issue is whether the "composition of biofuel" – and more specifically the quality of biofuel being produced "from food or feed crops" (for the 7% maximum share) or a specific food or feed crop determined to be high ILUC risk (for the high ILUC-risk cap and phase-out) – qualifies as a "product characteristic" within the meaning of Annex 1.1. After addressing that issue, the Panel explains, at paragraph 7.109, that it proceeds to address, as a second prong of the element under consideration, whether the 7% maximum share and the high ILUC-risk cap and phase-out "lay down", within the meaning of Annex 1.1, the product characteristic identified. In this context, the Panel refers, in paragraph 7.109, to the European Union's position that Article 26 of RED II does not "lay down" or "prescribe" the "composition of fuel" or the "composition of biofuel", either positively or negatively.

6.20. In the context of the Panel's findings on whether the measures "lay down product characteristics", Indonesia further submits that it is important to cross-reference, as an additional consideration, the Panel's later finding that the entirety of the EU conventional biofuel market is essentially governed by the RED II regime, in the sense that there is essentially no market for biofuels that are not eligible to count towards the EU renewable energy targets. Indonesia proposes adding language to this effect to **paragraph 7.111** accompanied by a cross-reference to the Panel's more detailed discussion on that point in section 7.1.2.3.5.1 of this Report. Indonesia proposes a related revision to **paragraph 7.130**, in the context of the Panel's findings on whether the measures at issue lay down product characteristics "with which compliance is mandatory".

6.21. In response to Indonesia's comment on paragraph 7.111, the European Union considers that it is for the Panel to select those facts and matters which it considers necessary to refer to when addressing arguments. As is reflected in Indonesia's comment, the Panel has made separate findings as regards the market. It does not follow that the Panel should repeat those arguments throughout the Interim Report. With regard to the related comment on paragraph 7.130, the European Union observes that this pre-empts the findings as to the nature of the biofuels market and states that Indonesia has not motivated its suggestion.

6.22. In the light of Indonesia's comments on paragraphs 7.111 and 7.130, the Panel agrees that it should be more explicit in how this factual finding by the Panel (i.e. that the entirety of the EU conventional biofuel market is essentially governed by the RED II regime, in the sense that there is essentially no market for biofuels that are not eligible to count towards the EU renewable energy targets) informs its analysis of whether the measures constitute "technical regulations". The Panel considers this factual finding to be more relevant to the issue of whether the measures at issue lay down product characteristics "with which compliance is mandatory" than it is to the issue of whether the measures "lay down" product characteristics. It is therefore in that context that the existing text of paragraph 7.130 has sought to reflect this point. The text of paragraph 7.130 has been revised in the light of Indonesia's comment to be more explicit in this regard.

6.3.3 Article 2.2 – Necessary to fulfil a legitimate objective

6.23. In the context of the Panel's findings on "The identification of the objective pursued" by the measures at issue, the Panel observes that there are certain internal tensions and ambiguities in respect of each party's identification of the objective(s) of the measures at issue. The Panel then sets forth, in **paragraph 7.208**, a brief exposition of certain statements and arguments presented by Indonesia along with the Panel's understanding of how certain of those arguments presented relate to one another, namely as arguments in the alternative. Indonesia proposes various revisions to this paragraph that would rearrange certain existing elements and add additional detail on its arguments.

6.24. The European Union observes that where references are made to Indonesia's arguments, appropriate terminology should be proposed. Here and elsewhere, the European Union considers that Indonesia's request to add the word "stated" before objective has not been explained. Given the findings of the Panel as to the objectives of the measures, the European Union does not consider that this is appropriate or necessary.

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

6.26. In the context of the Panel's findings on "The wider objectives of the EU Biofuels regime", Indonesia requests the Panel to delete the last sentence in **paragraph 7.230**. This sentence provides that "The Panel accepts that it is no doubt true" that limiting the risk of ILUC-related GHG emissions caused by conventional biofuel cannot be understood as an end in itself but is rather a means to secure the broader policy goals of climate change mitigation, environmental protection and biodiversity, and the protection of EU public morals, "and that the Panel does not consider that focusing on the objective of the specific measures at issue [implies] otherwise". Indonesia requests deletion of this sentence on the grounds that it reflects a point that is in dispute.

6.27. The European Union observes that the Panel has reached a conclusion on a point in dispute and objects to Indonesia's request which is, in essence, to delete a finding.

6.28. The Panel's intended meaning in the last sentence of paragraph 7.230 was simply to confirm that it is no doubt true that the objective of limiting the risk of ILUC-related GHG emissions caused by conventional biofuel cannot be understood as an end in itself, disconnected from any other higher-level objectives and values. It was not the Panel's intention to suggest that the parties agree on

what those higher-level objectives and values are, as the Panel appreciates is a point in dispute. The Panel has revised paragraph 7.230 accordingly.

6.29. In the context of the Panel's findings on "The allegation of protectionism in the guise of environmental protection", Indonesia comments on the Panel's analysis of the resolution of the European Parliament set out in **paragraph 7.261**. Indonesia submits that the Panel does not take into account some of the important elements of the resolution of 4 April 2017 and respectfully requests to take into account and reflect in paragraph 7.261 the elements of that resolution highlighted at paragraphs 142-143 of Indonesia's first written submission. According to Indonesia, the Panel should note there that "the European Parliament acknowledged the lack of (reliable) data and the need to improve scientific assessments as regards GHG emissions from palm oil-related land-use change. It has further observed that 'other plant-based oils produced from soybeans, rapeseed and other crops have a much higher environmental footprint and require much more extensive land use than palm oil' and that 'other oil crops typically entail a more intensive use of pesticides and fertiliser'. The European Parliament also recognised the complexity of the oil palm issue and emphasised 'the importance of developing a global solution based on the collective responsibility of many actors'".

6.30. The European Union observes that Indonesia is drafting an assessment of evidence on behalf of the Panel. The European Union objects. Indonesia might request that its arguments, properly characterised as such, are referenced. This would be a fundamentally different request to the reformulation currently proposed.

6.31. The Panel has not made the addition proposed by Indonesia because the Panel does not purport to provide a comprehensive description of the 4 April 2017 resolution of the European Parliament, or identify all the considerations therein that the parties may have referred to in their respective arguments in relation to different issues. The focus of the Panel's discussion at paragraphs 7.261-7.263 is on the statement in the resolution that appears most directly relevant to the alleged protectionist objective and motivation behind the measures at issue – which is the issue being addressed in this section of the Report. Of course, while the Panel has focused on the particular statement considered most relevant to the alleged protectionist objective, its assessment is based on the entirety of the resolution.

6.32. In the context of the Panel's findings on "The allegation of protectionism in the guise of environmental protection", Indonesia makes a request relating to **paragraph 7.269**. In that paragraph, the Panel observes that the arguments Indonesia presents relating to the "design and structure" of the high ILUC-risk cap and phase-out are many of the same arguments that Indonesia makes under the "legitimate regulatory distinction" step of the analysis under Article 2.1, and that the Panel considers that the issues raised by Indonesia are more appropriately addressed together with other aspects of the design and operation of the measure as part of the examination of the "legitimate regulatory distinction" step under Article 2.1. In its comment on this paragraph, Indonesia requests that the Panel explain the implications of its assessment under Article 2.1 of the issues referred to in this paragraph for its analysis of the allegation of a protectionist objective (and the lack of a legitimate objective) for the purpose of Article 2.2 of the TBT Agreement.

6.33. The European Union does not respond to Indonesia's comment.

6.34. The Panel recalls that, as stated in paragraph 7.269, the wide range of issues raised by Indonesia pertaining to the design and operation of the measure listed in paragraph 7.268 are more appropriately addressed together with other aspects of the design and operation of the measure as part of the examination of the "legitimate regulatory distinction" step under Article 2.1. Having said that, the Panel considers that it is implicit in its findings that, even if these issues were to be addressed in the context of making a finding on whether the measure has a protectionist objective, the Panel's findings under Article 2.1 do not provide support for Indonesia's allegation that the high ILUC-risk cap and phase-out has a protectionist objective. The Panel has revised paragraph 7.269 to state this point more explicitly.

6.3.4 Article 2.1 – Non-discrimination

6.35. In the context of the Panel's preliminary considerations on the likeness analysis under Article 2.1 concerning the "Identification of the universe of like products", the European Union requests

that the Panel completes the summary of the European Union's arguments at paragraph 7.440 by mentioning "findings in a merger decision and a trade defence measure that HVO and FAME are interchangeable, a US government report finding that FAME faced strong competition from HVO" referenced by the European Union.

6.36. Indonesia considers that these elements may be more appropriately included in a footnote. Indonesia further proposes adding in a footnote a sentence stating that "the European Union, in its first written submission, stated that '[t]here are indications that FAME and HVO have certain differences with regard to price and blending limitations'. In addition, should the Panel accept the European Union's request, Indonesia requests it to also include Indonesia's counterarguments and clarify that the trade defence measure referenced by the European Union does not state that FAME and HVO are interchangeable and use the original wording quoted by the European Union.

6.37. The Panel has revised paragraph 7.440 to more fully reflect, and more fully respond to, the parties' arguments on this issue.

6.38. In the context of the Panel's findings on the "Consumer perceptions" factor of the likeness analysis under Article 2.1, Indonesia requests that the Panel clarify the meaning of its statement, at **paragraph 7.473**, that it is "unclear whether these statements reflect consumers' preferences or business decisions dictated by a change in the regulatory environment". Indonesia understands that the remainder of the paragraph implies that the latter explanation appears more likely and suggests that the Panel's statement be clarified by stating this explicitly.

6.39. The European Union considers that the proposed "clarifying" language is unnecessary. It therefore objects.

6.40. The Panel considers that the current language of paragraph 7.473 suffices to reflect the Panel's assessment of the relevant evidence and therefore declines to make the change suggested by Indonesia.

6.41. In the context of the Panel's findings on the "*De facto* nature of the detrimental impact" on imported palm oil-based biofuel, the European Union takes issue with the Panel's assessment, at **paragraph 7.503**, that "[a]lthough Indonesia has demonstrated that palm oil-, rapeseed oil- and soybean oil-based biofuels are like, the European Union seems to be comparing only the treatment of domestically produced and imported palm oil-based biofuel." The European Union objects to this sentence, which, in its view, misrepresents the analytical exercise the European Union has consistently maintained the Panel should undertake. The European Union refers the Panel to paragraphs 667-668 of its first written submission, where it argues that it is the group of imported products that should be compared with the group of domestic products. The European Union requests, as a minimum, that its arguments are fully reflected in this respect.

6.42. Indonesia requests that the Panel reject the European Union's suggestion because paragraph 7.503 does not deal with the European Union's position as such, but rather with the Panel's assessment of the arguments submitted. Moreover, Indonesia considers that the Panel has accurately assessed the European Union's arguments in this respect, as set out at paragraph 690 of the European Union's first written submission. Indonesia requests that the Panel reject the European Union's suggestion to remove footnote 774. The paragraphs cited by the European Union present an alternative argument (introduced by the words "even on the basis of Indonesia's case as to what constitute 'like' products") and do not address the treatment of "the only product imported from the complainant [as compared] with all domestic products and products of other origin found to be like" but are rather a continuation of the European Union's arguments that Indonesia has not correctly identified the universe of products to be compared. Therefore, they are not relevant to the finding of the Panel at paragraph 7.503. If the Panel were to accept the European Union's suggestion, Indonesia requests that its counterargument included at paragraph 613 of its second written submission be included.

6.43. The Panel observes that its reasoning set out in paragraphs 7.501-7.503 addresses the point reiterated by the European Union that "domestically produced palm-oil based biofuel is subject to exactly the same eligibility criteria as imported palm oil based biofuel".[174] The Panel also notes the

[174] European Union's first written submission, paras. 690, 698, 1138, and 1183.

European Union's argument that the measure accords identical treatment to imported and domestically produced rapeseed oil- and soybean oil-based biofuel, which, together with palm oil-based biofuel, constitute the groups of imported and domestic like products.[175] The Panel recalls in this regard its findings that Indonesia does not export (and thus the European Union does not import from Indonesia) rapeseed oil- and soybean oil-based biofuel. The Panel further understands that the European Union does not import from Indonesia biofuel made from other crops grown there. This is an important factual consideration that has to be taken into account when comparing the treatment of imported products with the treatment of like products of EU and foreign origin. This consideration requires the Panel to assess the treatment of palm oil-based biofuel, which is the only relevant product imported from Indonesia, with the treatment of palm oil-, rapeseed oil- and soybean oil-based biofuel, which all are like products of EU and foreign origin.

6.44. In the context of the Panel's findings on the "Calculation of the share of expansion rate into land with high-carbon stock", Indonesia makes two comments on the Panel's discussion of productivity yields. These comments are made on paragraphs 7.602 and 7.603. These are addressed separately below.

6.45. In **paragraph 7.602**, the Panel states that the calculation of the productivity factor has to be based on yield data for all relevant co- and by-products, notes that the European Union has adjusted the source data to account for all by-products other than waste and residues, and states that Indonesia does not seem to be contesting these adjustments. In its comment on paragraph 7.602, Indonesia requests that the Panel instead summarize Indonesia's position as being that Indonesia "notes that oil palm's extensive by-products were not taken into account by the European Union".

6.46. The European Union responds that this proposal dissimulates Indonesia's position and has not been justified.

6.47. The Panel observes that while Indonesia contests comparing productivity on other basis than oil yield (see next paragraph), it does not contest in its arguments the specific values of the adjustments made to the yield results taken as basis for the calculation and reflected in the European Union's responses to Panel questions No. 42 and No. 145.[176] Furthermore, the Panel notes that Indonesia's argument concerning the alleged failure by the European Union to account for oil palm's by-products is already reflected in the last sentence of paragraph. 7.597. Therefore, the Panel rejects Indonesia's request to make the suggested changes to paragraph 7.602.

6.48. Indonesia submits that **paragraph 7.603** does not take into account its concern, namely that the European Union compares the grain yields with the oil yield of oil palm. In Indonesia's view the EU approach does not provide a fair comparison, and the Panel appears to have misunderstood Indonesia's argument on this point (as well as the European Union's actions in calculating the productivity factor). Indonesia submits that there is no question regarding the use of "raw data" to which the Panel refers. As Indonesia explained, in its response to Panel question No. 146, the European Union compares the grain yield of maize, rapeseed, soybeans, sunflower seed and wheat, with the oil yield of oil palm. However, the logical comparison should be between the oil yield of oil palm and the oil yields of rapeseed, soybeans, or sunflower seed or the ethanol yields of maize and wheat. The issue is not whether data on fresh fruit bunches should be used over oil yield, but rather why the European Union compares oil yields with grain yields at all, except to overstate the productivity factor. Furthermore, in respect of the Panel's statement in paragraph 7.603 that Indonesia "does not explain why it would be more appropriate to use the FAOSTAT data on fresh fruit bunches, other than that it is 'possible and simple'", Indonesia has explained at length that it is inappropriate to use the oil yield of only one product and compare that to a grain yield of others. The results of (not) doing so become clear from Table 2 of Indonesia's response to Panel question No. 146. Moreover, Indonesia responds in that paragraph directly to the European Union's incorrect assertion that "data on palm oil was chosen because it is more reliable than data on fresh oil palm fruit bunches". Indonesia provided reliable data which makes a proper comparison, disproving the European Union's assertion, and indicating that there is no good reason to compare oil yields with grain yields. Such comparison must be considered arbitrary and unreasonable. Indonesia asks the Panel to assess both parties' arguments on this point.

[175] European Union's first written submission, paras. 668-669.
[176] See Indonesia's comments on the European Union's responses to Panel questions Nos. 145-146.

6.49. The European Union observes that Indonesia is rearguing its case once again, claiming that "there is no good reason to compare oil yields with grain yields". The European Union disagrees that such comparison should be considered arbitrary and unreasonable. As indicated in its answers to the Panel's written questions Nos. 145 and 146, the European Union relies on raw data on palm oil yield by FAOSTAT (whose reliability is undisputed), subject to certain adjustments. Data on palm oil was chosen because it is the oil that is traded, and not the fresh oil palm fruit bunches. The rationale of comparing oil yield of oil palm and grain yield of other crops can be found in the crucial role played by by-products in increasing demand for a certain crop. In this regard, the EU calculation takes full account of the difference in by-products. On the contrary, in practice, Indonesia conveniently contends that all by-products should be ignored. To conclude, the European Union finds Indonesia's request unnecessary and not relevant, and objects to that request.

6.50. The Panel notes at the outset that the Report addresses, in paragraphs 7.599 through 7.601, Indonesia's argument that the calculation of the productivity factor should be based on oil yield for all relevant crops, as oil is used for biofuel production. In the Panel's view, Indonesia's arguments raised as part of the request to revise paragraph 7.603 restate this point.[177] Other than that, Indonesia does not explain why it would be "inappropriate" to compare grain yields with oil yields for the purposes of calculating the productivity factor. The Panel thus maintains its conclusion that insofar as appropriate adjustments have been made to raw data to account for all relevant by-products, it is reasonable for the European Union, in light of the record evidence, to take as a starting point for the calculation of the productivity factor grain yields for certain crops and oil yield for palm oil as the main co-products.

6.3.5 Article 2.5 – Explanation of justification for technical regulation

6.51. Indonesia takes issue with the Panel's assessment, set forth in **paragraph 7.687**, that the principal focus of Indonesia's statements to the TBT Committee, including their related questions directed to the European Union, is alleged *discrimination* against palm oil-based biofuels that would be relevant to Article 2.1, not the obligations in paragraphs 2 to 4 of Article 2. Indonesia submits that this does not accurately reflect the evidence presented by Indonesia. For instance, as noted at paragraph 803 of Indonesia's first written submission, Indonesia's statements at the TBT Committee meeting of 6 and 7 March 2019 referred to both Articles 2.1 and 2.2 of the TBT Agreement. At the same meeting, references were also made to Article 2.4. At the June 2019 TBT Committee meeting, Indonesia again raised its concerns as regards the consistency of the measures at issue with Article 2.2 (see paras. 804-805 of Indonesia's first written submission). Indonesia respectfully requests that this evidence be duly taken into account by the Panel.

6.52. The European Union responds that Indonesia is requesting that the Panel change its assessment of the evidence. The European Union objects to that request.

6.53. The Panel conducted a thorough and careful review of all of the TBT Committee statements submitted by Indonesia as evidence in support of its claim under Article 2.5. After reviewing this evidence, the Panel reached the conclusion in paragraph 7.687 that "the principal focus" of Indonesia's statements to the TBT Committee, including their related questions directed to the European Union, is alleged discrimination against palm oil-based biofuels that would be relevant to Article 2.1, not the obligations in paragraphs 2 to 4 of Article 2. The Panel added, in the next sentence, that "while Indonesia's first written submission highlights selected elements of these statements that set out assertions that the impugned measures are more trade-restrictive than necessary, and not consistent with 'international standards', it remains the case" that "the principal focus" of these statements relates to alleged discrimination under Article 2.1. Insofar as Indonesia is suggesting that the two selected elements of these statements that it highlights in its comment on the interim report contradict or undermine the Panel's conclusion on what the "the principal focus" of the statements relates to, the Panel disagrees.

6.3.6 Article 2.8 – Requirements specified in terms of performance

6.54. Indonesia takes issue with the Panel's assessment, set forth in **paragraphs 7.719** and 7.720, that Indonesia's arguments under Article 2.8 "seem to merely repeat points made under other claims

[177] The Panel notes in particular, that Indonesia points out in its request that "the logical comparison should be between the oil yield of oil palm and the oil yields of rapeseed, soybeans, or sunflower seed or the ethanol yields of maze, wheat".

without properly developing or substantiating them for the purposes of this claim" (paragraph 7.719) and that the concept of "environmental performance" that Indonesia relies on is "a concept that Indonesia does not explain" (paragraph 7.720).

a. Regarding the first issue, Indonesia submits that this does not reflect Indonesia's arguments and evidence presented during these panel proceedings and requests that the Panel take into account Indonesia's second written submission, paragraphs 936-945, addressing its Article 2.8 claim.

b. Regarding the second issue, Indonesia requests that the Panel adjust this statement to indicate that the concept of "environmental performance" is "established based on relevant ISO standards". According to Indonesia, this change would "duly reflect Indonesia's reference to the relevant ISO standards as setting out environmental performance requirements in terms of carbon footprint and sustainability of bioenergy, including requirements for quantifying GHG emissions, using LCA. (see Indonesia's second written submission, paragraph 944)."

6.55. The European Union responds that:

a. As regards paragraph 7.719, Indonesia is requesting that the Panel change its assessment of Indonesia's submissions. The European Union objects to that request.

b. As regards paragraph 7.720, the European Union observes that Indonesia is drafting an assessment of evidence on behalf of the Panel. The European Union considers that this manifestly falls outside the scope of the role of comments.

6.56. The Panel has carefully considered Indonesia's argumentation under Article 2.8 and is not persuaded that it is necessary or appropriate to adjust the Panel's assessment as reflected in paragraphs 7.719 and 7.720.

6.4 Claims in respect of the French measure

6.57. Indonesia notes that the progressive elimination of the tax advantage applicable only to high-ILUC risk raw materials is not discussed in section 2.5, and requests that it be included therein (with reference to paragraphs 213, 215 1249-1250 of Indonesia's first written submission, Indonesia's opening statement at the first meeting of the Panel, Indonesia's response to Panel question Nos. 105 and 111 and Section II.b.5.b of Indonesia's second written submission.) Indonesia makes this comment in the context of **section 2.5**, and again in the context of **paragraph 7.1262**, which summarizes Indonesia's arguments concerning the planned progressive elimination of the tax advantage by 2031.

6.58. The European Union observes that Indonesia is requesting that the planned progressive elimination of the TIRIB reduction applicable to biofuels produced from high ILUC feedstock be included in Section 2.5 of the Interim Report. The European Union objects to the relevance and necessity of including Indonesia's arguments with regard to the progressive elimination of the TIRIB reduction, for two main reasons: (i) the progressive elimination is not within the Panel's terms of reference; and (ii) the progressive elimination does not apply in the present and will not apply in the future.

a. With regard to (i), whereas Indonesia calls this another aspect of the measure, this so-called aspect is not the measure that Indonesia has identified in its panel request and, therefore, it is not part of the matter before this Panel. Indeed, Indonesia's panel request identifies the challenged measure as the "reductions to the fuel tax" and the correlative exclusion of oil palm crop-based biofuels from those reductions. It is, therefore, the exclusion of Palm oil from the TIRIB reduction as such which according to Indonesia would violate various WTO provisions and not also the elimination of that reduction over time. Therefore, the European Union objects to Indonesia's request.

b. With regard to (ii), the system of progressive elimination of the tax advantage that would have started applying as of 2024 was repealed in December 2020 with effect as of 2022. Therefore, at present, no system of progressive elimination of the TIRIB reduction for any

biofuel applies. Nor such a system will apply in the future. The measure was not only of no practical effect when Indonesia made its panel request, but is also not in existence anymore. Indeed, Article 58 of the French Law 2020-1721 of 29 December 2020 (the French budgetary law for 2021) amended Article 266 *quindecies* of the French Custom code and repealed the schedule for the progressive elimination, which therefore does not appear anymore in the text of that provision.

c. If the Panel nevertheless decides to include a discussion on the system of progressive elimination, the European Union requests that the arguments that the European Union has put forward be reflected as well (as in the European Union's response to Panel question No. 105; paras. 522-537 of its second written submission; and paragraph 1498 of its first written submission).

6.59. The Panel has expanded on its discussion in paragraph 7.1264 to provide some additional factual background information on the planned progressive elimination of the tax advantage for high-ILUC risk raw materials. The Panel has also adjusted paragraphs 7.1287 and 7.1288 to explain how the inapplicability of the planned progressive elimination for palm oil-based products is explained in the broader context of the objective of the French TIRIB measure.

6.5 Separate opinion by one panelist

6.60. Indonesia states that it welcomes the Panel's references, which are made following the overall conclusions reached in respect to the claims under Article 2.2, Article 2.1, and Article XX, to a different conclusion having been reached by one panelist as set forth in section 7.3 of this Report. Indonesia suggests that the Panel make similar references coherently "in each claim throughout the report where the different conclusion matters. This includes but is not limited to the different conclusion reached by that panelist as regards the objectives of the measures at issue (cf. paragraph 7.560)."

6.61. The European Union considers that the Panel is not required to repeatedly make references to a different conclusion reached by one panelist. The separate opinion of that panelist is already set out in the Report.

6.62. The Panel has already expressly referred to the separate opinion at the end of each claim and claim and defence throughout the Report where a different conclusion is reached. This includes the claims and defences under Article 2.2, Article 2.1, and Article XX (in respect of both the high ILUC-risk cap and phase-out and the French measure). It appears that what Indonesia is requesting is that the Panel add more references within each of those claims, so that the separate opinion is cross-referenced in the context of each issue and intermediate finding where relevant. The Panel considers such additions to be unnecessary.

6.63. The European Union observes that **paragraph 7.1446** states that Indonesia challenges the EU and French measures that single out one particular type of crop-based biofuels – i.e. palm oil-based biofuel – and "with a view to eliminating that one type of biofuel from the EU renewable energy market". With respect to the quoted clause of this sentence, the European Union requests that it be clarified that "this is a contested assertion".

6.64. Indonesia does not respond to the European Union's comment.

6.65. The European Union's request is declined. The sentence discussed by the European Union is in the nature of an introductory statement aimed at distinguishing Indonesia's claims, not a factual finding by the panelist. Moreover, the separate opinion states at the outset (see paragraph 7.1448) that the opinion does "not exhaustively identify and analyse all of the evidence that could be referred to in connection with the issues raised, or repeat all of the arguments and counterarguments of the parties that have a bearing on these issues".

6.66. The European Union observes that **paragraph 7.1452** states that "[t]he measures at issue in this dispute have been the subject of academic analyses and commentary by various institutions, and some of these studies have been placed on the record". The European Union states that given that reference is made to multiple studies, these multiple studies be referenced in the footnotes.

The European Union also requests clarification as to whether reliance is placed on studies that have not been placed on the record.

6.67. Indonesia does not respond to the European Union's comment.

6.68. The European Union's request is declined. The separate opinion states at the outset (see paragraph 7.1448) that "[t]he difference in view underlying this separate opinion is essentially a matter of how much weight to give to certain evidence before the Panel. I will not exhaustively identify and analyse all of the evidence that could be referred to in connection with the issues raised ... Instead, what follows sets forth the basic rationale behind the conclusions I reach by identifying some of the evidence that I give more weight to than the Panel majority." There is no need to reference all of the potentially relevant record evidence in the footnotes. For greater clarity, no reliance has been placed on non-record evidence. As stated at the outset, the difference in view underlying the separate opinion is essentially a matter of how much weight to give to certain evidence before the Panel.

6.69. The European Union observes that **paragraph 7.1453** states that "[t]his evidence must be assessed holistically, rather than examining each of these statements in isolation from the others". The European Union requests clarification as to whether the term "this evidence" refers to Delzeit only. To the extent that it refers to other "academic analyses and commentary by various institutions", the European Union reiterates its request that this is referenced and identified.

6.70. Indonesia does not respond to the European Union's comment.

6.71. For greater clarity, the reference to "this evidence" in paragraph 7.1453 refers to all of the evidence referenced in the three preceding paragraphs of the separate opinion (i.e. the explicitly protectionist recommendation contained in the 4 April 2017 resolution of the European Parliament; the evidence showing that the European Union has a long history of enacting trade barriers to limit imports of palm oil-based biofuel to protect the EU biofuel industry; and evidence of the anticipated effect of the high ILUC-risk cap and phase-out on EU production of competing vegetable oils and biofuels when assessing the objective of the measure).

6.72. The European Union observes that **paragraph 7.1456** states that, in seven out of the nine studies which were examined and estimated ILUC emissions for all types of oil crop, *soybean and rapeseed* were found to have higher estimated ILUC emissions than oil palm. The European Union requests that, in the interests of balance, references are included to its responses to the paragraphs identified in Indonesia's submissions. The European Union takes note that there is no need to replicate all arguments but observes that the footnotes currently exclusively reference paragraphs from Indonesia's submissions. It therefore requests that the footnotes refer to the European Union's response to Panel question No. 27. The European Union further considers that the footnote should make clear that, to the extent that the Panel member considers that nine studies made a comparison possible, this should be explicitly indicated as being an acceptance of Indonesia's submissions in this respect.

6.73. Indonesia recalls that it explained (in response to Panel question No. 38, at paragraph 98) that "[o]ut of the 30 studies selected by the 2017 Study Report, only nine made a comparison possible between so-called ILUC GHG emissions of different types of biodiesel, as relevant to this dispute". Of those nine studies, Indonesia noted (at paragraph 100 of its response to Panel question No. 38) that "[o]nly two studies concluded that oil palm crop-based biofuel might be related to higher so-called ILUC GHG emissions". This conclusion can be gathered from examining the studies listed by Indonesia. Indonesia therefore considers that it is not necessary to add any language that this conclusion is "an acceptance of IDN's submissions in this respect". Furthermore, Indonesia does not contest the inclusion of a reference to the European Union's limited response on this point included in the European Union's response to Panel Question No. 27, as long as additional citations to Indonesia's rebuttal of those submissions are also included. For example, Indonesia refers to its response to Panel question No. 38, mentioned above, as well as paragraphs 219-220 of Indonesia's second written submission.

6.74. The European Union's request is declined. The paragraph of the separate opinion referenced by the European Union has a single accompanying footnote containing a single reference to a single paragraph from Indonesia's first written submission. In stating that adding the proposed references

to its submissions in the interest of balance because "the footnotes currently exclusively reference paragraphs from Indonesia's submissions", the European Union's comment seems to proceed from an incorrect premise. Moreover, the separate opinion states at the outset (see paragraph 7.1448) that it does "not exhaustively identify and analyse all of the evidence that could be referred to in connection with the issues raised, or repeat all of the arguments and counterarguments of the parties that have a bearing on these issues".

6.75. **Paragraph 7.1459** refers to certain concerns being reflected in independent analyses conducted by academic institutions, and then quotes from the paper by Delzeit et al. The European Union comments that "[a]s only one such analysis is cited, the European Union requests that either all other such analyses to which reference is implicitly made are referenced, alternatively that the sentence is modified as proposed."

6.76. Indonesia responds that the following studies could be cited (in addition to any other studies which formed the basis of the separate opinion by one panelist), in order to address the European Union's concern that, following the first sentence of paragraph 7.1459, only one study is cited: Special Report of the Intergovernmental Panel on Climate Change (IPCC), "Climate Change and Land – Chapter 2: Land-Climate Interactions", 2019, (Exhibit IDN-393); Working Document of the European Commission, "Impact Assessment – Accompanying the document: Proposal for a Directive of the European Parliament and of the Council amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources", SWD(2012) 343 final, 17 October 2012, (Exhibit IDN-135); Working Paper by R. Delzeit et al., "Indirect land use change (iLUC) revisited: An evaluation of current policy proposals", (Kiel Institute for the World Economy, 2017), (Exhibit IDN-137); Study by H.S. Naess-Schmidt et al., Biofuels and indirect land use change: fundamental uncertainties make ILUC factors no good basis for regulation (Copenhagen Economics, 2019), (Exhibit IDN-131); Expert Report of Professor Finkbeiner, (Exhibit IDN-126).

6.77. The purpose of paragraph 7.1459 is not to provide a thorough or exhaustive listing of studies that may reflect the concerns discussed in this part of the separate opinion. The text of paragraph 7.1459 has been modified as proposed by the European Union (i.e. to refer to "an independent analysis conducted by an academic institution" in the singular).

6.78. The European Union states that the second sentence of **paragraph 7.1460**, wrongly implies that the formula only looks at relative expansion. The formula examines relative and absolute expansion.

6.79. Indonesia considers that the change proposed by the European Union could be misunderstood as, in essence, changing the finding reflected in the separate opinion by one panelist, which already clearly reflects the concerns that that panelist has with the formula developed by the European Union in the context of the Delegated Regulation.

6.80. The European Union's request is declined. It is understood that the measure takes into account the absolute expansion of the production area by requiring that the average annual expansion of the production area affects more than 100 000 hectares (as per Article 3(a) of the Delegated Regulation). Paragraph 7.1460 states that "the singling out of palm oil-based biofuel, notwithstanding the seemingly similar risk of ILUC-related GHG emissions associated with soybean, seems to stem from how the formula seeks to measure ILUC-related GHG emissions on the basis of relative expansion of land, and the relative share of that expansion into high-carbon stock land." This sentence does not state that the formula seeks to measure ILUC-related GHG emissions "exclusively" or "solely" on the basis of relative expansion of land.

7 FINDINGS

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

7.1.1 Preliminary considerations

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

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

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

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

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

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

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

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

7.4. In its submissions, the European Union takes issue with the fact that Indonesia challenges the 7% limitation/maximum share[178] and the high ILUC-risk cap and phase-out as individual "measures" distinct from what the European Union terms its broader "Biofuels regime".[179] Indonesia asks the Panel to reject the European Union's mischaracterization of the measure(s) as the EU "Biofuels regime", and focus on the specific measures at issue as identified in its panel request and submissions.[180]

7.5. The Panel notes that the European Union questions the characterization of the 7% maximum share and the high ILUC-risk cap and phase-out as individual "measures" primarily in the context of arguing that the alleged measures are not "technical regulations" within the meaning of Annex 1.1 to the TBT Agreement. However, in the Panel's view, the European Union's argument raises a more general issue regarding the Panel's terms of reference and the scope and definition of the measures at issue. Given that the identification of the relevant measure(s) is fundamental to the Panel's analysis of many of the issues that follow, the Panel considers it appropriate to address this issue at the outset.[181]

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

[179] European Union's first written submission, paras. 399-404.

[180] See e.g. Indonesia's opening statement at the first meeting of the Panel, paras. 10-23; second written submission, paras. 109-125, 1093.

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

7.6. The European Union's arguments on this point seem to weave together two alternative arguments. The first argument appears to be that the 7% maximum share and the high ILUC-risk cap and phase-out, as set out in Articles 26(1) and 26(2) of RED II, cannot be assessed as individual "measures" distinct from the broader "EU Biofuels regime".[182] The second argument appears to be that Indonesia is free to "extract" these different components of one provision (i.e. Article 26 of RED II) and identify them as distinct "measures", but it does not follow from this definition of the measures at issue "that those provisions should be scrutinised by the Panel in isolation from their broader context".[183] This second argument would seem to concern *how* the Panel should analyse the specific measures at issue, and not whether they can be assessed as individual "measures".[184] The Panel addresses these arguments separately in the interest of analytical clarity.

7.7. Beginning with the European Union's first line of argument, the Panel sees no basis to question Indonesia's identification of particular aspects of what the European Union refers to as the "Biofuels regime" as the specific measures at issue for the purposes of defining the subject-matter of its complaint. The fact that these aspects (including the 7% maximum share and the high ILUC-risk cap and phase-out) are part of the broader regulatory framework for the promotion of renewable energy in the European Union provided through RED II does not suggest that they could not validly constitute a challengeable "measure" for the purposes of Indonesia's identification of the subject-matter of its complaint.

7.8. The Panel recalls that a "measure" challengeable under the DSU may in principle consist of any act or omission attributable to a Member[185], and sees nothing in Indonesia's analytical approach to the definition of the measures at issue that "departs from the orthodoxy".[186] The Panel observes that when a complaining Member challenges one or more measures reflected in one or more written instruments, such as a law, regulation, or directive, it would almost invariably be expected to identify one or more specific provisions of the instrument(s) as the relevant measures at issue for the purposes of defining the subject-matter of its complaint. In other words, a complaining Member would almost invariably be expected to selectively identify one or more isolated provisions contained in the relevant written instrument(s) and characterize those provisions as the measure(s) at issue. Indeed, a complaining Member's failure to single out (or isolate) one or more specific (i.e. selectively identified) provisions contained in a law, regulation or other instrument could potentially render a

[182] For instance, the European Union argues that Indonesia "selectively identified only some of the provisions that constitute the EU Biofuels regime, notwithstanding that those provisions operate in conjunction with one another, and could only be assessed as a composite whole". (European Union's first written submission, para. 400.) Consistent with that understanding, throughout its submissions the European Union generally places quotation marks around the word "measures" whenever referring to the 7% maximum share and high ILUC-risk cap and phase-out (for instance, it develops this argument under the heading, "*Neither the EU Biofuels regime nor the 'measures' identified by Indonesia are a 'technical regulation'*"). In response to a question from the Panel, the European Union submits that Indonesia's panel request identifies the "Biofuels regime" as "the overarching measure" at issue, and that the panel request "does not identify the measures that Indonesia says it wants to challenge in its first written submission as being only the 7 % limitation and the high ILUC-risk cap and phase-out resulting from Article 26 RED II and the Delegated Regulation". (See European Union's response to Panel question No. 1, paras. 1-16.)

[183] European Union's first written submission, para. 403.

[184] For instance, the European Union does not appear to be arguing that the 7% maximum share and the high ILUC-risk cap and phase-out are capable of being assessed as individual measures when it argues that "even though Indonesia has singled out isolated provisions of RED II and characterised them as individual 'measures' for the purpose of the present proceedings, in order to assess and appreciate the objectives of those 'measures', the EU Biofuels regime must be considered as a composite whole, situated in the broader legal and policy context of which it forms part." (European Union's first written submission, para. 157.) In its second written submission, the European Union clarifies that "[w]hilst Indonesia is free to choose to define the measures it seeks to challenge by extrapolating parts of an isolated provision (e.g. parts of Article 26 RED II), it is not entitled to claim that the consequence of this surgical exercise is that the Panel is no longer permitted to take a step back and assess the 'measures' as part of the broader legislative scheme of which they are part." (European Union's second written submission, para. 29.) At the second meeting with the Panel, the European Union reiterated that "[w]hilst it is undoubtedly for a claimant to decide which matters it wishes to challenge, this autonomy does not confine a panel to evaluating the so-called measures that a claimant has surgically extrapolated with tunnel vision. … This is not a question of how measures are defined – it is a question of the context in which they operate. Any assessment of their compatibility with WTO law, including the object and purposes they pursue, cannot be conducted in isolation from that context." (European Union's opening statement at the second meeting with the Panel, paras. 2-5.)

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

[186] European Union's first written submission, para. 404.

panel request inconsistent with Article 6.2 of the DSU. That provision requires a complaining Member to identify the *specific* measures at issue.

7.9. The Panel does not question that the 7% maximum share and the high ILUC-risk cap and phase-out may be said to "operate in conjunction"[187] with one another, and with various other provisions of RED II, the Delegated Regulation, and other aspects of the broader regulatory framework (which the European Union refers to collectively as its "Biofuels regime"). However, that circumstance alone does not suffice to establish that all of these aspects of the broader EU "Biofuels regime" must be examined as "a composite whole"[188] in the sense of all of these aspects constituting a single, inseparable measure. Once again, it is only to be expected that, when a complaining Member challenges one or more provisions in a written instrument, the specific provision challenged as the measure at issue would operate in conjunction with other provisions in the same instrument and/or closely related instruments. There is nothing in WTO dispute settlement practice to suggest that, in such circumstances, a complaining Member must identify and challenge a single, inseparable measure comprising all provisions that "operate in conjunction" with the specific measure that it seeks to challenge.[189]

7.10. The Panel is equally unpersuaded by the European Union's suggestion that it was Indonesia itself, in its panel request, that effectively identified the "EU Biofuels regime" as the "overarching measure" at issue in this dispute.[190] It is true, as the European Union notes, that the section in Indonesia's panel request entitled "The measures at issue" starts with an identification of a number of legal instruments, in which "[t]he EU measures at issue are laid down"[191], and taken together these instruments correspond to what the European Union terms the broader "Biofuels regime". However, the relevant parts of the panel request include not only the section identifying the "legal instruments" in which the measures are "laid down", but also the detailed description of the individual measures at issue provided in subsequent paragraphs of the request[192] which identifies "the 7% limitation"[193], "the high ILUC-risk cap and phase-out"[194], and what Indonesia terms the "criteria for determining and certifying low ILUC-risk biofuels".[195] Moreover, when describing the legal basis for the complaint in respect of the EU measures[196], Indonesia refers again to the specific aspect or aspects that it challenges under each provision. Specifically, it refers in this context to "limiting and phasing out the use of palm oil crop-based biofuels for meeting EU renewable energy targets, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for

[187] European Union's first written submission, para. 400.
[188] European Union's first written submission, para. 400.
[189] To avoid any possible misunderstanding, the Panel is not suggesting that WTO dispute settlement practice prevents a complaining Member from asserting that multiple individual measures that it challenges should be analysed in combination as a single overarching measure. The issue raised by the European Union's argument presently under consideration is whether a complaining Member is *required* to expand the scope of the measures it wishes to challenge by including, as challenged measures, *all* provisions of the regulatory framework insofar as they operate in conjunction with the specific measures at issue.
[190] See European Union's response to Panel question No. 1, paras. 1-16, elaborating on European Union's first written submission, para. 401. In its first written submission, the European Union stated that although Indonesia has contended that the 7% maximum share and the high ILUC-risk cap and phase-out are distinct measures, Indonesia "has not explained which elements of the Delegated Regulation and Article 26 RED II it considers fall under which 'measure'. In this respect, Indonesia's panel request is clearly inconsistent with Article 6(2) of the DSU". (European Union's first written submission, para. 401.) In response to Panel question No. 1, which asked the European Union to elaborate on this statement, the European Union argued that it is the "EU Biofuels regime" that is the "overarching measure" that Indonesia identified in its panel request. More specifically, the European Union argued that in "paragraph 2 of its Panel request Indonesia explains that the EU measures at issue in the present proceedings are laid down in a series of legal instruments, which go well beyond RED II and the Delegated Regulation", and which are "the essential components of what the EU has called the "EU Biofuels regime'" (paras. 3-4); that "Indonesia's panel request is not simply addressed against two distinct measures resulting from Article 26 of RED II and the Delegated Regulation read in isolation" (para. 8); that "the Panel request does not identify the measures that Indonesia says it wants to challenge in its first written submission as being only the 7 % limitation and the high ILUC-risk cap and phase-out resulting from Article 26 RED II and the Delegated Regulation" (para. 15); and that "the Panel request as a whole confirms that the 7 % limitation and the high ILUC-risk cap and phase-out are just two aspects of the overarching measure that is the EU biofuels regime" (para. 16).
[191] Indonesia's panel request, para. 2.
[192] Indonesia's panel request, paras. 13-37.
[193] Indonesia's panel request, paras. 13-17.
[194] Indonesia's panel request, paras. 18-30.
[195] Indonesia's panel request, paras. 31-37.
[196] Indonesia's panel request, para. 47.

classifying and certifying low ILUC-risk biofuels"[197], "imposing the 7% limitation", "preparing, adopting or applying conformity assessment procedures for certifying oil palm crop-based biofuels as low ILUC-risk" and "failing to make available conformity assessment procedures for certifying oil palm crop-based biofuels as low ILUC-risk".[198]

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

7.12. Turning to the European Union's second line of argument described above, the Panel fully agrees that it does not follow from Indonesia's identification of the relevant aspects of Articles 26(1) and (2) of RED II as the specific measures at issue "that those provisions should be scrutinised by the Panel in isolation from their broader context".[199] In other words, the Panel accepts that the 7% maximum share, as reflected in Article 26(1) of RED II, and the high ILUC-risk cap and phase-out, as reflected in Article 26(2) of RED II and the Delegated Regulation, can only be understood as components of the broader regulatory framework.

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

- Directive 2003/30/EC on the promotion of the use of biofuels or other renewable fuels for transport (referring to Recitals (3) to (6), (22), Articles 3(1), 4(2));
- RED I (referring to Articles 3(1), 3(4), Annex I, Articles 2(i) and (a), 17(2), 17(3), 17(5), 19(6));
- Fuel Quality Directive (referring to Articles 1(5), 1(6));
- ILUC Directive (referring to Recitals (4), (5), (16), (17), (21), (28), (34), Articles 2(2)(b)(iv), 2(1)(w)):
- the 2012 Impact Assessment, the 2017 Study Report, the RED II Proposal;
- RED II (referring to Articles 1, 2(1), 2(33), 2(32), 2(27), 2(24), 2(34), 2(40), 2(37), 3(1), 3(2), 7(1), 7(4), 25(1), 26(1), 27, 29, 29(3), 29(4), 29(5), 29(10), 30(6), 30(8), Annex V, 30(1), Annex IX)
- Delegated Regulation (referring to Articles 2(5), 3, the Annex, Articles 4(1)(b), 5, 6, and 7); and
- the 2019 Status Report presented together with the Delegated Regulation.

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

7.15. Moreover, it appears that there is no actual disagreement between the parties in this regard. In their respective assessments of the 7% maximum share and the high ILUC-risk cap and

[197] Indonesia's panel request, paras. 47(i)-(v) and (xiv)-(xvi).
[198] Indonesia's panel request, paras. 47(vii)-(x) and (xii).
[199] European Union's first written submission, para. 403.

phase-out, as reflected in Article 26(1) and (2) of RED II respectively, Indonesia and the European Union both refer to numerous other provisions of RED II, the Delegated Regulation, and the broader regulatory framework. The parties do not always agree on *which* other provisions are relevant context for the assessment of the measures at issue, or on *how* certain other provisions are relevant. But such disagreements pertaining to the relevance and weight of particular aspects of the context of the measures at issue cannot be taken to imply that Indonesia is arguing that, as a consequence of its having identified the 7% maximum share and the high ILUC-risk cap and phase-out as the specific measures at issue, it follows that the Panel must assess the specific measures in Article 26(1) and (2) of RED II in isolation from all other relevant provisions of RED II, the Delegated Regulation, or the broader regulatory framework.

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

7.1.1.1.2 The relationship among the measures and related terminology

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

7.18. In examining the EU measures the Panel will proceed on a claim-by-claim basis. To the extent that Indonesia has raised the same claim against different EU measures, this means that the Panel will group the measures for the purposes of examining that claim. The Panel notes that this is also the way that Indonesia has presented its claims and that its arguments under such claims to a large extent do not distinguish between measures.

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

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

7.1.1.1.2.1 7% maximum share

7.21. Regarding the first measure, the Panel's observations are of a purely terminological nature. Indonesia's panel request refers to the measure set out in Article 26(1) of RED II as the "7% limitation".[200] The European Union calls the same measure "the 7% maximum share."

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

7.23. The Panel sees the potential for significant confusion if the same measure is referred to in multiple different ways and therefore this terminology has been harmonized throughout the Report.[201]

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[200] WT/DS593/9, paras. 13-17.

[201] The Panel notes that it is common for disputing parties to employ different terminology to describe the same measure(s), and it is clear that a panel is free to employ the terminology that it deems appropriate, taking into account a range of considerations such as neutrality, ease of reference, and minimizing the potential for confusion. See e.g. Panel Reports, *US – Origin Marking (Hong Kong, China)*, fn 13 ("origin marking requirement" vs "revised origin marking requirement"); *Turkey – Pharmaceutical Products (EU)*, fn 156 ("localization measure" vs "localisation requirement"); *Australia – Tobacco Plain Packaging*, fn 170

7.1.1.1.2.2 The high ILUC-risk cap and phase-out

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

A single measure or two distinct measures

7.25. In its panel request, Indonesia referred to the high ILUC-risk cap and phase-out as a single measure, and Indonesia follows the same approach in its submissions to the Panel. The European Union's submissions in this dispute follow suit and refer to the high ILUC-risk cap and phase-out out as a single measure. The Panel notes that whether two measures (or two aspects of a measure) may be treated as a single measure is a question to be determined by a panel. That determination should be informed by the formulations used by the complaining Member and/or the responding Member but is not controlled by how the parties refer to and characterize the measure(s).[202]

7.26. The Panel sees several reasons to refer to the high ILUC-risk cap and phase-out in the singular, and to analyse the high ILUC-risk cap and phase-out as a single measure. As a conceptual matter, the "phase-out" is essentially the "cap" that is gradually decreased to 0 by the end of 2030, at the latest.[203] Moreover, the claims that Indonesia presents in its panel request and also in its submissions regarding the high ILUC-risk "cap" and "phase-out" are the same and apply equally to both the cap and also to the phase-out.

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

Relationship to low ILUC-risk certification

7.28. The Panel notes that Indonesia's panel request refers to the high ILUC-risk cap and phase-out together with "the criteria for determining and certifying low ILUC-risk biofuels" and states that the low ILUC-risk criteria are to be "taken into account" as part of the assessment of the WTO-consistency of the high ILUC-risk cap and phase-out. The Panel will address terminology issues relating to low ILUC-risk certification below. For the purposes of establishing how low ILUC-risk certification relates to the high ILUC-risk cap and phase-out the following considerations apply.

(noting that the different complaining Members "have used different terms when referring collectively to the measures at issue"); *EU – Energy Package*, fn 20 ("government exemption measure" vs "public body measure"); *Argentina – Import Measures* ("Restrictive Trade-Related Requirements" or "RTRRs" vs "Trade-Related Requirements" or "TRRs"), fn 122; *EC and certain member States – Large Civil Aircraft*, fn 11 and para. 7.291 ("Launch Aid" vs "member State Financing"); *US – Continued Zeroing*, fn 4 and paras. 6.26-6.28 (explaining in light of the parties' preferred alternative formulations that the reference to the measure as "the continued application of the 18 duties" at issue was only intended to facilitate the multiple references that we make to the measure at issue throughout this Report).

[202] In cases involving challenges to a "single" measure composed of multiple components, panels and the Appellate Body have generally considered three main factors: (i) the complainant's presentation of its claim(s) in respect of the constituent components; (ii) the respondent's position; and (iii) the operation of and relationship between the components to determine whether they are "autonomous or independent", or more "interdependent" and "integrated". (See Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.7, and fns 168-176 (referring to Panel Reports, *China – Raw Materials*; *US – COOL*; *China – Rare Earths*, *EC – Seal Products*; *Argentina – Import Measures*; *Indonesia – Chicken*; and *India – Solar Cells*); and Appellate Body Reports, *EC – Seal Products*; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*; and *Argentina – Import Measures*, paras. 5.124 and 5.130-5.131).)

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

7.29. Low ILUC-risk certification operates as an exemption[204] to the high ILUC-risk cap and phase-out. The extent to which that exemption is to be taken into account in the assessment of the WTO-consistency of the high ILUC-risk cap and phase-out is a function of the Panel's objective assessment of its relevance to the assessment of the measure at issue, i.e. the high ILUC-risk cap and phase-out, under the particular legal standard being applied. The Panel has already stated that in its assessment of the specific measures at issue, it must take other provisions of RED II, the Delegated Regulation, or the broader regulatory context into account to the extent that they are relevant to the assessment of the design and operation of the specific measures at issue.

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

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

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

7.33. First, it is apparent from the text of RED II and the Delegated Regulation that the opportunity for low ILUC-risk certification is integral to the high ILUC-risk cap and phase-out in that, together with the criteria for high ILUC-risk classification, it partly defines the overall scope of application of the "cap and phase-out" requirements that are provided for in the measure. Indeed, the possibility of low ILUC-risk certification is incorporated into Article 26(2) itself, which states in its first paragraph that "the share of [high ILUC-risk biofuels] shall not exceed the level of consumption of such fuels in that Member State in 2019, *unless they are certified to be low indirect land-use change-risk biofuels*".[205] The close relationship between the high ILUC-risk cap and phase-out and low ILUC-risk certification is underscored by the fact that an exemption would not be needed, if the biofuel at issue did not in the first place constitute high ILUC-risk biofuel, to which the high ILUC-risk cap and phase-out applies. In other words, the high ILUC-risk cap and phase-out is integrally related to, and operates in conjunction with, low ILUC-risk certification.

7.34. Second, there have been several prior disputes in which the assessment of the WTO-consistency of a measure under the GATT 1994 and/or the TBT Agreement took into account the manner in which any exemptions to the challenged measure were defined and applied. For example, in *US – Shrimp* the measure at issue was a US import prohibition on shrimp, and the

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

[205] Emphasis added.

Appellate Body's examination of the measure at issue under the *chapeau* of Article XX of the GATT 1994 focused on certain deficiencies in the manner that the applicable exceptions and related certification procedures were applied.[206] In *EC – Seal Products*, the measure at issue was an EU ban on seal products, and the analysis by both the panel and the Appellate Body turned on the design and application of the exceptions for Inuit or other indigenous communities and marine resource management. The panel in *EC – Seal Products* addressed these exceptions as part of its assessment under Article 2.1 of the TBT Agreement and then again under Article XX.[207] The Appellate Body followed a similar approach in its analysis under Article XX of the GATT 1994.[208]

7.35. Third, the parties to this dispute appear to agree that certain aspects of low ILUC-risk certification, including at least the low-ILUC risk *criteria*, are in principle relevant to the Panel's assessment of the high ILUC-risk cap and phase-out under the TBT Agreement and the GATT 1994. Among other things, Indonesia's first written submission refers to the low ILUC-risk criteria in the context of its description of the high ILUC-risk cap and phase-out as the measure at issue[209] and, in the context of its claims against the high ILUC-risk cap and phase-out, argues that the low ILUC-risk criteria are impracticable and ineffective. According to Indonesia, this serves as additional evidence that the high ILUC-risk cap and phase-out is based on protectionist considerations and has a detrimental impact on the competitive opportunities of oil palm crop-based biofuel in the European Union for the purposes of Article 2.1 of the TBT Agreement, and also that the high ILUC-risk cap and phase-out has a limiting effect on trade for the purposes of Article 2.2 of the TBT Agreement.[210] For its part, the European Union notes that "[t]he low ILUC-risk fuel certification scheme clearly constitutes [an] integral part of the Delegated Regulation and is relevant to assessing both of the 'measures' Indonesia has identified."[211] In the context of addressing the trade-restrictiveness of the high ILUC-risk cap and phase-out, the European Union argues that the trade impact of the measures at issue is minimal in light of *inter alia*, the low ILUC-risk certification provisions.[212] Both parties cross-reference their arguments under the TBT Agreement and the GATT 1994.

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

7.37. Having said this, the Panel recalls the explicit distinction in the TBT Agreement between, on the one hand, disciplines applicable to technical regulations (Articles 2 and 3) and standards (Article 4 and Annex 3) and, on the other hand, disciplines applicable to procedures for assessment of *conformity* with those technical regulations and standards. In at least two prior disputes, panels have concluded that issues relating to the assessment of *conformity* with technical regulations do not fall within the scope of application of Article 2. In both cases, the panels reasoned that any conclusion to the contrary would improperly disregard the structure of the TBT Agreement and the different section headings for Articles 2-4 (Technical Regulations and Standards) and Articles 5-9 (Conformity with Technical Regulations and Standards).[213]

7.38. In this dispute, and for reasons elaborated on in section 7.1.3.1 of this Report, the Panel understands Indonesia to argue that Article 6 of the Delegated Regulation, which the Panel refers to as the "low ILUC-risk certification procedure", is a "conformity assessment procedure" as defined in Annex 1.3 to the TBT Agreement and which is thus subject to the disciplines of Article 5 of the

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

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

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

[209] See e.g. Indonesia's first written submission, paras. 160-161, and 319-397.

[210] Indonesia's first written submission, paras. 543, 555, 576 and 640 (cross-referencing its extended discussion of that issue at paras. 355-397 of its first written submission).

[211] European Union's first written submission, fn 289.

[212] European Union's first written submission, paras. 824-826.

[213] Panel Reports, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.510-7.515; and *Russia – Railway Equipment*, paras. 7.878-7.879.

Agreement.[214] The Panel will address in section 7.1.3 of this Report, the claims brought by Indonesia against this alleged "conformity assessment procedure" under Article 5.1, Article 5.2, Article 5.6, and Article 5.8 of the TBT Agreement.

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

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

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

7.1.1.1.2.3 Low ILUC-risk certification

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

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

7.44. As elaborated on in the context of its findings on the existence of a "conformity assessment procedure" within the meaning of Annex 1.3 to the TBT Agreement[215], the Panel understands the specific measure challenged by Indonesia for the purposes of the claims under Article 5 of the TBT Agreement to be the low ILUC-risk certification procedure.

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

[214] In particular, as Indonesia has clarified in its responses to Panel questions and its second written submission, Indonesia argues that Articles 4 and 5 of the Delegated Regulation impose obligations for identifying what constitutes low ILUC-risk biofuel and Article 6 sets out the (incomplete) certification procedure by imposing auditing and verification requirements. (Indonesia's second written submission, para. 975 and fn 1264.)

[215] See section 7.1.3.1 of this Report.

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

7.46. The Panel now turns to certain temporal scope issues arising from the Panel having been established in July 2020, in the context of the ongoing implementation of RED II and the Delegated Regulation over the period 2018-2023. The Panel will begin by setting out a brief chronology of events as relevant factual background and will then address several issues regarding the ongoing implementation of RED II and the Delegated Regulation that merit consideration in light of the timing of the establishment of the panel.

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

a. Although RED II was adopted on 11 December 2018 and entered into force on 24 December 2018, the period for its transposition (including but not limited to Articles 26(1) and (2)) into national law took almost two and a half years, with a deadline set at 30 June 2021.[216]

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

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

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

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

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

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

7.48. As provided for in the text of Article 26(2) of RED II, the European Commission took the following actions[217] in March 2019:

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

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

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

b. The European Commission adopted the Delegated Regulation, supplementing RED II. It was also adopted on 13 March 2019, and it entered into force on 10 June 2019.[218]

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

a. Article 7 of the Delegated Regulation, entitled "Monitoring and Review"[219], required the European Commission to conduct a review by 30 June 2021 (and also further reviews thereafter, but without specifying any particular timeframe(s)). More specifically, the European Commission was to review all relevant aspects of the Status Report, in particular the data on feedstock expansion, as well as the evidence on the factors justifying the "small holders" provision in Article 5(1)[220], and, if appropriate, amend the Delegated Regulation, the revised report becoming the basis for the application of the criteria set out in Article 3 of the Delegated Regulation.[221]

b. The Status Report states that measures regarding low ILUC-risk certification "need to be implementable in practice and avoid excessive administrative burden", and that guaranteeing robust compliance verification and auditing "requires an in-depth assessment that might not be warranted under certain circumstances and could represent a barrier for the successful implementation of the approach".[222] The Status Report also states that "[t]o ensure robust and harmonised implementation, the European Commission will set out further technical rules regarding concrete verification and auditing approaches in an Implementing Act in line with Article 30(8) of the RED II."[223] The Status Report further states that "[t]he Commission will adopt this implementing act by 30 June 2021 at the latest."[224]

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

a. The European Commission did not conduct the review required by Article 7 of the Delegated Regulation by 30 June 2021. Neither had any such review been conducted by the time that the parties filed their final submissions in this dispute.[225]

b. The European Commission did not adopt any implementing act[226] for low ILUC-risk certification by 30 June 2021. However, on 14 June 2022, the European Commission, in accordance with Article 30(8) of RED II, adopted Implementing Regulation (EU) 2022/996

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

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

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

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

[222] Status Report (2019), (Exhibit IDN-56), pp. 16 and 18.

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

[224] Status Report (2019), (Exhibit IDN-56), p. 18.

[225] European Union's response to Panel question No. 156, para. 347.

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

on rules to verify sustainability and GHG emissions saving criteria and low ILUC-risk criteria.[227]

7.51. Thus, there has been a gradual implementation of RED II and the Delegated Regulation, in relation to the 7% maximum share and the high ILUC-risk cap and phase-out measures, over the period 2018-2023. Indonesia's panel request is dated 18 March 2020, and the DSB established the panel on 29 July 2020.[228] The relevant events set out above may be summed up as follows in relation to the timing of the establishment of the Panel:

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

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

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

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

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

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

7.52. Against this background, the Panel will now turn to several issues regarding the ongoing implementation of RED II and the Delegated Regulation that merit consideration in light of the timing of the establishment of the Panel. The Panel considers that each of these issues merits consideration taking into account the Panel's duty to determine the scope of the measures and claims properly before it.

7.53. First, the Panel recalls the 30 June 2021 deadline for the transposition of RED II (including but not limited to Articles 26(1) and (2) thereof) into national law, and the fact that the latest start date for the "phase-out" is 31 December 2023. The Panel considers however that none of these deadlines gives rise to any jurisdictional impediment to its consideration of the specific measures at issue. Putting aside questions of what terminology would best characterize the status of the measures before and after the deadline for their transposition into national law on 30 June 2021[229], the European Union has not suggested that these dates falling after the date of the establishment of the Panel is a circumstance that precludes the Panel from ruling on the measures.

7.54. As a general principle, a Member's mandatory legislation, even if not yet in force or not applied, can be challenged by another WTO Member – at the very least when the entry into force or subsequent application is automatic at a future date and does not depend on further legislative action.[230] Moreover, the fact that an EU directive requires transposition by its member States does not mean that the measure set out in that directive would somehow be shielded from scrutiny by a

[227] See para. 2.63 above.

[228] See para. 1.3 above.

[229] The European Union argues that until 1 July 2021, no provision of RED II "can produce any legal effect in the EU". (European Union's response to Panel question No. 5, para. 24.) Indonesia responds that "the high ILUC-risk cap and phase-out in Article 26(2) of RED II became effective at the time of the entry into force of RED II" and adds that, for other reasons, the European Union is "wrong to state that, until 1 July 2021, no provision of RED II can produce any legal effect". (Indonesia's second written submission, paras. 142 and 145).

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

WTO panel, or not be ripe for consideration prior to the transposition deadline.[231] Here again, the Panel notes that the European Union has not suggested otherwise.

7.55. Returning to the measures at issue, the Panel notes that neither the general transposition date for RED II (30 June 2021) nor the date for the latest start (31 December 2023) of, and the latest end (31 December 2030) to, the "phase-out" precludes any EU member State from transposing the measures into national law *prior* to that time. Nor do they preclude any EU member State from starting to phase out the use of palm oil-based biofuel *prior* to 31 December 2023.[232]

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

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

7.58. In identifying the "specific measures at issue" for the purposes of Article 6.2 of the DSU, Indonesia's panel request starts by listing several legal instruments in which those measures are laid down. That list includes RED II and the Delegated Regulation[233] as well as:

> any annexes thereto, amendments, supplements, replacements, renewals, extensions, *implementing measures (including any implementing measures envisaged in the above-mentioned legal instruments)* or any other related measures, and any exemptions applied.[234]

7.59. In addition to this language indicating that the measures at issue include "*any … implementing measures (including any implementing measures envisaged in the above-mentioned instruments)*", paragraph 4 of Indonesia's panel request reiterates that "[a]ny such measures adopted or actions taken by the Commission, acting on the basis of EU RED II, are also covered by this panel request". Paragraph 33 of Indonesia's panel request repeats that point, stating that "[a]dditional rules governing certification of biofuels, bioliquids and biomass fuels as low ILUC-risk will be adopted by the Commission" and that those rules "to be adopted are also covered by this panel request".

7.60. The Panel notes that, as a general rule in WTO dispute settlement proceedings, a panel's terms of reference require it to assess the WTO-consistency of a challenged measure as it existed on the date of the Panel's establishment.[235] However, previous panels and the Appellate Body have confirmed that a panel may consider amending or implementing measures enacted after a panel's establishment. In deciding whether to examine amended or implementing measures, the relevant question is whether that amendment or implementing measure "changes the essence of the

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

[232] In its second written submission, Indonesia asserts that "a considerable number of Member States have already transposed the high ILUC-risk cap and phase-out. As the evidence before the Panel shows, several Member States are already excluding oil palm crop-based biofuel from being eligible to be counted towards the EU renewable energy targets." (Indonesia's second written submission, para. 144; see also para. 88. See also Indonesia's comment on the European Union's response to Panel question No. 169, Exhibit IDN-329 and its updated version - Exhibit IDN-369.)

[233] Indonesia's panel request, para. 2(i)-(ii).

[234] Indonesia's panel request, para. 2, final clause. (emphasis added)

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

measures" identified in the panel request.[236] The extent to which a reference to "related" or "implementing" measures in a panel request may serve to bring measures taken after the establishment of the panel into the scope of a panel's terms of reference is to be assessed "in light of the circumstances of each particular case".[237]

7.61. These principles have been developed by panels and the Appellate Body in the context of considering whether the "specific measures at issue" identified in a panel request can include implementing measures taken after the establishment of a panel. However, insofar as WTO dispute settlement practice allows scope for ruling on measures post-dating the establishment of a panel, it stands to reason, *a fortiori*, that a panel is not precluded from taking the factual situation post-dating establishment of the panel into account in its assessment of the design and operation of a measure that was in existence at the time of the establishment of the panel.[238]

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

7.1.1.2 Order of analysis

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

7.64. The Panel will first address the order of analysis between the TBT Agreement and the GATT 1994 and will then address the order of analysis among the multiple claims brought under those Agreements. In structuring its order of analysis, the Panel has accorded due weight to the manner in which the parties themselves have presented their claims and defences.[239]

7.1.1.2.1 Between the TBT Agreement and the GATT 1994

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

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

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

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

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

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

7.67. The Panel further notes that, when presented with claims under the TBT Agreement and the GATT 1994, considerations similar to those set out above have led previous panels to begin with the claims under the TBT Agreement.[240] While the Panel does not consider that this necessitates the same order of analysis as a general rule and without regard to the circumstances of a particular dispute, it confirms that there is no error in this approach.

7.1.1.2.2 Claims under the TBT Agreement

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

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

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

7.71. The Panel begins its analysis with the claim under Article 2.4 because the Panel's conclusion on the meaning and relevance of the four international standards central to that claim will inform the Panel's analysis of the claims under Articles 2.1 and 2.2. This is because Indonesia relies on its understanding of the meaning and relevance of those standards when arguing that the high ILUC-risk cap and phase-out does not reflect any "legitimate regulatory distinction"[241] for the purposes of Article 2.1, and also when arguing that the 7% maximum share and the high ILUC-risk cap and phase-out are more trade-restrictive than necessary to fulfil a legitimate objective for the purposes of Article 2.2.[242] The meaning and relevance of the four international standards is central to the claim under Article 2.4 and the parties devote detailed arguments to this issue. The Panel considers it logical to address the claim under Article 2.4 first and then refer back to its conclusions in the context of addressing any related arguments about the meaning and relevance of the international standards in the context of the claims under Article 2.1 and Article 2.2. Finally, it is worth noting that the assessment of the claim under Article 2.4 is also relevant for assessing later the transparency claims under Article 2.9, since the applicability of these obligations depends on whether a relevant international standard exists, and if one does, whether the measure is in accordance with such a standard.

7.72. The Panel will next address the claim under Article 2.2, because it considers that its conclusions on certain issues under that provision will necessarily inform its analysis of the claim under Article 2.1. More specifically, the Panel's identification of the measures' objective(s), and assessment of whether they constitute a "legitimate objective", is mandated by the text of

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

[241] Indonesia's first written submission, paras. 532-533.

[242] Indonesia's first written submission, paras. 599-600.

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

7.73. As a general principle, panels are free to structure the order of their analysis as they see fit.[243] Moreover, the parties have not argued that the present case is one in which "there exists a mandatory sequence of analysis which, if not followed, would amount to an error of law" or "have repercussions for the substance of the analysis itself".[244] Indeed, the Panel notes that the ordering of the claims set out above is the same order of analysis that was followed by the panel in *EC – Sardines*. In that case, the panel followed the complainant's suggested order of analysis and addressed the claim under Article 2.4 of the TBT Agreement first, noting that "it would not constitute an error of law to start the examination of the consistency of the EC Regulation with Article 2.4 followed by Articles 2.2 and 2.1 of the TBT Agreement as necessary since such sequential examination would not affect the interpretation of the other provisions."[245]

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

7.1.1.2.3 Claims under the GATT 1994

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

7.76. Leaving aside whether the Panel is bound to follow the same order of analysis by virtue of the seemingly conditional nature of Indonesia's claim under Article III:4[246], the Panel notes that it would maintain a degree of parallelism between the sequencing of claims under the TBT Agreement and the GATT 1994 if it first addresses the claim under Article XI:1 followed by the claims of discrimination under Articles III:4 and I:1 of the GATT 1994. As explained further above, the Panel orders its analysis of the claims under the TBT Agreement so as to (after assessing Article 2.4) address the claim under Article 2.2 of the TBT Agreement (more trade-restrictive than necessary) followed by the claim of discrimination under Article 2.1. While the Panel does not consider the meaning of the term "trade-restrictive" in the context of Article 2.2 to be coextensive with the terms

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

[244] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 109. See also Panel Reports, *EC – Seal Products*, para. 7.63; and *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.3.

[245] Panel Report, *EC – Sardines*, para. 7.18. The Panel further notes that in the present dispute the European Union made submissions as to the logical order of analysis under the TBT Agreement and specifically submitted that Article 2.2 should be assessed before Article 2.1. (European Union's second written submission, paras. 226ff.)

[246] Indonesia has clarified that its claim under Article III:4 in respect of discrimination against palm oil imported from Indonesia is "in the alternative" to its claim under Article XI:1. (Indonesia's response to Panel question No. 102, para. 297; second written submission, paras. 1051 and 1071.) This means that Indonesia's claim under Article III:4 is not in the alternative or conditional in the typical sense. Under Article XI:1 of the GATT 1994, Indonesia claims that the European Union, by imposing the high ILUC-risk cap and phase-out, makes effective quantitative prohibitions or restrictions on imports of *palm oil*. Under Article III:4 of the GATT 1994, Indonesia claims that the high ILUC-risk cap and phase-out discriminates between *palm oil* and *oil palm crop-based biofuel* originating in Indonesia and like products of EU origin. Indonesia explains that even if the Panel upholds Indonesia's claim under Article XI:1, it would still be necessary for the Panel to consider Indonesia's claim under Article III:4 concerning discrimination against *oil palm crop-based biofuel* originating in Indonesia. (Indonesia's response to Panel question No. 100, para. 287.) Furthermore, Indonesia does not qualify its discrimination claim under Article I:1 as being made in the alternative or conditionally.

"restrictions … on the importation" of products in Article XI:1 of the GATT 1994, there is a degree of parallelism between the arguments of the parties in relation to these terms in this dispute.

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

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

7.1.2 Claims under Article 2 of the TBT Agreement

7.1.2.1 Annex 1.1 – Existence of a "technical regulation"

7.1.2.1.1 Introduction

7.79. Having addressed these preliminary considerations relating to the definition of the EU measures at issue and the order of analysis of the claims under the TBT Agreement and the GATT 1994, the Panel now turns to the threshold issue of whether the 7% maximum share and the high ILUC-risk cap and phase-out are "technical regulations" within the meaning of Annex 1.1 to the TBT Agreement.[247]

7.80. Indonesia submits[248] that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations within the meaning of the definition in Annex 1.1. Based on the various elements of this definition, Indonesia argues that Article 26 of RED II and the Delegated Regulation: (i) are "documents" that apply to an "identifiable group of products"; (ii) that the "composition of biofuel", and more specifically the quality of being made from food or feed crops (for the 7% maximum share) or a specific crop determined to be high ILUC risk (for the high ILUC-risk cap and phase-out) qualifies as a "product characteristic"; and (iii) that each measure "lays down" such characteristics, with which compliance is "mandatory", by virtue of the content and nature of RED II and the Delegated Regulation and the consequence that follows from not being taken into account for achieving EU renewable energy targets (namely that such biofuel is in essence excluded from the EU renewable energy market).

7.81. The European Union submits[249] that neither the EU Biofuels regime nor the specific "measures" identified by Indonesia, i.e. the 7% maximum share and high ILUC-risk cap and phase-out, are technical regulations. The European Union does not dispute that, for the purposes of the definition in Annex 1.1, Article 26 of RED II and the Delegated Regulation are "documents", nor that the composition of a product may, in principle, constitute a "product characteristic". However, the European Union challenges Indonesia's approach for assessing the elements of the Annex 1.1 definition against the measures at issue by: (i) rejecting the way it defines the "identifiable group of products" to which the measures apply; (ii) arguing that the measures at issue are not properly

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

[248] Indonesia's first written submission, paras. 403-466; responses to the Panel's first set of questions, paras. 160-184; and second written submission, paras. 436-537.

[249] European Union's first written submission, paras. 378-507; responses to the Panel's first set of questions, paras. 320-345.

characterized as regulating the "composition of biofuel" (the relevant "product characteristic" identified by Indonesia), noting that the only differentiation in the "measures" at issue in these proceedings relates to "the environmental impact of its production process (including of the raw material used for its production) and not to any product characteristics as such"; (iii) arguing that the measures do not "lay down" any product characteristics; and (iv) arguing that compliance is not "mandatory".

7.82. In addition to these points, the European Union also argues that Indonesia "selectively identified only some of the provisions that constitute the EU Biofuels regime, notwithstanding that those provisions operate in conjunction with one another, and could only be assessed as a composite whole"; that this "definitional approach is highly artificial"; and that "[i]n line with the case law, an objective assessment of whether the 'measures' identified by Indonesia are 'technical regulations', (and therefore fall within the scope of application of the TBT Agreement), requires an assessment of all the constituent elements of the EU Biofuels regime."[250] The Panel recalls that it has already addressed this argument in the previous section of its Report because it raises a more general issue regarding the Panel's terms of reference and the scope and definition of the measures at issue in this dispute.

7.1.2.1.2 Legal standard

7.83. The obligations in Article 2 apply to measures that constitute "technical regulations" by central government bodies.[251] Article 1.2 provides that "for the purposes of this Agreement the meaning of the terms given in Annex 1 applies." Annex 1.1 of the TBT Agreement defines a "technical regulation" as a:

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

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

7.85. Whether a measure constitutes a technical regulation pursuant to the first sentence of Annex 1.1 depends on whether it is a "document"[252] that meets what has been described as a "three-tier test"[253]:

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[250] European Union's first written submission, paras. 400 and 402.

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

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

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

[252] The parties agree that Article 26 of RED II and the Delegated Regulation are "documents" for the purposes of Annex 1.1. Indonesia's first written submission, paras. 410-417; European Union's first written submission, paras. 388-389. In light of the applicable legal standard, the Panel sees no reason to disagree. The ordinary meaning of "document" is defined broadly, as "something written, inscribed, etc., which furnishes evidence or information upon any subject". As a result, the term covers "a broad range of instruments or apply to a variety of measures". (Appellate Body Report, *US – Tuna II (Mexico)*, para. 185. See also Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, fn 708; and Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.291-7.298 (discussing Annex 1.1 as part of its thorough interpretation of the same term "document" as used in the definition of "standard" Annex 1.2).)

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

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

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

c. compliance with which is mandatory.

7.86. These elements are cumulative[254], and thus each must be satisfied for a measure to constitute a technical regulation within the meaning of Annex 1.1 to the TBT Agreement. The Panel will elaborate further on the elements of the legal standard in Annex 1.1 as necessary in the course of its assessment of the issues in dispute.

7.1.2.1.3 'identifiable group of products'

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

7.88. For a measure to lay down product characteristics (or related PPMs), it must apply to an "identifiable product or group of products".[255] While the product or products at issue need not be expressly named or identified in the document that constitutes the technical regulation, they should at least be *identifiable*.[256] A product might be identifiable, for instance, through the very "characteristic" that is the subject of regulation.[257]

7.89. Indonesia argues that the 7% maximum share and the high ILUC-risk cap and phase-out both apply to the same identifiable group of products, namely "biofuel made out of food and feed crops".[258] Indonesia also submits that "energy from renewable sources" is the identifiable product group to which RED II and the Delegated Regulation apply more generally.

7.90. The European Union challenges Indonesia's approach to defining the "identifiable group of products" to which the measures apply. Specifically, the European Union argues that Indonesia has not demonstrated that the relevant "identifiable group of products" may be defined "as broadly as 'renewable energy' (in respect of RED II and the Delegated Regulation, as a whole) or as narrowly as 'biofuels made out of food and feed crops'" (in respect of Article 26 of RED II, which contains the 7% maximum share and the high ILUC-risk cap and phase-out).[259] The European Union does not dispute that Article 26 of RED II and the Delegated Regulation make reference to biofuels made out of food and feed crops[260], but argues that the "measures" at issue form part of a regime that applies

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

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

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

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

[258] Indonesia's first written submission, paras. 418-422; second written submission, paras. 447-456.

[259] European Union's first written submission, para. 406. As to the contention that the relevant "group of identifiable products" is "renewable energy", the European Union argues that Indonesia's position is ambiguous and the European Union is not in a position to know to which case it should respond; that treating "renewable energy" as the broad "group of identifiable products" is difficult to reconcile with Indonesia's definition of the specific "measures" it has identified as being at issue in these proceedings; that Article 26 of RED II does not purport to define or identify what comprises "renewable energy", either in a general sense or at all; that Indonesia has neither sought to explain what other "renewable energy products" would fall within that expansive definition and/or how they fall to be regulated by the "measures"; and that the EU Biofuels regime, even taken as whole, could not be considered to purport to "regulate" or apply to the entire field of "renewable energy products". (European Union's first written submission, paras. 406-409.

[260] European Union's first written submission, para. 411.

to "advanced biofuels"[261] and indeed "all biofuels, bioliquids and biogas used in the transport sector"[262] and that the assessment of the "measures" must take place in that broader context.

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

7.92. The Panel understands the European Union to argue that the relevant group of products for the purposes of the analysis encompasses "advanced biofuels" in addition to "biofuels made from food and feed crops", and that the Panel's assessment must take place "in the broader context" of the fact that the measure at issue forms part of a regime that applies to "all biofuels, bioliquids and biogas used in the transport sector". In the Panel's view, these arguments suggest that the European Union considers the relevant product group to be the broader category of "biofuels, bioliquids and biogas used in the transport sector", of which both "advanced biofuels" and the group of "biofuels made from food and feed crops" identified by Indonesia are a part.

7.93. The Panel recalls that RED II establishes a common framework for the promotion of "energy from renewable sources". Within this common framework, RED II lays down rules on the use of energy from renewable sources in the transport sector.[263] Article 26, in turn, is entitled "Specific rules for biofuels, bioliquids and biomass fuels produced from food and feed crops". The text of Article 26(1) likewise refers to "biofuels … produced from food and feed crops", and the text of Article 26(2) refers to "biofuels … produced from food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed". The Delegated Regulation elaborates further on particular aspects in relation to those biofuels that are the object of Article 26, namely "biofuels made from food and feed crops". The 7% maximum share and the high ILUC-risk cap and phase-out are thus provided for in a provision, i.e. Article 26 of RED II, that by its own terms contains "Specific rules for *biofuels, bioliquids and biomass fuels produced from food and feed crops*".[264]

7.94. The Panel considers that, while there may be more than one way of identifying the group of products to which the 7% maximum share and the high ILUC-risk cap and phase-out apply[265], it is clear that both measures apply to "biofuel produced from food and feed crops". Accordingly, the Panel finds that the 7% maximum share and the high ILUC-risk cap and phase-out both apply to an identifiable group of products.

7.1.2.1.4 "lays down product characteristics"

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

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

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[261] European Union's first written submission, para. 412.
[262] European Union's first written submission, para. 418.
[263] Article 1 of RED II.
[264] Emphasis added.
[265] The high ILUC-risk cap and phase-out introduces a further distinction within the group of "biofuels produced from food and feed crops", namely between biofuels produced from food and feed crops "for which a significant expansion of the production area into land with high-carbon stock is observed" (and, by implication, those biofuels produced from food and feed crops for which no such significant expansion is observed). From this perspective, a more narrowly defined group of products could be identified for Article 26(2). However, from the perspective that biofuels produced from food and feed crops are a subset of the broader group of "biofuels" products (which, as the European Union notes, also includes "advanced biofuels") the Panel considers that it would also not be inaccurate to identify "biofuels" more generally as a group of identifiable products to which the 7% maximum share and the high ILUC-risk cap and phase-out apply.

7.97. As described by the Appellate Body, "[t]he heart of the definition of a 'technical regulation' is that the 'document' at issue must 'lay down' — that is, set out, stipulate or provide — 'product *characteristics*'."[266] The term "product characteristics" has been understood to cover "any objectively definable features, qualities, attributes, or other distinguishing mark of a product" that may relate to "a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity".[267]

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

7.99. The Panel notes that this understanding is consistent with the approach taken in *EC – Sardines*. In that case, the measure was found to be a technical regulation and one "product characteristic" that it required was that "preserved sardines must be prepared exclusively from fish of the species *Sardina pilchardus*."[268] The panel considered that the requirement to use exclusively *Sardina pilchardus* was a product characteristic as it "objectively defines features and qualities" of preserved sardines for the purposes of their marketing as preserved sardines and under the trade description referred to in Article 7 of the EC Regulation.[269] The Appellate Body agreed with the panel's finding that this was an "objectively definable 'feature', 'quality' or 'attribute'" of the product.[270]

7.100. The Panel has already concluded, in the previous section, that while there may be more than one way of identifying the "group of products" to which the 7% maximum share and the high ILUC-risk cap and phase-out apply, it is clear that both measures apply to "biofuel produced from food and feed crops". In the course of its consideration of that issue, the Panel noted that Article 26 is entitled "Specific rules for biofuels, bioliquids and biomass fuels *produced from food and feed crops*". Article 26 thus identifies the products to which the 7% maximum share and the high ILUC-risk cap and phase-out apply by reference to the type of *feedstock* from which they have been obtained.[271]

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

7.102. Regarding the high ILUC-risk cap and phase-out, the text of Article 26(2) refers more specifically to "biofuels … produced from food and feed crops *for which a significant expansion of the production area into land with high-carbon stock is observed*".[272] The text of Article 26(2) itself does not specify which food and feed crops so qualify, as this determination is based on the criteria in Article 3 of the Delegated Regulation and the related Annex.

7.103. By its terms, Article 26(2) does not identify biofuels *solely* by reference to what they are produced from (i.e. "food and feed crops"), and also identifies the group of products to which it applies by reference to their *relative degree of ILUC risk*. The high ILUC-risk cap and phase-out in Article 26(2) is further subject to an exemption for individual consignments of any biofuels made from food and feed crops determined to be high ILUC risk, insofar as those consignments are certified

[266] Appellate Body Report, *EC – Asbestos*, para. 67. (emphasis original)
[267] Appellate Body Report, *EC – Asbestos*, para. 67.
[268] Panel Report, *EC – Sardines*, para. 7.27; and Appellate Body Report, *EC – Sardines*, para. 190.
[269] Panel Report, *EC – Sardines*, para. 7.27.
[270] Appellate Body Report, *EC – Sardines*, paras. 189-190.
[271] The Panel recalls that "food and feed crops" are defined in Article 2(40) of RED II as "starch-rich crops, sugar crops or oil crops produced on agricultural land as a main crop excluding residues, waste or ligno-cellulosic material and intermediate crops, such as catch crops and cover crops, provided that the use of such intermediate crops does not trigger demand for additional land".
[272] Emphasis added.

as satisfying the *low* ILUC-risk criteria. Thus, in contrast to the 7% maximum share in Article 26(1), the high ILUC-risk cap and phase-out in Article 26(2), and the accompanying exemption for individual consignments satisfying the low ILUC-risk criteria, do not identify biofuels *solely* by reference to what they are made from (i.e. "food and feed crops"). Rather, Article 26(2) explicitly identifies biofuels by reference to their relative degree of ILUC risk. This is a feature of Article 26(2) that cannot be disregarded in the context of characterizing the measures at issue under Annex 1.1.

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

7.105. The European Union is correct that Article 3 of the Delegated Regulation, establishing the criteria for determining high ILUC-risk feedstocks, covers matters relating to the observed impacts of cultivation of specific feed and food crops.[273] Furthermore, the Panel agrees with the European Union that these criteria do not, in and of themselves, relate to any intrinsic or extrinsic characteristic of the biofuels produced from feedstocks.[274] However, the Panel notes that it is not the criteria for the determination of high ILUC-risk crops that the Panel considers to be the relevant product characteristic in this context. The criteria included in the high ILUC-risk formula in Article 3, and the Annex to the Delegated Regulation, serve the purpose of designating an entire crop as a crop from which biofuel cannot be made without its eligibility to count towards EU renewable energy targets being limited by the high ILUC-risk cap and phase-out. This serves as an intermediate step in the determination, which ultimately leads to the designation of each crop as either "high ILUC risk" or not. This determination in turn dictates which biofuels are "high ILUC risk", based on the crop from which they are made (i.e. their feedstocks or raw materials). The quality of being produced from a specific crop is thus the product characteristic that ultimately dictates the application of the high ILUC-risk cap and phase-out to a particular group of biofuels.

7.106. The Panel observes that the possibility of certifying individual consignments of biofuel from a particular yield of a crop as low ILUC risk does not alter the characteristic of a biofuel as being made from a high ILUC-risk crop: any consignments of biofuel certified as "low ILUC-risk" is still made from a crop classified as high ILUC risk. The possibility of certification therefore does not detract from the characterization of the entire crop from which the biofuel is obtained (currently only palm oil) as high ILUC risk. It only enables some consignments of high ILUC-risk biofuels, when made from additional yield obtained in accordance with the criteria set out in Articles 4 and 5 of the Delegated Regulation, to be eligible to count towards EU renewable energy targets to the same extent allowed for other biofuels made from food and feed crops.

7.107. In any event, the Panel considers that while low ILUC-risk certification is an important part of the context that must be taken into account in characterizing the measures at issue for the purposes of determining the applicability of the TBT Agreement, the limited exemption for low ILUC-risk certification simply does not shift the "centre of gravity"[275] of the measures for the purposes of characterizing the measures under the TBT Agreement. Only a limited portion of the biofuel made from high ILUC-risk biofuel will be able to qualify for low ILUC-risk certification. By hypothesis, as a group, "high ILUC-risk" biofuels have been determined to present a high risk of ILUC, and low ILUC-risk certification can only be obtained on a consignment-by-consignment basis if it can be demonstrated that the specific biofuel at issue does not give rise to the same level of risk that characterizes the entire group of biofuels classified as "high ILUC risk". Leaving aside the parties'

[273] European Union's first written submission, para. 452.

[274] European Union's first written submission, para. 452.

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

disagreement about whether low ILUC-risk certification is even practicable, the existence of this limited exemption does not alter what the Panel regards as the core features of the 7% maximum share and the high ILUC-risk cap and phase-out.

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

7.109. The Panel now turns to the second prong of the element under consideration, which is whether the 7% maximum share and the high ILUC-risk cap and phase-out "lay down", within the meaning of Annex 1.1, the product characteristic identified. The Panel recalls that the European Union submits that Article 26 of RED II does not "lay down" or "prescribe" the "composition of fuel" or the "composition of biofuel", either positively or negatively.[276]

7.110. The verb "lay down" is defined as "establish, formulate definitely (a principle, a rule); prescribe (a course of action, limits, etc.)".[277] Accordingly, the verb "lays down", as used in Annex 1.1 of the TBT Agreement means "establishing" or "prescribing" certain product characteristics (or their related processes or production methods). The relevant product characteristics might be prescribed in a "positive" or "negative" form, i.e. the document may provide, positively, that products must possess certain "characteristics", or might prescribe, negatively, that products *not* possess certain "characteristics".[278]

7.111. The Panel first notes that by its own terms, RED II "*lays down rules* … on the use of energy from renewable sources … in the transport sector", for the purposes of meeting EU-wide renewable energy consumption targets.[279] The 7% maximum share and the high ILUC-risk cap and phase-out are among the rules that RED II, by its own terms, "lays down". Specifically, these measures are set out in Article 26 of RED II, which, as already emphasized, is entitled "*Specific rules* for biofuels, bioliquids and biomass fuels produced from food and feed crops". Articles 26(1) and (2) are thus integral and essential components of the calculation rules that define the terms of eligibility of different types of energy sources in the transport sector to be counted as renewable energy for the purposes of meeting RED II targets.

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

7.113. As regards the high ILUC-risk cap and phase-out, its essential feature and function within this broader framework (i.e. the calculation rules that define the terms of eligibility of different types of energy sources in the transport sector to be counted as renewable energy for the purposes of meeting RED II targets) is to limit and gradually eliminate the eligibility of biofuels made from high ILUC-risk feedstocks to be counted towards those targets. As with Article 26(1), therefore, Article 26(2) identifies the products to which this requirement applies by reference to a defining

[276] European Union's first written submission, para. 439. Among other things, the European Union argues that Article 26 of RED II identifies a methodology to enable the Member States to calculate their contribution to the Union's renewable energy targets, but whilst it refers to different biofuels based on their raw materials, this serves a purely descriptive function. (European Union's first written submission, para. 438, response to Panel question No. 71.)

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

[278] Appellate Body Report, *EC – Asbestos*, para. 69.

[279] Article 1 of RED II. (emphasis added)

product characteristic, namely being produced from "food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed". It is the presence of this characteristic that determines the applicability of the requirement at issue. Where a determination is made that a biofuel is produced from "food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed", that determination is made in respect of the product generally (as opposed to individual consignments) and thus becomes a very concrete product characteristic (specifically based on the raw material used to produce the product.) Considered as a whole and in the context of other provisions of RED II, the high ILUC-risk cap and phase-out specifically limits the eligibility of specific types of biofuels to be counted towards the renewable energy targets in RED II. Thus, like the 7% maximum share, the high ILUC-risk cap and phase-out also effectively defines and prescribes one of the characteristics required of biofuels for the purposes of meeting the consumption targets in RED II.

7.114. The European Union submits that a biofuel's eligibility to contribute to renewable energy consumption targets under RED II depends on a number of factors, including compliance with the sustainability and GHG emissions savings criteria, and is therefore not determined "solely" by reference to the raw material used to obtain it.[280] The Panel is not persuaded by this argument. The fact that there are other conditions not challenged in these proceedings that also define the eligibility of biofuels to contribute to RED II renewable energy consumption targets does not obscure the specific requirements contained in the 7% maximum share and the high ILUC-risk cap and phase-out which are at issue.

7.115. In the context of arguing that the measures do not "lay down" any product characteristic, the European Union submits that if Indonesia's logic were accepted by the Panel, the scope of the definition of a "technical regulation" under the TBT Agreement would be drastically widened. As a consequence any "document" that identified products by reference to the raw materials from which they are produced and established some legal effects from that identification would constitute a "technical regulation" because that reference alone would be considered equivalent to "regulating" the "composition" of the product. Under that logic, according to the European Union, any Member's WTO schedule, which commonly distinguishes hundreds of products based on their raw materials and establishes different rates of import duties, would constitute "a conglomerate of technical regulations".[281]

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

7.117. The Panel notes that the fact that the measures identify the product at issue through the very product characteristics that are the object of the prescriptions at issue does not imply that they cannot constitute a technical regulation. As observed by the Appellate Body, the product might be identifiable through the very "characteristic" that is the subject of regulation.[282] Whether the specific

[280] European Union's first written submission, para. 446.
[281] European Union's first written submission, para. 460.
[282] Appellate Body Report, *EC – Asbestos*, para. 70: "… there may be perfectly sound administrative reasons for formulating a 'technical regulation' in a way that does *not* expressly identify products by name, but simply makes them identifiable – for instance, through the 'characteristic' that is the subject of regulation." (ibid.). (emphasis original)

measure at issue is or is not a technical regulation must be determined based on the essential features of the measure considered as a whole.[283]

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

7.1.2.1.5 "with which compliance is mandatory"

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

7.120. Annex 1.1 makes clear that compliance with those product characteristics (or their related PPMs) must be mandatory for the measure to be a technical regulation. In contrast, a standard, as defined in Annex 1.2, is a document "approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, *with which compliance is not mandatory*".[284] The requirement that compliance be mandatory means that the document at issue must prescribe rules in a binding or compulsory fashion.[285] In *EC – Sardines*, the panel and the Appellate Body considered the measure to lay down product characteristics in a mandatory fashion, because the relevant requirements were contained in provisions that were "binding in [their] entirety and directly applicable in all Member States".[286]

7.121. The European Union submits that as these provisions are measures that have been adopted by the Union and the Commission respectively, they must be implemented by the member States and in that "narrow sense", the relevant provisions are "mandatory" on the EU member States.[287] However, the European Union argues that Article 26 of RED II neither imposes any obligation directly on palm oil and palm oil-based biofuel producers (or any producers of other food or feedstocks and the respective biofuels), nor does it fix requirements that the producers of other biofuels and their raw materials must comply with in order to obtain some advantage.[288] The European Union also argues that the 7% maximum share is binding only in the sense of imposing an outer limit.[289]

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

> This Directive establishes a common framework for the promotion of energy from renewable sources. It sets a *binding* Union target for the overall share of energy from renewable sources in the Union's gross final consumption of energy in 2030.[290]

7.123. Article 3 of RED II provides that "Member States shall collectively ensure that the share of energy from renewable sources in the Union's gross final consumption of energy in 2030 is at least 32%." The Panel notes that EU member States are required to set national contributions to meet, collectively, this binding overall EU target.[291] It is clear therefore from the terms of RED II that the renewable energy consumption targets defined are binding on EU member States.[292]

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

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

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

[286] Panel Report, *EC – Sardines*, para. 7.30; and Appellate Body Report, *EC – Sardines*, para. 194.

[287] European Union's first written submission, para. 500.

[288] European Union's first written submission, para. 501.

[289] European Union's first written submission, para. 503.

[290] Emphasis added.

[291] Article 3(2) of RED II.

[292] Article 2 of RED II.

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

> In order to mainstream the use of renewable energy in the transport sector, *each Member State shall set an obligation on fuel suppliers* to ensure that the share of renewable energy within the final consumption of energy in the transport sector is at least 14% by 2030 (minimum share) in accordance with an indicative trajectory set by the Member State and *calculated in accordance with the methodology set out in this Article and in Articles 26 and 27*.[293]

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

7.126. The Panel notes the European Union's acknowledgement that the overall consumption targets in Article 3 and the 14% share of renewable energy in transport in Article 25 of RED II are mandatory for EU member States at least "in the narrow sense" that they are prescribed by law.[294] Furthermore, with respect to the 7% maximum share, the European Union acknowledges that the effect of Article 26 of RED II is that only a maximum of 7% of an EU member State's use of conventional biofuels could be counted by that member State as contributing towards the 14% sectoral target in the transport sector and the 32% overall target of renewable energy consumption. Similarly, the Panel considers that the high ILUC-risk cap and phase-out requirement is an integral part of the binding calculation rules that apply to food and feed crop-based biofuels. In the Panel's view, this makes these requirements, on their face, mandatory, i.e. prescriptions that must be complied with by EU member States.[295]

7.127. The Panel notes the European Union's emphasis on certain flexibilities afforded to EU member States in deciding how exactly to implement these requirements. The European Union highlights in this respect that when framing obligations on fuel suppliers at the national level, member States may distinguish between different biofuels, bioliquids and biomass fuels produced from food and feed crops, and choose to promote all conventional biofuels or no conventional biofuels.[296] The Panel understands that Article 26(1) of RED II allows an EU member State meeting its renewable targets with less than 7% of conventional biofuels to lower its overall target for the transport sector commensurately; individual EU member States can thus set a lower maximum share if they wish. The Panel understands that EU member States enjoy similar flexibility with respect to setting lower maximum shares of biofuels made from high ILUC-risk feedstocks, within the limits of the high ILUC-risk cap and phase-out. However, the fact that there is flexibility to opt for a *lower* level of contribution from biofuels made from food and feed crops than the *maximum* share established by and allowed under the 7% maximum share, and also for a lower level of contribution from biofuels made from high ILUC-risk feedstocks within the limits of the cap and phase-out, does not modify the binding character of the *upper* limits defined in Article 26(1).

7.128. The conditions imposed by RED II and the Delegated Regulation therefore define in a binding manner the terms of eligibility of different types of fuels, including biofuels, for the purposes of

[293] Emphasis added.

[294] European Union's first written submission, para. 500.

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

[296] European Union's first written submission, para. 503.

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

7.129. In the Panel's view, in defining the characteristics required of biofuels to meet the requirements of RED II, Articles 26(1) and (2) prescribe "in a binding or compulsory fashion"[297] the characteristics required of biofuels [made from food and feed crops] to be eligible to contribute to the EU market for renewable sources of energy defined by RED II.

7.130. The Panel notes that, as the European Union observes, neither Article 26 of RED II nor the Delegated Regulation impose rules on the specific composition of biofuels in order for them to be sold on the EU market. Indeed, it is not disputed that conventional biofuels not eligible to contribute to RED II targets can be nonetheless legally sold on the EU market. However, the Panel is not persuaded that this implies that the 7% maximum share and the high ILUC-risk cap and phase-out do not lay down product characteristics with which compliance is "mandatory" within the meaning of Annex 1.1. It is undisputed that the entirety of the EU conventional biofuel market is essentially governed by the RED II regime, in the sense that there is little to no demand for biofuels that are not eligible to count towards the EU renewable energy targets.

7.131. In *US – Tuna II (Mexico)*, the measure prescribed the eligibility conditions for access to a voluntary label, and more generally the manner in which any "dolphin-safe" claims could be made in relation to tuna products. The measure essentially controlled eligibility to use a label, and did not otherwise prevent any products from being allowed onto the market. It was nonetheless found to lay down product characteristics with which compliance was mandatory (and thus a technical regulation). The Appellate Body observed in the context of the labelling requirement at issue that:

> The text of Annex 1.1 to the *TBT Agreement* does not use the words "market" or "territory"'. Nor does it indicate that a labelling requirement is "mandatory" *only* if there is a requirement to use a particular label in order to place a product for sale on the market. To us, the mere fact that there is no requirement to use a particular label in order to place a product for sale on the market does not preclude a finding that a measure constitutes a "technical regulation" within the meaning of Annex 1.1. Instead, in the context of the present case, we attach significance to the fact that, while it is possible to sell tuna products without a "dolphin-safe" label in the United States, any "producer, importer, exporter, distributor or seller" of tuna products must comply with the measure at issue in order to make any "dolphin-safe" claim.[298]

7.132. Likewise, in *EC – Sardines* the measure at issue did not condition lawfully placing a product on the market upon possessing (or not possessing) certain characteristics. Rather, the measure prescribed, among other things, which species of sardines could be sold as "preserved sardines" on the EU market. The measure essentially controlled eligibility to use a commercial designation and did not otherwise prevent any products from being allowed onto the market. It was nonetheless found to lay down product characteristics with which compliance was mandatory.[299]

7.133. Thus, in both disputes, compliance with the requirements in the technical regulations at issue was necessary to gain access to a certain advantage or a certain segment of the market. The fact that compliance with the requirements addressed in *US – Tuna II (Mexico)* and *EC – Sardines* was not a condition for selling the product lawfully (i.e. a condition to "place a product for sale on the market", as described by the Appellate Body in *US – Tuna II (Mexico)*) did not detract from the conclusion that they constituted technical regulations. The commonality to these two disputes was the critical fact that in both situations the measures exclusively, mandatorily and exhaustively

[297] Appellate Body Report, *EC – Asbestos*, para. 68.
[298] Appellate Body Report, *US – Tuna II (Mexico)*, para. 196. (emphasis original; fns omitted)
[299] Panel Report, *EC – Sardines*, para. 7.47; and Appellate Body Report, *EC – Sardines*, para. 194.

laid down criteria for the eligibility of the products concerned to receive a certain label or be marketed using a certain term.

7.134. In the Panel's view, the 7% maximum share and the high ILUC-risk cap and phase-out operate in an analogous manner. As pointed out by the European Union, these measures do not create a legal impediment to selling or otherwise placing on the EU market biofuels made from food or feed crops generally or from crops determined to be high ILUC risk. However, they limit access to a particular segment of the EU market comprising biofuels considered as renewable energy sources for the purpose of national contributions to EU renewable energy targets in the transport sector.[300] While it is possible to sell food and feed crop-based biofuel, including that made of high ILUC-risk feedstock, in the European Union, every EU member State must comply with the "maximum share" and cap on the use of these biofuels, or the gradual phase-out, in calculating its share of renewable energy consumption to meet the binding targets of RED II. There is no flexibility for EU member States to ignore these rules in calculating their share of renewable energy, or to abstain from performing such a calculation.

7.135. This was also a key reason in *US – Tuna II (Mexico)* that led the Appellate Body to ultimately conclude that the measure was a technical regulation. In that case, the measure set out "a *single and legally mandated definition* of a 'dolphin-safe' tuna product and *disallows the use of other labels* on tuna products that do not satisfy this definition [… and that, i]n doing so, the US measure *prescribes in a broad and exhaustive manner the conditions* that apply for making any assertion on a tuna product as to its 'dolphin-safety', regardless of the manner in which that statement is made[, and, a]s a consequence, the US measure *covers the entire field of what dolphin-safe means* in relation to tuna products".[301] Similarly here, there is absolutely no flexibility in terms of allowing alternative criteria for assessing whether biofuels are eligible for the purposes of the 7% maximum share or the high ILUC-risk cap and phase-out, except from those criteria prescribed in the measures. The measures therefore "*prescribe in a broad and exhaustive manner the conditions that apply*" for eligibility, thus covering "*the entire field of what*" eligible biofuels means for attaining RED II's renewable energy targets. This conclusion is not modified by the fact that biofuels that do *not* meet the requirements for eligibility may be lawfully sold on the market to supply the EU transport energy market.

7.136. The Panel is mindful that in *US – Tuna II (Mexico)*, the measure at issue was a labelling requirement, and that labelling requirements are expressly identified in the second sentence of Annex 1.1 as falling within the scope of what may be addressed in a technical regulation. In the present case, as discussed above, it is not alleged that the measure at issue would be covered by the second sentence of Annex 1.1. However, this difference does not imply that the reasoning applied in *US – Tuna II (Mexico)* cannot also find application here, *mutatis mutandis.* The relevant consideration in this respect is that a measure may constitute a technical regulation even if it does not impose particular product characteristics or requirements as a condition for placing a product on the market.[302]

7.137. The Panel observes that limiting the applicability of the relevant provisions of the TBT Agreement to measures that condition the ability to lawfully place products on the market would exclude from the disciplines of the TBT Agreement measures regulating or foreclosing access to a certain advantage or segment of a market on the basis of the characteristics of a product, without excluding the possibility of offering it for sale. In the Panel's view, the text and context of the relevant provisions of the TBT Agreement do not provide a basis for drawing such a distinction between measures that regulate the characteristics required of products to place them on the market

[300] In other words, compliance with product characteristics laid down in the technical regulation at issue in *US – Tuna II* was required to gain access to the advantages created by the United States' promotion of dolphin-safe tuna just as compliance with the product characteristics laid down in Articles 26(1) and (2) is required to gain access to the advantages created by the European Union's promotion of renewable energy in the transport sector.

[301] Appellate Body Report, *US – Tuna II (Mexico)*, para. 199. (emphasis added)

[302] The Panel notes that the requirement "with which compliance is mandatory", stated in the first sentence of Annex 1.1, applies also to the types of measures described in the second sentence. (See e.g. Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.449 (expressing the view that it would be contrary to the object and purpose of the obligations concerning technical regulations if the element that "compliance is mandatory" would not apply to the items described in the second sentence); and Panel Reports, *Australia – Tobacco Plain Packaging*, fn 979 to para. 7.281 (noting what while Annex 1.1 does not expressly refer to the "mandatory" nature of the document in its second sentence, it applies equally.)

altogether and those that regulate the characteristics required of products to access certain specific segments of the domestic market. This is also consistent, in the Panel's view, with the object and purpose of the TBT Agreement, as expressed in its preamble, "that technical regulations … do not create unnecessary obstacles to international trade".

7.138. Based on the above, the Panel finds that the 7% maximum share and the high ILUC-risk cap and phase-out lay down product characteristics "with which compliance is mandatory" within the meaning of Annex 1.1.

7.1.2.1.6 Conclusion on Annex 1.1

7.139. The Panel concludes that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations within the meaning of Annex 1.1 to the TBT Agreement.

7.140. The Panel notes that the European Union reiterates its view that the challenged measures are not technical regulations when responding to each of the claims made under Article 2. The Panel also appreciates that the way the European Union responds to certain of the claims under Article 2 is informed by its view that the measures are not technical regulations. However, having already addressed this issue at the outset, and with a view to avoiding repetition, the remainder of the Panel's findings proceed on the assumption that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations within the meaning of Annex 1.1 to the TBT Agreement.

7.1.2.2 Article 2.4 – Relevant international standards

7.1.2.2.1 Introduction

7.141. Having concluded that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations within the meaning of Annex 1.1, the Panel now turns to the claims under Article 2 of the TBT Agreement. The Panel begins with the claim under Article 2.4, addressing it before the claims under Articles 2.2 and 2.1 for reasons already set out in the Panel's discussion of its order of analysis.

7.142. Indonesia submits[303] that the European Union violates Article 2.4 by imposing the 7% maximum share and the high ILUC-risk cap and phase-out without using relevant international standards as a basis. More specifically, Indonesia refers to four ISO standards as being the relevant standards for the purposes of its Article 2.4 claim, explaining that they set out a methodology for assessing the environmental performance and sustainability of biofuel. Indonesia contends that this methodology explicitly excludes ILUC from the assessment. For Indonesia, therefore, these standards contradict the 7% maximum share and the high ILUC-risk cap and phase-out and, therefore, the European Union has not used them as a basis for its technical regulations. Indonesia further submits that these standards are an effective and appropriate means of fulfilling the European Union's objective of addressing GHG emissions relating to the environmental performance of fuel in the transport sector.

7.143. The European Union submits[304] that these four ISO standards are neither relevant standards nor are they effective or appropriate for fulfilling the legitimate objective pursued through the measures at issue. More specifically, the European Union argues that the measures address a matter which is outside of the scope of the four ISO standards as these do not capture ILUC and associated environmental risks. The European Union submits that because of this fact, it has adopted an alternative approach in the Delegated Regulation.

[303] Indonesia's first written submission, paras. 669-777; responses to the Panel's first set of questions, paras. 226-247; Indonesia's second written submission, paras. 870-906; Indonesia's opening statement at the second meeting of the Panel, para. 31; Indonesia's responses to the Panel's second set of questions, paras. 162-190; and Indonesia's comments on the European Union's responses to the Panel's second set of questions, paras. 411-434.

[304] European Union's first written submission, paras. 876-902; European Union's responses to the Panel's first set of questions, paras. 446-448; European Union's second written submission, paras. 88-99; European Union's responses to the Panel's second set of questions, paras. 522-582; and European Union's comments on Indonesia's responses to the Panel's second set of questions, paras. 153-160.

7.1.2.2.2 Legal standard

7.144. Article 2.4 sets forth the obligation that:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problem.

7.145. Article 2.4 has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.146. Based on the text of Article 2.4, a complainant has to show three elements[305] to establish that a technical regulation is inconsistent with the obligation:

a. relevant international standards exist, or their completion is imminent;

b. the international standard(s), or the relevant parts thereof, has/have not been used as a basis for the technical regulation; and

c. the international standard(s), or relevant parts thereof, is/are not an *ineffective* or *inappropriate* means for the fulfilment of the legitimate objectives pursued by the technical regulation, taking into account fundamental climatic or geographical factors or fundamental technological problems.

7.147. These elements apply cumulatively, and thus each must be satisfied to establish an inconsistency with the first sentence of Article 2.4.

7.148. The Panel will elaborate further on the elements of the legal standard in Article 2.4 as necessary in the course of its assessment of the issues in dispute. As is its prerogative[306], the Panel will also scrutinize and interpret the meaning of relevant parts of the four ISO standards at issue in this dispute.

7.1.2.2.3 Description of the general content of the four ISO standards

7.149. The four ISO standards in respect of which Indonesia makes its claim under Article 2.4 are the following:

a. ISO standard 14040:2016 entitled "Environmental management — Life cycle assessment — Principles and framework" (hereinafter "ISO 14040:2016")[307]

b. ISO standard 14044:2017 entitled "Environmental management — Life cycle assessment — Requirements and guidelines" (hereinafter "ISO 14044:2017")[308]

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[305] Panel Report, *US – Tuna II (Mexico)*, para. 7.627 (referring to Panel Report, *EC – Sardines*, paras. 7.61-7.139 and Appellate Body Report, *EC – Sardines*, paras. 217-291).

[306] In *Australia – Tobacco Plain Packaging*, the panel, based on certain guidance by the Appellate Body in *India – Agricultural Products* (an SPS dispute) on the panel's task in identifying and interpreting international standards, which it considered applied *mutatis mutandis* to TBT disputes, stated that "[o]nce the relevant instruments have been identified, their meaning will also need to be discerned and understood" by the panel. (Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.297. See more generally ibid., paras. 7.295-7.297.) In *India – Agricultural Products*, the Appellate Body stated, for instance, that "because the international standard serves as the benchmark against which a Member's compliance under Article 3 [of the SPS Agreement] is to be assessed, it is *incumbent on a panel* to discern the meaning of that standard. In conducting such an assessment, panels have various means available to them. A panel may be guided by any relevant interpretative principles, including relevant customary rules of interpretation of public international law." (Appellate Body Reports, *India – Agricultural Products*, para. 5.79; and *Australia – Tobacco Plain Packaging*, para. 7.296. (emphasis added))

[307] ISO 14040:2016, (Exhibit IDN-226).

[308] ISO 14044:2017, (Exhibit IDN-227).

c. ISO standard 14067:2018 entitled "Greenhouse gases – Carbon footprint of products – Requirements and guidelines for quantification" (hereinafter "ISO 14067:2018")[309]

d. ISO standard 13065:2015 entitled "Sustainability criteria for bioenergy" (hereinafter "ISO 13065:2015")[310]

7.150. Article 2.4 refers to "international standards" that are "relevant". With respect to the former element, the parties agree that these four ISO documents are international standards within the meaning of this provision. The Panel sees no reason to disagree.[311]

7.151. The Panel observes that ISO 14040:2016 and ISO 14044:2017 both concern the life cycle assessment (LCA) of a product and that, given their commonalities, they can be examined together. ISO 14040:2016 describes the principles and framework of an LCA, whereas ISO 14044:2017 specifies requirements and provides guidelines for an LCA.[312] An LCA addresses environmental aspects and potential environmental impacts of a given product throughout that product's life cycle – from raw material acquisition through to its production, use, end-of-life treatment, recycling and final disposal (i.e. cradle-to-grave).[313]

7.152. The Panel observes that ISO 14040:2016 defines LCA as the "compilation and evaluation of the inputs, outputs and the potential environmental impacts of a product system throughout its life cycle".[314] A "product system" is in turn defined as a "collection of unit processes with elementary and product flows, performing one or more defined functions, and which models the life cycle of a product".[315] As ISO 14040:2016 explains, "LCA is conducted by defining product systems as models that describe the key elements of physical systems. The system boundary defines the unit processes to be included in the system."[316] Furthermore, ISO 14040:2016 explains that LCA is a "relative approach, which is structured around a functional unit."[317] A "functional" unit is then defined as the "quantified performance of a product system for use as a reference unit".[318] The functional unit defines what is being studied and all subsequent analyses are relative to that functional unit.[319]

7.153. The Panel notes that an expert study submitted by Indonesia describes LCA as "the most accepted tool to assess environmental performance of products" and describes ISO 14040:2016 and ISO 14044:2017 as the "most broadly accepted standards in the field [that] can be regarded as the 'mother' of almost all other standardization activities".[320]

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[309] ISO 14067:2018, (Exhibit IDN-228).

[310] ISO 13065:2015, (Exhibit IDN-229).

[311] Pursuant to Annex 1.2, a "standard" is a "[d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory". Furthermore, pursuant to Annex 1.4, an "international body or system" is defined as a "body or system whose membership is open to the relevant bodies of at least all Members". Further, as the Appellate Body has clarified, an international standard is one adopted by an "international standardizing body", i.e. a body with "recognized activities in standardization" and whose membership is open to the relevant bodies of at least all Members. (Appellate Body Report, *US – Tuna II (Mexico)*, para. 359. See also Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.278-7.287.) Like the parties, the Panel considers that the ISO standards at issue meet these definitions and are consistent with the Appellate Body guidance with respect to the meaning of the term "international standard". See Indonesia's first written submission, paras. 677-689; European Union's response to Panel question No. 190, para. 527.

[312] ISO 14040:2016, (Exhibit IDN-226), Clause 1, first sentence (scope), p. 1; and ISO 14044:2017, (Exhibit IDN-227), Clause 1 (scope), p. 1.

[313] ISO 14040:2016, (Exhibit IDN-226), p. iv.

[314] ISO 14040:2016, (Exhibit IDN-226), Clause 3.2 (Life cycle assessment), p. 2.

[315] ISO 14040:2016, (Exhibit IDN-226), Clause 3.28 (Product system), p. 6.

[316] ISO 14040:2016, (Exhibit IDN-226), Clause 5.2.3 (System boundary), p. 18.

[317] ISO 14040:2016, (Exhibit IDN-226), Clause 4.1.4 (Relative approach and functional unit), p. 10.

[318] ISO 14040:2016, (Exhibit IDN-226), Clause 3.20 (Functional unit), p. 5.

[319] ISO 14040: 2016, (Exhibit IDN-226), Clause 4.1.4 (Relative approach and functional unit), p. 10, which states:

> LCA is a relative approach, which is structured around a functional unit. This functional unit defines what is being studied. All subsequent analyses are then relative to that functional unit, as all inputs and outputs in the LCI and consequently the LC1A profile are related to the functional unit.

[320] Finkbeiner Study, (Exhibit IDN-223), p. 13.

7.154. The Panel now turns to ISO 14067:2018, which as noted above is entitled "Greenhouse gases – Carbon footprint of products – Requirements and guidelines for quantification". It specifies principles, requirements and guidelines for the quantification and reporting of the carbon footprint (CFP) of a product, in a manner consistent with the above standards on LCA.[321] ISO 14067:2018 defines the CFP of a product as the "sum of GHG emissions and GHG removals in a product system, expressed as CO_2 equivalents and based on a life cycle assessment using the single impact category of climate change".[322] According to the standard, this quantification is based on an LCA which must be in conformity with ISO 14044:2017.[323]

7.155. Finally, ISO 13065:2015, which as noted above is entitled "Sustainability criteria for bioenergy", specifies principles, criteria and indicators for the bioenergy supply chain to facilitate assessment of environmental, social and economic aspects of sustainability.[324] The standard defines "bioenergy" as "energy derived from biomass". That this definition covers biofuels is uncontested between the parties.[325] The relevant principles, criteria and indicators are set out in separate chapters of this standard concerning the respective sustainability aspects. As regards environmental sustainability, the standard defines the relevant principle as reducing anthropogenic GHG emissions and stipulates, as an indicator, certain calculations of GHG emissions and GHG removals.[326] In terms of methodology, the standard stipulates that GHG quantification and reporting shall be undertaken in accordance with the above standard, i.e. ISO 14067:2018, and thus requires an LCA which must be in conformity with ISO 14044:2017.[327]

7.156. In sum, the four ISO standards, read together, provide for an LCA-based quantification of GHG emissions of biofuels. This is uncontested between the parties.

7.1.2.2.4 How the four ISO standards relate to the issue of ILUC

7.157. The Panel observes that of the four standards, only ISO 14067:2018 directly refers to ILUC. The Panel therefore first examines relevant language in that standard, before turning to considerations of whether other more general language in this and the other three standards may also have a bearing on the issue of ILUC. As noted above, ISO 14067:2018 defines ILUC as "change in the use of land which is a consequence of direct land use change […], but which occurs outside the relevant boundary".[328] This definition differs somewhat from the manner in which the European Union has defined ILUC in its measures.[329] However, at the same time, the example provided in the Notes to the ISO standard's definition is similar to the way the measures define ILUC.[330] The Panel does not see that any such differences in how definitions of ILUC are formulated

[321] ISO 14067:2018, (Exhibit IDN-228), Clause 1, first sentence (Scope), p. 1.
[322] ISO 14067:2018, (Exhibit IDN-228), Clause 3.1.1.1 (Carbon footprint of a product), p. 2.
[323] ISO 14067:2018, (Exhibit IDN-228), Clause 6.1 (General), also Clause 1 (Scope), p. 13 and 1.
[324] ISO 13065:2015, (Exhibit IDN-229), Clause 1, first sentence (Scope), p. 1.
[325] ISO 13065:2015, (Exhibit IDN-229), Clause 3.3 (Bioenergy), p. 1.
[326] ISO 13065:2015, (Exhibit IDN-229), Clause 5.2.1.1.1, p. 13, which states:
Indicator: Provide, in accordance with Clause 6:
a) Sufficient data to allow the calculation of GHG emissions and GHG removals of a life cycle stage; or
b) Partial carbon footprint of the bioenergy product calculated as the sum of GHG emissions and removals of one or more processes expressed in gCO_2 equivalents per delivered unit; or
c) Life cycle carbon footprint calculated as the sum of GHG emissions and GHG removals expressed in gCO_2 equivalents per MJ energy delivered and functional unit.
[327] ISO 13065:2015, (Exhibit IDN-229), Clause 6.1 (General), p.20, which states in relevant part:
This clause establishes the requirements for quantifying GHG emissions to address the GHG principle (see 5.2.1). GHG quantification and reporting shall be undertaken in accordance with ISO/TS 14067 as supplemented by Clause 6. ISO/TS 14067 specifies principles, requirements and guidelines for the quantification and communication of the carbon footprint of a product (CFP), based on International Standards on life cycle assessment (ISO 14040 and ISO 14044) and on environmental labels and declarations (ISO 14020, ISO 14024 and ISO 14025). It includes requirements on data and data quality.
[328] See para. 2.82 above.
[329] "Indirect land-use change occurs when the cultivation of crops for biofuels, bioliquids and biomass fuels displaces traditional production of crops for food and feed purposes. Such additional demand increases the pressure on land and can lead to the extension of agricultural land into areas with high-carbon stock, such as forests, wetlands and peatland, causing additional greenhouse gas emissions." (See para. 2.81 above)
[330] The example in ISO 14067:2018, (Exhibit IDN-228), Clause 3.1.7.6 (indirect land use change – iLUC), p. 10:

in the ISO standard and the measures would affect the present analysis (nor has either party to this dispute argued so).

7.158. While ISO 14067:2018 refers to ILUC, there is no disagreement between the parties that it excludes ILUC from the LCA methodology set out therein.[331] Indeed, the definition of ILUC in ISO 14067:2018 describes ILUC as occurring "outside the relevant boundary". As described above, the (system) boundary "defines the unit processes to be included in the system". In other words, ILUC lies outside the scope of what is being studied.

7.159. That ILUC is excluded from the LCA methodology is also clear from the following sentence in ISO 14067:2018, which states that:

> Indirect land use change (ILUC) should be included in CFP studies once an internationally agreed procedure exists.[332]

7.160. The sentence is contained in a Note to Clause 6.4.9.5 of ISO 14067:2018, which stipulates the inclusion of DLUC in the quantification of GHG emissions.[333] Thus, while DLUC is included in that quantification, ILUC currently is not.

7.161. Both parties elaborate on why ILUC effects, which they both describe as "indirect effects"[334], are currently not included in the LCA-based quantification of GHG emissions. Indonesia quotes the above expert study stating that "the product system and its unit processes as core objects of any LCA study are defined physically and as such do not intend to cover non-physical, indirect market effects like iLUC."[335] The European Union describes the system boundaries of an LCA as "inherent limitations" of an LCA and quotes the same expert study as Indonesia, stating that "due to the different nature of ILUC and the material and energy flow typically assessed in LCA, it is probably wise to try and address and mitigate iLUC separately from LCA – at least for some time."[336]

7.162. The Panel considers that the sentence in ISO 14067:2018, quoted above, as well as the parties' submissions on this point, demonstrate that the question of whether to include ILUC in an LCA-based quantification of GHG emissions, and if so how, is an open question still the object of ongoing scientific debate. The Panel understands that it is the existence of this scientific debate that explains why there is currently no internationally agreed procedure.[337] Furthermore, the prevailing

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> If land use on a particular parcel of land changes from food production to biofuel production, land use change might occur elsewhere to meet the demand for food. This land use change elsewhere is indirect land use change.

[331] Indonesia's first written submission, paras. 692, 712-713, 720; second written submission, paras. 178, 874; European Union's first written submission, para. 883; second written submission, paras. 94-95.

[332] ISO 14067:2018, (Exhibit IDN-228), Clause 6.4.9.5 (Land use change), p. 26.

[333] ISO 14067:2018, (Exhibit IDN-228), Clause 6.4.9.5 (Land use change), p. 25, states in relevant part:

> The GHG emissions and removals occurring as a result of direct land use change (dLUC) within the last decades (see NOTE 1) shall be assessed in accordance with internationally recognized methods, such as the IPCC Guidelines for National Greenhouse Gas Inventories and included in the CFP. The net dLUC GHG emissions and removals shall be documented separately in the CFP study report. If site-specific data are applied, they shall be transparently documented in the CFP study report. If a national approach is used, the data shall be based on a verified study, a peer-reviewed study or similar scientific evidence and shall be documented in the CFP study report. (fns omitted)

[334] Indonesia's first written submission, paras. 712, 740, 766; second written submission, paras. 883-884; European Union's second written submission, para. 118; closing statement at the second meeting of the Panel with the parties, para. 12.

[335] Indonesia's first written submission, para. 706; responses to Panel question No. 194, para. 170 (referring to Finkbeiner Study, (Exhibit IDN-223), p. 34). Indonesia further submits that the life cycle approach and carbon footprint "focus on real material, energy and emission flows while ILUC is not physically tangible; it is based on theoretical models that rely on hypothetical assumptions and market predictions". (Indonesia's response to Panel question No. 89, paras. 230-236.) In addition, Indonesia submits that ILUC GHG emissions are in fact DLUC GHG emissions of other products and including ILUC GHG emissions would thus result in double-counting GHG emissions. (Indonesia's response to Panel question No. 90, para. 240.)

[336] European Union's first written submission, para. 885.

[337] The Panel notes, in this respect, that Note 6 to Clause 6.4.9.5 of ISO 14067:2018 states that "[t]here is *ongoing research* to develop a methodology and data for the inclusion of iLUC in GHG reporting." (emphasis added)

opinion, to which both parties refer, seems to be that ILUC cannot be measured or observed (at least with sufficient precision to draw conclusions on the levels of ILUC-related GHG emissions) and therefore cannot be included in an LCA study.[338] Moreover, the European Union refers to this view as the reason why it has chosen a different approach from quantification.[339] However, while the parties appear to agree on the fact of, and the reasons for, the non-inclusion of ILUC in the LCA-based quantification, they disagree on what the non-inclusion, and in particular the above sentence in ISO 14067:2018, means.

7.163. To recall, the above sentence in ISO 14067:2018 states that ILUC "should be included in CFP studies once an internationally agreed procedure exists". For Indonesia, this means that the four standards "exclude" relying on ILUC in any measure that relates to GHG emissions in connection with biofuel.[340] Indonesia understands this sentence to be "a clear rejection of, as things stand, allocating, in a life cycle analysis, any type of ILUC GHG emissions to any product"[341], "as long as no internationally agreed procedure exists".[342] Indonesia refers to this sentence as a "negative requirement"[343] stipulated by that standard.[344]

7.164. For the European Union, the implication of this sentence in ISO 14067:2018 is that "the known climate change and environmental risks associated with ILUC, are not properly addressed by the existing ISO standards."[345] The EU measures, according to the European Union, therefore "address a matter which is outside the scope of those standards".[346] The European Union further submits that this sentence in ISO 14067:2018 cannot be interpreted in any sense as precluding any Member from following a regulatory approach that takes account of ILUC, whether in the context of an LCA of the CFP of products, or in the context of other methodologies aimed at assessing the environmental impact of the same products.[347]

7.165. The Panel therefore understands Indonesia to interpret the sentence in ISO 14067:2018 quoted above as meaning that there is no basis in that standard to consider ILUC for the purpose of determining CFP due to the current lack of any scientific methodology for calculating ILUC GHG emissions – in other words, that the standard effectively proscribes, i.e. does not allow, the inclusion of ILUC before any procedures have been internationally agreed. The Panel considers that the following two textual considerations speak against such an interpretation.

7.166. The first textual consideration is the *sentence itself*, and more specifically its wording and place in the standard. Regarding the wording, the sentence makes a positive statement about the possibility of including ILUC in the methodology of ISO 14067:2018 in the future, rather than a negative statement about excluding ILUC from any assessment currently carried out, as suggested by Indonesia. Thus, while Indonesia may be right that ISO standards may also stipulate "negative requirements", the sentence in ISO 14067:2018 quoted above is not a negative requirement. Indeed, to get to the meaning Indonesia attributes to the quoted sentence, the addition of the word "only" before "once" would seem necessary, and the word "should" would have to be replaced by "shall".[348] Regarding the placement of the quoted sentence in the standard, the sentence is contained in a "Note" to the actual clause i.e. Clause 6.4.9.5, which provides for the inclusion of DLUC in the assessment. Under the ISO's own directives, however, notes to clauses in ISO standards do not

[338] Recital 81 to RED II; Status Report (2019) (Exhibit IDN-56), p. 4. See also Indonesia's first written submission, paras. 233-254.

[339] European Union's first written submission, paras. 886-888.

[340] Indonesia's first written submission, paras. 692 and 747; second written submission, para. 874.

[341] Indonesia's first written submission, para. 722.

[342] Indonesia's first written submission, paras. 720 and 746.

[343] Indonesia's response to Panel question No. 194, para. 172; comments on the European Union's response to Panel question No. 191, para. 419.

[344] Indonesia's first written submission, paras. 722, 747; response to Panel question No. 194, para. 172.

[345] European Union's first written submission, para. 883.

[346] European Union's first written submission, para. 884.

[347] European Union's second written submission, para. 95.

[348] Indonesia points to the difference between "should" and "shall", stating that:

> Even if an internationally agreed procedure would exist, ISO 14067:2018 does not prescribe a mandatory inclusion because note 5 in paragraph [sic] 6.4.9.5 uses "should" instead of "shall."

(Indonesia's response to Panel question No. 91, para. 243 (referring to Excerpt of ISO/IEC Directives, Part 2 – Principles and rules for the structure and drafting of ISO and IEC documents, ninth edition, 2021, Section 3 – 7, (Exhibit IDN-326), paras. 3.3.3 and 3.3.4 and tables 3 and 4.))

have the function of setting out requirements.[349] Instead, their function is simply that of "giving additional information intended to assist the understanding or use of the text of the document".[350]

7.167. The second textual consideration that speaks against Indonesia's reading of the sentence in ISO 14067:2018 quoted above is the *existence of other clauses in ISO 14067:2018*, which also refer to ILUC, namely:

a. Clause 6.4.9.8, like Clause 6.4.9.5, is a sub-clause to Clause 6.4.9 ("Treatment of specific emissions and removals"), and contains a "Summary of requirements and guidance":

   i. Table 1 in Clause 6.4.9.8 refers to ILUC as a specific component of GHG emissions that, in terms of *treatment* in the CFP, "should be considered for inclusion" and, in terms of *documentation* in the CFP study report, "shall be documented separately *if calculated*".[351]

   ii. Additionally, Figure 3 to Table 1, which contains an illustration of the specific components of the CFP and the partial CFP also refers to ILUC emissions and ILUC removals indicating that they "should be considered *separately*" and noting that DLUC and ILUC "can have a positive or negative contribution to the CFP".[352]

b. Clause 7.2 ("GHG values in the CFP study report") requires that GHG emissions and removals occurring as a result of ILUC "shall be documented separately if calculated".

7.168. These clauses and subclauses show that ISO 14067:2018 already envisages the possible inclusion of ILUC in a CFP study at present, i.e. even in the absence of internationally agreed procedures. As a consequence, this implies that the inclusion of ILUC, in the absence of harmonization through a standard, is a methodological choice by the entity preparing the CFP study.

7.169. The Panel notes that in response to questions regarding these clauses, Indonesia submits that they reflect the understanding that a party deciding to calculate these values is to document those values in the CFP study report. Furthermore, Indonesia points out that Clause 7.2 relates to what is to be documented and not the calculation of the CFP itself.[353] The Panel considers however that the latter argument does not apply to Clause 6.4.9.5, which not only addresses the documentation but also the "treatment" of ILUC in a CFP (which the Panel understands refers to the assessment/calculation itself). In any event, neither argument rebuts the point that the very existence of these clauses proves that ISO 14067:2018, while not itself offering a methodology for doing so, acknowledges that ISO standard users, including regulators, may already be accounting for GHG emissions from ILUC based on their own methodologies.

7.170. Based on these textual considerations, the Panel finds that the above sentence in ISO 14067:2018 does not address the issue of whether countries may assess ILUC in the absence of internationally agreed procedures, and if so, how they would do so. The Panel therefore does not share Indonesia's interpretation under which the standard would effectively proscribe, i.e. not allow, the inclusion of ILUC before any procedures have been internationally agreed.

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[349] See Clause 24.5 of the ISO/IEC Directives, Part 2, Principles and rules for the structure and drafting of ISO/IEC documents, which states: "Notes shall not contain requirements … or any information considered indispensable for the use of the document, for example instructions (imperative mood), recommendations … or permission … Notes should be written as a statement of fact." (Indonesia submitted parts of this document as Exhibits IDN-326 and IDN-403. The document is available in its entirety at: https://www.iso.org/resources/publicly-available-resources.html?t=2GjwAG0y1pTGaWMLrFyd8JcnY2jv_ZM8-53tGT1-6f5uPDmC2DinHt5OHGv4uZf7&view=documents#section-isodocuments-top)

[350] See the first para. of Clause 24.1 of the ISO/IEC Directives, Part 2, Principles and rules for the structure and drafting of ISO/IEC documents, which also adds, confirming the understanding that Notes themselves do not set requirements, the "document [i.e. the standard] shall be usable *without* the notes." (emphasis added)

[351] Emphasis added.

[352] Emphasis added.

[353] Indonesia's response to Panel questions No. 91, paras. 242-247 and No. 194, para. 174; comments on the European Union's response to Panel question No. 191, para. 424.

7.171. Having assessed the specific references to ILUC in ISO 14067:2018, the Panel now turns to other, more general language found in the four ISO standards referred to above, that may also have a bearing on the issue of ILUC.

7.172. The Panel first examines ISO 13065:2105, because its product coverage (bioenergy, including biofuel) is the most specific amongst the four ISO standards in terms of addressing the assessment of environmental effects of biofuel. Clause 4.12 of ISO 13065:2015, entitled "Direct and indirect effects", states:

> In developing this International Standard, issues concerning direct and indirect effects were carefully considered. The aim of this International Standard is to provide clear guidance to produce consistent and replicable results. The term "indirect effects" can be understood in different ways due to various opinions and definitions. This International Standard considers the measurable environmental, social and economic effects that are under the direct control of the economic operator and caused by the process being assessed. For the purpose of this International Standard, these are defined as "direct effects". *Other effects that do not meet these requirements are not included in this International Standard*.[354]

7.173. Thus, Clause 4.12 makes clear that only "direct effects" are included in the standard and defines the latter as "measurable, under the direct control of the economic operator and caused by the process being analysed". ILUC effects clearly do not qualify as "direct effects" under this definition, and thus are not covered by this standard.[355]

7.174. The Panel notes that, in response to a question from the Panel, Indonesia argues that this clause does not mean that ISO 13065:2015 does not cover ILUC as an indirect effect and points to the fact that Clause 4.12 is part of the heading "General requirements and recommendations" and thus is not set out under the "Scope" of this standard.[356] The Panel is not persuaded by this argument. As defined under the ISO's own directives[357], the scope provision serves to define the subject of the document and the aspects covered.[358] The subject of ISO 13065:2015, as defined in its scope clause, is "principles, criteria and indicators for the bioenergy supply chain". Subsequent clauses flesh out the relevant methodology, including the matter of effects to be taken into account. Clause 4.12 states that effects that do not qualify as direct effects "are not included in this International Standard". This does not affect the subject of ISO 13065:2015, but is rather part of defining the scope of its methodology. In fact, this clause is not much different from Clause 6.4.9.5 in ISO 14067:2018, examined above, which also contains parameters that define the methodology used in that standard (i.e. the inclusion of DLUC, and non-inclusion of ILUC).

7.175. In the Panel's view, by not including "indirect effects" such as ILUC in the methodology under ISO 13065:2015, Clause 4.12 leaves open whether or how such effects would be assessed. Furthermore, the Panel notes that ISO 13065:2015 also states that "the indicators in this International Standard might not comprehensively capture all sustainability aspects for all bioenergy processes."[359] Thus, the Panel concludes that ISO 13065:2015, as the most specific standard of the four at issue in terms of addressing the assessment of environmental effects of biofuel, not only makes clear that it does not purport to comprehensively address all sustainability aspects of biofuel, but it also specifically excludes from the scope of its methodology the assessment of "indirect effects" such as ILUC.

7.176. Turning to the other ISO standards, the Panel observes that they also contain language qualifying the scope and methodology they set out, and the role they have in a decision/policy-making process. Thus, ISO 14040:2016 itself describes LCA as just "one of the techniques" that have been developed for the purpose of better understanding and addressing the environmental

[354] ISO 13065:2015, (Exhibit IDN-229), Clause 4.12, p. 13. (emphasis added)
[355] As noted above, both parties agree that ILUC effects are indirect effects. See para. 7.161 above.
[356] Indonesia's response to Panel question No. 196 (referring to Indonesia's response to Panel question No. 195, para. 185).
[357] Excerpt of ISO/IEC Directives, Part 2 (2021), (Exhibit IDN-403).
[358] Excerpt of ISO/IEC Directives, Part 2 (2021), (Exhibit IDN-403), para. 14.1 (Purpose or rationale): "The Scope clearly defines the subject of the document and the aspects covered, thereby indicating the limits of applicability of the document or particular parts of it."
[359] ISO 13065:2015, (Exhibit IDN-229), Introduction, p. vi.

impacts of products.[360] Furthermore, ISO 14040:2016 states that "LCA is one of several environmental management techniques (e.g. risk assessment, environmental performance evaluation, environmental auditing, and environmental impact assessment) and might not be the most appropriate technique to use in all situations."[361] ISO 14044:2017, building on ISO 14040:2016, contains identical language.[362]

7.177. Furthermore, ISO 14067:2018 states that it "addresses only a single impact category: climate change" and "does not assess any social or economic aspects or impacts, or any environmental aspects and related impacts potentially arising from the life cycle of a product".[363] Annex A details the "limitations of the CFP", which it identifies to be the "focus on climate change as the single impact category, and limitations related to the methodology".[364] In particular with regard to the focus on a single impact category, Annex A points out that "decisions about product impacts that are only based on a single environmental issue can be in conflict with goals and objectives related to other environmental issues" and advises that "CFP or partial CFP should not be the sole component of a decision-making process".[365]

7.178. For the Panel, it is clear from these qualifications in the different standards, that the standards do not purport to confine a regulator to using LCA only and do not purport to comprehensively or exhaustively address every potential environmental impact.

7.179. In sum, the Panel finds that ISO 13065:2015 generally excludes ILUC effects, as indirect effects, from its methodology and that ISO 14067:2018 specifically excludes ILUC effects from the LCA methodology used to quantify GHG emissions. However, neither of these standards (nor the other two standards discussed in this section) contains language that precludes a national regulator from addressing ILUC through its own approach outside internationally standardized methodologies.

7.1.2.2.5 The requirements of Article 2.4

7.180. Having established that the four ISO standards do not include ILUC in their methodology, but also do not preclude a national regulator from addressing ILUC through its own methodology, the Panel now turns to the question whether, in light of this reading, Indonesia's case meets the requirements of Article 2.4. The first element that Indonesia must demonstrate is that the four ISO standards, which the Panel noted above qualify as international standards, are "relevant" international standards within the meaning of Article 2.4.

7.181. Indonesia submits that the four standards are relevant because they have a bearing on how to determine the CFP of products, including biofuel based on an LCA and the sustainability of biofuel. More specifically, Indonesia contends that the standards apply to the products at issue, concern the calculation of the CFP of biofuel and the determination of the sustainability of biofuel. For Indonesia, therefore, the four standards are relevant to the products and subject-matter of the technical regulations at issue.[366] Indonesia also contests the European Union's argument that the standards are not relevant because ILUC is outside the scope of the standards. According to Indonesia, the fact that ISO 14067:2018 defines ILUC means that ILUC is within the scope of that standard.[367]

7.182. The European Union submits that the standards are only partially relevant[368], and explains that they apply to DLUC emissions, which are also regulated in the EU Biofuel regime, and that they do not apply to ILUC emissions.[369] The European Union considers that ILUC falls outside of the scope of the standards.[370]

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[360] ISO 14040:2016, (Exhibit IDN-226), Introduction, p. iv.
[361] ISO 14040:2016, (Exhibit IDN-226), Introduction, p. vi.
[362] ISO 14044:2017, (Exhibit IDN-227), Introduction, p. vii.
[363] ISO 14067:2018, (Exhibit IDN-228), Clause 1 (Scope), p. 1.
[364] ISO 14067:2018, (Exhibit IDN-228), Annex A, p. 33.
[365] ISO 14067:2018, (Exhibit IDN-228), Annex A, p. 33.
[366] Indonesia's first written submission, paras. 692-740; second written submission, paras. 877-888.
[367] Indonesia's second written submission, paras. 878-882; response to Panel question No. 194, para. 172.
[368] European Union's first written submission, para. 877.
[369] European Union's response to Panel question No. 191, paras. 531-535.
[370] European Union's first written submission, para. 884.

7.183. The Panel notes that the ordinary meaning of "relevant" has been found by previous panels to be "bearing upon or relating to the matter in hand; pertinent".[371] Furthermore, in the context of discussing the second element of Article 2.4 ("use as a basis"), the Appellate Body elaborated on the issue of "relevance". Pointing out that Article 2.4 also refers to "the relevant parts" of international standards, the Appellate Body relied on this language to "define the appropriate focus of the analysis" and limit the examination of the standard to those parts. In this regard, the Appellate Body stated:

> [T]he examination must be limited to those parts of the relevant international standards that *relate to the subject-matter of the challenged prescriptions or requirements*. In addition, the examination must be broad enough to address all of those relevant parts; the regulating Member is not permitted to select only some of the "relevant parts" of an international standard. If a "part" is "relevant", then it must be one of the elements which is "a basis for" the technical regulation.[372]

7.184. The Panel agrees with this interpretation and considers that it reflects a narrow approach to "relevant" by linking it directly to the challenged aspect of the measure at issue. Thus, the "matter" that a standard "bears upon or relates to" is the challenged prescription or requirement itself, not just the product scope or general subject-matter of the measure at issue.[373]

7.185. Applying this interpretation to the case at hand, the Panel considers that the relevance of the four ISO standards for the purposes of the claim under Article 2.4 is not determined by the fact that they apply to biofuel which is the product at issue or that they deal with sustainability issues. Moreover, their relevance is not determined by the fact that these standards apply to aspects of the EU Biofuels regime that are not challenged in this proceeding, or that they contain provisions that define or directly mention ILUC (whether or not that brings them within the scope of the standard[374]). Instead, their relevance depends on whether they address that which the Panel understands is being addressed by the challenged measures, namely the taking into account of ILUC effects. As the Panel has found above, this is not the case as the standards make clear that they do not cover ILUC.

7.186. In light of this, the Panel finds that the four ISO standards are not "relevant" international standards for the purposes of Indonesia's claim under Article 2.4. This claim must therefore fail.

7.187. Before concluding, the Panel wishes to make three observations. First, the Panel's finding that these four ISO standards are not "relevant" within the meaning of Article 2.4 does not in any way lessen the role that these standards generally play in the discussion on sustainability and environmental performance of products. Furthermore, in this dispute, while these standards are not "relevant" under Article 2.4, they play an important role in providing evidence of the debate on ILUC and the state of that debate, as this section of the Report demonstrates.[375]

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[371] Panel Reports, *EC – Sardines*, para. 7.68; and *Australia – Tobacco Plain Packaging*, para. 7.276 and fn 962.

[372] Appellate Body Report, *EC – Sardines*, para. 250. (emphasis added)

[373] The Panel finds confirmation for this reading in the two cases to date where panels made findings on the relevance of an international standard. In *EC – Sardines*, the standard that the panel found to be "relevant" addressed what was regulated by the challenged measure, namely the product name for sardines. This finding was upheld by the Appellate Body. (Panel Report, *EC – Sardines,* paras. 7.98-7.99; Appellate Body Report, *EC – Sardines*, paras. 230-233.) In *US – Tuna II*, the standard that the panel found to be "relevant" addressed the same requirements as the challenged measure, namely the fishing methods allowed for the purposes of the dolphin-safe label. On appeal, the panel's finding on the existence of an international standard was reversed for different reasons. (Panel Report, *US – Tuna II (Mexico)*, paras. 7.700-7.707; Appellate Body Report, *US – Tuna II (Mexico),* para. 399.)

[374] The Panel notes that the legal question here is not whether ILUC falls within the scope of the ISO standard, but whether the standard is "relevant" within the meaning of Article 2.4.

[375] Indonesia's response to Panel question No. 197, paras. 189-190; European Union's response to Panel question No. 197, paras. 571-582. The Panel recalls, in this respect, the observation made by the panel in *Australia – Tobacco Plain Packaging* that just because a document does not constitute a relevant international standard under the TBT Agreement, it does not follow that such document is deprived of any other probative value for the purposes of other obligations in the Agreement. In that case, the Panel found that, while certain WHO FCTC Guidelines were not relevant international standards under the second sentence of Article 2.5 of the TBT Agreement (which contains a rebuttable presumption of consistency with Article 2.2), they could still be (and in fact were used as) evidence of fact under other claims at issue, including Article 2.2 of the TBT Agreement. Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.403-7.416.

7.188. Second, as the findings in this section confirm, the absence of international harmonization does not mean that countries are prevented from taking action and developing their own approaches to issues of concern. However, the fact that such national approaches do not fall under the disciplines of international standards does not mean that they do not fall under any WTO disciplines in terms of the scientific and evidentiary basis of the measure. In particular, Articles 2.2 and 2.1 which Indonesia has also raised in this proceeding, impose their own disciplines on technical regulations.[376]

7.189. Third, the Panel observes that its findings under Article 2.4 are based on international standards that currently exist. The Panel agrees with a previous panel's view that Article 2.4 is "not a static obligation and that there is an ongoing obligation to reassess technical regulations in light of new international standards that are adopted or revised", and that the obligation in Article 2.3 of the TBT Agreement contextually supports that view.[377]

7.1.2.2.6 Conclusion on Article 2.4

7.190. The Panel concludes that Indonesia 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 2.4 of the TBT Agreement to use relevant international standards as a basis for technical regulations.

7.1.2.3 Article 2.2 – Necessary to fulfil a legitimate objective

7.1.2.3.1 Introduction

7.191. The Panel now turns to the claim under Article 2.2 of the TBT Agreement. The Panel addresses this claim in the light of its findings under Article 2.4, and prior to addressing the claim under Article 2.1. The Panel does so for the reasons set out in its discussion of the order of analysis among the claims under the TBT Agreement.

7.192. Indonesia submits[378] that the 7% maximum share and the high ILUC-risk cap and phase-out violate Article 2.2. Indonesia accepts that the European Union's asserted policy objectives regarding climate change, biodiversity, and public morals are legitimate, but submits that these are not the objectives of the specific measures at issue. According to Indonesia, the stated objective of the specific measures is to limit "ILUC GHG emissions caused by biofuel"[379] and the actual objective is protectionism in the guise of environmental protection. Indonesia argues that the stated objective is not "legitimate": it argues that relevant international standards "exclude ILUC from being taken into account"[380]; it maintains in the context of Article 2.1 and Article 2.2 that because ILUC can neither be observed nor measured, the measures protect against a "fictional risk" and the regulation of ILUC-related GHG emissions is not "legitimate"[381]; and in response to the European Union's arguments, it challenges the legitimacy of addressing GHG emissions outside of a Member's own territory. Indonesia further submits that the measures are trade-restrictive, that the risks of the non-fulfilment of the objective would be limited, and that the measures are not apt to make a

[376] It is in the context of these provisions that the Panel will discuss non-standard-specific scientific arguments with respect to the approach that the European Union has adopted, which Indonesia has referred to under the present claim.

[377] Panel Report, *EC – Sardines*, para. 7.81. See also paras. 7.78-7.80, 7.82 and 7.86.

[378] Indonesia's first written submission, paras. 559-668; opening statement at the first meeting of the Panel, paras. 24-34; responses to the Panel's first set of questions, paras. 185-219; second written submission, paras. 659-869; opening statement at the second meeting of the Panel, paras. 17-26, and 59-103; responses to the Panel's second set of questions, paras. 101-161; and comments on the European Union's responses to the Panel's second set of questions, paras. 351-410.

[379] Indonesia's first written submission, paras. 621 and 642. While the cited paragraphs refer specifically to the objective of the 7% maximum share, Indonesia's arguments relating to the high ILUC-risk cap and phase-out are premised on the objective of that measure also being to limit ILUC GHG emissions caused by biofuel. See e.g. Indonesia's first written submission, paras. 600, 632, and 634.

[380] Indonesia's first written submission, paras. 599-600.

[381] Indonesia's first written submission, para. 624 (arguing that "the alleged objective of the 7% limitation is the protection against a risk (of ILUC GHG emissions) that can be neither observed nor quantified. Protection against such a risk is not a legitimate objective within the meaning of Article 2.2 of the TBT Agreement."); para. 533 (reiterating, in the context of its arguments under Article 2.1 of the TBT Agreement, that "[p]rotection against a risk (of ILUC GHG emissions) that can be neither observed nor quantified cannot be the basis of a legitimate distinction within the meaning of Article 2.1 of the TBT Agreement.")

material contribution[382] to their objective. Indonesia also identifies multiple less trade-restrictive alternative measures reasonably available to the European Union.

7.193. The European Union submits[383] that the Panel should reject the claims under Article 2.2, and disputes Indonesia's arguments on all of these elements of the legal standard. The European Union argues that the EU Biofuels regime must be considered as a "composite whole", and the "legitimate objective" that the measures pursue is the composite objective of mitigating climate change, preserving biodiversity, and addressing the associated moral concerns of the EU public.[384] In addition to arguing that the measures do not pursue a protectionist objective, the European Union maintains that the difficulties and limitations in assessing ILUC do not mean that ILUC GHG emissions are a "fictional risk", and submits that there is no territorial limitation in Article 2.2 of the TBT Agreement or Article XX of the GATT 1994. The European Union also disputes that the measures are "trade-restrictive", recalls that its composite objective implicates values of high importance in the European Union, and argues that the measures are apt to make a material contribution to the composite objective pursued. According to the European Union, the various alternative measures proposed by Indonesia would either be more trade-restrictive than the measures at issue or would not make an equivalent contribution to the composite objective pursued.

7.194. The Panel notes at the outset that there is substantial overlap between the parties' arguments under the different analytical steps of Article 2.2, and further overlap between certain of the parties' arguments under Article 2.2 and Article 2.1. For example, Indonesia stresses that ILUC cannot be observed nor measured when presenting its views on the identification of the measures' true objective, in the context of addressing the "legitimacy" of regulating ILUC-related GHG emissions under Article 2.1 and Article 2.2, and also when addressing the measures' capacity to contribute to that stated objective. In developing their arguments on these and related issues, both parties cross-reference certain arguments under Article 2.1 in the sections of their submissions addressing Article 2.2, and vice versa; and the parties also cross-reference sections of their arguments under Article 2.1 and Article 2.2 in the sections of their submissions addressing the general exceptions in Article XX of the GATT 1994 (and vice versa). All of these sections cross-reference several up-front sections of the parties' submissions that set out extended discussions on the validity of the concepts of ILUC and the scientific basis for the measures at issue, and the history and factual circumstances surrounding the measures at issue.

7.195. The Panel appreciates that the parties' overlapping arguments under multiple different elements of these provisions is largely a consequence of apparent overlaps in the legal standards that apply under these provisions. However, the Panel does not consider that it is under an obligation to formalistically address the same issues and arguments in the context of every analytical step or provision where they are repeated. It is well established that a panel has "the discretion to address only those arguments it deems necessary to resolve a particular claim".[385] The Panel addresses disputed issues and arguments under the steps in the analysis of Article 2.2 and Article 2.1 that it considers most relevant and appropriate to the issues and arguments raised. Towards that end, the Panel engages in a holistic reading of the parties' arguments under Article 2.2 and Article 2.1 and their submissions more generally. Where appropriate and useful to enhancing the clarity of its reasoning, the Panel employs the technique of cross-referencing.

7.196. The Panel notes that there is also substantial overlap between the parties' arguments concerning the 7% maximum share and the parties' arguments concerning the high ILUC-risk cap and phase-out. Insofar as the parties' arguments are the same, or raise the same or similar issues, the Panel addresses them together to avoid repetition. Naturally, insofar as the parties' arguments

[382] Indonesia argues that the 7% maximum share and the high ILUC-risk cap and phase-out "would not be capable" of contributing to their stated objective. (See e.g. Indonesia's first written submission, paras. 630 and 642.)

[383] European Union's first written submission, paras. 770-875; opening statement at the first meeting of the Panel, paras. 148-160; responses to the Panel's first set of questions, paras. 349-429; second written submission, paras. 259-313; opening statement at the second meeting of the Panel, paras. 57-135; responses to the Panel's second set of questions, paras. 404-521; and comments on Indonesia's responses to the Panel's second set of questions, paras. 123-152.

[384] The European Union has referred to three objectives as its multiple intertwined objectives pursued concurrently, and has also referred to them as comprising a single, composite objective.

[385] Appellate Body Report, *EC – Poultry*, para. 135.

raise issues that are specific to one of the two different measures, this is reflected in the Panel's reasoning and findings.

7.1.2.3.2 Legal standard

7.197. Article 2.2 sets forth the obligation that:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

7.198. Article 2.2 has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.199. Article 2.2 requires technical regulations not to be more trade-restrictive than necessary to fulfil "a legitimate objective". Thus, the initial steps in the analysis under Article 2.2 would typically[386] consist of:

a. the identification of the objective of the measure at issue, and

b. an assessment of whether it is a "legitimate" objective.

7.200. If the measure is aimed at fulfilling a legitimate objective, the next step of the analysis typically aims to arrive at a "preliminary conclusion"[387] about whether the measure is necessary to fulfil that legitimate objective. This so-called "relational analysis"[388] is based on a "weighing and balancing" of three factors:

a. the trade–restrictiveness of the measure;

b. the risks that non-fulfilment of the objective would create; and

c. the degree of contribution made by the measure to the objective.

7.201. The final step of the necessity test under Article 2.2 consists of a "comparative analysis"[389] whereby the challenged measure is compared against possible alternative measures. More specifically, this step of the analysis entails a comparison of the trade-restrictiveness and the degree of achievement of the objective by the measure at issue with those of possible alternative measures that are reasonably available, apt to make an equivalent contribution to the objective of, and less trade-restrictive than, the challenged measure.

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[386] See Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.3. The Appellate Body has clarified that, in the context of Article 2.2, "the particular manner of sequencing the steps of this analysis is adaptable, and may be tailored to the specific claims, measures, facts, and arguments at issue in a given case." (Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.205.) In certain circumstances, a panel may elect to begin its analysis by considering the "trade-restrictiveness" of the technical regulation at issue. (See e.g. Panel Reports, *US – COOL*, para. 7.554 and fn 742.)

[387] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.203-5.204 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.)

[388] Appellate Body Reports, *US – COOL*, para. 374 (recalling its earlier use of the term "relational analysis" in Appellate Body Report, *US – Tuna II (Mexico)*, para. 318); and *Australia – Tobacco Plain Packaging*, paras. 6.3 and 6.517.

[389] The term "comparative analysis" has been used by previous panels and the Appellate Body. See e.g. Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.199; and *Australia – Tobacco Plain Packaging*, para. 6.4.

7.202. These steps of the analysis under Article 2.2 generally correspond to the steps of the analysis followed when applying those exceptions in Article XX of the GATT 1994 that require that a measure be "necessary" to the fulfilment of a specified objective (these exceptions include Articles XX(a), (b), and (d)). The first and second steps of the analysis also overlap, to a certain extent, with the assessment of whether a measure is one "relating to" the conservation of exhaustible natural resources within the meaning of Article XX(g).[390]

7.203. The Panel will elaborate further on the elements of the legal standard in Article 2.2 as necessary in the course of its assessment of the issues in dispute.

7.1.2.3.3 Identification of the objective pursued

7.204. The Panel begins with the identification of the measures' objective(s). The conclusion reached on this issue will necessarily condition the nature and scope of subsequent steps of the analysis under Article 2.2. More specifically, the identification of the objective is the logical prerequisite to assessing whether that objective is a "legitimate objective" and is also a prerequisite for assessing "the risks non-fulfilment [of the legitimate objective] would create" in accordance with the text of Article 2.2. Furthermore, the Appellate Body has confirmed that a measure's objective also serves as "the benchmark against which a panel must assess the degree of contribution made by a challenged technical regulation, as well as by proposed alternative measures".[391]

7.205. Indonesia accepts that the European Union's wider policy objectives regarding climate change, biodiversity, and public morals are legitimate, but submits that the Panel's determination should focus on the objective of the specific measures at issue. According to Indonesia, the stated objective of the specific measures is to limit "ILUC GHG emissions caused by biofuel"[392] and the measures' actual objective is protectionism in the guise of environmental protection.

7.206. The European Union responds that "even though Indonesia has singled out isolated provisions of RED II and characterised them as individual 'measures' for the purpose of the present proceedings, in order to assess and appreciate the objectives of those 'measures', the EU Biofuels regime must be considered as a composite whole, situated in the broader legal and policy context of which it forms part".[393] When seen from this broader perspective, it argues, this means that the "legitimate objective" that the measures pursue is the composite objective of mitigating climate change, preserving biodiversity, and addressing the associated moral concerns of the EU public.[394] The European Union therefore takes issue with Indonesia seeking to define the objective of the measures in isolation from the broader objectives of RED II and its Biofuels regime, and with what it sees as Indonesia's disregard of the biodiversity and public morals objectives. The European Union also disputes Indonesia's assertion that the measures pursue a protectionist objective.

7.207. The Panel considers that there are certain internal tensions and ambiguities in respect of each party's identification of the objective(s) of the measures at issue, as briefly elaborated below.

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[390] The Panel elaborates further on the relationship between the legal standards under Article 2.2 and Article XX(b) and (g) in the context of its interpretation and application of Article XX.

[391] Appellate Body Reports, *US – COOL*, para. 387.

[392] Indonesia's first written submission, paras. 621 and 642. While the cited paragraphs refer specifically to the objective of the 7% maximum share, Indonesia's arguments relating to the high ILUC-risk cap and phase-out are premised on the objective of that measure also being to limit ILUC GHG emissions caused by biofuel. (See e.g. Indonesia's first written submission, paras. 600, 632, and 634.)

[393] European Union's first written submission, para. 157.

[394] The European Union has referred in the plural to three objectives as its multiple intertwined objectives pursued concurrently, and has also referred to them as comprising a single, composite objective. In its first written submission the European Union referred to the promotion of "energy security" as an objective pursued. (See e.g. European Union's first written submission, para. 25.) However, in response to Panel question No. 172, the European Union confirmed that "to solve this dispute the Panel does not need to address the argument of whether the measures challenged by Indonesia contribute to the EU energy security as this is not an argument that the EU has raised for the purpose of Article XX of the GATT 1994 or 2 of the TBT agreement" (para. 408).

7.208. Indonesia argues that the objective of the measures is to limit "ILUC GHG emissions caused by biofuel".[395] Indonesia sometimes formulates the objective in different terms[396] yet also asserts that the actual objective of the measures is protectionism in the guise of environmental protection. The Panel understands these to be arguments made in the alternative, with Indonesia arguing that, insofar as the Panel bases its understanding of the objective of the specific measures on their stated purpose as expressed in the text of RED II and other relevant legal instruments, the objective may thus be understood as limiting ILUC GHG emissions caused by biofuel; but that, insofar as the Panel bases its understanding of the objective of the specific measures on their legislative history, attendant circumstances, and other indicators that pertain to the true objective, the true objective is revealed to be protectionism in the guise of environmental protection. Under either of these alternative perspectives, the Panel understands Indonesia to argue that the Panel should focus on the specific measures at issue, not the wider, higher-level objectives of RED II or the EU Biofuels regime.

7.209. The Panel notes that, for its part, the European Union repeatedly stresses the objective of the measures cast at a relatively high level of generality and abstraction, i.e. in terms of climate change, biodiversity and public morals.[397] It identifies the objective of the measures in terms that do not specifically refer to the concept of ILUC or ILUC-related GHG emissions. Indeed, the European Union confirms that what it identifies as the objectives of the specific measures at issue are "not specific to the Delegated Regulation or to RED II, but they are shared by the entirety of the EU's Biofuels Regime".[398] However, the Panel finds it significant that, at the same time, the European Union presents various other arguments implying that the objective of the measure may or even must be understood more specifically in terms of ILUC or ILUC-related GHG emissions. In this connection, the European Union argues that the alternative measures proposed by Indonesia are vitiated by the fact that they fail to address *ILUC and/or ILUC-related GHG emissions* and therefore are not apt to make an equivalent contribution to the objective pursued.[399] The Panel considers that such arguments are entirely consistent with an approach of defining the objective of the measures in relatively narrow and direct terms, that is, by focusing on ILUC and/or ILUC-related GHG emissions, as opposed to the broader and higher-level objectives of climate change, biodiversity and public morals.[400]

7.210. In these circumstances, the Panel's task is not a matter of simply choosing between one of two alternative ways of articulating the objective of the measures at issue. Rather, the Panel must undertake an independent and objective assessment of the proper characterization of the measures'

[395] Indonesia's first written submission, paras. 621 and 642. While the cited paragraphs refer specifically to the objective of the 7% maximum share, Indonesia's arguments relating to the high ILUC-risk cap and phase-out are premised on the objective of that measure also being to limit ILUC GHG emissions caused by biofuel. See e.g. Indonesia's first written submission, paras. 600, 632, and 634.

[396] For example, in its second written submission, Indonesia states that if the Panel accepts that these measures pursue a legitimate objective, then, "at best that objective is ensuring that the use of biofuel results in net savings in respect of GHG emissions, in the sense of net emissions savings of using biofuel exceed the emissions of using fossil fuel. The specific objective is ensuring that the use of biofuel results in net savings, as compared to the use of fossil fuel." (Indonesia's second written submission, para. 835.)

[397] See generally section 3.3 of the European Union's first written submission.

[398] European Union's opening statement at the second meeting of the Panel, para. 102 (referring to European Union's responses to Panel question Nos. 76 and 77).

[399] European Union's first written submission, paras. 852-857 (recalling at the outset that "RED II seeks to address both [DLUC] and [ILUC] emissions", and that insofar as estimated ILUC-related GHG emissions are mostly expected to take place outside of the European Union, Indonesia's first proposed alternative, which is reducing GHG emissions "at home", "obviously cannot qualify as a less trade-restrictive alternative"; second written submission, paras. 301-302 (arguing that a proposed alternative does not address the fact that the "objective of addressing ILUC emissions is to identify the net impact of stimulating demand for a specific raw material") and 305 ("one objective of the EU measures is to avoid an exacerbation of a known, observed phenomenon (crop expansion into areas of high carbon stock), especially when that phenomenon can increase as a consequence of an EU's own policy" and that, for this reason, one of Indonesia's proposed alternative measures "is not an alternative but at best a complementary measure"); and opening statement at the second meeting with the Panel, para. 110 (noting, with regard to extending emissions accounting for agricultural products, that Indonesia confirms that the respective alternative "does not take into account ILUC, but only DLUC based on LCA").

[400] The Panel appreciates that such arguments could also be understood as speaking to what constitutes an "equivalent contribution" to the higher-level objectives relating to climate change, biodiversity and EU public morals concerns.

objective, guided by its consideration of the main issues raised by parties in their related arguments.[401]

7.211. The Panel will begin its analysis by setting out the stated rationale behind the specified measures at issue. The Panel then considers the following issues that are raised by the alternative formulations of the measures' objective presented by Indonesia and the European Union. First, the Panel considers the European Union's approach of identifying the measures' objective in terms that focus on the wider objectives of RED II and the EU Biofuels regime. Second, the Panel considers the European Union's argument that the measures' objective should be formulated by reference to not only ILUC-related GHG emissions, but also associated biodiversity and EU public morals concerns. Third, the Panel addresses Indonesia's argument that the measures' legislative history, their attendant circumstances, and other indicators establish that the measures' true objective is protectionism in the guise of environmental protection.

7.212. Before turning to these issues, the Panel notes that neither party has suggested that the objective of the 7% maximum share should be defined *differently* from the objective of the high ILUC-risk cap and phase-out. The parties' arguments relating to the objective of the specific measures at issue generally do not distinguish between them. The Panel will therefore address these measures together, except insofar as the parties' arguments draw relevant distinctions that merit separate consideration of the 7% maximum share and the high ILUC-risk cap and phase-out.

7.1.2.3.3.1 The stated rationale behind the 7% maximum share and the high ILUC-risk cap and phase-out

7.213. The Panel observes that the rationale behind the measures at issue was explained as early as 2015, in the form of the ILUC Directive which amended RED I for the stated purpose of "address[ing] the impact of indirect land-use change given that current biofuels are mainly produced from crops grown on existing agricultural land".[402] From the earliest explanations of the rationale behind the EU measures, there is an indication that the European Union's concern is directed at ILUC-related GHG emissions. According to the ILUC Directive, "when [ILUC] involves the conversion of land with high carbon stock *it can lead to significant greenhouse gas emissions*."[403] The Panel recalls and hereby incorporates by reference the discussion at paragraphs 2.15 to 2.22 of this Report, which reference the ILUC Directive, the European Commission's 2016 proposal for a "recast" Directive to address ILUC, and the 2017 Study Report relating to ILUC.

7.214. The Panel further observes that the text of RED II itself, and in particular its Recitals 80 and 81, explains the ILUC-related justification for the measures at issue:

> (80) To prepare for *the transition towards advanced biofuels and minimize the overall direct and indirect land-use change impacts*, it is appropriate to limit the amount of biofuels and bioliquids produced from cereal and other starch-rich crops, sugars and oil crops that can be counted towards the targets laid down in this Directive, without restricting the overall possibility of using such biofuels and bioliquids. The establishment of a limit at Union level should not prevent Member States from providing for lower limits to the amount of biofuels and bioliquids produced from cereal and other starch-rich crops, sugars and oil crops that can be counted at national level towards the targets laid down in this Directive, without restricting the overall possibility of using such biofuels and bioliquids.
>
> (81) Directive 2009/28/EC introduced a set of sustainability criteria, including criteria protecting land with high biodiversity value and land with high-carbon stock, *but did not cover the issue of indirect land-use change*. *Indirect land-use change occurs when the cultivation of crops for biofuels, bioliquids and biomass fuels displaces traditional production of crops for food and feed purposes. Such additional demand increases the*

[401] There is nothing unusual in this regard. As long clarified by the Appellate Body, a panel must always "independently and objectively assess" the objective of the specific measures at issue without being bound by either party's characterization of the objective pursued. (Appellate Body Report, *US – Tuna II (Mexico),* para. 314).

[402] ILUC Directive, (Exhibit IDN-86), Recital (4), p. 2.

[403] Indonesia's first written submission, para. 227 (referring to ILUC Directive, (Exhibit IDN-86), Recital (4), p. 2). (emphasis added)

> *pressure on land and can lead to the extension of agricultural land into areas with high-carbon stock, such as forests, wetlands and peatland, causing additional greenhouse gas emissions.* Directive (EU) 2015/1513 of the European Parliament and of the Council recognises that *the magnitude of greenhouse gas emissions-linked indirect land-use change is capable of negating some or all greenhouse gas emissions savings* of individual biofuels, bioliquids or biomass fuels. While there are risks arising from indirect land-use change, research has shown that the scale of the effect depends on a variety of factors, including the type of feedstock used for fuel production, the level of additional demand for feedstock triggered by the use of biofuels, bioliquids and biomass fuels, and the extent to which land with high-carbon stock is protected worldwide.
>
> While *the level of greenhouse gas emissions caused by indirect land-use change cannot be unequivocally determined with the level of precision required to be included in the greenhouse gas emission calculation methodology, the highest risks of indirect land-use change have been identified for biofuels, bioliquids and biomass fuels produced from feedstock for which a significant expansion of the production area into land with high-carbon stock is observed. It is therefore appropriate, in general, to limit food and feed crops-based biofuels, bioliquids, and biomass fuels promoted under this Directive* and, in addition, to require *Member States to set a specific and gradually decreasing limit for biofuels, bioliquids and biomass fuels produced from food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed. Low indirect land-use change-risk biofuels, bioliquids and biomass fuels should be exempt from the specific and gradually decreasing limit.*[404]

7.215. Recitals 80 and 81 of RED II thus set out the rationale for addressing ILUC, link the issue of ILUC risks specifically to the issue of GHG emissions, and explain how the 7% maximum share in Article 26(1) and the high ILUC-risk cap and phase-out in Article 26(2), including the concept of low ILUC-risk biofuels, are related to this rationale.

7.216. The Panel further notes that the Delegated Regulation reiterates that the measures at issue are taken to address the issue of ILUC, through its 16 Recitals that explain the measures at issue by reference to ILUC. The Delegated Regulation recalls that "ILUC can occur when land previously devoted to food or feed production is converted to produce biofuels, bioliquids and biomass fuels", and that "[i]n that case, food and feed demand still needs to be satisfied, which may lead to *the extension of agricultural land into areas with high carbon stock such as forests, wetlands and peat land, causing additional greenhouse gas emissions*."[405] It recalls that the "sustainability and greenhouse gas saving criteria" set out in RED I and carried forward into Article 29 of RED II "do not account for ILUC emissions".[406] It reiterates that the 2015 ILUC Directive:

> [N]ot only acknowledged the existence of ILUC emissions, but also recognised, despite the uncertainty in calculating them, that *the magnitude of greenhouse gas emissions linked to ILUC can lead to negating some or all of the greenhouse gas emissions savings of individual biofuels*, as defined in that Directive, and bioliquids. *Therefore*, it introduced an overall limit to the amount of those fuels produced from cereal and other starch-rich crops, sugars and oil crops and from crops grown as main crops primarily for energy purposes on agricultural land that can be counted towards targets set out in Directive 2009/28/EC. That limit consists of a 7% maximum contribution of such fuels towards the final consumption of energy in rail and road transport in each Member State.[407]

7.217. The Delegated Regulation also includes the observation that "*the impact of ILUC* on the potential of biofuels, bioliquids and biomass fuels *to achieve greenhouse gas emission savings* is particularly pronounced for oil crops", and that "[r]enewable fuels made from such feedstocks are *therefore widely considered as having a higher ILUC-risk*" and that this is reflected in both RED I and RED II.[408] It states that "[t]he report on feedstock expansion also highlights that *the impact of the expansion of the production area of oil crops into land with high-carbon stock* on the potential

[404] Recitals 80 and 81 of RED II. (emphasis added)
[405] Recital 2 of the Delegated Regulation. (emphasis added)
[406] Recital 3 of the Delegated Regulation.
[407] Recital 4 of the Delegated Regulation. (emphasis added)
[408] Recital 8 of the Delegated Regulation. (emphasis added)

of biofuels, bioliquids and biomass fuels *to achieve greenhouse gas emission savings* depends on several factors."[409]

7.218. In light of the foregoing, the Panel understands that the stated rationale for the 7% maximum share and the high ILUC-risk cap and phase-out is to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.1.2.3.3.2 The wider objectives of the EU Biofuels regime

7.219. The parties approach the analysis of the identification of the objective from different standpoints. Indonesia focuses on the specific objective of the measures at issue, whereas the European Union frames its arguments by reference to broad policy objectives common to RED II and the EU Biofuels regime more generally.

7.220. The Panel notes that the objective of any challenged measure in WTO dispute settlement proceedings could in principle be formulated and understood either in terms of its relatively narrow and direct objective, or in terms of one or more higher-level objectives which are one or more steps removed from that relatively narrow and direct objective. For instance, in this case the objective of the specific measures at issue could in principle be formulated and understood in terms of the relatively narrow and direct objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. However, that relatively narrow and direct formulation of the objective of the specific measures at issue can be understood not as an end in and of itself, but as a means towards fulfilling the higher-level objective of mitigating climate change, which may in turn be understood as a means to fulfilling further higher-level objectives relating to the consequences of climate change on the planet and human, animal or plant life or health.

7.221. There is nothing inherent in the concept of identifying a measure's objective that dictates the level of immediacy or specificity at which it must be defined. Furthermore, the text of Article 2.2 itself gives examples of legitimate objectives which are cast at a relatively high level of generality (e.g. "national security requirements", "the prevention of deceptive practices", "protection of human health or safety, animal or plant life or health", and "the environment"). In *US – Clove Cigarettes*, the panel observed in this regard that "the 'legitimate objectives' explicitly mentioned in the text of Article 2.2 of the TBT Agreement are formulated at a high level of generality" and added that "defining the objective of [the measure banning flavoured cigarettes] in terms of 'reducing youth smoking' may already be more specific than required under Article 2.2, which refers generally to the 'protection of human health' as a legitimate objective."[410] There are several examples of other panels referring to the "objective" of a measure at a level of generality commensurate with the level of generality set out in the text of Article 2.2.[411]

7.222. On the other hand, the Panel recognizes that framing the analysis under Article 2.2 in terms of the relatively narrow and direct objective of the specific measure at issue, rather than on broader objectives that are one or more steps removed from that objective, is an approach that comports well with certain other considerations. For instance, the direction set out in the text of Article 2.2 to identify and assess the nature and gravity of "the risks that non-fulfilment [of the legitimate objective] would create" may be difficult to apply, and not particularly meaningful, if the objective is identified at a high level of generality. This element of the analysis would seem to presuppose that the objective is understood in a more particular way, given the related directive set out in the text of Article 2.2 that "In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products".

7.223. Furthermore, in a number of cases under Article 2.2, and indeed Article XX of the GATT 1994, panels have formulated the objective of the measure at issue in a manner that focuses on its relatively immediate and direct objective. For example, in *Brazil – Retreaded Tyres*, the panel identified the objective of the import ban at issue in relatively specific terms as "the reduction of the

[409] Recital 9 of the Delegated Regulation. (emphasis added)
[410] Panel Report, *US – Clove Cigarettes*, fn 635.
[411] For instance, in *EC – Sardines*, the panel identified the objective of the measure in the context of addressing the claim under Article 2.4 of the TBT Agreement, and identified the "the three legitimate objectives" pursued by the EC Regulation at issue as "market transparency", "consumer protection" and "fair competition". (Panel Report, *EC – Sardines*, para. 7.123.)

exposure to risks arising from the accumulation of waste tyres"[412], and it found that this objective fell within the broader goal of protecting human, animal or plant life or health. In *US – Tuna II (Mexico)*, the panel identified the objectives of the US dolphin-safe labelling measure as including the "objective of preventing consumers of tuna products from being deceived by false dolphin-safe allegations" and stated that measure's objective fell "within the broader goal of preventing deceptive practices".[413]

7.224. Additionally, as already noted, the Appellate Body has stated that the identification of a measure's objective serves as "the benchmark against which a panel must assess the degree of contribution made by a challenged technical regulation, as well as by proposed alternative measures".[414] The Appellate Body stressed that because the identification of the objective pursued serves that function, "the importance of a panel identifying with sufficient clarity and consistency the objective or objectives pursued by a Member through a technical regulation cannot be overemphasized".[415] These considerations do not necessarily support an approach of identifying a measure's objective at a high level of generality.

7.225. In light of the foregoing, the Panel does not consider that there is some requisite level of specificity with which the relevant "objective" must always be defined for the purposes of Article 2.2. Instead, the Panel will ground its approach on the particular circumstances of this case.

7.226. For the reasons elaborated below, the Panel considers it appropriate to seek to identify the particular objective of the specific measures at issue, as opposed to the wider objectives of the RED II as a whole.

7.227. First, the Panel considers that in this case the European Union's approach of framing the analysis under Article 2.2 in terms of its higher-level objectives of climate change, biodiversity, and EU public morals is a corollary of its view that the 7% maximum share and the high ILUC-risk cap and phase-out cannot be assessed as individual "measures" distinct from what the European Union terms its broader "Biofuels regime". The Panel has already addressed and rejected this argument. The Panel has concluded that the European Union has not established any basis to question Indonesia's identification of particular aspects (i.e. the 7% maximum share and the high ILUC-risk cap and phase-out) of what the European Union refers to as the "Biofuels regime" as the specific measures at issue for the purposes of defining the subject-matter of its complaint.[416]

7.228. Second, the Panel considers that as a general matter, it does not prejudice a responding Member to identify a measure's objective in relatively specific terms. Indeed, to the extent that the objective of the measures is defined at a very high level of generality in terms of e.g. "climate change mitigation" and "avoidance of biodiversity loss", the range of measures that might validly be considered as "alternatives" might become commensurately very expansive. Conversely, a narrower and more specific formulation of the objective by reference to the specific measure at issue will narrow the range of measures that might validly be considered as "alternatives".

7.229. Third, the Panel notes that while the European Union generally refers to its broad policy objectives for the purposes of establishing that these are "legitimate objectives", at the same time it also presents various arguments that imply that the objective of the measure may or even must be understood more specifically in terms of ILUC or ILUC-related GHG emissions. The Panel finds it highly significant that, as already noted above, the European Union argues that the alternative measures proposed by Indonesia are vitiated by the fact that they fail to address *ILUC and/or ILUC-related GHG emissions* and therefore are not apt to make an equivalent contribution to the objective pursued.[417] As already observed, such arguments are entirely consistent with an approach of defining the objective of the measures in relatively narrow and direct terms that focus on ILUC

[412] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 179.
[413] Panel Report, *US – Tuna II (Mexico)*, para. 7.437.
[414] Appellate Body Reports, *US – COOL*, para. 387.
[415] Appellate Body Reports, *US – COOL*, para. 387.
[416] See section 7.1.1.1.1 of this Report.
[417] See fn 399 above.

and/or ILUC-related GHG emissions, as opposed to the broader and higher-level objectives of climate change, biodiversity and public morals.[418]

7.230. The Panel understands that the European Union's concern with identifying the objective in terms of the specific ILUC-related objective of the challenged measures, as opposed to the broader policy objectives it pursues through RED II, may stem from the notion that limiting the risk of ILUC-related GHG emissions caused by conventional biofuel cannot be understood as an end in itself, but is rather a means to secure the broader policy goals of climate change mitigation, environmental protection and biodiversity, and the protection of EU public morals. The Panel accepts that it is no doubt true that limiting the risk of ILUC-related GHG emissions caused by conventional biofuel cannot be understood purely as an end in itself, disconnected from any higher-level objectives and values. However, the Panel does not consider that focusing on the objective of the specific measures at issue implies otherwise.

7.231. To the contrary, the assessment of whether the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuel is a "legitimate objective" under Article 2.2, and falls within the range of policies covered by one or more of the general exceptions in Article XX, necessarily involves an assessment of how the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuel is related to the conservation of exhaustible natural resources, the protection of human, animal or plant life or health, and environmental protection more generally. However, for analytical clarity the Panel considers that the identification of the objective of the specific measures at issue is separate from the issue of whether that objective, once identified, falls within the broader objectives of conserving exhaustible natural resources, protecting human, animal or plant life or health, or the environment more generally.[419]

7.232. For these reasons, the Panel agrees with Indonesia that it is appropriate to identify the objective of the specific measures at issue, as opposed to the wider objectives of RED II or the EU Biofuels regime as a whole, to serve as the benchmark against which the Panel must assess, for the purposes of the Article 2.2 claim, the legitimacy of the objective, the risks that its non-fulfilment would create, the measures' contribution to that objective, and the availability of any less trade-restrictive alternative measures that would make an equivalent contribution to that objective.

7.233. As set out in the previous section, that objective may be identified as limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.1.2.3.3.3 ILUC-related biodiversity and public morals concerns

7.234. Indonesia considers that the principal objective of the measures is specifically to address increased GHG emissions allegedly caused by ILUC, and not a wider set of concerns emphasized by the European Union relating to biodiversity and EU public morals. In Indonesia's view, these other alleged objectives are either unrelated, or merely ancillary, to the objective of limiting ILUC-related GHG emissions.

7.235. The European Union submits that Indonesia's arguments under Article 2.2 wrongly assume that the EU measures pursue only one objective, i.e. GHG emissions reduction. The European Union stresses throughout its submissions that the measures at issue pursue the composite objective of mitigating climate change, preserving biodiversity, and addressing the associated moral concerns of the EU public.

7.236. The Panel considers that although Article 2.2 refers to "a legitimate objective" in the singular, there is no reason in principle why a given measure could not pursue several different objectives. In *US – Clove Cigarettes*, the panel stated that "it would be entirely possible, both as a factual and a legal matter, for a single technical regulation to pursue more than one objective."[420] On appeal, the

[418] The Panel appreciates that such arguments could also be understood as speaking to what constitutes an "equivalent contribution" to the higher-level objectives relating to climate change, biodiversity and EU public morals concerns.

[419] As the first WTO panel to address the general exceptions in Article XX(b) observed, the initial step of the analysis involves an assessment of whether "the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health". (Panel Report, *US – Gasoline*, para. 6.20.)

[420] Panel Report, *US – Clove Cigarettes*, para. 7.342.

Appellate Body agreed that "measures, such as technical regulations, may have more than one objective" and that it may not be uncommon for a measure to have "a multiplicity of objectives".[421] In *EC – Seal Products*, the panel accepted that "there is no reason in principle why the measure at issue could not have several objectives".[422]

7.237. The Panel also accepts that, in circumstances where a measure pursues a multiplicity of objectives, those different objectives may reflect competing interests, and that, where this is so, it may be relevant to the assessment of the measure under the TBT Agreement and the GATT 1994. For instance, where a measure pursues more than one objective, it will in principle be necessary for a complaining Member to identify a less trade-restrictive alternative measure that makes an equivalent contribution to each of those objectives (and not merely one of them) in order to establish a violation of Article 2.2. The assessment of whether a detrimental impact on imports "stems exclusively from a legitimate regulatory distinction" under Article 2.1, and the assessment of whether discrimination is "arbitrary or unjustifiable" under the *chapeau* of Article XX of the GATT 1994, could likewise be distorted if a measure with multiple competing objectives is analysed as though it had a monolithic objective.

7.238. However, while the Panel does not exclude the possibility that the 7% maximum share and the high ILUC-risk cap and phase-out could be demonstrated to have more than one objective, and possibly competing objectives, it is not persuaded that, for the purposes of settling this dispute, it would be material to consider that the measures pursue the protection of biodiversity and EU public moral concerns as separate objectives from the objective to limit the risk of ILUC-related GHG emissions.

7.239. According to the logic of the European Union's own explanations of how these three objectives are interlinked, it would appear that any measure that addressed ILUC-related GHG emissions associated with crop-based biofuels would necessarily address the relevant biodiversity and EU public morals objectives at the same time and with the same degree of contribution to each separate objective. Therefore, to the extent that EU concerns relating to climate change, biodiversity and EU public morals are properly characterized as different objectives, from the perspective of the measures at issue these objectives would be entirely complementary.

7.240. In the context of rebutting Indonesia's arguments on possible less trade-restrictive alternative measures, the European Union argues that Indonesia's arguments wrongly assume that the EU measures pursue only one objective (GHG emission reduction). According to the European Union, any alternative measure must address all of these aspects of the composite objective pursued, not just the objective of addressing GHG emissions or climate change.[423]

7.241. It appears to the Panel that the fundamental premise of the European Union's rebuttal, as elaborated further below in the context of assessing the alternative measures proposed, is that the alternative measures are vitiated insofar as they do not address *ILUC* associated with crop-based biofuels. However, the European Union has not explained how there could be a less trade-restrictive alternative measure that made an equivalent contribution to the objective of limiting *ILUC-related GHG emissions* associated with crop-based biofuels, without simultaneously making an equivalent contribution to the objective of limiting ILUC-related *biodiversity* loss, and without simultaneously making an equivalent contribution to protecting *EU public morals* associated with ILUC-related GHG emissions and ILUC-related biodiversity loss. The Panel agrees with Indonesia's observation that "according to the logic of the European Union's own defence, any measure addressing GHG emissions and climate change automatically concerns also biodiversity loss and therefore protects EU public morals".[424]

7.242. The Panel is not persuaded by the European Union's argument that it must consider how the measures pursue the protection of biodiversity and EU public moral concerns as separate objectives from the objective to limit the risk of ILUC-related GHG emissions.

[421] Appellate Body Report, *US – Clove Cigarettes*, paras. 113 and 115.
[422] Panel Reports, *EC – Seal Products*, para. 7.400.
[423] European Union's first written submission, para. 850.
[424] Indonesia's opening statement at the second meeting of the Panel, para. 61. See also Indonesia's comments on the European Union's response to Panel question No. 188, para. 405.

7.1.2.3.3.4 The allegation of protectionism in the guise of environmental protection

7.243. The Panel now turns to Indonesia's argument that the measures' legislative history, their attendant circumstances, and other indicators establish that the measures' true objective is protectionism in the guise of environmental protection. There are differences between the arguments that Indonesia presents with respect to the 7% maximum share and the high ILUC-risk cap and phase-out. The Panel will therefore examine the two measures in turn.

7.244. Beginning with the 7% maximum share, Indonesia submits that:

> [E]nvironmental protection in general and the reduction of GHG emissions in particular are not the reasons *why only oil palm crop-based biofuel is affected by the high ILUC-risk cap and phase-out* and *why the 7 % limitation applies only to biofuel made from food and feed crops*. Rather, the design and structure of the *measures* at issue as well as the relevant historical background demonstrate that the European Union's objective, in adopting *both* technical regulations, is to reduce the competitiveness of oil palm crop-based biofuel and palm oil in the EU market and to shield from competition the EU production of food and feed crops that may be used for biofuel production and the EU biofuel industry, while preserving market access for certain trading partners.[425]

7.245. The Panel notes however that despite making this assertion against the 7% maximum share, in its first written submission Indonesia develops its allegation of protectionism only in respect of the high ILUC-risk cap and phase-out. In its first written submission, Indonesia presents detailed arguments seeking to establish that the protectionist objective of the high ILUC-risk cap and phase-out can be inferred from several circumstances, including: (i) the European Union's history of seeking to limit imports of oil palm crop-based biofuel, *inter alia* through illegal trade barriers; (ii) the measure's legislative history and the stated intentions of the European Parliament; (iii) the design and structure of the measure; and (iv) the measures taken to preserve market access for important EU trading partners exporting soybean products.[426] Indonesia's first written submission contains no equivalent arguments, and indeed no further explicit arguments or elaboration, in relation to the alleged protectionist objective of the 7% maximum share.

7.246. In addition, Indonesia's arguments in the context of seeking to demonstrate the alleged protectionist motivation of the high ILUC-risk cap and phase-out measure would seem to contradict its assertion that the 7% maximum share has a protectionist objective. As will be addressed further below, Indonesia argues that the European Union has singled out palm oil-based biofuel to shield other types of crop-based biofuels from competition, in order to protect EU producers of those other types of crop-based biofuels (and/or the food or feed crops used as inputs). However, the 7% maximum share applies to *all* crop-based biofuels (including, but not limited to, palm oil-based biofuels).

7.247. Insofar as Indonesia's allegation regarding the protectionist objective of the 7% maximum share is linked to the stated objective of promoting greater use of advanced biofuels, the Panel does not see that a stated policy of promoting advanced biofuels is inconsistent with the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The Panel recalls that Recital 80 of RED II states that the rationale for the measures is "[t]o prepare for *the transition towards advanced biofuels* and minimize the overall direct and indirect land-use change impacts". Advanced biofuels are not made from crops[427], and therefore do not, under the stated rationale for the measures, pose any risk of ILUC-related GHG emissions. This means that the very problems identified specifically in respect of crop-based biofuel production would make the promotion of advanced biofuels a logical corollary of limiting the consumption of conventional crop-based biofuels.

7.248. During these proceedings, the European Union clarified that a consideration underlying the decision to continue to allow crop-based biofuels to count as renewable energy towards each member State's targets under RED II, and to cap their maximum contribution by reference to 2020 levels (plus one percentage point higher, up to a maximum share of 7%), was that "investments

[425] Indonesia's first written submission, para. 581. (emphasis added)
[426] Indonesia's first written submission, paras. 584-620.
[427] Article 2(34) of RED II defines "advanced biofuels" to mean biofuels produced from the feedstock listed in Part A of Annex IX, which lists various materials including algae, biowaste, nut shells, corn cobs, and tree bark.

that had already been made should not be affected".[428] The Panel notes that this explanation is consistent with Recital 4 of Directive (EU) 2015/1513 (i.e. the ILUC Directive) which states that:

> Where pasture or agricultural land previously destined for food and feed markets is diverted to biofuel production, the non-fuel demand will still need to be satisfied either through intensification of current production or by bringing non-agricultural land into production elsewhere. The latter case constitutes indirect land-use change and when it involves the conversion of land with high carbon stock it can lead to significant greenhouse gas emissions. Directives 98/70/EC and 2009/28/EC should therefore be amended to include provisions to address the impact of indirect land-use change given that current biofuels are mainly produced from crops grown on existing agricultural land. *Those provisions should take due account of the need to protect investments already made*.

7.249. In its subsequent submissions, Indonesia states that the European Union's explanation is an admission that the objective of the measure is to "protect investments at home".[429] In this connection, Indonesia makes certain statements suggesting that this reveals the true objective of the 7% maximum share, observing in the context of both Article 2.2 and Article XX that:

> Due effect should be given to that admission. A WTO Member should not be able to justify a measure based on alleged public morals or environmental concerns where it expressly admits that the measure is designed to protect domestic investments.[430]

7.250. The Panel does not see a basis for Indonesia's assertion that the European Union crafted the 7% maximum share to "protect investments at home". To the contrary, the European Union has clarified that the 7% maximum share was "without distinction as to where economic operators might have realised those investments".[431]

7.251. Moreover, even assuming for the sake of argument that the investments already made in conventional biofuel production were exclusively or predominantly domestic investments in EU territory, and that the motivation for setting the 7% maximum share at that level was to take due account of the need to protect domestic investments already made, this would not imply that the objective of the 7% maximum share is something other than limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. This would simply mean that the European Union took economic considerations into account when determining the level of protection it wished to pursue. The fact that economic considerations (including but not necessarily limited to the decision to protect investments already made in crop-based biofuel production) led to the 7% maximum share being set at that level – rather than for instance 5% or 2% – does not detract from the reason why a maximum share was set in the first place.

7.252. For these reasons, the Panel finds that Indonesia has failed to substantiate its assertion that the true objective of the 7% maximum share is protectionism in the guise of environmental protection or has an objective other than that of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.253. Turning to the high ILUC-risk cap and phase-out, Indonesia argues that the protectionist objective of the high ILUC-risk cap and phase-out can be inferred from several circumstances, including: (a) the European Union's history of seeking to limit imports of oil palm crop-based biofuel, *inter alia* through illegal trade barriers; (b) the measure's legislative history and the stated intentions of the European Parliament; (c) the design and structure of the measure, including in particular a multitude of elements showing the arbitrariness of the European Union's formula and methodology that led to the designation of palm oil-based biofuel as high ILUC-risk; and (d) the measures taken to preserve market access for important EU trading partners exporting soybean products.[432]

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[428] European Union's response to Panel question No. 34(b), para. 172.

[429] See e.g. Indonesia's second written submission, paras. 3, 150, 169, 230, 386, 388, 409, 652, 759, 836, 838, 865, 1342, 1348, 1372, and 1383.

[430] Indonesia's second written submission, paras. 230 and 1372.

[431] European Union's response to Panel's question No. 34, para. 172; response to Panel question No. 120, paras. 3-6.

[432] Indonesia's first written submission, paras. 584-620.

7.254. The Panel considers that it is well established that panels may make findings based on inferences and circumstantial evidence[433], particularly in circumstances where direct evidence is unlikely to exist. Therefore the Panel does not consider that a complaining Member is required to adduce direct evidence in all cases and is open to the possibility that a trade-related measure with a stated environmental objective would be shown, on the basis of circumstantial evidence, to serve a protectionist objective. Moreover, the Panel understands that, in line with the Appellate Body's guidance[434], it must consider the inference that might reasonably be drawn on the basis of the totality of the evidence, rather than focusing on individual pieces of evidence in isolation (which might become more significant when viewed in their totality). However, for analytical clarity, the Panel will proceed by examining the specific arguments and categories of evidence presented by Indonesia before turning to its global assessment.

7.255. Indonesia submits that the protectionist motive of the measure is evidenced by the fact that the European Union "has a long history of enacting trade barriers" to limit imports of palm oil-based biofuel to protect the EU biofuel industry and the high ILUC-risk cap and phase-out is the "latest iteration of these types of measures".[435] In support of that assertion, Indonesia identifies "illegal trade defence proceedings" that have targeted Indonesian oil palm crop-based biofuel.[436] Indonesia points out that although both WTO panels and the European Union's General Court found the anti-dumping duties to be unlawful, the European Union initiated an anti-subsidy investigation and in 2019 levied countervailing duties on the imports of oil palm crop-based biofuel.[437] Indonesia submits that a bias against Indonesian exporters of oil palm crop-based biofuel has led to a steep decline in the imports of Indonesian oil palm crop-based biofuel into the European Union.[438]

[433] See e.g. Appellate Body Reports, *Canada – Aircraft*, para. 198 (stating that "panels routinely draw inferences from the facts placed on the record. The inferences drawn may be inferences of fact: that is, from fact A and fact B, it is reasonable to infer the existence of fact C."); *US – Continued Zeroing*, para. 357 (stating that "a panel may have a sufficient basis to reach an affirmative finding regarding a particular fact or claim on the basis of inferences that can be reasonably drawn from circumstantial rather than direct evidence."); and Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.778 (stating that "[a]s a consequence of the applicable evidentiary standard being closer to that of a balance of probabilities, and not that of certainty or proof beyond a reasonable doubt, it is well established that panels may make findings of fact based on inferences and circumstantial evidence.")

[434] See e.g. Appellate Body Report, *US – DRAMS*, paras. 141-158.

[435] Indonesia's first written submission, paras. 545 and 585.

[436] Indonesia's first written submission, paras. 587-591. Indonesia refers to WTO disputes, *EU — Biodiesel (Argentina)* and *EU — Biodiesel (Indonesia)*; anti-dumping duties challenged by Argentinian and Indonesian producers before the European Union's General Court (Case T-80/14, PT Musim Mas v. Council, EU:T:2016:504, (Exhibit IDN-200), and related proceedings; Orders of the President of the Court of 15 February 2018 in Joined Cases C-602/16 P, and C- 607/16 P to C-609/16 P, EU:C:2019:1148, (Exhibit IDN-201); Orders of the President of the Court of 16 February 2018 in Cases C-603/16 P, EU:C:2019:1040, to C-606/16 P, EU:C:2018:156, (Exhibit IDN-202); Notice concerning the judgments of the General Court of 15 September 2016 in Cases T-80/14, T- 111/14 to T-121/14 and T-139/14 regarding Council Implementing Regulation (EU) No 1194/2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on Argentinian and Indonesian imports of biodiesel, and following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organisation in disputes DS473 and DS480 (*EU — Anti-Dumping Measures on Biodiesel* disputes), OJ 2018 C 181, p. 5, (Exhibit IDN-203); and Commission Implementing Regulation (EU) 2018/1570 of 18 October 2018 terminating the proceedings concerning imports of biodiesel originating in Argentina and Indonesia and repealing Implementing Regulation (EU) No 1194/2013, OJ 2018 L 262, p. 40, (Exhibit IDN-27)); and a trade remedy investigation by the European Union (Notice of initiation of an anti-subsidy proceeding concerning imports of biodiesel originating in Indonesia, OJ 2018 C 439, p. 16, (Exhibit IDN-204); Commission Implementing Regulation (EU) 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia, OJ 2019 L 212, p. 1 (Exhibit IDN-28); Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia, OJ 2019 L 317, p. 42 (Exhibit IDN-29); Commission Implementing Decision (EU) 2019/245 of 11 February 2019 accepting undertaking offers following the imposition of definitive countervailing duties on imports of biodiesel originating in Argentina, OJ 2019 L 40, p. 71 (Exhibit IDN-205); and Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia, OJ 2019 L 317, p. 42, (Exhibit IDN-29), Recitals 490-500.)

[437] Indonesia's first written submission, paras. 587-590.

[438] Indonesia's first written submission, para. 590 (referring to Eurostat, "Data on EU imports of biodiesel", (Exhibit IDN-41)). According to Indonesia, this data does not include imports of HVO given that HVO lacks a unique CN code identifier at the 8-digit level. Eurostat import statistics do not allow extractions beyond the 8-digit level. The data for 2020 is annualized based on the latest available import data (January to October 2020).

7.256. The European Union responds that the trade defence measures referred to by Indonesia concerned not only palm oil-based biofuel but also soybean oil-based biofuel from Argentina, and led to an increase in the imports of palm oil as feedstock for domestically produced biofuel.[439] Furthermore, the European Union argues that these measures were tailored to the specific injurious situation and do not reflect or discuss the broader policy concerns that are addressed by the cap and phase-out.[440]

7.257. The Panel considers that any connection between the trade defence measures and the high ILUC-risk cap and phase-out is very attenuated if it exists at all. The Panel notes that trade defence measures follow investigations that are typically initiated by the domestic industry and are imposed based on methodologies specifically prescribed by the relevant national legislation and regulated by the Anti-Dumping and SCM Agreements. The Panel recognizes that the trade defence measures on imported biofuels taken by the European Union can be viewed as evidence that domestic EU producers have, at various points, sought protection from imports of biofuels, including (but not limited to) palm oil-based biofuel. However, there appears to be no evidence on record of any link between EU trade defence measures and the high ILUC-risk cap and phase-out. For these reasons, the Panel does not consider that past trade defence measures adopted by the European Union on imports of biodiesel suggest a protectionist objective in respect of the high ILUC-risk cap and phase-out, in contradiction to the stated objective of limiting the risk of ILUC-related GHG emission associated with crop-based biofuels.

7.258. Indonesia submits that the measure's legislative history and the stated intentions of the European Parliament reveal the measure's protectionist objective. Indonesia refers to several circumstances, including: the European Parliament's resolution of 4 April 2017 calling for a phase-out of palm oil as a biofuel component[441]; the European Parliament's proposed amendment to the European Commission's RED II proposal[442]; and statements by some EU lawmakers justifying the proposed amendment on grounds unrelated to environmental protection.[443]

7.259. The European Union responds that the European Commission's initial proposal was subject to various consultations and amendments throughout the legislative process, and that not all of the provisions of the initial proposal or the proposed amendments were retained in the final text of RED II.[444] The European Union further notes that in spite of "inter-institutional debate on certain issues … there was considerable convergence on the core policy objectives" of RED II.[445] With respect to the statements from certain members of the European Parliament, the European Union argues that these statements made during a parliamentary debate should be approached with caution, given various motivations for the declarations[446]; that it would be incoherent to ignore the text of RED II, but give weight to isolated statements of certain lawmakers as evidence of the objectives pursued by the measure[447]; and that, in any event, the statements reflect a common concern about the environment and there is no indication of an attempt to disguise a protectionist measure favouring domestic producers.[448]

7.260. The Panel recalls that the legislative history of a measure is a source of information that may be taken into account to inform a panel's assessment of a measure's design, structure, and intended operation.[449] However, where evidence is submitted to reflect the subjective intent of legislators as distinct from the motivations expressed in the resulting legal instrument, an appropriate degree of

[439] European Union's opening statement at the first meeting of the Panel, para. 47.

[440] European Union's opening statement at the first meeting of the Panel, para. 48; opening statement at the second meeting of the Panel, paras. 99-100.

[441] European Parliament Resolution of 4 April 2017, (Exhibit IDN-89), para. 82.

[442] Promotion of the use of energy from renewable sources, P8_TA (2018)0009, Amendment 307, (Exhibit IDN-193); European Parliament, Governance of the Energy Union (debate), 15 January 2019, (Exhibit IDN-194), pp. 3-4; European Parliament, Governance of the Energy Union (debate), 12 November 2018, (Exhibit IDN-206), Statement by L. Boylan ("An end to palm oil is in sight but we cannot have any backsliding on this.").

[443] European Parliament, Governance of the Energy Union (debate), 15 January 2019, (Exhibit IDN-194), pp. 7 and 8.

[444] European Union's first written submission, paras. 248-251.

[445] European Union's first written submission, paras. 248-252.

[446] European Union's opening statement at the first meeting of the Panel, para. 61.

[447] European Union's second written submission, para. 199.

[448] European Union's opening statement at the first meeting of the Panel, para. 62.

[449] Appellate Body Report, *US – Tuna II (Mexico)*, para. 314; and Panel Report, *US – 1916 Act*, para. 6.17. See also Appellate Body Reports, *US – COOL*, para. 395; and *Colombia – Textiles*, para. 5.80.

caution needs to be exercised in relying on such evidence.[450] Nonetheless, depending on the circumstances of the case, the declared intention of legislators can play an important role.[451]

7.261. The Panel observes that the resolution of the European Parliament of 4 April 2017 called for a phase-out of palm oil as a biofuel component preferably by 2020. In this 15-page resolution, the European Parliament conducts an analysis of climate change, environmental considerations, deforestation and social implications of palm oil production (and to some extent that of other vegetable crops and agriculture in general). The European Parliament refers to the "indirect effects of EU biofuel demand associated with tropical forest destruction" and notes that "once Indirect Land Use Change (ILUC) is taken into account, crop-derived biofuels can in some cases even result in a net increase in greenhouse gas emissions, e.g. the burning of habitats with high-carbon stocks like tropical forests and peatland."[452] In this and other respects discussed below, the resolution appears to be fully consistent with the understanding that the objective of the high ILUC-risk cap and phase-out is to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.262. In this resolution the European Parliament recognizes that simply banning or phasing out the use of palm oil as a component of biofuels could give rise to replacement tropical vegetable oils in all probability being grown in the same ecologically sensitive regions as palm oil and which may have "a much higher impact on biodiversity, land use and greenhouse gas emissions than palm oil itself". It is in this context that the European Parliament recommends the promotion of "more *sustainable* alternatives for biofuel use, such as … oils produced from domestically cultivated rape and sunflower seeds".[453]

7.263. Thus, by its own terms, the resolution recommends a ban or phase-out of consumption of palm oil-based biofuel in the European Union for reasons related to the risk of ILUC-related GHG emissions. It recognizes that the possible unintended consequence could be substitution effects in the same sensitive regions, which could have a much higher impact. In this context, the resolution recommends the promotion of more sustainable alternatives, and contemplates domestically cultivated rape and sunflower seeds to avoid giving rise to what are referred to in the resolution as "replacement tropical vegetable oils". This reference to domestically cultivated rape and sunflower seeds appears to be not so much an admission of a protectionist objective, but rather an illustrative example ("such as …") of oil-stock that is not grown in tropical areas where there is a risk of replacement by other tropical vegetable oils. This is therefore not, in the Panel's view, evidence that the high ILUC-risk cap and phase-out has an objective other than limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.264. The Panel recalls that on 17 January 2018, the European Parliament called for the phasing out, by 2021, of palm oil-based biofuel for calculating EU renewable energy targets. As with the resolution of the European Parliament of 2017, the Panel sees nothing in the proposed amendment that contradicts the understanding that the high ILUC-risk cap and phase-out has the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The fact that the proposed amendment singled out palm oil as the only biofuel feedstock to be excluded from counting towards the EU renewable energy consumption targets does not, in itself, speak to whether such an exclusion would be justified, or call into question the stated objective of limiting ILUC-related GHG emissions associated with crop-based biofuel.

7.265. The Panel notes that the European Parliament's proposed amendment raised substantive concerns in the European Commission about the compatibility of those amendments with the European Union's WTO obligations. Indonesia refers, in this connection, to internal legal advice

[450] Panel Reports, *US – COOL*, para. 7.691; and Appellate Body Reports, *US – COOL*, para. 420. See also Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 27, DSR 1996: I, 97, at 119; and *Chile – Alcoholic Beverages*, para. 62.

[451] Panel Reports, *Mexico – Taxes on Soft Drinks*, para. 8.91 (referring to Appellate Body Report, *Canada – Periodicals*, pp. 30-32, DSR 1997:1, p. 449, at pp. 475-476); and *EC – Approval and Marketing of Biotech Products*, paras. 7.522-7.523.

[452] European Parliament Resolution of 4 April 2017, (Exhibit IDN-89), paras. 76 and 77. It should be noted that in this Resolution, the European Union "welcomes the fact that Malaysian primary forest levels have increased since 1990, but remains concerned that current deforestation levels in Indonesia are running at a rate of -0,5 % total loss every five years" (General considerations, para. 11).

[453] European Parliament Resolution of 4 April 2017, (Exhibit IDN-89), paras. 82-83. (emphasis added)

regarding the consistency of the proposed amendment with EU and WTO law.[454] The Panel notes that there is a question of how much weight it should accord to such internal legal advice in the context of its objective assessment of the matter.[455] However, leaving that question to one side, the Panel considers that the contents of that opinion do not identify any aspect of the opinion that calls into question, or is inconsistent with, the measure's stated objective to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.266. Furthermore, while the legal opinion does express concerns about the WTO-consistency of the proposed amendment that would have phased out palm oil-based biofuel by 2021, the high ILUC-risk cap and phase-out that was ultimately adopted differs in a material respect from that proposed amendment. Whereas the proposed amendment would have singled out palm oil-based biofuel in a way that gave rise to the concerns set out in the legal opinion, the high ILUC-risk cap and phase-out that was subsequently adopted is directed at any crop-based biofuels that are classified as high ILUC risk, and is implemented through the Delegated Regulation which sets out a formula that applies generally and equally to all crop-based biofuels. While the application of that formula based on the data that was before the European Union authorities as of 2019 led to the conclusion that palm oil-based biofuel was, at that time, the only crop-based biofuel that qualified as high ILUC risk, this does not change the fact that the formula applies generally and equally to all crop-based biofuels and may, in the future, lead to other oil-based biofuels being determined to qualify as high ILUC-risk biofuels. It is possible that this material difference between the proposed amendment and the high ILUC-risk cap and phase-out may have actually been informed by the internal legal advice presented regarding the possible WTO-consistency of the proposed amendment.

7.267. Indonesia further seeks to link the proposed amendment and the high ILUC-risk cap, introduced subsequently in RED II, and demonstrate a protectionist purpose to both by relying on the following quotes from members of the European Parliament. The Panel does not consider that the selected quotations highlighted by Indonesia reveal that the measure has a protectionist objective:

a. The European Union should be "credible on limiting the worst biofuels, palm oil in particular" and "[a]n end to palm oil [being] in sight" without the option of "any backsliding on it".[456] The Panel considers that the statements read in their entirety indicate concerns that are in line with the stated objectives of the measure.

b. "It is essential to reduce the geopolitical risk by limiting [the European Union's] dependence on imports and to stimulate green growth."[457] The Panel notes that it is not clear whether this statement relates to limiting imports of palm oil-based biofuel or promoting the use of renewable energy sources over importing fossil fuels.

c. "Giving up palm oil is the best decision – it competes with rapeseed cultivated in Europe, and its production leads to the cutting down of tropical forests."[458] The Panel notes that this statement, while containing a reference to palm oil competing with rapeseed oil, does not show that the high ILUC-risk cap and phase-out was adopted to protect domestic products. It seems to reflect individual motivations of a single MEP that cannot be attributed to all legislators. In addition, another part of the same statement appears to

[454] Indonesia's first written submission, para. 146, referring to Letter of DG Trade to DG Energy, (Exhibit IDN-91).

[455] In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, the panel observed, in somewhat analogous circumstances, that "it is perfectly normal for different individuals or agencies within a government, or advising a government, to hold different views on certain legal issues. In addition, we consider that it is to be expected that a Member's view on certain issues may change or evolve over time. … More generally, if a complaining party considers that certain arguments or analysis contained in an agency's opinions are compelling, then it may present those arguments or analysis to the Panel – authorship by an organ or agency of the responding party does not itself contribute to the force of the arguments or analysis." (Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.52.)

[456] European Parliament, Governance of the Energy Union (debate), 12 November 2018, (Exhibit IDN-206), pp. 8 and 17.

[457] European Parliament, Governance of the Energy Union (debate), 15 January 2019, (Exhibit IDN-194), p. 8.

[458] European Parliament, Governance of the Energy Union (debate), 15 January 2019, (Exhibit IDN-194), pp. 7-8.

confirm the objective of the measure: "The drive to reduce greenhouse gas emissions in order to limit adverse climate change is definitely a commendable action."

d. The Panel further notes that among the variety of positions presented in the MEPs' statements on the record, the vast majority confirms the objectives of RED II as addressing climate change through the reduction of GHG emissions and promotion of renewable energy sources.[459]

7.268. The Panel next turns to Indonesia's argument that a protectionist objective can be inferred from "the design and structure" of the high ILUC-risk cap and phase-out.[460] Under that heading, Indonesia refers to a multitude of elements allegedly showing the arbitrariness of the EU formula and methodology that led to the classification of oil palm crop as high ILUC risk. Among other things, Indonesia argues that protection against ILUC risk cannot be the basis for a legitimate regulatory distinction; that there is no basis for the European Union's decision to designate specifically oil palm crop-based biofuel as high ILUC-risk; that there are multiple flaws in the EU ILUC methodology and formula; that the parameters of the formula and the data reported in the Annex to the Delegated Regulation were specifically selected to ensure that only palm oil-based biofuels were designated as high ILUC-risk; and that the low ILUC-risk criteria are impracticable and ineffective.

7.269. The Panel observes that the arguments Indonesia presents here are many of the same arguments that Indonesia makes under the "legitimate regulatory distinction" step of the analysis under Article 2.1. The Panel considers that the issues raised by Indonesia are more appropriately addressed together with other aspects of the design and operation of the measure as part of the examination of the "legitimate regulatory distinction" step under Article 2.1. In any event, the Panel considers that even if these issues were to be addressed in the context of making a finding on whether the measure has a protectionist objective, the Panel's findings under Article 2.1 do not provide support for Indonesia's allegation that the high ILUC-risk cap and phase-out has a protectionist objective.

7.270. Finally, the Panel turns to Indonesia's argument that the protectionist objective of the high ILUC-risk cap and phase-out can be inferred from the measures taken to preserve market access for important EU trading partners exporting soybean products. In this connection, Indonesia refers to a political agreement "to import more soybeans from the United States" shortly before the adoption of the Delegated Regulation on 13 March 2019[461] which allowed US soybean certified under the U.S. Soybean Sustainability Assurance Protocol to be classified as sustainable under RED I.[462] Indonesia also refers to alleged special treatment accorded to imports of soybeans from the Mercosur countries, including Brazil, despite evidence of higher deforestation rates in South America's primary rainforest, compared to Southeast Asia, and particularly the high rates observed in Brazil.[463] According to Indonesia, a ban on imports of soybean oil for biofuel production would have derailed approval of the EU-Mercosur free trade agreement.[464]

[459] European Parliament, Governance of the Energy Union (debate), 15 January 2019, (Exhibit IDN-194); European Parliament, Governance of the Energy Union (debate), 12 November 2018, (Exhibit IDN-206).

[460] Indonesia's first written submission, paras. 598-611.

[461] Indonesia's first written submission, para. 613, referring to Joint U.S.-EU Statement on 25 July 2018 following President Juncker's visit to the White House, (Exhibit IDN-92); Statement by President Jean-Claude Juncker at the joint press conference in the White House Rose Garden with Donald Trump, President of the United States, 25 July 2018, (Exhibit IDN-93).

[462] Indonesia's first written submission, para. 613, referring to Commission Implementing Decision (EU) 2019/142, (Exhibit IDN-94), pp. 10-11; European Commission press, "The Commission recognises the U.S. Soya bean – scheme as compatible with EU sustainable standards", 29 January 2019, (Exhibit IDN-95).

[463] Indonesia's first written submission, paras. 616 and 618 (referring to M. Weisse and E.D. Goldman, "The World Lost a Belgium-sized Area of Primary Rainforests Last Year", (Exhibit IDN-148); H. Escobar, "Brazil's deforestation is exploding—and 2020 will be worse", Science 22 (2019), (Exhibit IDN-207); R. Rajao et al., "The rotten apples of Brazil's agribusiness", Science, Vol. 369:6501, 246, (Exhibit IDN-208); and Finkbeiner Expert Opinion, (Exhibit IDN-126), Section 2.2.1).

[464] Indonesia's first written submission, para. 617 (referring to Communication by the European Commission, "EU and Mercosur reach agreement on trade", 28 June 2019, (Exhibit IDN-209); and Communication by the European Commission, "European Commission publishes draft Sustainability Impact Assessment for the Trade part of the EU-Mercosur Association Agreement", 8 July 2020, (Exhibit IDN-210)). Indonesia states that the European Union imports significant amounts of soybean crop- based biofuel from Argentina. (See Figure No. 26 of Indonesia's first written submission).

7.271. The European Union responds that the reference to the US Soybean Sustainability Assurance Protocol does nothing to negate the genuineness of the values pursued by the measures at issue.[465] It states that the Protocol is a voluntary scheme allowing economic operators to demonstrate compliance with the sustainability and GHG saving criteria.[466] Furthermore, the European Union submits that the application of the high ILUC-risk formula does not indicate that soybean production represents equal or equivalent risk of overall emissions or adverse environmental effects as palm oil and the evidence presented by Indonesia does not undermine this.[467]

7.272. The Panel considers that any connection between the US Soybean Sustainability Protocol and the high ILUC-risk cap and phase-out is very attenuated if it exists at all. The US Soybean Sustainability Assurance Protocol concerns DLUC, which is addressed under the sustainability and GHG emission savings criteria, rather than ILUC. The RED I directive, in force at the time, specifically provided for a possibility of certifying biofuels produced in a sustainable manner through such mechanisms.[468] Furthermore, the US Soybean Sustainability Assurance Protocol does not set out any obligation on the European Union to import more soybeans from the United States. Indonesia's contention that there was a political agreement to import more soybeans from the United States is based solely on a 25 July 2018 statement by EU Commission President Jean-Claude Juncker, made at a joint press conference with the President of the United States, that "the European Union can import more soybeans from the U.S. and it will be done".[469] This statement, which was made without any further elaboration, is part of a brief and general statement identifying a number of areas on which the European Union and the United States had agreed to work together. As regards soybeans, the Joint US-EU Statement of the same date merely states that "[w]e will also work to reduce barriers and increase trade in services, chemicals, pharmaceuticals, medical products, as well as soybeans".[470]

7.273. Furthermore, the statements of EU officials referenced by Indonesia regarding arrangements to promote bilateral trade, including in soybeans, do not imply that the high ILUC-risk cap and phase-out measure has a protectionist objective.[471] Indonesia has not pointed to any obligation on the European Union to import more soybeans from Mercosur countries. In the Panel's view, Indonesia's argument that the high ILUC-risk formula was designed to preserve access for soybean products, despite the negative environmental effects of production of soybean, is more appropriately addressed together with other aspects of the design and operation of the measure as part of the "legitimate regulatory distinction" step of the analysis under Article 2.1.

7.274. The Panel understands Indonesia's overarching argument to be that consideration of all of the evidence reviewed above demonstrates that the classification of oil palm crop as high ILUC risk is merely an *ex post* rationalization, through the invention of the high ILUC-risk concept, to ban palm oil-based biofuel in line with the earlier protectionist statements of EU lawmakers. As noted at the outset, the Panel accepts that individual pieces of evidence in isolation may become more significant when viewed in their totality, insofar as they are interrelated. However, the Panel is not persuaded that this is the picture that emerges from considering the evidence in its totality in this case. The Panel fails to see anything in the arguments and evidence of Indonesia that contradicts the conclusion that the objective of the high ILUC-risk cap and phase-out is to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.275. The Panel therefore finds that Indonesia has not substantiated its assertion that the measures' actual objective is protectionism in the guise of environmental protection.

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[465] European Union's first written submission, para. 792.
[466] European Union's first written submission, para. 792.
[467] European Union's second written submission, paras. 360-361.
[468] RED I, (Exhibit IDN-18), Recital 79, p. 13; Commission Implementing Decision (EU) 2019/142, (Exhibit IDN-94); European Commission press, "The Commission recognises the U.S. Soya bean – scheme as compatible with EU sustainable standards", 29 January 2019, (Exhibit IDN-95).
[469] Statement by President Jean-Claude Juncker at the joint press conference in the White House Rose Garden with Donald Trump, President of the United States, 25 July 2018, (Exhibit IDN-93).
[470] Joint U.S.-EU Statement on 25 July 2018 following President Juncker's visit to the White House, (Exhibit IDN-92).
[471] Statement by President Jean-Claude Juncker at the joint press conference in the White House Rose Garden with Donald Trump, President of the United States, 25 July 2018, (Exhibit IDN-93); Commission Implementing Decision (EU) 2019/142, (Exhibit IDN-94).

7.1.2.3.3.5 Conclusion on the identification of the objective

7.276. The Panel understands that the stated rationale for the 7% maximum share and the high ILUC-risk cap and phase-out is to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels. The Panel agrees with Indonesia that it is appropriate to identify the objective of the specific measures at issue, as opposed to the wider objectives of RED II or the EU Biofuels regime as a whole. The Panel is not persuaded by the European Union's argument that the Panel must consider how the measures pursue the protection of biodiversity and EU public moral concerns as separate objectives from the objective to limit the risk of ILUC-related GHG emissions. The Panel finds that Indonesia has not substantiated its assertion that the measures' actual objective is protectionism in the guise of environmental protection.

7.1.2.3.4 Legitimacy of the objective

7.277. The Panel recalls that the identification of the measures' objective conditions the nature and scope of subsequent steps of the analysis under Article 2.2, including the assessment of whether it is a "legitimate objective". The Panel now proceeds to consider whether limiting the risk of ILUC-related GHG emissions posed by crop-based biofuels is a legitimate objective.

7.278. Indonesia argues that the stated objective is not "legitimate": it argues that "statements based on ILUC are impossible to prove" and therefore, relevant international standards "exclude ILUC from being taken into account"[472]; it maintains in the context of Article 2.1 and Article 2.2 that because ILUC can neither be observed nor measured, the measures protect against a "fictional risk" and the regulation of ILUC-related GHG emissions is not "legitimate"[473]; and it questions, in response to the European Union's arguments on the common concern of mankind, the legitimacy of addressing GHG emissions outside of a Member's own territory.

7.279. The Panel begins by addressing whether the particular objective of limiting the risk of ILUC-related GHG emissions posed by crop-based biofuels *prima facie* falls within the scope of one or more of the legitimate objectives that are reflected in the text of Article 2.2, the Preamble to the TBT Agreement, and/or Article XX. After conducting that analysis, and before reaching a definitive conclusion on the legitimacy of the objective pursued, the Panel will address a number of issues that are raised by Indonesia's arguments and that, in the Panel's view, are pertinent to the appraisal of the legitimacy of the objective. These issues include: (a) the status of ILUC under current international standards; (b) the existence of a risk of ILUC-related GHG emissions associated with the production of crop-based biofuels; and (c) the fact that agricultural activities and the associated ILUC and ILUC-related GHG emissions in question occur outside of the territory of the European Union.

7.1.2.3.4.1 Relation to the legitimate objectives specified in Article 2.2, the Preamble to the TBT Agreement, and Article XX

7.280. The Appellate Body has indicated that the objectives expressly listed in Article 2.2 "provide a reference point for which other objectives may be considered to be legitimate in the sense of Article 2.2" and "objectives recognized in the provisions of other covered agreements may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective under Article 2.2."[474] The Panel considers that the provisions of other covered agreements that may provide guidance and inform the analysis in this regard would include, most notably, the objectives set out in the general exceptions of Article XX of the GATT 1994. The Panel now proceeds to address whether the specific objective of limiting the risk of ILUC-related GHG emissions *prima facie* falls

[472] Indonesia's first written submission, paras. 532, 599-600, 623.

[473] Indonesia's first written submission, para. 624 (arguing that "the alleged objective of the 7% limitation is the protection against a risk (of ILUC GHG emissions) that can be neither observed nor quantified. Protection against such a risk is not a legitimate objective within the meaning of Article 2.2 of the TBT Agreement.") and para. 533 (reiterating, in the context of its arguments under Article 2.1 of the TBT Agreement, that "[p]rotection against a risk (of ILUC GHG emissions) that can be neither observed nor quantified cannot be the basis of a legitimate distinction within the meaning of Article 2.1 of the TBT Agreement.")

[474] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 313; and *US – COOL*, para. 370.

within the scope of one or more of the legitimate objectives specified in the text of Article 2.2 and/or Article XX.

7.281. The Panel considers that although it is free to develop its own reasoning in light of the arguments of the parties[475], it is it not free to make a case for either party. In the context of its assessment of the high ILUC-risk cap and phase-out under Article XX, the Panel would not be able to consider the applicability of the general exceptions generally, but would be confined to the particular exceptions invoked by the European Union. Accordingly, the Panel focuses on the specific subparagraphs of Article XX put forward by the European Union in its submissions.

7.282. First, in the context of Article XX, the European Union argues that the high ILUC-risk cap and phase-out is justified under Article XX(g), as a measure relating to the conservation of "exhaustible natural resources".

7.283. The Appellate Body has stated that Article XX(g) covers measures directed at the "the preservation of the environment, especially of natural resources"[476], and in past cases a broad range of policies have been found to fall within the scope of measures relating to the conservation of exhaustible natural resources. The Appellate Body has held that the terms "exhaustible natural resources" must be read "in light of contemporary concerns of the community of nations about the protection and conservation of the environment"[477] and has concluded that "exhaustible natural resources" covers both living and non-living exhaustible natural resources.[478] In past cases, measures taken to conserve clean air[479], sea turtles[480], petroleum[481], and various mineral resources[482] have been found to be measures relating to the conservation of "exhaustible natural resources" under Article XX(g).

7.284. The Panel notes that the conservation of exhaustible natural resources is not specifically mentioned as a legitimate objective in either Article 2.2 or the Preamble to the TBT Agreement. However, both refer to the "the protection of … the environment" and Article XX(g) covers measures directed at the "the preservation of the environment, especially of natural resources".[483] In other words, measures taken with the objective of conserving exhaustible natural resources in the sense of Article XX(g) would in principle fall within the scope of measures to taken to protect "the environment" in the sense of Article 2.2 and the Preamble to the TBT Agreement.

7.285. The Panel recalls that as set out in Recitals 80 and 81 of RED II, the measures at issue are aimed at limiting the risk of ILUC-related GHG emissions that arise when the cultivation of crops for biofuels displaces traditional production of crops for food and feed purposes, leading to "the extension of agricultural land into areas with high-carbon stock, such as forests, wetlands and peatland, causing additional greenhouse gas emissions".[484] Thus, the measures seek to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels, which would arise when the cultivation of crops for biofuels displaces traditional production of crops for food and feed purposes requiring the extension of agricultural land into areas with high-carbon stock, including forests, wetlands and peatland. The objective of the 7% maximum share and the high ILUC-risk cap and phase-out therefore *prima facie* relates to the conservation of an "exhaustible natural resource", namely high-carbon stock land (forests, wetlands and peatland). Furthermore, in addition to high-carbon stock land being an exhaustible natural resource in and of itself, the Panel considers that measures taken to conserve high-carbon stock land, and thereby avoid the GHG emissions that

[475] The Appellate Body has stated that "the Panel is not bound by the arguments raised by a party and can use those arguments freely to develop its own legal reasoning to supports its findings and conclusions in the matter under consideration. Moreover, if the panel's analysis was shaped solely by the parties' arguments, the panel may not be able to conduct an objective assessment of the matter, as required under Article 11 of the DSU." (Appellate Body Report, *Brazil – Taxation*, para. 5.171 (referring to Appellate Body Reports, *EC – Hormones*, para. 156; *Korea – Dairy*, para. 139; and *US – Certain EC Products*, para. 123).)

[476] Appellate Body Reports, *China – Raw Materials*, para. 355.

[477] Appellate Body Report, *US – Shrimp*, para. 129.

[478] Appellate Body Report, *US – Shrimp*, para. 131.

[479] Appellate Body Report, *US – Gasoline*, p. 14.

[480] Appellate Body Report, *US – Shrimp*, para. 131.

[481] Appellate Body Report, *US – Shrimp*, para. 128.

[482] Appellate Body Report, *US – Shrimp*, para. 128; and Panel Reports, *China – Raw Materials*, para. 7.369.

[483] Appellate Body Reports, *China – Raw Materials*, para. 355.

[484] Recital 81 of RED II.

would be released through their use, are related to the conservation of a wide range of exhaustible natural resources that are threatened by increased GHG emissions and climate change.

7.286. The Panel is therefore satisfied that the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels *prima facie* falls within the scope of the objective of "the conservation of exhaustible natural resources" within the meaning of Article XX(g), and within the scope of the objective of "the protection … of the environment" under Article 2.2 and the Preamble to the TBT Agreement and is therefore *prima facie* a "legitimate objective".

7.287. Second, in the context of Article XX, the European Union argues that the high ILUC-risk cap and phase-out is justified under Article XX(b), as a measure necessary to protect human, animal or plant life or health.

7.288. The Panel notes that in past cases, a broad range of policies has been found to fall within the scope of measures taken for the protection of human, animal and plant life or health. These include policies relating to the reduction of air pollution as a result of consumption of gasoline[485], the reduction of risks arising from the accumulation of waste tyres[486], and even the protection of monkeys in the wild.[487]

7.289. The Panel notes that the objective of protecting human, animal or plant life and health is referred to as a legitimate objective in very similar terms in Article XX(b)[488], Article 2.2[489], and the Preamble to the TBT Agreement.[490] Panels and the Appellate Body have stated that "few interests are more 'vital' and 'important' than protecting human beings from health risks, and protecting the environment is no less important".[491]

7.290. The Panel recalls that as set out in Recitals 80 and 81 of RED II, the measures at issue are aimed at limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. In *Brazil – Retreaded Tyres*, the Appellate Body suggested that "measures adopted in order to attenuate global warming and climate change" would fall within the scope of Article XX(b) in the context of providing guidance on how panels should assess certain "complex public health or environmental problems" under the necessity test in Article XX(b).[492] In *Brazil – Taxation*, the panel found that "the reduction of CO_2 emissions is one of the policies covered by subparagraph (b) of Article XX, given that it can fall within the range of policies that protect human life or health".[493] The Panel sees no reason to disagree, considering that global warming and climate change pose one of the greatest threats to life and health on the planet. The objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels therefore *prima facie* relates to the protection of human, animal or plant life or health.

7.291. The Panel is therefore satisfied that the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels *prima facie* falls within the scope of the objective of protecting human, animal or plant life or health within the meaning of Article XX(b), Article 2.2 and the Preamble to the TBT Agreement and is therefore *prima facie* a "legitimate objective".

7.292. In the context of Article XX, the European Union has argued that the high ILUC-risk cap and phase-out is justified under Article XX(a), as a measure necessary to protect public morals.

7.293. For reasons already set out in the context of the Panel's identification of the objective of the measures at issue, the Panel is unpersuaded that there is any need to make an additional ruling on whether the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels would fall within the scope of the objective protecting EU public morals. In this connection,

[485] Panel Report, *US – Gasoline*, para. 6.21.
[486] Panel Reports, *China – Raw Materials*, para. 7.479 (referring to Panel Reports, *US – Gasoline*, para. 6.21 and *Brazil – Retreaded Tyres*, paras. 7.108 and 7.115).
[487] Panel Report, *Brazil – Retreaded Tyres*, paras. 7.108 and 7.115.
[488] Article XX(b) refers to measures necessary "to protect human, animal or plant life or health".
[489] Article 2.2 refers to the "protection of human health or safety, animal or plant life or health".
[490] The sixth Recital of the Preamble to the TBT Agreement refers to "the protection of human, animal or plant life or health".
[491] Panel Report, *Brazil – Retreaded Tyres*, para. 7.108. See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 179.
[492] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[493] Panel Reports, *Brazil – Taxation*, para. 7.880.

the Panel observes that a finding on whether the high ILUC-risk cap and phase-out additionally pursues a "legitimate objective" of protecting EU public morals would have no impact on the outcome of the proceedings. If the Panel were to agree with the European Union that the same measure that pursues the legitimate objectives of protecting human, animal and plant life and health and the conservation of exhaustible natural resources also pursues the objective of protecting EU public morals, this would merely serve to establish an additional basis for the overall conclusion that the measure pursues a legitimate objective for the purposes of Article 2.2. Were the Panel to agree with Indonesia that the measure does not pursue the objective of protecting EU public morals, this would not alter the conclusion that the measure pursues the legitimate objectives of protecting human, animal and plant life and health and the conservation of exhaustible natural resources.

7.294. In light of the foregoing, the Panel finds that the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels is *prima facie* a "legitimate objective" under Article 2.2, given that this objective is *prima facie* within the scope of policies related to the conservation of exhaustible natural resources (forests, wetlands, and peatland) and the environment more generally, and is also *prima facie* within the scope of policies directed to the protection of human, animal or plant life or health. Before reaching a definitive conclusion on the legitimacy of the objective pursued, however, the Panel considers it necessary to consider and address a number of issues that are raised by Indonesia's arguments and that, in the Panel's view, are pertinent to the appraisal of the legitimacy of the objective. While some of these issues are interrelated, the Panel addresses them sequentially for analytical clarity.

7.1.2.3.4.2 The status of ILUC under current international standards

7.295. Article 2.4 of the TBT Agreement provides that Members shall use relevant international standards as a basis for their technical regulations except when such international standards or their relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued. Given that Article 2.4 contemplates that there may be situations where basing a technical regulation on international standards would be an ineffective or inappropriate means for fulfilling the legitimate objective pursued, it follows that the assessment of whether a measure's objective is "legitimate" cannot be based solely on the measure's relationship to international standards.

7.296. However, the Panel considers that its appraisal of the legitimacy of limiting the risk of ILUC-related GHG emissions posed by crop-based biofuels should begin with the manner in which ILUC is treated under the international standards cited by the parties to the dispute. The reason is that Indonesia's arguments imply not only that the 7% maximum share and the high ILUC-risk cap and phase-out are not based on relevant international standards, but that the very objective of the measures – i.e. limiting the risk of ILUC-related GHG emission associated with crop-based biofuels – is at odds with multiple relevant international standards.

7.297. Indeed, if the Panel were to share Indonesia's reading of those standards and find that the ISO standards referred to "exclude ILUC from being taken into account"[494] in the context of measures seeking to regulate GHG emissions, which is the view that Indonesia asserts in the context of its arguments under Article 2.2, then this would be highly relevant to the Panel's appraisal of the legitimacy of the measures' objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. As the Panel has already explained when setting out its order of analysis among the claims under the TBT Agreement, it is for this reason that the Panel began its analysis of the claims under the TBT Agreement with the claim under Article 2.4.

7.298. The Panel has concluded, in the context of addressing the claim under Article 2.4, that ISO 13065:2015 generally excludes ILUC effects, as indirect effects, from its methodology and that ISO 14067:2018 specifically excludes them from the LCA methodology used to *quantify* GHG emissions, but that neither of the standards contains language that *precludes* a regulator from addressing ILUC through its own approach outside the standardized methodologies. Thus, the Panel found that the standards do not cover ILUC and observed that the absence of international harmonization does not mean that countries are prevented from taking action and developing their own approaches to issues of concern. In other words, the conclusions reached by the Panel in the context of its analysis of the ISO standards under Article 2.4 do not disturb, and indeed are fully consistent with, the Panel's assessment that the objective of limiting the risk of ILUC-related GHG

[494] Indonesia's first written submission, paras. 532, 599-600, 623.

emissions posed by crop-based biofuels is *prima facie* a legitimate objective for the purposes of Article 2.2.

7.299. The Panel therefore concludes, in light of its findings under Article 2.4, that the ISO standards referred to by Indonesia do not "exclude ILUC from being taken into account" in the context of measures seeking to regulate GHG emissions.

7.1.2.3.4.3 The existence of a risk of ILUC-related GHG emissions associated with the production of crop-based biofuels

7.300. Indonesia argues that the stated objective is not "legitimate", on the grounds that because ILUC can neither be observed nor measured, the measures protect against a "fictional risk" and the regulation of ILUC-related GHG emissions is not "legitimate".[495] Among other things, Indonesia states that ILUC is a "theoretical economic concept" of which the effects are assumed but cannot be empirically demonstrated.[496]

7.301. The Panel observes that in the context of Article XX(b), when assessing whether a measure is taken to protect human, animal or plant life or health, prior panels have often commenced their analysis by determining the existence of the risk to human, animal or plant life or health (health risk) that the challenged measure aims to reduce.[497] For instance, in *EC – Asbestos*, the panel determined, as the first step in its analysis, whether chrysotile-asbestos posed a risk to human life or health.[498] In *Brazil – Retreaded Tyres*, the panel began by assessing whether the accumulation of waste tyres posed risks to human, animal or plant life or health.[499] As the panel in *EC – Asbestos* observed, "inasmuch as they include the notion of 'protection', the words 'policies designed to protect human life or health' imply the existence of a health risk."[500]

7.302. In a more recent case under Article XX, the panel in *Turkey – Pharmaceuticals (EU)* surveyed prior rulings under Article XX(b), (a), and (j), and concluded that panels and the Appellate Body have generally required the regulating Member "to demonstrate, at a minimum, that the asserted risk … was more than a merely hypothetical possibility" and that "in the context of Article XX(b), as in the context of the other sub-paragraphs of Article XX, a party invoking a general exception must identify some degree of probability that the alleged risk exists".[501] After recalling prior panel and Appellate Body reports involving the approach taken to measures aimed at limiting risks, the panel stated that:

> The Panel does not consider that there is any rigid or pre-determined threshold or evidentiary standard that should be applied in this respect. Insofar as a responding party presents evidence and arguments demonstrating that there is a substantial degree of probability of a specified risk to human life or health materializing, it will be easier for the responding party to discharge its burden of proving that the challenged measure was taken to protect against that risk, thus qualifying as a measure taken to protect human life or health under Article XX(b). Conversely, insofar as a responding party asserts the existence of a risk without establishing any substantial degree of probability, such that the risk appears to be theoretical, abstract or otherwise hypothetical, it will

[495] Indonesia's first written submission, para. 624 (arguing that "the alleged objective of the 7% limitation is the protection against a risk (of ILUC GHG emissions) that can be neither observed nor quantified. Protection against such a risk is not a legitimate objective within the meaning of Article 2.2 of the TBT Agreement.") and para. 533 (reiterating, in the context of its arguments under Article 2.1 of the TBT Agreement, that "[p]rotection against a risk (of ILUC GHG emissions) that can be neither observed nor quantified cannot be the basis of a legitimate distinction within the meaning of Article 2.1 of the TBT Agreement.")

[496] Indonesia's first written submission, para. 233.

[497] Panel Reports, *EC – Asbestos*, para. 8.170; *Brazil – Retreaded Tyres*, para. 7.42; *China – Rare Earths*, para. 7.156; *Brazil – Taxation*, para. 7.859; and *Indonesia – Chicken*, para. 7.209.

[498] Panel Report, *EC – Asbestos*, paras. 8.170, 8.182, and 8.185-8.194.

[499] Panel Report, *Brazil – Retreaded Tyres*, paras. 7.42, and 7.53-7.93.

[500] Panel Report, *EC – Asbestos*, para. 8.170. See also Appellate Body Reports, *EC – Seal Products*, para. 5.197.

[501] Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.170.

> be more difficult for the responding party to discharge its burden of proving that the challenged measure was taken to protect against that risk.[502]

7.303. The Panel sees no reason to follow a different approach in the context of Article 2.2. Accordingly, the Panel proceeds to address whether the risk of ILUC-related GHG emissions being caused by the production of crop-based biofuels is a risk that appears to be theoretical, abstract or otherwise hypothetical, or is rather a risk that can be established with a substantial degree of probability. In assessing that issue, the Panel considers that the appropriate standard of review is whether the European Union had a reasonable basis to conclude that increasing demand for crop-based biofuels increases the risk of ILUC-related GHG emissions.[503]

7.304. The Panel recalls that Recital 81 of RED II, already quoted in full earlier in this section, explains in relevant part that:

> Indirect land-use change occurs when the cultivation of crops for biofuels, bioliquids and biomass fuels displaces traditional production of crops for food and feed purposes. Such additional demand increases the pressure on land and can lead to the extension of agricultural land into areas with high-carbon stock, such as forests, wetlands and peatland, causing additional greenhouse gas emissions.

7.305. In the Panel's view, the idea that increasing demand for crop-based biofuels increases the risk of ILUC-related GHG emissions is a straightforward proposition. Indeed, this proposition appears to be the logical corollary of certain known facts relating to the production of agricultural goods, and it does not appear that Indonesia's arguments actually dispute any of those facts.

7.306. The Panel understands that because available agricultural land is limited, any increased demand for crop-based biofuels can only be met by: (1) increasing productivity on existing agricultural land, (2) expanding into non-agricultural land (including high-carbon stock land), or (3) expanding into existing agricultural land at the expense of cultivation for other purposes.

7.307. The Panel does not understand Indonesia to suggest that increased demand for crop-based biofuels can be accommodated exclusively through increased productivity yield improvements on existing agricultural land. According to the Study Report, scientific evidence indicates that the increase in potential yields, i.e. the yield that can be reached with current technology at optimal conditions, ranges between 0.6% and 1.1% annually.[504] However, there is uncertainty whether this rate in increase in potential yield could be maintained[505], and whether yield increases for some crops can meet the increased overall levels of demand.

7.308. Furthermore, the Panel observes that even if any increased demand for crop-based biofuel could be met exclusively by growing more food and feed crops on existing agricultural land, it would remain the case that by exploiting such productivity gains to supply food and feed crops for the purpose of producing biofuels, the additional supply of food and feed crops achieved through productivity gains is not then available to be used for food and feed purposes. Thus, unless global food demand were to remain fixed (or decrease), the utilization of increased yields of food and feed crops to supply biofuel demand would mean they are not available for, and in this sense diverted from, use for food and feed purposes.

7.309. The Panel recalls that increased EU demand for crop-based biofuels cannot be met by expanding biofuel production destined for the EU market into non-agricultural land (including high-carbon stock land). Under RED I and RED II, any biofuel crops produced in high-carbon stock land will not be eligible to be counted towards the EU renewable energy targets on account of the sustainability and GHG emissions criteria in Article 29. Accordingly, suppliers are incentivized to serve the EU market either by using existing "biofuel" land (either by increasing productivity or

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[502] Panel Report, *Turkey – Pharmaceutical Products (EU)*, para. 7.171.

[503] The Panel elaborates further on the standard of review in the context of addressing the claim under Article 2.1, when examining various calculations leading to the classification of palm oil as a high ILUC-risk feedstock, as well as the underlying data and assumptions.

[504] Study Report (2017), (Exhibit IDN-87), p. 63, referring to Baldos & Hertel, 2016; Burney, Davis, & Lobell, 2010.

[505] Study Report (2017), (Exhibit IDN-87), p. 64.

capturing part of the biofuel production destined to non-EU markets) or by expanding biofuel production into existing "non-biofuel" agricultural land.

7.310. There is therefore a substantial likelihood that increasing demand for crop-based biofuel will be met, in the case of EU demand for biofuel, by expanding biofuel production into existing agricultural land at the expense of cultivation for other purposes. Given that the global demand for food and feed crops has been increasing and is unlikely to decrease any time soon, it follows that there is a substantial likelihood that food and feed production *displaced* by crop-based biofuel production will expand into non-agricultural land, including into land with high carbon stock, in the absence of significant productivity yield improvement.

7.311. The Panel understands that there is no certainty that food and feed production displaced by crop-based biofuel production will expand into land without a previous history of agricultural production, such as pasture areas, savannahs, or forests (i.e. non-agricultural land). The Panel also understands that, where such expansion does occur, the land that will be converted into new agricultural land will not necessarily be forest, peatland, or other high-carbon stock land that raises concerns relating to GHG emissions. However, it is clear that a basic driver for deforestation is increased demand for agricultural commodities.[506]

7.312. In sum, crop-based biofuel is a product from food and feed crops, using agricultural land, that can also used for other purposes (e.g. food). If biofuel is produced from food or feedstock and/or agricultural land previously used for food production, the demand in food must then be met by food production that expands into non-agricultural land or displaces other crop production, which in turn expands into non-agricultural land, if global food demand does not decrease, and/or the productivity does not increase, by a corresponding amount.

7.313. A review of the evidence submitted by the parties on ILUC risks associated with crop-based biofuels suggests that this issue has received increased attention in the literature, including in peer-reviewed publications and IPCC reports. The IPCC Report on *Climate Change and Land* notes that "[b]ioenergy from dedicated crops are in some cases held responsible for GHG emissions resulting from indirect land use change (iLUC), that is the bioenergy activity may lead to displacement of agricultural or forest activities into other locations, driven by market-mediated effects". The report further mentions that "iLUC emissions are potentially more significant for crop-based feedstocks such as corn, wheat and soybean, than for advanced biofuels from lignocellulosic materials."[507] While the IPCC Report contains a statement regarding the "low confidence in attribution of emissions from iLUC to bioenergy", the findings of the IPCC Report appear to be consistent with the findings reported in the Study Report.[508] Both reports acknowledge the variability, and therefore uncertainty, in the estimation of ILUC-related GHG emissions attributed to biofuels. This statement read in context appears to address only the uncertainty and variability surrounding the attribution of a particular ILUC effect to a particular feedstock and not, more generally, an assessment of a low confidence in the proposition that a causal relationship exists between biofuel production as a whole and ILUC effects.

7.314. Furthermore, the review of existing ILUC modelling studies in the Study Report, which are concerned with the *quantification* of GHG emissions, reveals that the modelling estimates of ILUC-related GHG emissions associated with biofuel demand vary depending on the study design, methodological approach, parameter assumptions, scenarios considered, omitted factors, definitions of specific variables and data sources. The existence of large variability in the modelling estimates makes it difficult to assess with accuracy the specific *quantity* of ILUC-related GHG emissions by specific types of conventional biofuel crops. That being said, although the number of modelling studies on advanced biofuels is limited, available estimates of ILUC-related GHG emissions attributed to crop-based biofuels tend to be, on average, larger than the estimates of ILUC-related GHG emissions associated with advanced biofuels.[509] This is in large part due to the fact that, unlike conventional biofuels, advanced biofuels do not compete directly with food and feed crop production. This finding is consistent with the underlying assumption of RED II according to which conventional

[506] See e.g. European Parliament Resolution of 4 April 2017, (Exhibit IDN-89), para. 4, noting that "73% of global deforestation arises from the clearing of land for agricultural commodities, with 40% of global deforestation caused by conversion to large-scale monocultural oil palm plantation".

[507] IPCC Report, "Climate Change and Land", (Exhibit IDN-393), section 2.6.1.5.

[508] Study Report (2017), (Exhibit IDN-87).

[509] Study Report (2017), (Exhibit IDN-87), pp. 8-9.

biofuels present a higher risk of ILUC-related GHG emissions than advanced biofuels. It follows that, all other things being equal, the economic modelling studies corroborate, or at least do not undermine, the conclusion that an increase in conventional biofuel demand and production increases the risk of ILUC-related GHG emissions.

7.315. The question of whether ILUC can be directly measured, observed or precisely quantified does not speak to whether the production of crop-based biofuels creates a *risk* of ILUC-related GHG emissions. If an increase in crop-based biofuel is produced from crop land previously used for food production, demand in food must then be met by food production that expands into non-agricultural land or displaces other crop production which in turn expands into non-agricultural land, if global food demand does not decrease, and/or the productivity does not increase, by a corresponding amount. The existence of a causal link between the risk of ILUC-related GHG emissions and crop-based biofuel production, and more specifically, the existence of a risk of ILUC-related GHG emissions arising from increasing EU demand for crop-based biofuels, is more than "theoretical" in the Panel's view. It is another question to try to assess whether GHG emissions associated with a particular expansion into high-carbon stock land, or with an expansion rate of a specific crop, could be attributed to EU biofuel demand. This, however, is not what the measures seek to achieve, as they do not distinguish between specific drivers of expansion into land with high-carbon stock, as explained further in the section addressing Indonesia's claim under Article 2.1.

7.316. Therefore, at the present time and subject to future technological developments, the Panel considers that there is a risk that additional demand for crop-based biofuel increases the risk of ILUC-related GHG emissions. The Panel does not consider the risk of ILUC-related GHG emissions being caused by the production of crop-based biofuels to be a risk that appears to be theoretical, abstract or otherwise hypothetical. Rather, it is a probable risk based on known facts and evidence presented in this dispute.

7.317. The Panel concludes that there exists a reasonable basis for the European Union to conclude that increasing demand for crop-based biofuels increases the risk of ILUC-related GHG emissions. The Panel notes this conclusion leaves open any questions relating to the *quantification* of ILUC-related GHG emissions, and it also leaves open all questions relating to whether there is a sound basis for concluding that different conventional biofuels present different levels of ILUC risk. The Panel returns to the latter issue in the context of the "legitimate regulatory distinction" step of the analysis under Article 2.1.

7.1.2.3.4.4 The agricultural activities and associated ILUC and ILUC-related GHG emissions in question occurring outside of the territory of the European Union

7.318. The Panel notes that the wording of Article 2.2 and Article XX do not speak to any territorial or jurisdictional limitation on the scope of the measures that may be examined thereunder, and Indonesia did not initially raise any issue in this regard in the context of presenting its arguments under Article 2.2 (or elsewhere). In its first written submission, the European Union advanced a series of arguments in support of its view that there is no explicit or implicit territorial limitation in either Article XX of the GATT 1994 or in Article 2.2 of the TBT Agreement. Indonesia responded by arguing that the objective of addressing GHG emissions in another WTO Member's territory, or preventing biodiversity loss in the territory of another WTO Member, is not a "legitimate objective" within the meaning of Article 2.2.[510]

7.319. In these circumstances, the Panel considers that its appraisal of the legitimacy of the objective of limiting the risk of ILUC-related GHG emissions posed by crop-based biofuels should

[510] Indonesia's second written submission, para. 719. Indonesia argues that the Panel need not take a general position on whether there is a territorial or jurisdictional limitation, because there is an implied jurisdictional limitation in the context of the specific objectives on which the European Union relies. Indonesia refers among others to the territoriality principle in international law as the basis for accounting GHG emissions under the UNFCCC and the Paris Agreement and for the protection agreed under the Convention on Biological Diversity; it also argues that recognition of climate change and biodiversity as common concerns of humankind does not support the notion that the European Union may take unilateral measures to address GHG emissions and biodiversity loss in the territories of other States. (Indonesia's second written submission, paras. 693-719; opening statement at the second meeting of the Panel, paras. 17-26.)

take account of the fact that the agricultural activities and associated ILUC and ILUC-related GHG emissions in question are mostly expected to occur outside of the territory of the European Union.

7.320. The Panel recalls that the objectives expressly listed in Article 2.2, and also those in Article XX, provide a reference point for which other objectives may be considered to be legitimate in the sense of Article 2.2.[511] In this connection, the Panel notes that none of the examples of "legitimate objectives" listed in the text of Article 2.2 necessarily have any inherent jurisdictional or territorial limitation, and it may be difficult to reconcile such a limitation with such objectives as "the environment". Likewise, the objectives in Article XX(g) (the "conservation of exhaustible natural resources") and (b) (the protection of "human, animal or plant life or health"), which the Panel considers particularly relevant to its analysis for reasons already given earlier in this section, do not have any inherent jurisdictional or territorial limitation. The Panel further notes that while Annex A(1)(a), (b) and (c) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) specify that SPS measures only include those measures applied to protect human, animal or plant life or health "within the territory of the Member", there is no similar textual qualification in Article 2.2 or Article XX (nor, more broadly, is there such a qualification in the definition of TBT measures in Annexes 1.1, 1.2 and 1.3).

7.321. Past rulings by panels and the Appellate Body under the TBT Agreement and the GATT 1994 have addressed situations in which the challenged measure distinguished between products on the basis of fishing and harvesting methods occurring outside of its own jurisdiction and territory. These cases include *US – Shrimp*, *US – Tuna II (Mexico)*, and *EC – Seal Products*. These prior cases suggest that the fact that the interest being protected is situated outside the territory of the Member having adopted the measure is not, in itself, an obstacle to the possible justification of a measure under Article XX of the GATT 1994, or even under the TBT Agreement.

7.322. At the same time, the Panel is mindful that in prior cases, panels and the Appellate Body have refrained from making any broad interpretative rulings on the existence of any implied jurisdictional or territorial limitation under Article 2.2 and Article XX. In *US – Shrimp* and *EC – Seal Products*, the Appellate Body assessed whether there was a "sufficient nexus" between the regulating Member and the activities being regulated.[512] The Panel considers it appropriate to follow a similar approach and focus on relevant case-specific arguments and circumstances.

7.323. As the Panel understands it, Indonesia's central argument in this case comes down to the proposition that, through its measures, the European Union is setting "the level of protection" or otherwise regulating activities occurring in Indonesia (and other sovereign Members), and that this entailed an inherent conflict with Indonesia's "sovereign right to regulate those matters".[513] According to Indonesia, relevant rules of international law (it refers to general concepts and specific conventions) "recognise that it is for Indonesia to account for the GHG emissions and removals taking place within its national territory and to act for the protection of the natural resources in its territory".[514]

7.324. The Panel is not persuaded by this argument, because it does not consider that the EU measures have the aim or effect of interfering with Indonesia's "right to regulate" matters falling within Indonesia's territory or the scope of its jurisdiction. Indonesia is free to regulate matters falling with Indonesia's territory and the scope of its jurisdiction. The EU measures govern activities

[511] Appellate Body Report, *US – Tuna II (Mexico)*, para. 313.

[512] In *US – Shrimp*, the Appellate Body stated that "[w]e do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for the purposes of Article XX(g)." (Appellate Body Report, *US – Shrimp*, para. 133.) In *EC – Seal Products* the Appellate Body stated that "the EU Seal Regime is designed to address seal hunting activities occurring 'within and outside the Community' and the seal welfare concerns of 'citizens and consumers' within the EU member States". On that basis, and taking into account the participants' agreement that there was a "sufficient nexus" between the public moral concerns and activities addressed by the measure, on the one hand, and the European Union, on the other hand, the Appellate Body did not consider it necessary to address this question of "systemic importance" further for the purposes of resolving that dispute. (Appellate Body Reports, *EC – Seal Products*, para. 5.173.)

[513] Indonesia's second written submission, para. 714.

[514] Indonesia's second written submission, para. 718.

occurring within the territory of the European Union, by entities located in the territory of the European Union.

7.325. Moreover, if Indonesia were correct, and a regulating Member could not adopt any technical regulation with the objective of limiting activities associated with GHG emissions except insofar as those activities occur within its own jurisdiction and territory, on the grounds that this would interfere with one or more other Members' sovereign right to regulate those matters itself, this would invalidate any measures that take into account DLUC and/or an LCA analysis of DLUC-related GHG emissions. This would include not only the sustainability criteria set out in Article 29 of RED II, but several of the other measures that Indonesia proposes as legitimate alternative measures to replace the 7% maximum share and the high ILUC-risk cap and phase-out.

7.326. The Panel notes that the measures at issue in this dispute are concerned with land use change as an issue related to GHG emissions, which are linked to climate change. Climate change is inherently global in nature. Therefore, there is a nexus between EU territory and the objective of limiting the risk of ILUC-related GHG emissions.

7.327. Moreover, the Panel does not consider that the measures can be characterized as regulating GHG emissions outside the European Union. The measures seek to regulate whether and to what extent products supplying the EU transport fuel market can be counted towards the EU renewable energy targets, and to address the adverse ILUC impacts that *EU demand* for crop-based biofuels could have. In this respect, the objective of RED II is to promote the use of renewable green energy in the EU transportation sector for environmental reasons and in particular to lower GHG emissions and to combat climate change; the European Union has assessed that the resulting increase in EU demand for crop-based biofuel could undermine that objective; and the measures therefore regulate EU demand for those products. Finally, the Panel observes that even though "the estimated indirect land-use change emissions are mostly expected to take place outside the European Union, where the additional production is most likely to be realised"[515], the ILUC-related GHG emissions from crop-based biofuels that the European Union is seeking to limit do not exclusively arise outside the European Union's borders and may very well occur also within the European Union's own territory.

7.328. The Panel finds that there is a sufficient nexus between the regulating Member and the activities being regulated.

7.1.2.3.4.5 Conclusion on the legitimacy of the objective

7.329. The Panel finds that the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels is a "legitimate objective" under Article 2.2, given that this objective falls within the scope of policies related to the conservation of exhaustible natural resources (forests, wetlands, and peatland) and the environment more generally, and falls also within the scope of policies directed to the protection of human, animal or plant life or health. The Panel concludes, in light of its findings under Article 2.4, that the ISO standards referred to by Indonesia do not "exclude ILUC from being taken into account" in the context of measures seeking to regulate GHG emissions. The Panel concludes that there exists a reasonable basis for the European Union to conclude that increasing demand for crop-based biofuels increases the risk of ILUC-related GHG emissions associated with crop-based biofuels. The Panel further concludes that there is a sufficient nexus between the regulating Member and the activities being regulated.

7.330. The Panel therefore finds that the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels is a "legitimate objective" for the purposes of Article 2.2.

7.1.2.3.5 Trade-restrictiveness, risks of non-fulfilment, and contribution to the objective

7.331. Having found that the 7% maximum share and the high ILUC-risk cap and phase-out are aimed at fulfilling a "legitimate objective", the next step of the Panel's analysis is to arrive at a

[515] European Union's first written submission, para. 46.

"preliminary conclusion"[516] about whether the measures are necessary to fulfil that legitimate objective. This consists of a relational analysis based on a "weighing and balancing" of three factors:

a. the trade–restrictiveness of the measure;

b. the risks that non-fulfilment of the objective would create; and

c. the degree of contribution made by the measure to the objective.

7.332. The parties present opposing arguments in relation to each of these factors. The Panel will address each factor individually, following which it will set out its weighing and balancing of its findings under each factor to reach a preliminary conclusion on the necessity of the measures at issue under Article 2.2.

7.1.2.3.5.1 Trade-restrictiveness

7.333. The Panel begins with the first factor set out above, namely the trade-restrictiveness of the 7% maximum share and the high ILUC-risk cap and phase-out.

7.334. The Panel recalls that, under the applicable legal standard and in accordance with the ordinary meaning to be given to the terms, a technical regulation is "trade-restrictive" within the meaning of Article 2.2 insofar as it has "a limiting effect on international trade".[517] In prior cases, panels and the Appellate Body have confirmed that a demonstration of trade-restrictiveness "could be based on qualitative or quantitative arguments and evidence, or both, including evidence relating to the characteristics of the challenged measure as revealed by its design and operation".[518] Where a panel considers that the design and structure of a measure is sufficient to establish that it will have "a limiting effect on trade", it is not necessary to make findings on the actual trade effects, or the anticipated effects, of the challenged measure.[519]

7.335. Indonesia argues that by establishing a limitation on the total quantity of crop-based biofuels that are eligible to count towards the 14% target in the European Union for the transport sector (with the entirety of EU crop-based biofuel demand being essentially defined by the RED II regime) the 7% maximum share and the high ILUC-risk cap and phase-out have, by design, a "limiting effect on trade" insofar as crop-based biofuels are imported into the European Union.[520]

7.336. The Panel agrees. Under RED II, the overall target for the share of renewable energy to be used in the transport sector is set at 14% by 2030. The measures at issue establish an express limitation on the total quantity of crop-based biofuels that are eligible to count towards the 14% target. It is undisputed that the entirety of the EU conventional biofuel market is essentially governed by the RED II regime, in the sense that there is little to no demand for biofuels not eligible to count towards the 14% target. The crop-based biofuels subject to the 7% maximum share include (without necessarily being limited to) crop-based biofuels imported into the European Union, and palm oil-based biofuel is also imported into the European Union. It follows that the measures at issue have, by design, a limiting effect on international trade.

7.337. The European Union presents several arguments aimed at showing that the 7% maximum share and high ILUC-risk cap and phase-out are not "trade-restrictive" measures.[521] For the reasons that follow, the Panel is unpersuaded by these arguments.

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[516] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.203-5.204 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.)

[517] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1072; and Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.384-6.386.

[518] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1072; and Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.384-6.386.

[519] Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.392.

[520] Indonesia's first written submission, paras. 563-579.

[521] The European Union's position appears to be that Indonesia has failed to demonstrate that the 7% maximum share and the high ILUC-risk cap and phase-out are "trade-restrictive" at all. However, the European Union also presents certain arguments to the effect that the "trade impact" of the measures at issue "is

7.338. First, the European Union stresses that the measures at issue do not "ban" the importation of crop-based biofuels and cannot be treated as equivalent to "elimination of a product from the market".[522] In the context of seeking to establish that the challenged measures do not constitute a "ban", the European Union observes that biofuels that are not eligible to count towards the target "are still consumed, albeit in small quantities, in the European Union".[523] In addition, it argues that the low ILUC-risk certification ensures that the use of palm oil-based biofuel can contribute to the renewable energy targets to the same degree as other conventional biofuels.[524]

7.339. The Panel considers that the relevance of this argument to the question of whether the measures have a "limiting effect on trade" is unclear, as a measure falling short of a complete ban can still clearly have a "limiting effect on trade". Insofar as the European Union's position is that since Indonesia has argued that the measures at issue (in particular the high ILUC-risk cap and phase-out) are tantamount to a ban on palm oil-based biofuel, Indonesia needs to demonstrate that these measures constitute a *de facto* ban to prove that they are "trade-restrictive", the Panel is not persuaded. The Panel recalls that what needs to be established for the purposes of demonstrating the trade-restrictiveness of a measure, under Article 2.2 and Article XX, is that the measure has "a limiting effect on international trade".

7.340. Second, the European Union argues that insofar as it is correct that there is no real market for biofuel in the European Union outside the RED II regime, such that the biofuels market was created by the RED regime itself, it follows that the measures are part of a regime that has a trade restricting effect only for *fossil fuels*, and a trade *enhancing* effect for *biofuels*. It follows from this, the European Union argues, that the measures set a cap on the trade-restrictiveness of the public intervention with respect to *fossil fuels*. It cannot be the case, the European Union argues, that "once a Member alters the functioning of the market and restricts trade in certain products [i.e. fossil fuels] it should do that without *any* limitation for the trade which was *artificially created* for other products" [i.e. biofuels].[525]

7.341. The Panel considers that the logical implication of the European Union's argument is that where a Member artificially creates a market for certain products (e.g. biofuels), any limitation on the eligibility of which products have access to that market, including through a total ban, would not have any "limiting effect on trade" in those products. By this logic, an amended version of RED II that immediately set a 0% share for all crop-based biofuels would not be trade-restrictive, and thus could not be said to be any more "trade-restrictive" than the current measure. The Panel considers that the disciplines under Article 2.2, and for that matter under Article 2.1 and Article III:4, apply in the same way irrespective of whether a given market exists only because the government created it.

7.342. Third, the European Union argues that, in assessing whether the measures at issue have a "limiting effect on trade", the Panel should consider whether Indonesia's possible loss of exports to the EU market "might have been compensated by an increase in exports to India and China", and whether the high ILUC-risk cap and phase-out has import-*enhancing* effects with respect to conventional biofuels from *other* WTO Members.[526] The European Union relies on the statement by the panel in *Australia – Tobacco Plain Packaging* that, in assessing whether a technical regulation has limiting effects on international trade, "consideration might be given to 'the value or other importance of imports in respect of the importing and/or exporting Members concerned', as well as 'both import-enhancing and import-reducing effects on the trade of other Members'".[527]

minimal". (See e.g. European Union's first written submission, paras. 826 and 1344.) The Panel proceeds on the understanding that these may be construed as arguments in the alternative, and not as concessions that the challenged measures are in fact "trade-restrictive" (which would obviate the need for further consideration of its arguments on that issue).

[522] European Union's first written submission, paras. 822-823.

[523] European Union's first written submission, para. 819.

[524] European Union's first written submission, paras. 824-826.

[525] European Union's first written submission, para. 827. (emphasis added)

[526] European Union's first written submission, paras. 831-832.

[527] European Union's first written submission, paras. 785 and 830-831 (quoting Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1088.)

7.343. The Panel does not consider that this argument finds support in prior dispute settlement practice under Article 2.2 or Article XX. Indeed, the panel in *Australia – Tobacco Plain Packaging* itself concluded that:

> We see no basis in the terms of Article 2.2 to assume, as Australia proposes, that the effects of a technical regulation on international trade, and specifically the existence and extent of a "trade-restrictive" effect, should be assessed only on the basis of the effect of the measure on trade of all WTO Members, in all products that are the subject of the technical regulation. Indeed, we consider that the adoption of that interpretation would have the effect that a WTO Member could have no recourse to Article 2.2 of the TBT Agreement in respect of a particular product in which its trade were being restricted, in the event that the trade of (an)other Member(s) increased. Further, following Australia's logic, in order to succeed in a claim under Article 2.2, a Member would in all cases need to establish the existence of a limiting effect not only in respect of its own exports, but in respect of the entirety of exports from all Members. This interpretation would, in our view, diminish the rights of Members under Article 2.2.[528]

7.344. The Panel further notes that the specific paragraph of that panel report that contains the sentence relied upon by the European Union in developing its argument reiterates that "the 'trade-restrictiveness' of a technical regulation need not be assessed only on the basis of the effect of the measure on trade between *all* WTO Members, in *all products* that are the subject of the technical regulation."[529]

7.345. The foregoing considerations apply equally to the 7% maximum share and the high ILUC-risk cap and phase-out. While it is evident that the 7% maximum share is less trade-restrictive than the high ILUC-risk cap and phase-out, both measures are "trade-restrictive" for the purposes of Article 2.2 because they establish a limitation on the total quantity of crop-based biofuels that are eligible to count towards the 14% target in the European Union, with the entirety of EU conventional biofuel demand being essentially defined by the RED regime. The measures thereby have, by design, a "limiting effect on trade" insofar as crop-based biofuels are imported into the European Union.[530] The fact that the European Union has created the market in question does not modify this assessment.

7.1.2.3.5.2 Risks of non-fulfilment of the objective

7.346. Having found that the 7% maximum share and the high ILUC-risk cap and phase-out are trade-restrictive, the Panel now turns to the second factor that is taken into account in the weighing and balancing step of the analysis, which is "the risks that non-fulfilment [of the objective] would create".

7.347. The Appellate Body has explained[531] that Article 2.2 does not prescribe further a particular methodology for assessing "the risks non-fulfilment would create" or define how they should be "tak[en] account of". In some contexts, it might be possible and appropriate to seek to determine separately the nature of the risks, on the one hand, and to quantify the gravity of the consequences that would arise from non-fulfilment, on the other hand; in other contexts, however, it might be difficult, in practice, to determine or quantify those elements separately with precision. In such contexts, it may be more appropriate to conduct a conjunctive analysis of both the nature of the risks and the gravity of the consequences of non-fulfilment, in which "the risks non-fulfilment would create" are assessed in qualitative terms. The Appellate Body has confirmed that "the manner of such consideration is adaptable to the particularities of a given case."

7.348. Indonesia argues that because "ILUC cannot be observed or quantified, nor accurately modelled", there is as a result "no basis on which to assess the gravity or risks of the non-fulfilment

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[528] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1078.

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

[530] The Panel recalls that, where the design and structure of the measure is sufficient to establish that it will have a limiting effect on trade, it is not necessary to make findings on the actual trade effects, or the anticipated effects, of the challenged measure. (See e.g. Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.392.)

[531] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.218.

of the technical regulations' alleged objective".[532] Thus, Indonesia's argument on this element of the analysis substantially overlaps with the same argument(s) it makes in relation to the "legitimate objective" and "contribution" arguments. Indonesia further argues that the fact that the European Union has not adopted similar criteria in respect of DLUC emissions related to products other than biofuel but which are made from the same feed or food crops as biofuel demonstrates that the European Union itself does not consider that the non-fulfilment of the objective would be particularly grave.

7.349. The European Union, referring to its broad policy objectives, submits in relation to this element of the analysis that "climate change, biodiversity and related moral concerns are regarded as values of high importance in the European Union and embedded into its constitutional fabric".[533] The European Union also argues that the nature of the risks and the fact that the consequences are far reaching and difficult to predict with certainty, as they pertain to climate change, biodiversity destruction and absence of protection of EU public morals, mean that a qualitative analysis would be more suitable to a quantitative one.[534]

7.350. The Panel has found that the objective of the 7% maximum share and the high ILUC-risk cap and phase-out is to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels. Having so identified the objective of the measures, the Panel considers that the risk that the non-fulfilment of that objective would create is that the GHG emissions savings expected to result from the promotion of crop-based biofuels through RED II would be partially undermined, or even completely negated, by their ILUC-related GHG emissions.

7.351. The Panel reaches this conclusion based on several different considerations. First and foremost, this understanding of the risks that non-fulfilment of the objective would create corresponds to the understanding that is expressly set out in the ILUC Directive, Recital 81 of RED II, and the Delegated Regulation. In the context of setting forth the stated rationale for the measures at issue, Recital 81 of RED II, which has already been quoted in full earlier in this section of the Report, recalls that the ILUC Directive "recognises that the magnitude of greenhouse gas emissions-linked indirect land-use change is capable of negating some or all greenhouse gas emissions savings of individual biofuels, bioliquids or biomass fuels". This is repeated in Recital 4 of the Delegated Regulation.

7.352. Additionally, the parties themselves appear to share the same understanding. In its submissions, the European Union refers to this potential consequence.[535] Indonesia states that it understands that "the 7% limitation and the high ILUC-risk cap and phase-out allegedly seek to avoid that GHG emissions savings resulting from using biofuel are undone by so-called ILUC GHG emissions."[536] Indonesia appears to accept this understanding of the risks that non-fulfilment would create. In discussing the "risks that non-fulfilment would create", Indonesia states that "the risk allegedly addressed by both the 7% limitation and the high ILUC-risk cap and phase-out is that the use, in the European Union, of biofuel made from feed and food crops, especially oil palm crop-based biofuel, does not lead to emission savings because of DLUC GHG emissions related to the cultivation of displaced crops".[537]

7.353. The Panel is not of the view that consideration of "the risks that non-fulfilment [of the objective] would create" necessitates the quantification of the risks, or an attempt to establish the degree of probability of those risks materializing. Rather, and as the Appellate Body has explained[538], in some contexts it may be possible to quantify the gravity of the consequences that would arise from non-fulfilment, whereas in other contexts this may be assessed in qualitative terms. The Panel notes that in some cases, prior panels have identified "the risks of non-fulfilment" of the objective in terms of one or more simple corollaries flowing from the objective identified. For example, in *Australia – Tobacco Plain Packaging*, the panel found that the objective of the measures was "to improve public health by reducing the use of, and exposure to, tobacco products", and found that "the nature of the risk of not fulfilling the TPP measures' legitimate objective" was that "public

[532] Indonesia's first written submission, paras. 650-652.
[533] European Union's first written submission, para. 844.
[534] European Union's second written submission, paras. 269-281.
[535] European Union's first written submission, paras. 43, 232, and 727.
[536] Indonesia's second written submission, para. 757 (referring to European Union's first written submission, paras. 43, 101, 107, 121, 232, 841, 1335, 1336, and 1354.)
[537] Indonesia's second written submission, paras. 824-825.
[538] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.218.

health would not be improved, as the use of, and exposure to, tobacco products would not be reduced."[539]

7.354. The Panel therefore finds that the "risks that non-fulfilment [of the objective] would create" are that GHG emissions savings resulting from the promotion of conventional biofuels through RED II are partially undermined, or even completely negated, by their ILUC-related GHG emissions. As already noted above, avoiding GHG emissions is a central element in combating climate change, in itself a key objective of current international and domestic efforts. The foregoing considerations apply equally to the 7% maximum share and the high ILUC-risk cap and phase-out, given that the Panel considers that both measures have the same objective.

7.1.2.3.5.3 Contribution to the objective

7.355. Having considered the first two factors that inform the weighing and balancing step of the analysis, the Panel now turns to the third factor, which is the degree of contribution made by the measures to their objective.

7.356. The present case has several parallels with *Brazil – Retreaded Tyres,* and therefore the Panel considers it useful to briefly summarize the Appellate Body's analysis in that dispute.

7.357. The measure at issue in *Brazil – Retreaded Tyres*, namely, a ban on imports of retreaded tyres, was particular in at least two respects. First, the import ban formed part of a comprehensive policy designed and implemented by Brazil to deal with the public health and environmental consequences of waste tyres. As the Appellate Body recognized, "certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures".[540] Consequently, the Appellate Body noted, it may prove difficult in the short term "to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy".[541] Second, the Appellate Body considered that the results obtained from, for example, certain preventive actions to reduce the incidence of diseases, "can only be evaluated with the benefit of time".[542] It referred, in this connection, to "measures adopted in order to attenuate global warming and climate change".

7.358. The Appellate Body in *Brazil – Retreaded Tyres* was thus confronted with the particular challenge of assessing the contribution of a measure that formed part of a broader policy scheme, and that was not yet having, or likely itself to produce, an immediately discernible impact on its objective. The Appellate Body thus sought to determine whether the measure was "apt to make a material contribution" to its objective.[543] It ultimately found that the broader regulatory scheme was designed to induce changes in the practices and behaviour of commercial actors in order to reduce the number of waste tyres generated and, thereby, to reduce the risks to human, animal, and plant life and health arising from the accumulation of waste tyres.[544]

7.359. In the present case, the 7% maximum share and the high ILUC-risk cap and phase-out do not take the form of a ban on imports of any crop-based biofuel. However, the measures have, by design, a limiting effect on EU demand for and consumption of all crop-based biofuels, and will by 2030 eliminate RED II-induced EU demand for and consumption of those crop-based biofuels deemed to be high ILUC risk. As with the import ban at issue in *Brazil – Retreaded Tyres*, the objective of the measures is related to the protection of human, animal or plant life or health (which the Appellate Body accepted "is both vital and important in the highest degree".)[545] Furthermore, it appears to be common ground between the parties in this case that it is not possible to quantify the extent to which the 7% maximum share and the high ILUC-risk cap and phase-out contribute to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The measure at issue in *Brazil – Retreaded Tyres* was likewise one that did not have an immediately discernible impact on its objective. In these circumstances, the Appellate Body accepted that a

[539] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1287.
[540] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[541] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[542] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[543] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150.
[544] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 154.
[545] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 144.

measure could be considered "necessary" even if the contribution of the measure "is not immediately observable"[546], and considered that the relevant standard was whether the measure was *apt to make a material contribution* to its objective.

7.360. The Panel considers that the 7% maximum share and the high ILUC-risk cap and phase-out are apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. The measures have, by design, a limiting effect on EU demand for and consumption of all crop-based biofuels and will by 2030 eliminate RED II-induced EU demand for and consumption of those crop-based biofuels deemed to be high ILUC risk. It follows that the measures are apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. In light of the design and intended operation of the 7% maximum share and the high ILUC-risk cap and phase-out, the Panel considers that there is a direct correlation between their aptitude to contribute to their objectives and their degree of trade-restrictiveness.

7.361. Indonesia submits that there are several reasons why the 7% maximum share and the high ILUC-risk cap and phase-out "would not be capable"[547] of contributing to their stated objective. The Panel has elected to address most of these arguments elsewhere in its analysis, either in the context of assessing whether the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels is a "legitimate objective" or in the context of the "legitimate regulatory distinction" step of the analysis under Article 2.1.

7.362. For instance, Indonesia argues[548] ILUC cannot be observed or measured and therefore there is no evidence showing that oil palm crop-based biofuel exported from Indonesia into the European Union will cause ILUC. Indonesia argues that it is therefore impossible to establish a causal link between the cultivation of food and feed crops for producing biofuel in one geographical location, and the growing of crops in another geographical location. As a result, Indonesia argues that it is not possible to quantify the contribution, if any, of the limitation on the importation of the cap and phase-out to the stated objective.

7.363. The Panel considers this argument to be pertinent to the assessment of whether the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels is a "legitimate objective" and has elected to address it in that context. The Panel found that there exists a reasonable basis for the European Union to conclude that increasing demand for crop-based biofuels increases the risk of ILUC-related GHG emissions. The Panel therefore considers that this argument does not undermine its conclusion that the high ILUC-risk cap and phase-out is apt to make a material contribution to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuel.

7.364. Indonesia also argues[549] that even if the European Commission's new ILUC methodology is taken at face value, this methodology fails to demonstrate that the cap and phase-out contributes to preventing ILUC GHG emissions, and in fact it is likely to increase GHG emissions. The reason is that reducing the consumption of oil palm crop-based biofuel in the European Union in favour of rapeseed or other crop-based biofuel would reduce the amount of rapeseed oil or other crops produced for food purposes by an equivalent amount, which may therefore trigger ILUC effects elsewhere in the world. The phase-out of palm oil-based biofuels may also result in a shift towards palm oil being supplied for food and feed purposes in the European Union, which would not be subject to the sustainability and GHG emissions saving criteria under RED I and RED II. Finally, even if the cap and phase-out could actually limit global consumption of palm oil, the high yield and the high-carbon sequestration value of oil palm, compared to other oil crops, means that ILUC GHG emissions would likely increase.

7.365. The Panel notes that the issues raised by Indonesia relating to potential substitution effects are also raised in the context of the "legitimate regulatory distinction" step of the analysis under Article 2.1. The Panel considers it appropriate to address these arguments together with other aspects of the design and operation of the measure in that context. The Panel notes that its

[546] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[547] Indonesia's first written submission, paras. 630 and 642.
[548] Indonesia's first written submission, paras. 233, 631-632 and 643-644; second written submission, para. 169.
[549] Indonesia's first written submission, para. 634.

conclusions under Article 2.1 do not undermine its conclusion that the high ILUC-risk cap and phase-out is apt to make a material contribution to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuel.

7.366. Indonesia further argues[550] that because the high ILUC-risk cap and phase-out targets existing crop production for which the alleged emissions have already occurred in the past, as well as feedstock produced from yield increases to existing land, such production does not cause ILUC because it does not result in additional land use. In its view, this further undermines the ability of the measures at issue, and in particular the high ILUC-risk cap and phase-out, to contribute to their objective.

7.367. The Panel notes that the issues raised by Indonesia are also raised in the context of the "legitimate regulatory distinction" step of the analysis under Article 2.1. The Panel considers it appropriate to address these arguments together with other aspects of the design and operation of the measure in that context. Here again, the Panel notes that its conclusions under Article 2.1 do not undermine its conclusion that the high ILUC-risk cap and phase-out is apt to make a material contribution to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuel.

7.368. Indonesia also argues[551] that even if it could be shown that biofuel production leads to ILUC GHG emissions and those emissions could be accurately estimated and calculated, those new GHG emissions would likely be very low. According to Indonesia, and as explained in the Expert Opinion of Professor Finkbeiner, biofuel only accounts for around 1% of the world's land use change emissions. In addition, given that the initial ILUC emissions are amortized over time, if the European Union's objective is to reduce overall GHG emissions in the atmosphere, ILUC emissions from biofuel production constitute a negligible part of such emissions. Indonesia adds[552] that any reduced demand in the EU biofuel sector can be remedied by increased demand for palm oil-based biofuel in third countries.

7.369. The Panel does not consider that the contribution that the 7% maximum share and the high ILUC-risk cap and phase-out are apt to make to their objective (i.e. limiting ILUC-related GHG emissions associated with crop-based biofuels) is undermined by the fact that the measures focus only on a relatively narrow aspect of the problem of GHG emissions, and directed only at the European Union's own demand and consumption of biofuels. It is often the case that a given measure will "only address[] a specific component of the overall risk"[553] it pertains to. *A fortiori*, in the context of a global issues like climate change and GHG emissions the assessment of whether a single measure taken by a single Member is apt to make a material contribution to its objective cannot be directed at the global impact of the measure in quantitative terms.

7.370. Rather, a "contribution" exists "when there is a genuine relationship of ends and means between the objective pursued and the measure at issue".[554] That is the case here. The measures seek to address certain negative externalities of the European Union's policy promoting the use of renewable energy sources in the transport sector. Therefore, insofar as the measures aim at correcting a specific aspect of that policy, it is to be expected that the measures' contribution will be limited to that specific element.

7.371. The Panel concludes that, while it is not possible to quantify the extent to which the 7% maximum share and the high ILUC-risk cap and phase-out contribute to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels, the measures are apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. The conclusion follows from the fact that the 7% maximum share has, by design, a limiting effect on EU demand for and consumption of all crop-based biofuels, and from the fact that the high ILUC-risk cap and phase-out has, by design, a limiting effect on EU demand for and consumption of those crop-based biofuels deemed to be high ILUC risk.

[550] Indonesia's first written submission, para. 639.
[551] Indonesia's first written submission, para. 637.
[552] Indonesia's second written submission, paras. 1267, 1310.
[553] Panel Report, *Brazil – Retreaded Tyres*, para. 7.214.
[554] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 210.

7.1.2.3.5.4 Weighing and balancing of the three factors

7.372. Having considered the trade-restrictiveness of the measures, the risks that non-fulfilment of their objective would create, and the degree of contribution made by the measures to the objective, the Panel now proceeds to the "weighing and balancing" of these factors in order to reach a "preliminary conclusion" on the necessity of the measures at issue.

7.373. In the context of considering these three factors individually, the Panel has concluded that:

a. The 7% maximum share and the high ILUC-risk cap and phase-out are trade-restrictive for the purposes of Article 2.2 because they establish a limitation on the total quantity of crop-based biofuels that are eligible to count towards the 14% target in the European Union, with the entirety of EU conventional biofuel demand being essentially defined by the RED regime. While it is evident that the 7% maximum share is less trade-restrictive than the high ILUC-risk cap and phase-out, both measures thereby have, by design, a limiting effect on trade insofar as crop-based biofuels are imported into the European Union. The fact that the European Union has created the market in question does not modify this assessment.

b. The 7% maximum share and the high ILUC-risk cap and phase-out have the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels, and the risk that non-fulfilment of that objective would create is that the GHG emissions savings expected to result from the promotion of crop-based biofuels through RED II would be partially undermined, or even completely negated, by their ILUC-related GHG emissions.

c. While it is not possible to precisely quantify the extent to which the 7% maximum share and the high ILUC-risk cap and phase-out contribute to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels, the measures are apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. This conclusion follows from the fact that the 7% maximum share has, by design, a limiting effect on EU demand for and consumption of all crop-based biofuels, and from the fact that the high ILUC-risk cap and phase-out has, by design, a limiting effect on EU demand for and consumption of those crop-based biofuels deemed to be high ILUC risk.

7.374. The Panel appreciates that the exercise of "weighing and balancing" implies that the flexibility of such an exercise does not allow for the setting of pre-determined thresholds in respect of any particular factor, and therefore the Appellate Body has stated that it does "not see that mandating in advance a pre-determined threshold level of contribution would be instructive or warranted in a necessity analysis".[555] Thus, a panel may be found to have erred insofar as it considers that it is required to apply a standard of "materiality" as a generally applicable pre-determined threshold in its "contribution" analysis.[556]

7.375. Having said this, the Panel notes that in every case where a panel or the Appellate Body has found that a measure is apt to make a material contribution to the fulfilment of its objective, the preliminary conclusion reached in the context of the weighing and balancing step has been that the measure is necessary. This includes cases where the measure was highly trade-restrictive, including cases where the measure was an outright ban on the importation or sale of the products at issue (including for example *Brazil – Retreaded Tyres* and *US – Clove Cigarettes*). Indeed, the Appellate Body has suggested that the only circumstance in which a panel could end its analysis at this juncture and find that a measure is more trade-restrictive than necessary based on the "weighing and balancing", and not continue with a comparison of the measure against the proposed alternative measures, would be if the measure "makes *no* contribution to the achievement of the legitimate objective".[557]

7.376. The Panel preliminarily concludes that the measures are necessary to fulfil their objective, on the grounds that they are "apt to make a material contribution" to the achievement of that

[555] Appellate Body Reports, *EC – Seal Products*, para. 5.215.
[556] Appellate Body Reports, *EC – Seal Products*, para. 5.216.
[557] Appellate Body Report, *US – Tuna II (Mexico)*, fn 647 to para. 322.

objective, and that this is the requisite degree of contribution required in the circumstances of this case having weighed and balanced their trade-restrictiveness and the risks that non-fulfilment of the objective would create.

7.1.2.3.6 Alternative measures

7.377. The Panel has reached the preliminary conclusion that the 7% maximum share and the high ILUC-risk cap and phase-out are necessary under Article 2.2. Accordingly, the next and final step of the analysis of the necessity test under Article 2.2 is a comparison of the challenged measures with possible alternative measures.

7.378. Indonesia initially identified four possible alternative measures to the high ILUC-risk cap and phase-out, and one possible alternative measure to the 7% maximum share. In its second written submission, Indonesia identified two further alternative measures, and also indicated that the European Union "could even combine the removal of the 7 % limitation with any of the reasonably available alternative measures that have been identified by Indonesia in respect of the high ILUC-risk cap and phase-out".[558] Indonesia identified an additional alternative measure in its opening statement at the second meeting of the Panel. The Panel therefore proceeds on the understanding that Indonesia has identified eight alternative measures, of which one is specific to the 7% maximum share, with the others being proposed as alternatives to both the 7% maximum share and the high ILUC-risk cap and phase-out.

7.379. The Panel will proceed to individually examine the eight less trade-restrictive alternative measures that have been identified. According to Indonesia, the 7% maximum share and the high ILUC-risk cap and phase-out are more trade-restrictive than necessary to fulfil a legitimate objective, because the following measures are reasonably available to the European Union, that would make an equivalent contribution to the stated objective, while being less trade-restrictive:

a. reduce GHG emissions in respect of risks arising within the European Union's own territory;

b. extend the European Union's GHG emissions accounting to other agricultural products using a LCA analysis in accordance with international standards;

c. offer technical and financial support to assist Indonesia in its efforts to preserve forests;

d. tax meat and dairy products to drive down global feed demand;

e. remove the 7% maximum share or set it at a higher level;

f. replace the 7% maximum share and high ILUC-risk cap and phase-out with "properly designed low ILUC-risk criteria" applied to all food and feed crop-based biofuels;

g. label fuel as ILUC risk when sold to consumers purchasing fuel to drive their cars; and

h. introduce a certification requirement for all major food and feed crops addressing DLUC-related GHG emissions.

7.380. Before reviewing these measures individually, the Panel considers it useful to recall certain aspects of the applicable legal standard that will guide its analysis of the alternative measures proposed by Indonesia.

7.1.2.3.6.1 The purpose of identifying alternative measures

7.381. The Panel recalls that consideration of less trade-restrictive alternative measures is a conceptual tool to analyse whether the measures at issue are more trade-restrictive than necessary.[559] The question that a panel seeks to answer in considering possible alternative measures

[558] Indonesia's second written submission, para. 863.

[559] See e.g. Appellate Body Reports, *Australia – Tobacco Plain Packaging (Honduras)*, para. 6.461; *US – Tuna II (Mexico)*, para. 320; and *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.200.

is whether there are one or more less trade-restrictive measures that the regulating Member could adopt to *replace* a challenged measure.

7.382. Accordingly, a panel must be satisfied that any proposed alternative measure is indeed less trade-restrictive than the measure at issue, that it is reasonably available to the regulating Member, and that it would make an equivalent contribution to the challenged measure's objective.[560] As indicated above, all these elements of the comparative analysis are cumulative. The Appellate Body has confirmed that a measure's objective serves as "the benchmark" against which a panel must assess the degree of contribution made "by proposed alternative measures".[561] Thus, in assessing whether a proposed alternative measure would make an equivalent contribution to the challenged measure's objective, it is important to start this analysis by clearly identifying the objective that serves as the benchmark.

7.383. The Panel has identified the objective of the 7% maximum share and the high ILUC-risk cap and phase-out as limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The Panel has also found that this is a "legitimate objective", and the Panel has further found that the measures at issue are apt to make a material contribution to that objective. Accordingly, to establish that the measures are more trade-restrictive than necessary at this juncture of its analysis, the Panel would need to be satisfied that one or more of the proposed alternatives would make an equivalent contribution to the objective of *limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels* and that these alternatives are less trade-restrictive than the challenged measures.

7.384. The Panel considers that it is necessary, but not sufficient, that any proposed alternative measure be less trade-restrictive, be reasonably available, and make an equivalent contribution to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The Panel must further consider whether any proposed alternative is correctly viewed as an *alternative* to, or rather as *complementary* to, the 7% maximum share and the high ILUC-risk cap and phase-out. In *Brazil – Retreaded Tyres*, the Appellate Body upheld the panel's finding, made in the context of applying the necessity test in Article XX(b), that certain alternatives proposed by the complaining Member were "complementary" to the challenged import ban, and constituted "mutually supportive elements of a comprehensive policy to deal with" waste tyres and "[t]herefore, these measures cannot be considered real alternatives to" the import ban.[562] As the underlying panel observed, "it is possible that different measures may address different aspects of the same risk and complement each other towards addressing this risk".[563]

7.385. While the Appellate Body has not had occasion to elaborate further on the distinction between alternative and complementary measures, the distinction would seem to be reasonably straightforward. Necessity tests under Article 2.2 and Article XX do not prevent a regulating Member from taking more than one measure at the same time to fulfil any given objective. By way of illustration, a technical regulation that laid down GHG emissions standards for scooters that have a limiting effect on trade (in respect of non-compliant scooters) could not be shown to be more trade-restrictive than necessary via a demonstration that introducing a subsidy for homeowners to install solar panels (or purchase electric bikes, or electric cars) would make at least an equivalent contribution to the reduction of GHG emissions. Such measures would in principle be complementary, not alternative, measures.

7.386. An alternative measure is therefore one that either could not co-exist with a challenged measure as it currently stands, or that could co-exist but whose implementation alongside the challenged measure would negate or render redundant or immaterial the contribution that the challenged measure is apt to make to its objective. A complementary measure is one that could co-exist with a challenged measure as it currently stands, and whose implementation alongside the challenged measure would not negate or render redundant or immaterial the contribution that the challenged measure is apt to make to its objective.

[560] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 322; and *US – COOL*, para. 471.
[561] Appellate Body Reports, *US – COOL*, para. 387.
[562] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 211. See also ibid., para. 172.
[563] Panel Report, *Brazil – Retreaded Tyres*, para. 7.213.

7.1.2.3.6.2 Assessment of the alternative measures proposed by Indonesia

First proposed alternative: reduce GHG emissions in respect of risks arising within the European Union's own territory

7.387. Indonesia argues[564] that if the European Union is concerned about reducing emissions related to fuel consumption in the transport sector, it could first focus on reducing GHG emissions and achieving its Paris Agreement commitments in respect of risks arising within its own territory. According to Indonesia, such measures, unlike the measures at issue, would be consistent with the principles of the Paris Agreement and the commitments the European Union has assumed thereunder towards supporting the GHG emissions mitigation efforts of developing countries. Indonesia observes that tackling GHG emissions at home is the basis for accounting for GHG emissions under the United Nations Framework Convention on Climate Change and the Paris Agreement. Indonesia notes that there is considerable scope for the European Union to first address challenges at home, taking into account that the European Union is the world's third largest CO_2 emitter and faces several climate change and sustainability challenges within its own territory. Therefore, Indonesia argues, taking measures to reduce GHG emissions within its own territory would make an equivalent contribution to the European Union's stated objective and would be significantly less trade-restrictive.

7.388. The European Union responds[565] that it has adopted a comprehensive set of policies to reduce GHG emissions within the European Union.[566] It adds that it has long recognized the importance of forests and the negative effects of deforestation within EU territory, as reflected *inter alia* in the 2013 Forest Strategy, the Land Use, Land Use Change and Forestry regulation and its commitments under the Kyoto Protocol. Thus, the measures "form one component of a broader, coherent policy approach" and "Indonesia's argument's fail to account for the existing and future measures in this sector which have already been announced and which complement those measures taken to address the effects of stimulating crop production for certain biofuels."[567] In any event, the European Union argues that regulating exclusively "at home" in the European Union cannot achieve an equivalent contribution because of the asymmetries between the sources of concern (emissions and biodiversity loss) and where their effects manifest themselves, given that the expansion of palm oil production comes at the expense of tropical forests, which are some of the most biodiverse areas of the globe. The European Union adds that insofar as this alternative measure is explicitly premised on the concept that the European Union is constrained to addressing issues of global concern "at home", Indonesia has applied an incorrect and unduly restrictive analytical framework.

7.389. The Panel observes that Indonesia's first proposed alternative measure, i.e. that the European Union should first focus on reducing GHG emissions and achieving its Paris Agreement commitments in respect of risks arising within its own territory, appears to be unrelated to the specific objective pursued by the 7% maximum share and the high ILUC-risk cap and phase-out. This proposed alternative appears to be an alternative *objective* related to GHG emissions that the European Union should pursue, and not an alternative *measure* that would make an equivalent contribution to its chosen objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. In addition, the Panel does not see why the 7% maximum share and the high ILUC-risk cap and phase-out could not co-exist with a measure aimed at reducing GHG emissions in the European Union's own territory. Given that the measures at issue have a focus that is different from the proposed alternative, the challenged measures would continue to be apt to make a material contribution to their objective if they operated alongside the proposed alternative. As such the first alternative appears to be complementary, and not a genuine alternative, to the EU measures at issue.

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[564] Indonesia's first written submission, paras. 659-663; second written submission, paras. 849-851; and opening statement at the second meeting of the Panel, paras. 67-69.

[565] European Union's first written submission, paras. 853-857; second written submission, paras. 292-296; and opening statement at the second meeting of the Panel, paras. 108-109.

[566] The European Union refers to such policies as the Emissions Trading System (ETS), CO_2 standards for vehicles, the energy efficiency directive, the effort sharing regulation, the Land Use, Land Use Change and Forestry regulation and it is working on measures to increase supply chain transparency and minimize the risk of deforestation and forest degradation associated with products placed on the EU market. (European Union's first written submission, para. 853.)

[567] European Union's second written submission, para. 294.

Second proposed alternative: extend GHG emissions accounting to other agricultural products using LCA analysis in accordance with international standards

7.390. Indonesia argues[568] that because "the iLUC of one agricultural activity is always the dLUC of another agricultural activity"[569], the European Union could "extend its GHG emissions accounting to other agricultural products". According to Indonesia, measuring DLUC instead of ILUC would be a much more accurate way of measuring GHG emissions associated with land use and would be in accordance with international standards, and extending GHG emissions accounting to other agricultural products would "make a greater contribution to the alleged objective of reducing GHG emissions associated with land-use"[570] because it would apply to a wider scope of products, including palm oil supplied for food and feed purposes in the European Union. It would also be less trade-restrictive "by avoiding a *de facto* ban on the importation of oil palm crop-based biofuel and palm oil used to produce that biofuel".[571] Indonesia explains that this second alternative "builds on the fact that any alleged concerns about (significant or high) ILUC GHG emissions are concerns about DLUC emissions of oil palm destined for non-EU biofuel demand or possibly other agricultural products."[572] In other words, "[a]ny alleged concerns about ILUC GHG emissions are in fact concerns about DLUC emissions of oil palm destined for non-EU biofuel demand and of other agricultural products."[573]

7.391. The European Union responds[574] that this second alternative measure "would be significantly more demanding in technical and administrative terms"[575], and would require years of preparation to implement whereas the climate emergency requires immediate action, and therefore would not make an equivalent contribution.[576] Furthermore, the European Union argues that the objective of addressing ILUC emissions is to identify the net impact of stimulating demand for a specific raw material and therefore analysing exclusively DLUC emissions does not present a full picture. In this connection, the European Union explains that it follows an approach that is "targeted in terms of the crops concerned and the nature of the demand for those crops", and that "accounting only for DLUC of any agricultural crop would result in an approach that would target both the increase of crops demand for nourishing the world population and the increase due to the EU renewable energy policy."[577]

7.392. The Panel observes that Indonesia's second proposed alternative measure i.e. that the European Union should extend its GHG emissions accounting to other agricultural products using a LCA analysis in accordance with international standards, may be understood as being indirectly related to the specific objective pursued by the 7% maximum share and the high ILUC-risk cap and phase-out. The Panel accepts that the ILUC of one agricultural activity is always the DLUC of another agricultural activity.[578] Therefore a comprehensive scheme accounting for the *DLUC*-related GHG emissions of a wide range of products *other than biofuels* could potentially contribute to limiting the risk of *ILUC*-related GHG emissions associated with *crop-based biofuels*.

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[568] Indonesia's first written submission, para. 663; second written submission, paras. 852-855; and opening statement at the second meeting of the Panel, paras. 70-85.

[569] Indonesia references Section 2.1.2 of the Finkbeiner Expert Opinion, (Exhibit IDN-126).

[570] Indonesia's first written submission, para. 663.

[571] Indonesia's first written submission, para. 663.

[572] Indonesia's second written submission, para. 854.

[573] Indonesia's opening statement at the second meeting of the Panel, para. 70.

[574] European Union's first written submission, paras. 858-863; second written submission, para. 297-303; and opening statement at the second meeting of the Panel, paras. 110-112.

[575] European Union's second written submission, para. 298.

[576] European Union's second written submission, para. 299.

[577] European Union's second written submission, para. 302. The European Union explains that "there is a difference between the expansion of agricultural land induced purely by the increasing demand for food and expansion that is the (direct and indirect) consequence of an increase demand for crops for fuel production. Both phenomena may raise environmental concerns, but while nutrition is an essential human need, using biofuels for transport is certainly not as essential and, moreover, there are alternative sources of renewable energy that can be used for transport. The moral concerns addressed by the EU renewable energy policy are therefore specifically linked to the effects on climate change and biodiversity of the expansion of production of crops that can be used for biofuels and which is due to an increase of EU demand of that category of biofuels, not by the production of any agricultural commodity for all potential end uses." (European Union's second written submission, para. 303.)

[578] Given this, if DLUC were accounted for in every agricultural product, ILUC would no longer need to be accounted for; indeed, doing so, assuming quantifiability, would amount to double-counting.

7.393. However, leaving aside the feasibility of the European Union administering a more global scheme to account for the DLUC-related GHG emissions of all agricultural products imported into its territory, and the question of whether this would be a less trade-restrictive measure, such a measure would not negate or render redundant or immaterial the contribution that the 7% maximum share and the high ILUC-risk cap and phase-out make to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The reason is that only a fraction of the agricultural products produced in the world are imported to and consumed in the European Union. Thus, for this measure to be a real alternative, at a minimum all countries in the world would have to create and administer the same scheme. Until such time as all countries adopt a uniform scheme to regulate the DLUC of all agricultural products and ban any further crop expansion into non-agricultural land, measures like the second proposed alternative will remain a complementary measure, and not a genuine alternative, to the 7% maximum share and the high ILUC-risk cap and phase-out.

Third proposed alternative: offer technical and financial support to assist Indonesia in its efforts to preserve forests

7.394. Indonesia argues[579] that the European Union could offer technical and financial support to Indonesia, in accordance with its commitments under the Paris Agreement, to help preserve forests. Indonesia offers several examples of successful bilateral cooperation to preserve forests in Indonesia and in other developing countries. Indonesia comments on the European Union's observation that it has provided development assistance to Indonesia by stating that this "does not address why it considers that technical and financial support helping Indonesia to meet its NDC is not an available less trade-restrictive measure".[580] Indonesia responds to the European Union's mention of the smallholder pathway by observing that this "bears no connection to whether it is impractical"[581] to adopt this alternative measure, and by reiterating its arguments against the restrictive definition of "smallholders" in the Delegated Regulation.

7.395. The European Union responds[582] by stating that it has offered development assistance to Indonesia which has been used "to deliver sustainable growth and address global challenges" and mentions the smallholder pathway low ILUC-risk criteria. The European Union argues that in essence, Indonesia asks the European Union to pay Indonesia to help mitigate the environmental impacts of palm oil production rather than to seek to avoid further stimulation of demand for that feedstock in the European Union. The European Union observes that Indonesia does not make clear how much the European Union should pay, nor what type of technical support it would require from the European Union, making this alternative measure so general and undefined that the European Union struggles to understand how such an alternative could contribute to the European Union's objectives. In any event, the European Union emphasizes that it already supports initiatives in developing countries, including in Indonesia, to increase sustainability[583], and therefore Indonesia's alternative is "not an alternative but at best a complementary measure".[584]

7.396. The Panel observes that Indonesia's third proposed alternative measure i.e. offering technical and financial support to assist Indonesia in its efforts to preserve forests, may be understood as being indirectly related to the specific objective pursued by the 7% maximum share and the high ILUC-risk cap and phase-out. The Panel accepts that insofar as measures are in place

[579] Indonesia's first written submission, para. 664; second written submission, paras. 856-858; and opening statement at the second meeting of the Panel, paras. 86-89.

[580] Indonesia's second written submission, para. 857.

[581] Indonesia's second written submission, para. 858.

[582] European Union's first written submission, paras. 864-866; second written submission, paras. 304-308; and opening statement at the second meeting of the Panel, paras. 113-123.

[583] The European Union states that "this cooperation portfolio is worth 500 million euros in the past 10 years, while 100 million euros are dedicated to ongoing projects, and special assistance is given for sustainable economic development and climate change/environment. This ongoing financial support comprises RESBOUND (Responsible & Sustainable Business in Indonesia Palm Oil Plantation) (EUR 576 000), ECHO Green (EUR 950 000), support to FLEGT (EUR 1 million), Climate Resilient and Inclusive Cities (EUR 3 million), ASEAN Sustainable Use of Peatland and Haze Mitigation (EUR 5 million) and marine biodiversity and fisheries in the Coral Triangle (EUR 10 million)." (European Union's opening statement at the second meeting of the Panel, para. 113.) The European Union elaborates on this at paras 114-121 of its opening statement at the second meeting of the Panel.

[584] European Union's second written submission, para. 305.

to protect against deforestation, this could potentially contribute to limiting the risk of *ILUC*-related GHG emissions associated with crop-based biofuels.

7.397. However, leaving aside the fact that the European Union apparently already offers technical and financial support to assist Indonesia in its efforts to preserve forests, such a measure would not negate or render redundant or immaterial the contribution that the 7% maximum share and the high ILUC-risk cap and phase-out make to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The reason is that the risk of ILUC-related GHG emissions associated with crop-based biofuels can occur anywhere in the world. This would therefore appear to be a complementary measure, not a genuine alternative to the measures at issue.

Fourth proposed alternative: tax meat and dairy products to drive down global feed demand

7.398. Indonesia argues[585] that the European Union could tax meat and dairy products to drive down global feed demand. Indonesia references a study which found that imposing a tax on meat and dairy products had "larger effects on land use and food markets than biofuel policies".[586] Indonesia explains that since the ILUC associated with biofuel policies is driven by food and feed demand, reducing food and feed demand through different policy options, such as taxes to drive down global feed demand, would have an equivalent effect to preventing alleged ILUC GHG emissions. Indonesia submits that the European Union's counterarguments misrepresent the study, and that the impact of meat and dairy consumption is well-known – it is the impact of changes in the demand for those products on agricultural markets and global land use that is less studied. The study notes that a tax on meat and dairy consumption "in industrialised countries causes global consumption of animal products to decline by 6-33%", and thus concludes that such a tax "has a stronger impact on land use change than biofuel policies".

7.399. The European Union responds[587] by questioning whether this measure would be less trade-restrictive than the measures at issue[588], and states that Indonesia is "trying to impose regulatory choices on the European Union, with no good reason".[589] It argues that the study relied upon by Indonesia does not provide an adequate scientific foundation for Indonesia's claims, because it acknowledges that the impacts of meat and dairy consumption are not as well studied as the impacts of biofuels and because it indicates that a tax on meat and dairy would cause higher consumption by consumers of fossil fuels (and for that reason could never be deemed to make an equivalent contribution to the objective as the measure at issue).[590] Furthermore, the European Union argues that Indonesia's proposal "does not account for the measures that are being introduced in the context of the EU's agricultural policy, including the 'farm to fork' strategy which are also intended to further the objectives of climate change mitigation and decarbonisation of the economy".[591]

7.400. The Panel observes that Indonesia's fourth proposed alternative measure i.e. taxing meat and dairy products to drive down global feed demand, may also be understood as being indirectly related to the specific objective pursued by the 7% maximum share and the high ILUC-risk cap and phase-out. The Panel accepts that, as a corollary of the basic economic logic that establishes a reasonable basis for the European Union to conclude that increasing demand for crop-based biofuels increases the risk of ILUC-related GHG emissions, measures that reduced demand for crops for food and feed purposes would mean that such crops would be less likely to be displaced by the cultivation

[585] Indonesia's first written submission, para. 665; second written submission, paras. 859-860; and opening statement at the second meeting of the Panel, paras. 90-92.

[586] R. Delzeit et al., "Land Use Change under Biofuel Policies and a Tax on Meat and Dairy Products: Considering Complexity in Agricultural Production Chains Matters", Sustainability, Vol. 10 (2018), 419, (Exhibit IDN-215).

[587] European Union's first written submission, paras. 867-868; second written submission, paras. 308-312; and opening statement at the second meeting of the Panel, para. 124.

[588] In its first written submission, the European Union stresses that the measures at issue do not constitute a "*de facto* ban" on palm oil-based biofuel. In its second written submission, the European Union adds that "it should not be forgotten that the European Union is also a meat importer and therefore a tax on meat consumed in the EU may very well have consequences for meat producers in other WTO Members. Hence, by proposing this alternative Indonesia recognises that the European Union could take domestic policies that have effect on trade flows and on producers outside the European Union's borders." (European Union's second written submission, para. 312.)

[589] European Union's first written submission, paras. 867.

[590] European Union's second written submission, paras. 310-311.

[591] European Union's second written submission, para. 311.

of crops to produce biofuel. Accordingly, such a measure could potentially contribute to limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.401. However, the Panel does not consider that such a measure would negate or render redundant or immaterial the contribution that the 7% maximum share and the high ILUC-risk cap and phase-out make to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. This is because the European Union can only tax or otherwise disincentivize the consumption of meat and dairy products in its own territory, and it is not within the European Union's control to drive down global feed demand associated with meat and dairy products in the territory of other countries. This alone establishes that such a measure would be a complementary measure, not a genuine alternative to the measures at issue. Furthermore, to tax meat and dairy products with a view to making them too expensive for many poorer members of EU society to consume (with some finding it hard to feed their families) would be problematic from a social policy perspective and would not necessarily be less trade-restrictive than the measures at issue.

Fifth proposed alternative: remove the 7% maximum share or set it at a higher level

7.402. Indonesia argues[592], specifically with respect to the 7% maximum share, that "[i]n relation to the stated objective, the 7 % figure adopted is completely arbitrary and could have been e.g. 10% instead."[593] Indonesia therefore submits that "[a]s a result, because the 7 % limitation does not contribute to the stated objective, nor was designed to do so, it is more trade-restrictive than necessary" and a less trade-restrictive alternative which is reasonably available to the European Union "would therefore be to remove the 7% limitation or set it at a higher level".[594]

7.403. The European Union responds[595] that "it is obvious" that removing the 7% maximum share or setting it to a higher level "cannot be considered to make an equivalent contribution".[596] More specifically, it states that "[t]o the extent that limiting the eligibility of conventional biofuels prevents an increase in EU demand for that type of biofuels and thereby is capable of contributing to the EU objectives, removing that limitation or putting a higher limit by definition could not make an equivalent contribution."[597]

7.404. The Panel has found that the 7% maximum share is apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels because the measures have, by design, a limiting effect on EU demand for and consumption of all crop-based biofuels. The Panel agrees with the European Union that removal of the 7% maximum share, or setting it to a higher level so as to allow greater EU demand for consumption of crop-based biofuels, would make less of a contribution to the measure's objective.

Sixth proposed alternative: replace the 7% maximum share and high ILUC-risk cap and phase-out with "properly designed low ILUC-risk criteria" applied to all food and feed crop-based biofuels

7.405. Indonesia identifies a sixth alternative measure in its second written submission. Indonesia argues[598] that the European Union could replace the 7% maximum share and the high ILUC-risk cap and phase-out with "properly designed low ILUC-risk criteria" applied to all oil crop-based biofuel, and not solely oil palm crop-based biofuel. Indonesia explains that such criteria would (a) be put in place "only following an impact assessment and an assessment of how the criteria outlined in [the] regulation which introduces them might be implemented and operationalised"[599]; (b) provide that feedstock "from *any* yield increase should be considered as low ILUC-risk" because "any yield increase should be sufficient to evade any displacement effects"[600]; (c) dispense with the "financial

[592] Indonesia's first written submission, paras. 666-667; and second written submission, paras. 863-865.
[593] Indonesia's first written submission, para. 666.
[594] Indonesia's first written submission, para. 666.
[595] European Union's first written submission, paras. 869-871; and opening statement at the second meeting of the Panel, paras. 131-132.
[596] European Union's opening statement at the second meeting of the Panel, para. 130.
[597] European Union's opening statement at the second meeting of the Panel, para. 132.
[598] Indonesia's second written submission, paras. 861 and 868; opening statement at the second meeting with the Panel, para. 94; and response to Panel question No. 187, paras. 153-161.
[599] Indonesia's response to Panel question No. 187, para. 155.
[600] Indonesia's response to Panel question No. 187, para. 156.

additionality" requirement[601]; (d) allow additionality measures to be implemented "after requesting the low ILUC-risk certification, because the requirement to apply additionality measures before it is possible to apply for low ILUC-risk certification significantly exacerbates the financial risk"[602]; (e) reflect that oil palm has a high-carbon sequestration value, so that "not only abandoned and severely degraded land should be relevant, but also shrubland and other types of low-carbon stock land" to reflect that planting oil palms on such low-carbon stock land would result in additional carbon absorption and thus negative DLUC emissions[603]; (f) be "designed in such a way that they are able to be met by the operators that require certification" and avoid unduly burdensome evidentiary requirements[604]; (g) expand the 2 hectare definition of "smallholders" in the Delegated Regulation to take into account the standards and differences in countries or areas likely to require certification under those criteria.

7.406. The European Union responds[605] that when introducing this new alternative at the late stage of its second written submission, Indonesia did not provide any information on how the low ILUC-risk criteria could be "properly designed" and that in the absence of any explanation about what this alternative would be *in concreto*, the European Union is not in a position to assess whether it would contribute to the same extent to the EU objectives and would be workable in practice. In its comments on Indonesia's responses to the Panel's second set of questions, where Indonesia elaborates on its proposal, the European Union comments that: (a) the ILUC Directive and RED II, which introduced the concept of low ILUC-risk fuels, were both subject to an impact assessment; (b) additionality measures must be implemented before low ILUC-risk certification can be granted; (c) if the additionality criterion is demonstrated, then abandoned and severely degraded land are not the only types of land that can be used for the production of low ILUC-risk feedstock; (d) while the European Union agrees that the administrative burden should be minimized, reducing the burden must not risk jeopardizing the objective of low ILUC-risk certification; (e) qualifying as a smallholder under the Delegated Regulation is not a precondition for qualifying for low ILUC-risk certification, it is only an option, which allows the application of a simplified procedure.

7.407. The Panel observes that there is a lack of clarity as to what the sixth alternative measure proposed by Indonesia would entail, as it is not clear what it would mean for the European Union to "replace the 7% maximum share and the high ILUC-risk cap and phase-out" with "properly designed low ILUC-risk criteria" applied to all oil crop-based biofuel, and not solely oil palm crop-based biofuel. The low ILUC-risk criteria operate as a limited exemption to the high ILUC-risk cap and phase-out, and such criteria would therefore have no role in the absence of a measure restricting EU demand for and consumption of crop-based biofuels. It is therefore not clear what the implications would be of replacing the 7% maximum share and the high ILUC-risk cap and phase-out with "properly designed low ILUC-risk criteria".

7.408. Insofar as Indonesia is proposing that any consignments determined to meet low ILUC-risk criteria should be allowed to count towards the EU renewable energy targets, without the imposition of any 7% maximum share, then the Panel considers that such a measure would not make an equivalent contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. This is because consignments that satisfy the low ILUC risk criteria currently in place do not pose a zero risk.[606] Moreover, as Indonesia has elaborated in its explanation of this proposed alternative, the "properly designed" low ILUC-risk criteria that it proposes would significantly relax the criteria that are currently in place.

7.409. The Panel notes that Indonesia's sixth proposed alternative measure regarding "properly designed" low ILUC-risk criteria is essentially a reiteration of the arguments that it presents in the context of the "legitimate regulatory distinction" step under Article 2.1. In the Panel's view, Indonesia's argument that the high ILUC-risk formula was designed to preserve access for soybean products, despite the negative environmental effects of production of soybean, is more appropriately

[601] Indonesia's response to Panel question No. 187, para. 157.
[602] Indonesia's response to Panel question No. 187, para. 158.
[603] Indonesia's response to Panel question No. 187, para. 159.
[604] Indonesia's response to Panel question No. 187, para. 160.
[605] European Union's opening statement at the second meeting of the Panel, paras. 125-128.
[606] For example, the strict financial additionality requirements in the form of the financial attractiveness or barriers test or the yield being obtained from abandoned or heavily degraded land, do not apply to small farm holders. As a result, consignments certified as low ILUC risk through the smallholder pathway arguably pose some degree of ILUC risk.

addressed together with other aspects of the design and operation of the measure as part of the "legitimate regulatory distinction" step of the analysis under Article 2.1.

Seventh proposed alternative: label fuel as ILUC-risk when sold to consumers purchasing fuel to drive their cars

7.410. Indonesia identifies a seventh alternative measure in its second written submission. Indonesia argues[607] that another less trade-restrictive alternative measure could consist of labelling fuel as ILUC risk when sold to consumers purchasing fuel to drive their cars. Indonesia notes that there is currently no such labelling requirement, and that this would be less trade-restrictive than restricting or even eliminating the use of oil crop-based biofuel, or more specifically oil palm crop-based biofuel. Indonesia further argues that a labelling measure would enable EU consumers to choose, based on their moral values, what (bio)fuel to purchase, provided they understand the meaning of ILUC and ILUC-related GHG emissions.

7.411. The European Union responds[608] that labelling would not be less trade-restrictive or capable of making an equivalent contribution. The European Union considers that the majority of EU consumers would be probably guided by their moral concerns and would not buy biofuels which contribute to climate breakdown and biodiversity collapse, and from that perspective labelling would not be less trade-restrictive. However, there may still be certain consumers who would simply prefer the cheapest price and not care about other considerations. Therefore, the measure would not be able to make the same or a similar contribution. The European Union argues that it "is precisely in such circumstances that a regulatory authority has the possibility to intervene, so that the measure at issue is making the desired contribution to the objectives sought".[609]

7.412. The Panel does not consider that a labelling measure predicated on EU consumers understanding what ILUC is, and what ILUC-related GHG emissions are, is capable of constituting a less trade-restrictive measure that would make an equivalent contribution to the objective pursued by the measures at issue. It is highly uncertain that a labelling measure that relied on consumers understanding the concept of ILUC-related GHG emissions would be effective in achieving its objective. To the extent that it was effective, it is not clear how it would be less trade-restrictive. Moreover, Indonesia has offered no indication of how a labelling measure would work at the point of purchase in the case of biofuels.

Eighth proposed alternative: introduce a certification requirement for all major food and feed crops addressing DLUC-related GHG emissions

7.413. In its opening statement at the second meeting, Indonesia identified an eighth alternative measure.[610] Indonesia argues[611] that the European Union could introduce "a certification requirement for all major (imported and domestically produced) food and feed crops showing that those products comply with sustainability criteria, such as those laid down in Article 29 of RED II or well-recognised voluntary certification schemes such as those of the ISCC as well as recognised domestic schemes in third countries, regardless of the end use of these crops".[612] Indonesia argues that such a certification scheme "could ensure that no products are consumed in the European Union that result in DLUC and thus DLUC GHG emissions" and "[t]here would be no further need for the measures at issue."[613] Indonesia adds that "unlike ILUC GHG emissions, DLUC GHG emissions are measurable and can be included in an LCA analysis" and therefore "this alternative measure could enable the European Union to have more certainty that its measure would address the urgent risks on which it relies in these proceedings whilst acting also in accordance with international

[607] Indonesia's second written submission, para. 862; and opening statement at the second meeting with the Panel, para. 95.
[608] European Union's opening statement at the second meeting of the Panel, paras. 129-130.
[609] European Union's opening statement at the second meeting of the Panel, para. 130.
[610] There appears to be considerable overlap between the substance of this alternative measure and Indonesia's second alternative measure. However, Indonesia appears to treat this measure as a separate alternative measure and lists it as such in the Integrated Executive Summary of its arguments. In commenting on this measure, the European Union does not raise any issue about its relationship to the second alternative measure. The Panel therefore addresses it as a separate alternative measure.
[611] Indonesia's opening statement at the second meeting of the Panel, paras. 96-102; and comments on the European Union's response to Panel question No. 188, paras. 404-410.
[612] Indonesia's opening statement at the second meeting of the Panel, para. 97.
[613] Indonesia's opening statement at the second meeting of the Panel, para. 99.

standards."[614] Indonesia reiterates that ILUC GHG emissions are DLUC GHG emissions of other agricultural commodities. Indonesia adds that the European Union cannot argue that such a scheme is not reasonably available given that this type of measure is similar to a proposed regulation to reduce the environmental and climate footprint of the EU food system published by the Commission in 2021 (the Deforestation Proposal) and is on the agenda of the Food and Agriculture Organization of the United Nations (FAO). It adds that such a measure need not take the form of a ban or have more trade-restrictive consequences.[615]

7.414. The European Union responds[616] that Indonesia's proposed alternative measure "addresses DLUC (Article 29 RED II) and not ILUC (Article 26 RED II)" and that "any regulatory approach has to be taken step by step, not placing an excessive burden on the regulatory authority".[617] The European Union then argues that Indonesia, by referring to the Deforestation Proposal, proposes the adoption of a measure the European Union "is already elaborating and which it considers to be complementary" to the measures it has in place (and will further develop) to pursue its objectives.[618] It thus considers that the measure is "manifestly not an alternative" also because the Deforestation Proposal intends to make sure that demand existing independently of any EU policy does not contribute to deforestation[619], in contrast to the measures concerning EU demand for biofuels. Finally, the European Union complains that Indonesia does not specify what would be the consequence for those products that do not meet the sustainability criteria and suggests that the European Union cannot assess the trade-restrictiveness of the measure.[620]

7.415. The Panel observes that there is considerable overlap between the substance of this alternative measure and Indonesia's second alternative measure. Assuming that it is meant to be considered as a separate alternative measure, the Panel considers that the considerations and conclusions reached in respect of the second alternative measure extend *mutatis mutandis* to the eighth alternative measure proposed by Indonesia.

7.1.2.3.6.3 Conclusion on the proposed alternative measures

7.416. The Panel finds that none of the alternative measures put forward by Indonesia demonstrate that the 7% maximum share and the high ILUC-risk cap and phase-out are more trade-restrictive than necessary to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.1.2.3.7 Conclusion on Article 2.2

7.417. The Panel therefore concludes that Indonesia has failed to establish that the 7% maximum share and the high ILUC-risk cap and phase-out are inconsistent with the obligation in Article 2.2 of the TBT Agreement to ensure that technical regulations are not more trade-restrictive than necessary to fulfil a legitimate objective.

7.418. One panelist has reached a different conclusion, as set out in section 7.3 of this Report.

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[614] Indonesia's opening statement at the second meeting of the Panel, para. 101.

[615] According to Indonesia, "it is clear from Indonesia's proposal in its opening statement at the second substantive meeting that the consequence of not meeting the sustainability criteria would be a lack of certification. There is no need (and Indonesia did not suggest) to ban non-certified products. Moreover, where the measure is combined with a corresponding labelling requirement, for example, the certification would allow access to the label, but non-certified products could still be placed on the market. If there is no labelling requirement, certification may be obtained for certain products without a ban on placing non-certified products on the market, enabling operators to make informed decisions when incorporating relevant products." (Indonesia's comments on the European Union's response to Panel question No. 188, para. 409.)

[616] European Union's response to Panel question No. 188, paras. 517-521.

[617] European Union's response to Panel question No. 188, paras. 517-518.

[618] European Union's response to Panel question No. 188, para. 519.

[619] European Union's response to Panel question No. 188, para. 520.

[620] European Union's response to Panel question No. 188, para. 520.

7.1.2.4 Article 2.1 - Non-discrimination

7.1.2.4.1 Introduction

7.419. The Panel now turns to the claim under Article 2.1 of the TBT Agreement. The Panel addresses this claim in light of its findings under Articles 2.2 and 2.4, for reasons already set out in the Panel's discussion of its order of analysis.

7.420. Indonesia submits[621] that the European Union violates the national treatment and the MFN obligations under Article 2.1 because the high ILUC-risk cap and phase-out discriminates between oil palm crop-based biofuel from Indonesia and like oil crop-based biofuel of EU origin, as well as among like oil crop-based biofuels of different foreign origin. More specifically, Indonesia claims that the high ILUC-risk cap and phase-out limits and eventually excludes the eligibility of palm oil-based biofuel to count towards EU renewable energy targets, while allowing biofuel made from rapeseed oil and soybean oil to count towards these targets within the 7% maximum share. Indonesia argues that the detrimental impact on palm oil-based biofuel does not stem from a legitimate regulatory distinction.

7.421. The European Union submits[622] that the challenged measure does not discriminate against imported products[623] and that any difference in treatment between products stems exclusively from a legitimate regulatory distinction. More specifically, the European Union contests that palm oil-, rapeseed oil- and soybean oil-based biofuels are like products or that the measure adversely affects the competitive opportunities for palm oil-based biofuel on the EU market. The European Union adds that, in any event, any detrimental impact on palm oil-based biofuel stems exclusively from a legitimate regulatory distinction based on the risk of ILUC-related GHG emissions associated with the production of palm oil.

7.1.2.4.2 Legal standard

7.422. Article 2.1 sets forth the obligation that:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

7.423. Article 2.1 has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to these prior cases.

7.424. According to the text of Article 2.1, it must be established in respect of a technical regulation that:

a. the imported products are like domestic products and/or products originating in other countries; and

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[621] Indonesia's first written submission, paras. 467-558; opening statement at the first meeting of the Panel, paras. 38-73; responses to the Panel's first set of questions, paras. 103-143 and 146-159; second written submission, paras. 538-658; responses to the Panel's second set of questions, paras. 68-86 and 99-100; and comments on the European Union's responses to the Panel's second set of questions, paras. 299-308 and 329-350.

[622] European Union's first written submission, paras. 508-769; opening statement at the first meeting of the Panel, paras. 26-42; responses to the Panel's first set of questions, paras. 215-287, 289-314 and 318-319; second written submission, paras. 314-365; opening statement at the second meeting of the Panel, paras. 38-56; responses to the Panel's second set of questions, paras. 349-368 and 390-403; and comments on Indonesia's responses to the Panel's second set of questions, paras. 104-112.

[623] In its submissions, the European Union stresses that, for purposes of the Panel's assessment of whether the measure discriminates against imported products, the Panel must compare the group of imported products from Indonesia against the group of domestic like products and/or other origin like products. (See e.g. European Union's first written submission, para. 511.)

b. the treatment accorded to imported products is less favourable than accorded to like domestic products and like products from other countries.[624]

7.425. Regarding the last element of this legal test, a panel considering a claim under Article 2.1 should seek to ascertain "whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products or like products originating in any other country".[625] However, a finding of a detrimental impact alone is not dispositive of less favourable treatment under Article 2.1. Instead, when assessing a claim under this provision a panel must further analyse whether the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction.[626]

7.426. As a general matter, the parties do not contest the legal standard developed under Article 2.1.[627] In the absence of any disagreement between the parties, the Panel proceeds on the same understanding of the applicable legal standard.

7.427. The Panel will therefore elaborate further on the elements of the legal standard as necessary in the course of its assessment of the issues in dispute.

7.1.2.4.3 Like products

7.428. Indonesia submits that the high ILUC-risk cap and phase-out discriminates against palm oil-based biofuel, which is like other oil crop-based biofuels, in particular those made from rapeseed oil and soybean oil.[628] Indonesia argues that all three types of oil crop-based biofuels share the same or similar basic physical characteristics and end-uses, and that this similarity is also reflected in consumer tastes and habits as well as in the tariff classification.[629]

7.429. The European Union contends that Indonesia has failed to properly identify the universe of like products by unduly limiting the scope of the likeness analysis to palm oil-, rapeseed oil- and soybean oil-based biofuels.[630] The European Union further contests that palm oil-based biofuel is like biofuel made from rapeseed oil or soybean oil due to different physical characteristics, end-uses or consumer tastes and habits.[631] The European Union also makes an alternative argument that if the Panel were to find rapeseed oil- and soybean oil-based biofuels to be like palm oil-based biofuel, then other biofuels made from sunflower oil, waste material and animal fat would also be like products.[632]

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[624] Appellate Body Reports, *US – Clove Cigarettes*, para. 87; *US – COOL*, para. 267; and *US – Tuna II (Mexico)*, para. 202.

[625] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 215; and *US – Clove Cigarettes*, para. 180.

[626] Appellate Body Reports, *US – Clove Cigarettes*, para. 182; *US – Tuna II (Mexico)*, para. 215; *US – COOL*, para. 271; and *EC – Seal Products*, para. 5.311.

[627] Indonesia's response to Panel question No. 46, paras. 103-116; European Union's response to the Panel question No. 46, paras. 215-238. In its third-party submission, the United States expresses the view that the legal standard developed under Article 2.1, and in particular the requirement that any detrimental impact on imported products "stem exclusively from" a legitimate regulatory distinction, has no basis in the text of the TBT Agreement and significantly narrows the scope of regulatory action permitted under the Agreement. In its view, a measure is not inconsistent with Article 2.1 or Article III:4 if the detrimental impact experienced by imports is explained by factors unrelated to the foreign origin of the product. (United States' third-party submission, paras. 11-20).

[628] Indonesia's first written submission, paras. 469 and 471.

[629] Indonesia's first written submission, paras. 483-505; second written submission, paras. 561-579; responses to Panel questions Nos. 48, 50-52, 56-58, 61, 63-65, 68-69, 159-163; and comments on the European Union's responses to Panel questions Nos. 160-161.

[630] European Union's first written submission, paras. 537-544; second written submission, paras. 664-670; responses to Panel question No. 47 and 157; and comments on Indonesia's responses to Panel question No 158.

[631] European Union's first written submission, paras. 545-586; responses to Panel question Nos. 63-68 and 160-161; and comments on Indonesia's response to Panel question, No. 160.

[632] European Union's second written submission, para. 320; and response to Panel question No. 70, para. 319.

7.1.2.4.3.1 Preliminary considerations

7.430. The Panel considers it useful to briefly explain at the outset certain characteristics of biofuels, and related terminology, that are relevant to the analysis that follows. The Panel then turns to the disputed issue of whether, for the purposes of the likeness analysis in this claim, Indonesia has properly identified the "universe of like products".[633] After setting forth these preliminary considerations, the Panel turns to the disputed issue of whether palm oil-, rapeseed oil- and soybean oil-based biofuels are like products.

Characteristics of biofuels

7.431. The general category of oil crop-based biofuels refers to biofuels that are made from vegetable or tropical oils obtained from various food and feed crops, including oil palm, soybean, rapeseed, sunflower, etc.[634] They undergo a process called transesterification, which consists of mixing the fatty acids in oil of vegetable or animal origin with alcohol and a catalyst.[635] Biofuel produced through this method is called biodiesel and has a chemical composition of a fatty acid methyl ester (FAME).[636] Biodiesel (or FAME) made from palm oil is called palm methyl ester (PME); when made from rapeseed oil is called rapeseed methyl ester (RME); and when made from soybean oil is called soybean methyl ester (SBME).[637]

7.432. Biodiesel can also be made from animal fat and waste material, such as used cooking oil.[638] Biodiesel, frequently a mix of various biofuels, is blended with diesel, which is then sold as transport fuel. Biodiesel should be distinguished from bioethanol, which is made from sugar-rich and starch-rich crops through the fermentation process of sugars contained in these plants.[639] Unlike biodiesel, bioethanol is mixed with petrol.

7.433. Oil crops are also used as feedstocks for the production of hydrotreated vegetable oil (HVO) or biomass-to-liquids biofuels (BTL). HVO is produced through the process of hydrogenation, whereby oxygen is separated from the triglyceride of the oil through the use of hydrogen.[640] Unlike biodiesel, the chemical composition of HVO is similar to diesel fuel. As a result, HVO is particularly suitable to replace diesel fuel and it is sometimes referred to as "renewable diesel" or "green diesel".[641] In order to produce BTL, biomass is converted to syngas through decomposition and gasification, which is then catalytically converted into alkanes through the Fischer-Tropsch synthesis.[642]

Identification of the universe of like products

7.434. Indonesia's claim under Article 2.1 concerns the treatment of imported palm oil-based biofuel as compared with the treatment of like rapeseed oil- and soybean oil-based biofuel of EU or foreign origin. Although Indonesia refers in its submissions in general terms to "oil crop-based biofuels", it confirms that the focus of its claim is the treatment of PME, as compared to RME and SBME.[643]

7.435. The European Union takes issue with Indonesia's identification of the universe of like products. According to the European Union, Indonesia has unduly limited the likeness analysis to a

[633] The Panel's finding in this regard will also be relevant for the assessment of other claims of discrimination made by Indonesia, where the European Union raises the same issue.
[634] UFOP Global Market Supply 2019/2020, (Exhibit IDN-11), p. 27.
[635] European Technology and Innovation Platform, "Transesterification to biodiesel", (Exhibit IDN-14), p. 2. Feedstocks for the production of biodiesel include not only vegetable oils, but also other feedstocks of organic origin, such as used cooking oil (UCO) or animal fat.
[636] This is the case if methanol is used as the catalyst. European Technology and Innovation Platform, "Transesterification to biodiesel", (Exhibit IDN-14), p. 2.
[637] Soybean methyl ester oil is also sometimes abbreviated as "SME". In this dispute, the Panel uses the term SBME to avoid confusion with sunflower methyl ester.
[638] European Technology and Innovation Platform, "Transesterification to biodiesel", (Exhibit IDN-14), p. 2.
[639] Refueling the Future, "Biofuels and Bioenergy - The First Generation", (Exhibit IDN-15).
[640] TNO Report 2013, (Exhibit EU-34), p. 36.
[641] TNO Report 2013, (Exhibit EU-34), p. 36.
[642] TNO Report 2013, (Exhibit EU-34), p. 36.
[643] Indonesia's responses to Panel question Nos. 48, para. 125 and 162, para. 78.

"subset of the biodiesels produced from food and feed crops", and makes a methodological error that affects all of its claims based on likeness.[644] Relying on the Appellate Body's ruling in *US – Clove Cigarettes*, the European Union submits that a proper likeness analysis should involve the "universe" of like products, going beyond the products identified by Indonesia.[645] This universe is determined, based on the competitive relationship between and among products and extends beyond palm oil-, rapeseed oil- and soybean oil-based biofuels.[646] According to the European Union, Indonesia fails to explain the exclusion from the likeness analysis of a number of products, such as HVO and biofuels made from certain other vegetable and tropical oils, animal fat and waste material.[647] The European Union submits that comparing the treatment of only certain selected like products distorts the outcome of the analysis by failing to reflect the measure's overall impact on like products imported from Indonesia and like products of EU and foreign origin.[648] In this context, the European Union points out that palm oil-based HVO represents up to 10% of EU-produced biodiesel.[649]

7.436. Indonesia rejects the European Union's argument that it has incorrectly identified the like products to be compared.[650] Although Indonesia agrees with the European Union that the "universe of like products" is determined by the relevant market, it contends that this market is delineated by the EU's regulatory framework and in particular the measures at issue.[651] In addition, Indonesia contests that HVO is like PME, SBME and RME due to differences in physical properties, end uses and consumers' preferences, which in Indonesia's view is reflected in a different tariff classification.[652]

7.437. The Panel considers that a complainant has a degree of leeway in how it frames its claim under Article 2.1, including with respect to the identification of the imported and domestic products to compare. However, this does not mean that a complainant's choice of products to compare for the purposes of a likeness analysis is free of any scrutiny. It cannot be excluded that in particular factual circumstances a complainant might identify only an artificially defined subset of like products to compare in a manner that could distort the picture of the adverse impact of the measure on the groups of like products as it has defined them. This seems to be the concern that was recognized by the Appellate Body in *US – Clove Cigarettes*, which the European Union relies on[653], when stating that "a panel is not bound by its terms of reference to limit its analysis to those products identified by the complaining Member".[654] Accordingly, a panel must be able to look beyond the like products identified by the complainant to determine which domestic products and products of foreign origin are in a sufficiently close competitive relationship with the products imported from the complaining Member to be considered like.[655]

7.438. However, the Panel does not consider that Indonesia's identification of the products to compare for the purposes of its claim under Article 2.1 is geared towards artificially skewing the outcome of the assessment. It is uncontested by the parties that the European Union's imports of biofuel from Indonesia consists exclusively of oil palm crop-based biofuel, and more specifically PME.[656] Nor do the parties contest that the European Union produces and imports from other countries biofuel made from rapeseed oil, soybean oil and palm oil.[657] Under these circumstances, and especially given that Indonesia does not produce on a commercial scale biofuel made from other feedstocks than palm oil, it is not clear how including biofuels made from other feedstocks than palm

[644] European Union's first written submission, para. 538.
[645] European Union's first written submission, para. 667; and response to Panel question No. 47, para. 239 (qutoing Appellate Body Report, *US – Clove Cigarettes*, paras. 191-192).
[646] European Union's second written submission, paras. 317 and 320; and responses to Panel question No. 47, para. 241 and No. 50, paras. 255-259.
[647] European Union's second written submission, para. 319.
[648] European Union's first written submission, para. 668; and second written submission, paras. 323-327.
[649] European Union's opening statement at the first meeting of the Panel, paras. 44-45.
[650] Indonesia's second written submission, para. 548; and response to Panel question No. 47, para. 121.
[651] Indonesia's second written submission, para. 549; and response to Panel question No. 50, para. 129.
[652] Indonesia's response to Panel question No. 163, and comment on the European Union's response to Panel question No. 163.
[653] Appellate Body Report, *US – Clove Cigarettes*, paras. 191-194.
[654] Appellate Body Report, *US – Clove Cigarettes*, para. 191.
[655] Appellate Body Report, *US – Clove Cigarettes*, para. 191.
[656] Indonesia's response to Panel question No. 61, para. 147; European Union's second written submission, para. 1179; and response to Panel question No. 61, para. 296.
[657] Indonesia's response to Panel question No. 52, paras. 133-135; European Union's first written submission, para. 1179; and response to Panel question No. 52, paras. 264-266.

oil, rapeseed oil and soybean oil in the assessment of less favourable treatment would artificially skew the outcome of the assessment.[658]

7.439. The Panel further considers inapposite the European Union's reliance on the Appellate Body report in *US – Tuna II (Article 21.5 – Mexico)*, which, in the European Union's view, stands for the proposition that a likeness analysis must comprise the "universe of like products".[659] In that dispute, the Appellate Body faulted the panel not for a failure to assess whether all products that are potentially in a competitive relationship are like, but for limiting the comparison of the treatment accorded by the measure to a subset of the products the panel found to be like.[660] The Appellate Body's findings thus concern a different type of situation and do not support the European Union's contention that a complainant is obliged, as a general matter, to identify the "universe of like products".

7.440. The Panel notes that the European Union argues that, if the Panel were to find rapeseed oil- and soybean oil-based biofuel to be like palm oil-based biofuel, then other biofuels made from sunflower oil, waste material and animal fat would also be like products.[661] However, the Panel considers that the European Union has not substantiated this contention with sufficient arguments or evidence. The European Union refers in general terms to certain characteristics of HVO, relies on data showing an increase in the use of waste material and animal fat as biofuel feedstock to argue that they compete with PME, SBME and RME, submits findings of a competitive relationship between FAME and HVO by certain regulatory agencies, and cites a research paper discussing physical properties of FAME biofuel made from palm oil, rapeseed oil, soybean oil and sunflower oil.[662] Indonesia, for its part, maintains that the European Union has failed to demonstrate that FAME and HVO are like products and that, they are not interchangeable and not like.[663] In the Panel's view, the adduced evidence and arguments are insufficient to show *prima facie* that FAME and HVO are "like products". In particular, the European Union seems to be essentially asking the Panel to accept as its own conclusions of certain governmental agencies regarding the existence (and not the extent) of a competitive relationship between FAME and HVO made in different contexts. Other than that, however, the European Union fails to seriously engage in a discussion on whether any of these products is like palm oil-based biofuel, including on the basis of evidence relating to the four "likeness criteria".[664]

7.441. The Panel concludes that for the purposes of its claim under Article 2.1, Indonesia may limit the scope of its "like products" demonstration to a comparison of FAME biofuels made from rapeseed oil and soybean oil with palm oil-based biofuel.

7.1.2.4.3.2 The likeness analysis

7.442. The parties agree that similarly to Articles I:1 and III:4, the likeness analysis under Article 2.1 entails a determination of the "nature and extent of a competitive relationship between and

[658] The Appellate Body arrived at a similar conclusion in *US – Clove Cigarettes* based on the factual circumstances established by the panel. (Appellate Body Report, *US – Clove Cigarettes*, para. 200.)

[659] European Union's second written submission, paras. 316-328; and response to Panel question No. 50, paras. 256-260.

[660] Although, the panel found that US tuna products and tuna products originating in other countries are like, the panel considered the impact of the measure only on Mexican tuna products made from tuna caught through other methods than setting on dolphins with the impact of the measure on US or other origin tuna products made from tuna caught through other methods than setting on dolphins. (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.70.)

[661] European Union's second written submission, para. 320.

[662] European Union's second written submission, paras. 321-323; and responses to Panel question No. 70, para. 319, and No. 163, para. 366. In particular, the European Union references findings in a merger decision and a trade defence measure that HVO and FAME are interchangeable, refers to a US government report finding that FAME faced strong competition from HVO.

[663] Indonesia's response to Panel question No. 163, paras. 83-86; Indonesia's comments on the European Union's responses to the Panel question No. 163, paras. 309-314.

[664] The Panel notes in this regard the European Union's statement that "[t]here are indications that FAME and HVO have certain differences with regard to price and blending limitations". European Union's first written submission, para. 541.

among products".[665] Both parties also rely in their submissions on four criteria relevant for the assessment of like products:

a. physical properties of the products;

b. the extent to which the products can serve the same or similar end-uses;

c. consumers' perception of the products as alternatives; and

d. the tariff classification of the products.[666]

7.443. Indeed, when called upon to assess whether products are like in the context of non-discrimination obligations, panels and the Appellate Body have frequently relied on the above-listed four criteria developed in the Report of the Working Party on Border Tax Adjustments.[667] They have done so when considering claims under Articles I:1 and III of the GATT 1994, and also when considering claims under Article 2.1 of the TBT Agreement.[668]

7.444. The Panel will follow the same general approach, bearing in mind that the notion of "like products" may vary depending on the specific obligation at issue[669] and that the four likeness criteria are neither "treaty-mandated" nor a "closed list of criteria" for determining the legal characterisation of products.[670] The Panel's determination whether products are like thus has to be based on all of the pertinent evidence relating to each of the four criteria, none of which is determinative for the Panel's conclusion.[671] The Panel should consider them in a holistic manner, while remaining mindful that:

> In many cases, the evidence will give conflicting indications, possibly within each of the four criteria. For instance, there may be some evidence of similar physical properties and some evidence of differing physical properties. Or the physical properties may differ completely, yet there may be strong evidence of similar end-uses and a high degree of substitutability of the products from the perspective of the consumer.[672]

7.445. The overarching question is thus whether the degree of competition between the products is sufficiently close to regard them as like. The Appellate Body recognized in this regard that "[t]here is a spectrum of degrees of "competitiveness" or "substitutability" of products in the marketplace, and that it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word "like" in Article III:4 of the GATT 1994 falls".[673] The Appellate Body also found that "Article 2.1 requires the panel to identify the domestic products that stand in a sufficiently close competitive relationship with the products imported from the complaining Member to be considered like products within the meaning of that provision".[674]

7.446. Having recalled the applicable legal principles that will guide its analysis, the Panel turns to the analysis of various aspects of the competitive relationship between palm oil-based biofuel and rapeseed oil- and soybean oil-based biofuel.

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[665] Indonesia's first written submission, para. 472 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 120). European Union first written submission, paras. 521-526.

[666] Indonesia's first written submission, para. 473 (referring to Appellate Body Report, *EC – Asbestos*, para. 101). European Union first written submission, para. 551.

[667] Appellate Body Report, *EC – Asbestos*, para. 85; Panel Report, *US – Clove Cigarettes*, para. 7.121.

[668] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.281.

[669] Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 21; *EC – Asbestos*, para. 102; and Panel Report, *US – Clove Cigarettes*, para. 7.122.

[670] Appellate Body Report, *EC – Asbestos*, para. 101.

[671] Appellate Body Report, *EC – Asbestos*, paras. 101-103. See also Ecuador's third-party submission, pp. 12-13.

[672] Appellate Body Report, *EC – Asbestos*, para. 120.

[673] Appellate Body Report, *EC – Asbestos*, para. 99.

[674] Appellate Body Report, *US – Clove Cigarettes*, para. 191.

Physical properties

7.447. Indonesia submits that PME, RME and SBME share a number of similar physical characteristics and have the same chemical structure of FAME.[675] Indonesia points out that all three types of biofuels have similar density, viscosity and flash point, which are the properties relevant to their functioning as fuel.[676] The European Union argues that the characteristics relevant to assessing whether palm oil-based biofuel, rapeseed oil-based biofuel and soybean oil-based biofuel are like include the cold-filter plugging point (CFPP), the cetane number and the iodine value.[677] The European Union argues that the differences in CFPP are not minimal, affect the degree of competition that exists between these products, and Indonesia has failed to appreciate to what extent SME, PME and RME are substitutable in general.[678]

7.448. The Panel observes that biodiesel, or FAME, is characterized by the basic chemical composition of monoalkyl esters of long-chain fatty acids derived from vegetable oils or animal fats.[679] The exact chemical composition of this type of biofuel is dependent on the fatty acid composition of the feedstock and determines some of the fuel's properties.[680] However, the fact that the three biodiesel fuels are made from different feedstocks could only be relevant to the Panel's analysis insofar as it affects the competitive relationship between the final products.[681]

7.449. It is uncontested between the parties that PME, RME and SBME share the basic chemical composition of FAME. Where the parties' views differ is the significance of the differences in certain specific properties of the three biofuels. For the purposes of addressing these arguments, Table 3 provides an overview of the various relevant biofuels' basic physical and chemical properties, followed by a brief explanation provided by Indonesia.

Table 3: Physical properties of PME, RME and SBME[682]

Properties	PME	RME	SBME
CN	62	56-61	48-56
ΔH (kJ kg-)	37400-38320	37300-37780	39720-40080
CP(°C)	15 ± 1	0 ± 1	1± 1
PP(°C)	-9 ± 1	-9 ± 1	-5 ± 1
CFPP(°C)	12 ± 1	-7 ± 1	-4 ± 1
OSI(h)	10.3± 0.1	6.4 ± 0.1	5.0 ± 0.1
V ($mm^{-2}s^{-1}$)	4.58 ± 0.01	4.42 ± 0.01	4.12 ± 0.01
lub (μm)	126 ± 1	169 ± 1	136 ± 3
AV (mg of KOH g-1)	0.01 ± 0.01	0.01 ± 0.01	0.04 ± 0.01
Iodine value	54	110	134

7.450. Indonesia explains the different characteristics of biodiesel as follows:

> Cetane number (CN) is the ability of fuel to ignite quickly after injection. The higher value the better [ignition] of fuel. This is an important parameter considered during selection of FAMEs for use as biodiesel. CN is included in a fuel quality specification in petroleum diesel standard. CN of oil palm crop-based biodiesel is higher than that of the standard number (>51), because palm oil and palm kernel oil are rich in saturated fatty acids. The [cold flow properties include] three important parameters for low temperature characteristics of biodiesel fuel, namely, CP (cloud point), PP (pour point) and CFPP (cold filter plugging point). At the cloud point (CP), the crystals first become visible as cloud when fuel is cooled under the conditions described by ASTM D2500-09 or ISO 3015:1992. The pour point (PP) is the lowest temperature at which fuel can flow and the amount of wax that crystallizes is sufficient to gel the fuel. Viscosity (V) is one of the most important properties of biodiesel. Viscosity influences the ease of starting

[675] Indonesia's first written submission, paras. 486-487.
[676] Indonesia's second written submission, para. 565; and response to Panel question No. 64, para. 153.
[677] European Union's response to Panel question No. 64, paras. 304-306.
[678] European Union's first written submission, para. 1428.
[679] Moser, "Biodiesel Production, Properties, and Feedstocks", (Exhibit IDN-16), p. 286.
[680] Moser, "Biodiesel Production, Properties, and Feedstocks", (Exhibit IDN-16), p. 287.
[681] Panel Reports, *Philippines – Distilled Spirits*, para. 7.37.
[682] Indonesia's first written submission, para. 487.

> the engine, the spray quality, the size of the particles (drops), the penetration of the injected jet and the quality of the fuel-air mixture combustion. Fuel viscosity has both an upper and a lower limit. Fuel with a too low viscosity provides a very fine spray, the drops having a very low mass and speed. This leads to insufficient penetration and the formation of black smoke specific to combustion in the absence of oxygen (near the injector). A too viscous biodiesel leads to the formation of large drops, which will penetrate the wall opposite to the injector. Lubricity describes the ability of the fuel to reduce the friction between surfaces that are under load. This ability reduces the damage that can be caused by friction in fuel pumps and injectors. Lubricity is an important consideration when using low and ultra-low sulfur fuels. Biodiesel may be used as a lubricity improver. Biodiesel quality can be affected by oxidation during storage (in contact with air) and hydrolytic degradation (in contact with water). The two processes can be characterised by the oxidative stability and hydrolytic stability of the biodiesel. Biodiesel oxidation can occur during storage while awaiting distribution or within the vehicle fuel system itself. The stability of biodiesel can refer to two issues: long-term storage stability or aging and stability at elevated temperatures or pressures as the fuel is recirculated through an engine's fuel system. The iodine value is a measurement of total unsaturation of fatty acids measured in g iodine/100 g of biodiesel sample, when formally adding iodine to the double bonds. Biodiesel with high iodine value is easily oxidized in contact with air.[683]

7.451. Another relevant characteristic of biofuel is its density. Fuel density affects a fuel's quality of combustion and performance, as some properties, such as cetane number, heating value and viscosity are strongly connected to density.[684] The density of PME, RME and SBME is respectively 864.4-870, 880.2 and 872-885 kg/m^3.[685]

7.452. In the Panel's view, it follows from the above overview that a number of physical characteristics of PME, RME and SBME, while not identical, are similar. This includes the properties particularly relevant to the products' nature as a biofuel, such as viscosity, density, and flash point. The Panel notes that the European Union does not explain why properties other than CFPP, cetane number and iodine value would not be relevant to the assessment whether the biofuels at issue are like. Ignoring these similarities, would run counter to the established practice of holistically assessing whether two or more products are like based on the totality of evidence before the Panel.[686] Finally, the Panel will consider the significance of the differences in certain physical properties, such as CFPP, when assessing their impact on end-uses and consumer perceptions of PME, RME and SBME.

End-uses

7.453. Having considered the physical properties of biofuels, the Panel now turns to the main disputed issues pertaining to the second criterion, which is the extent to which the different products can serve the same or similar end-uses.[687]

7.454. The core differences that are the focus of the parties' arguments relate to the cold flow properties, in particular the CFPP, as well as the iodine value and cetane number. Indonesia argues that such differences do not significantly affect the competitive relationship between the three biofuels, especially because they are usually blended together and into diesel fuel.[688] Indonesia adds that it does not need to show that the products are suitable for all consumers or that they actually

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[683] Indonesia's first written submission, fn 625.

[684] I. Barabás and I.-A. Todoruţ, "Biodiesel Quality, Standards and Properties" in G. Montero, Biodiesel – Quality, Emissions and By-Products (IntechOpen, 2011), (Exhibit IDN-187), p. 17.

[685] I. Barabás and I.-A. Todoruţ, "Biodiesel Quality, Standards and Properties" in G. Montero, Biodiesel – Quality, Emissions and By-Products (IntechOpen, 2011), (Exhibit IDN-187), p. 16.

[686] Appellate Body Reports, *EC – Asbestos*, para. 114.

[687] The Panel notes that evidence relating to certain aspects of a product could be relevant to more than one "likeness" criterion, and the physical property of a product may "shape and limit" its end-uses (Appellate Body Reports, *US – Clove Cigarettes*, para. 126; and *EC – Asbestos*, para. 102.) To the extent that the physical properties of PME, RME and SBME "shape and limit" their end-uses, the Panel's assessment of the other "likeness" criteria will be of particular relevance for determining the significance of the similarities and differences in the products' physical properties.

[688] Indonesia's first written submission, para. 489; and response to Panel question No. 64, para. 152.

compete in the entire market.[689] The European Union submits that the differences in the characteristics of PME, RME and SBME, especially with regard to cold flow properties, are material and affect their end-uses.[690]

7.455. The Panel notes that the parties do not dispute that PME, RME and SBME are all primarily used as biofuel mixed with diesel transport fuel, in addition to certain other applications.[691] Where the parties disagree is the extent of substitutability between the three types of biofuel.

7.456. The European Union argues that due to a higher CFPP value of PME, its substitutability with RME and SBME is limited, including when blended.[692] The European Union relies in this regard on the EU and EU member States' standards setting out the CFPP requirements for FAME. The European Union points out that the FAME 0 blend with a CFPP of 0°C, identified by Indonesia as the most common biofuel blend on the EU market, can contain no more than 20% of PME.[693] The European Union further submits that the use of PME as biofuel is very low in certain EU member States with colder climates, such as Austria, Denmark or the Czech Republic.[694]

7.457. Indonesia maintains that any differences in cold flow properties could be addressed either through mixing with other biofuels or additives.[695] Indonesia points out in this regard that the European Commission's findings in an anti-dumping investigation into the imports of biodiesel from the United States considered the differences in CFPP to be "minor" and could "easily be compensated either by mixing different types of biodiesel or by using additives".[696]

7.458. The Panel considers that the evidence submitted by the parties confirms that low-temperature operability is an important factor to be considered for the use of biofuel in diesel engines in colder climates.[697] The CFPP is the lowest temperature at which a given volume biodiesel flows through a wire mesh filter.[698] Below that temperature, solid particles crystalize in the fuel and plug the fuel filter, rendering the engine inoperable.[699] As a result, and as argued by the European Union, PME is less commonly used as biofuel in colder climates than RME and SBME and, by implication, not fully substitutable with the latter two products in certain geographical areas.[700] However, in other areas, such as ¨western and southern Europe (including France, Netherlands, Spain, and Italy), PME is more frequently used.[701] The Panel notes in this regard that the measure at issue does not distinguish between different parts of the European Union, but applies uniformly to the entirety of its territory.

[689] Indonesia's first written submission, para. 477; and second written submission, paras. 577-578 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 142 and *Philippines – Distilled Spirits*, para. 220).

[690] European Union's first written submission, paras. 553-555 and 569.

[691] Indonesia's first written submission, para. 491; and response to Panel question No. 159, paras. 72-74. European Union's response to Panel question No. 159, para. 355.

[692] European Union's first written submission, para. 554. Although the European Union makes these arguments in the context of the products' physical properties, the Panel understands that to the extent that they concern the use of biofuels in FAME blends in different countries, they are equally relevant to the products' end-uses.

[693] European Union's first written submission, para. 556; and response to Panel question No. 65, para. 308.

[694] European Union's first written submission, para. 571.

[695] Indonesia's first written submission, paras. 488 and 493; second written submission, paras. 564-567.

[696] Indonesia's first written submission, para. 490 (referring to Commission Regulation (EC) 193/2009, (Exhibit IDN-183)).

[697] Moser, "Influence of Blending Canola, Palm, Soybean, and Sunflower Oil Methyl Esters on Fuel Properties of Biodiesel", (Exhibit IDN-186), p. 4304.

[698] Moser, "Biodiesel Production, Properties, and Feedstocks", (Exhibit IDN-16), p. 301.

[699] Moser, "Influence of Blending Canola, Palm, Soybean, and Sunflower Oil Methyl Esters on Fuel Properties of Biodiesel", (Exhibit IDN-186), p. 4304.

[700] Biofuel supply data reported under the Fuel Quality Directive and submitted by the European Union shows that PME was either not supplied as fuel at all, or supplied in limited quantities, in Austria (3.2% of total FAME), the Czech Republic (0.8% of total FAME) and Denmark (none). (See Austria's reporting under Article 7a of the Fuel Quality Directive for 2019, (Exhibits EU-38, p. 56); Czech Republic's reporting under Article 7a of the Fuel Quality Directive for 2019, (Exhibit EU-39), pp. 56-57; and Denmark's reporting under Article 7a of the Fuel Quality Directive for 2018, (Exhibit EU-40), pp. 56-71.

[701] USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit IDN-30), p. 31.

7.459. In addition the Panel observes that biofuels are commonly used with various additives such as flow improvers enhancing the operability of biofuels and the scope of the degree of substitution.[702] The Panel notes the European Union's argument that blending biofuels or mixing them with additives to obtain fuel suitable for use in transport in certain conditions suggests that they have different properties and qualities.[703] The Panel cannot, however, ignore the fact that PME, RME, and SBME, even if combined with additives, all are used nearly exclusively for transport fuel. Moreover, the Panel notes that in warmer climates, PME, RME and SBME are nearly perfect substitutes and demonstrate a very high degree of competition.

7.460. Regarding the differences in the cetane number, which reflects the fuel's ability to ignite, studies and research papers submitted by the parties show that some quantities of SBME can in fact meet the minimum value prescribed by the EU standard EN 14214.[704] In addition, the cetane number of SBME can be increased through a specific design of the distillation process or the use of so-called cetane boosters.[705]

7.461. As for the iodine value, which relates to fuel's oxidation stability, the evidence relied on by the European Union confirms that SBME does not comply with the iodine value in the EU standard EN 14214 for biodiesel, but notes that "the incentives persist to maximize the use of S[B]ME and PME due to their lower cost".[706] This indicates that PME, RME and SBME compete as biofuels regardless of the differences in the iodine values. The Panel also notes that in the context of a trade remedy investigation, the European Union itself found that iodine values of rapeseed oil and soybean oil (which determine the iodine value of the biofuel) "correlate to some extent".[707]

7.462. Indeed, both PME and SBME have been imported into and produced in the European Union in significant quantities primarily for the use as biofuel.[708] This would not have been the case had there been no or only limited substitution between the three products as a consequence of certain differences in their physical properties. A market research report submitted by the European Union confirms that in 2020 RME, being more expensive, "had difficulties competing with cheaper imported soybean oil methyl ester (S[B]ME) and palm oil methyl ester (PME)" on the EU market.[709] The Panel also notes that a 2021 Statement of the Indonesia's Biofuel Producer Association (APROBI) affirms that PME, RME and SBME compete on the EU biofuel market.[710]

7.463. Furthermore, the Panel notes that both parties rely on the findings concerning the substitutability between PME, RME and SBME made by the European Union in the context of anti-dumping and countervailing duty investigations into the imports of biodiesel from the United States and from Argentina and Indonesia. Indonesia relies on the European Commission's findings that the differences in CFPP values between PME, RME and SBME are minor and do not "play any role in most

[702] Arbeitsgemeinschaft Qualitätsmanagement Biodiesel e.V., "Cold Properties of Biodiesel", (Exhibit IDN-17), pp. 1-2.

[703] Arbeitsgemeinschaft Qualitätsmanagement Biodiesel e.V., "Cold Properties of Biodiesel", (Exhibit IDN-17), pp. 2-3.

[704] Depending on the study, the cetane number of SBME varies between 48-56 and 37-52. (See Moser, "Influence of Blending Canola, Palm, Soybean, and Sunflower Oil Methyl Esters on Fuel Properties of Biodiesel", (Exhibit IDN-186), p. 4303; and K. Azly Zahan and M. Kano, "Biodiesel Production from Palm Oil, Its By-Products, and Mill Effluent: A Review", Energies, Vol. 11 (2018), 2132, (Exhibit IDN-3), p. 9.)

[705] Instruction Nr. 6 of 2017 adopted on 17 June 2017 of the President of the Republic of Indonesia Number 6 of 2017 concerning moratorium of new permits and improvement of governance of primary natural forest and peatland, (Exhibit IDN-146), p. 10.

[706] USDA FAS, "GAIN Biofuels Annual: European Union", 29 June 2020, (Exhibit IDN-12), p. 36.

[707] Commission Regulation (EC) 193/2009, (Exhibit IDN-183), p. 26.

[708] In 2018 and 2019, palm oil was the third most-used feedstock for the production of biodiesel, as distinguished from HVO, in the European Union, following rapeseed oil and UCO. (ETC/CME Eionet Report, Greenhouse gas intensities of road transport fuels in the EU in 2018 - Monitoring under the Fuel Quality Directive, November 2020, (Exhibit EU-134), p. 9; and ETC/CME Eionet Report, Greenhouse gas intensities of transport fuels in the EU in 2019 - Monitoring under the Fuel Quality Directive, October 2021, (Exhibit EU-218), p. 9.) The volume of biodiesel imports to the European Union fluctuated over the years due to trade defence measures imposed by the European Union on the imports of biodiesel from, among other countries, Argentina and Indonesia. It is notable that biodiesel imported from these two countries to the European Union, which is respectively almost exclusively SBME and PME, rapidly gained market share when the trade defence measures were repealed or amended. (Excerpt from the website of Preem, a Swedish fuel company, (Exhibit EU-41).)

[709] USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit EU-219), p. 27.

[710] APROBI, Statement of the Indonesian Industry (APROBI) and Factsheet, 30 June 2021, (Exhibit IDN-346), p. 1.

blends sold in the Community market".[711] The European Union, for its part, refers to the findings concerning price differences resulting from different CFPP levels, as well as the differences in sales volumes of biofuels at the same CFPP level.[712]

7.464. The Panel must base its likeness analysis on the evidence and arguments presented by the parties and should not accord undue weight to findings made by a national investigating authority in the context of adopting anti-dumping and countervailing duty measures. The Panel further notes that the findings at issue were subsequently reviewed by the panel in *EU – Biodiesel (Indonesia)*. Having said this, in the Panel's view the findings of the trade defence investigations relied on by the parties, read in their proper context, confirm that despite certain differences in product characteristics, there is a significant degree of overlap between PME, RME and SBME.[713] The European Union found in these investigations, among other things, that "PME is in competition with biodiesel produced in the Union, which is not just RME but also biodiesel made from other feedstocks".[714]

7.465. The parties also discuss the panel's findings in *EU – Biodiesel (Indonesia)* relating to the above-mentioned determinations of the European Commission in anti-dumping and countervailing duty investigations. Indonesia relies on that panel report for the proposition that PME competes with SBME from Argentina, RME and other biodiesels produced by the EU industry, but the European Union argues that such reliance is misplaced. The European Union submits that the relevant statement that the three biofuels compete is taken out of its context. It is also nuanced, argues the European Union, by a finding that PME was not found to be like a CFPP 0 biodiesel blend and noting the differences in the cetane number or iodine value.[715]

7.466. It is true, as the European Union points out, that in the relevant passage of the report in *EU – Biodiesel (Indonesia)*, the panel merely restates a finding of the investigating authority.[716] The panel then considers aspects of the competitive relationship that the investigating authority failed to address, such as the extent of competition between PME and a CFPP 0 blend.[717] Importantly, these findings concern the existence of price undercutting under Article 3.2 of the Anti-Dumping Agreement and not the determination whether products are like.[718] While it cannot be excluded that such considerations could be relevant to a likeness analysis, they seem to be of limited assistance in the current dispute. First, the quoted passage concerns different products than those subject of the likeness analysis in the case at hand. Second, the Panel has already addressed the role of cold flow properties, and CFPP in particular, in the competitive relationship between PME, RME and SBME

[711] Indonesia's first written submission, para. 490, referring to Commission Regulation (EC) 193/2009, (Exhibit IDN-183).

[712] European Union's first written submission, paras. 564-566 and 576-577 (referring to Council Implementing Regulation (EU) 1194/2013, (Exhibit IDN-25); and Commission Implementing Regulation (EU) 2019/244 of 11 February 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Argentina, OJ 2019 L 40, p. 1, (Exhibit IDN-184). The Panel notes, however, that in the European Union's view, the findings of "likeness" between PME, RME and SBME in EU trade defence instruments were made in a different regulatory context and were limited in scope. European Union's first written submission, paras. 560-566.

[713] Commission Regulation (EC) 193/2009, (Exhibits IDN-183), pp. 26-27; Commission Regulation (EU) No 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, OJ 2013 L 141, p. 6, (Exhibit IDN-24), pp. 8-9; and Council Implementing Regulation (EU) 1194/2013, (Exhibit IDN-25), pp. 3-4.

[714] Council Implementing Regulation (EU) 1194/2013, (Exhibit IDN-25), p. 3.

[715] European Union's first written submission, paras. 580-582. See also Indonesia's first written submission, paras. 499-500; Indonesia's response to Panel question No. 64, para. 152.

[716] Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.154.

[717] The panel found that:

> The fact that the imported and domestic products were considered to be like products does not automatically mean that each of the products included in the basket of imported products is alike in all respects to each of the products included into the basket of domestic products. Nor does the fact that the imported and domestic products were considered to be like products address the particular competitive dynamic that PME may only be used in a blend, and is actually a component of the different blends sold to end users in the EU market. PME might compete with RME to the extent that they both are used to produce a blend. However, this does not mean that PME and blended CFPP 0 biodiesel are in competition with each other.

(Panel Report, *EU – Biodiesel (Indonesia)*, paras. 7.156.)

[718] Panel Report, *EU – Biodiesel (Indonesia)*, paras. 7.149-7.154.

and the findings of the panel in *EU – Biodiesel (Indonesia)* do not undermine the Panel's conclusions in this respect.

7.467. In sum, the Panel is of the view that despite certain differences in physical characteristics, PME, RME and SBME all have the same primary end-use of biofuel mixed with diesel. The Panel notes that the products are not all used in the same degree in colder conditions. However, this does not call into question the fact that they constitute nearly perfect substitutes in warmer climates and that overall, there is a significant overlap in the use of PME, RME and SBME as biofuels.

Consumer perceptions

7.468. Having considered the physical properties of biofuels, and their end-uses, the Panel now turns to the main disputed issues pertaining to the third criterion, which is consumer perception of the products as alternatives.

7.469. The Panel further notes that the determinations made by the EU investigating authority in the above-referenced national proceedings indicate that final consumers are not aware of, or concerned by, the composition of the biofuel blend, if the product meets the required CFPP.[719] This is also the view held by Indonesia.[720] Indonesia further submits that the choices of direct consumers of biofuels, i.e. economic operators that blend them together and/or with diesel, are dictated by the CFPP value and price.[721] The European Union agrees that in the absence of a feedstock labelling requirement, final consumers are not aware of the biofuel content blended with diesel and the purchasing decisions are not reflective of their tastes and habits.[722]

7.470. The Panel considers that the evidence of consumer perceptions relating to the CFPP corroborates its findings regarding the significant degree of overlap in the use of PME, RME and SBME as biofuels. Economic operators involved in blending of biofuels mix PME, RME and SBME with a view to obtaining a blend conforming with the CFPP specifications required by the customer.[723] Consistent with the Panel's findings above, if the specification requires a particularly low CFPP, the amount of PME will admittedly be lower compared to fuel destined for warmer climates. Within the specification, however, PME competes with RME and SBME. The 2021 statement by APROBI affirms that "[w]henever PME is available, it is the first choice of blenders within the order specifications set by oil companies. If PME is not available or not eligible for meeting the renewable energy targets the demand shifts to the next cheapest product, SBME, and then RME".[724]

7.471. The European Union submits that the consumers' tastes and habits must nevertheless be considered due to the widespread public concern with deforestation associated with palm oil production and the impact of such concerns on decisions of fuel suppliers.[725] The European Union posits that a more general concern with products containing or made from palm oil has manifested itself in the food industry and is also relevant to the fuel sector.[726] The European Union argues that there is a latent demand for palm oil-free fuels that the Panel should consider in the determination whether PME is like RME and SBME.[727] According to the European Union, the consumers' preference for palm oil-free fuel is reflected in the decisions by certain EU fuel suppliers to avoid or reduce producing palm oil-based biofuels.[728] In the European Union's view, this shows that if there was a labelling requirement for the composition of biofuels, the latent preferences and tastes of EU consumers would become manifest and indicate palm oil-based biofuel is not like other biofuels.[729]

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[719] Council Implementing Regulation (EU) 1194/2013, (Exhibit IDN-25), p. 15.
[720] Indonesia's first written submission, para. 501.
[721] Indonesia's first written submission, paras. 497-498; response to Panel question No. 68, para. 158.
[722] European Union's first written submission, para. 577.
[723] Council Implementing Regulation (EU) 1194/2013, (Exhibit IDN-25), p. 15.
[724] APROBI, Statement of the Indonesian Industry (APROBI) and Factsheet, 30 June 2021, (Exhibit IDN-346), p. 1.
[725] European Union's first written submission, para. 575; response to Panel question No. 67, para. 312.
[726] European Union's response to Panel question No. 67, para. 312; opening statement at the first meeting of the Panel, paras. 36-38.
[727] European Union's response to Panel question No. 67, para. 313 (quoting Appellate Body Report, *EC – Asbestos*, para. 174).
[728] European Union's response to Panel question No. 67, para. 313; opening statement at the first meeting of the Panel, paras. 39-40.
[729] European Union's first written submission, para. 575.

7.472. The Panel finds unconvincing the evidence produced by the European Union and pertaining to decisions by certain biofuel and fuel producers reducing the use of oil palm crop-based biofuel in their fuel blends.[730] In particular, other than mentioning only in general terms sustainability considerations, the evidence does not elucidate the specific reasons behind such decisions or that they were in fact driven by consumers' preferences.[731]

7.473. Furthermore, the statements by biofuel and fuel producers submitted by the European Union appear to postdate the adoption of certain EU and member State regulatory measures, including those challenged in this dispute. It is therefore unclear whether these statements reflect consumers' preferences or business decisions dictated by a change in the regulatory environment.[732] For example, Repsol's information about replacing palm oil used at its Bilbao refinery with used cooking oil (UCO) should be viewed in the context of the "Spain's climate change bill" debated at the time in the Parliament.[733] In a similar vein, the decision by Total France to switch from production of palm oil-based biofuel to biofuel made from other feedstocks, appears to have been driven by the exclusion of PME from the scope of renewable energy sources for the purposes of the TIRIB.[734]

7.474. In the Panel's view, the European Union thus has failed to substantiate its assertion that consumer preferences against palm oil-based biofuels are of such nature and magnitude that could rebut the findings of a high degree of competition reached so far on the basis of the analysis of the products' physical properties and end-uses.

Tariff classification

7.475. Turning to the tariff classification, Indonesia points out that PME, RME and SBME are all classified under the same six-digit heading.[735] It adds that the EU Combined Nomenclature does not distinguish between biofuels based on the feedstock even at the eight-digit level of tariff classification.[736] In the European Union's view, the classification of PME, RME and SBME under the same heading is not determinative given the evidence of differences between the products.[737] According to the European Union, the lack of detail of its tariff classification undermines Indonesia's claim of likeness.[738]

7.476. The Panel notes that in circumstances where there is a sufficiently detailed tariff classification, the fact that two products are classified under the same tariff subheading can be an indication of product similarity.[739] It is uncontested between the parties that PME, RME and SBME are classified under the same heading six-digit heading 3826.00 "Biodiesel and mixtures thereof, not containing or containing less than 70 % by weight of petroleum oils or oils obtained from bituminous minerals".[740] As explained in the footnote to the heading, the term biodiesel covers "mono-alkyl esters of fatty acids of a kind used as a fuel, derived from animal or vegetable fats and oils whether or not used".[741] It follows that a number of FAME biofuels of organic origin, including

[730] European Union's response to Panel question No. 67, paras. 312-314; and opening statement at the first meeting of the Panel, paras. 35-42.

[731] Excerpt from the website of Preem, a Swedish fuel company, (Exhibits EU-41), p. 1.; Midttun, Knut Myrum Næss, and Proadpran Boonprasurd Piccini "Biofuel Policy and Industrial Transition—A Nordic Perspective" in Energies 2019, 12(14), 2740, (Exhibit EU-42), pp. 5-6; Eni press release of 15 April 2021: "Eni: New Systems Installed at the Venice Biorefinery to Eliminate Palm Oil Entirely", (Exhibit EU-86), p. 1; Press article from Argusmedia of 11 September 2020: "Spain's climate bill threatens biofuel projects: Repsol", (Exhibit EU-87), p. 2; Total's webpage (accessed on 22 April 2021): "GRANDPUITS: A ZERO-CRUDE PLATFORM BY 2024", (Exhibit EU-88), p. 2; Total's webpage (accessed on 22 April 2021): "LA MÈDE: A MULTIPURPOSE FACILITY FOR THE ENERGIES OF TOMORROW" (Exhibit EU-89), p. 2; and Press article of 1 April 2021 from Le Monde "Total condamné à revoir son étude d'impact sur l'utilisation del'huile de palme dans une raffinerie", (Exhibit EU-90).

[732] See Indonesia's response to Panel question No. 106, para. 310.

[733] Press article from Argusmedia of 11 September 2020: "Spain's climate bill threatens biofuel projects: Repsol", (Exhibit EU-87), pp. 2-3.

[734] Press article, 11 January 2019, (Exhibit EU-140).

[735] Indonesia's first written submission, para. 502.

[736] Indonesia's first written submission, paras. 503-504.

[737] European Union's response to Panel question No. 66.

[738] European Union's response to Panel question No. 161, paras. 360-361 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21).

[739] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21.

[740] HS Nomenclature, 2017, Chapter 38, (Exhibit IDN-190), p. 8.

[741] HS Nomenclature, 2017, Chapter 38, (Exhibit IDN-190), p. 2.

those made from animal fat, UCO ad other waste material, as well as blends of different biofuels and with mineral diesel, fall within the scope of this heading.[742] The customs classification of PME, RME and SBME under the same six-digit heading thus is consistent with the indication that they all belong to the category of biodiesel fuels and corroborates the finding that they share certain product characteristics and have the same application. It is not, however, dispositive of the question whether the three products are like.

Conclusion on the likeness of RME, SBME and PME

7.477. As noted above, Article 2.1 requires the panel to identify the domestic products that stand in a sufficiently close competitive relationship with the products imported from the complaining Member to be considered like products within the meaning of that provision.[743] In the Panel's assessment, evidence of such a close competitive relationship has been put forward by the parties in this dispute. The Panel therefore finds that Indonesia has demonstrated that RME and SBME produced in the European Union and/or imported from other countries are like PME imported from Indonesia. As Indonesia refers to these biodiesel fuels as, respectively, rapeseed oil-based biofuel, soybean oil-based biofuel and palm oil-based biofuel, so will the Panel in the remaining sections of this report.

7.1.2.4.4 Detrimental impact on palm oil-based biofuel

7.478. Having determined the groups of like products at issue, the Panel turns to the question whether products imported from Indonesia are accorded less favourable treatment than like products of EU or foreign origin. Considering the nature of the obligation in Article 2.1, panels and the Appellate Body have found its scope to overlap with the non-discrimination obligation in Article III:4 and noted a similar formulation of the two provisions.[744] As such, Article III:4 was found to provide relevant context for the interpretation of Article 2.1.[745]

7.479. In light of these considerations, panels and the Appellate Body have found that establishing less favourable treatment under Article 2.1 involves an assessment of whether the technical regulation "modifies the conditions of competition to the detriment of the group of imported products vis-à-vis the group of domestic products" and/or vis-à-vis the group of imported products originating in other countries.[746] As noted above, the existence of a detrimental impact on imported products is not dispositive of less favourable treatment under Article 2.1. A panel must further analyse whether the detrimental impact stems exclusively from a legitimate regulatory distinction.[747]

7.480. Therefore, the Panel will first determine whether the high ILUC-risk cap and phase-out has a detrimental impact on imported palm oil-based biofuel as compared to the group of like products of EU and/or foreign origin. Should the Panel find the existence of such detrimental impact, it will then assess whether it stems exclusively from a legitimate regulatory distinction.

7.481. The Panel's assessment of whether the measure has a detrimental impact on imported products requires an inquiry into the measure's impact on the equality of competitive opportunities between imported products and like domestic products or like products originating in other countries.[748] In this regard, it is not necessary for the Panel to rely on evidence of actual effects of the measures on trade in the relevant market.[749] Rather, a panel may base its assessment on evidence of the design, structure and expected operation of the measure.[750]

7.482. Indonesia submits that the high ILUC-risk cap and phase-out limits and eventually eliminates the use of biofuel made from palm oil, while rapeseed oil-based biofuel and soybean oil-based biofuel

[742] Indonesia's response to Panel question No. 161, para. 76; European Union's response to Panel question No. 161, para. 360.
[743] Appellate Body Report, *EC – Asbestos*, para. 99.
[744] Appellate Body Reports, *US – Clove Cigarettes*, para. 100; and *EC – Seal Products*, para. 5.122.
[745] Appellate Body Reports, *EC – Seal Products*, para. 5.122.
[746] Appellate Body Reports, *US – Clove Cigarettes*, para. 180; and *US – COOL*, para. 268.
[747] Appellate Body Reports, *US – Clove Cigarettes*, para. 182; *US – Tuna II (Mexico)*, para. 215; *US – COOL*, para. 271; and *EC – Seal Products*, para. 5.311.
[748] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.29.
[749] Appellate Body Reports, *US – COOL*, para. 325; and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.29.
[750] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.15.

enjoy access to the EU biofuel market within the 7% maximum share.[751] Indonesia argues that as a result, there will be little to no demand in the European Union for palm oil-based biofuel.[752] Indonesia submit in this regard that the EU renewable energy targets essentially create the market for biofuels in the European Union.[753]

7.483. The European Union submits that Indonesia has failed to provide sufficient evidence relating to the relevant market, the modification of the competitive opportunities, and that such modification is detrimental to palm oil-based biofuel.[754] More specifically, the European Union contends that limiting the relevant market to the EU biofuel market is overly narrow and is not supported by evidence.[755]

7.484. The European Union further contests that the measures at issue restrict or condition access to the EU market for palm oil-based biofuel.[756] The European Union submits in this regard that Indonesia has not demonstrated that eligibility to contribute to the renewable energy targets should be equated in legal terms to a market access condition.[757] According to the European Union, the renewable energy targets are designed to "promote" the use of all forms of renewable energy, but they do not establish market access conditions. Furthermore, the creation of renewables targets does not guarantee specific, protected competitive opportunities for any specific biofuel. It is the EU member States that may, but are not required to, provide financial support for certain types of biofuels.[758] The European Union thus contests that any detrimental impact can be attributed to the EU measure.

7.485. The European Union refers back to its arguments concerning the scope of like products, arguing that Indonesia has isolated the treatment of certain specific biofuels skewing the analytical approach and that imported and domestically produced palm oil-based biofuel is treated in the same way.[759] In the European Union's view, there is no differentiation in the treatment of imported and domestically produced palm oil-based biofuel.[760] The European Union argues that Indonesia has not demonstrated how a group of imported products has less competitive opportunity than a group of like domestic products.[761]

7.486. The parties' arguments appear to raise a number of distinct albeit related issues, which the Panel will address in turn. The first issue concerns the modification of the conditions of competition on the EU biofuel market. The second issue concerns the question whether the measure equally affects products imported from Indonesia and products of EU or foreign origin. The third issue concerns the attributability of any detrimental impact to the high ILUC-risk cap and phase-out.

7.1.2.4.4.1 Modification of conditions of competition on the biofuel market

7.487. The Panel now turns to the question whether the high ILUC-risk cap and phase-out modifies the conditions of competition in the relevant market to the detriment of products imported from Indonesia. It is uncontested between the parties that the high ILUC-risk cap and phase-out does not formally prohibit the importation or distribution of palm oil-based biofuel on the EU market. However, Article 2.1 covers not only those measures that condition access to a Member's market, but also those that result in a detrimental impact by creating incentives to choose certain products (domestic

[751] Indonesia's first written submission, paras. 517-519; second written submission, paras. 609-627; response to Panel question No. 6, paras. 27-28; and opening statement at the first meeting of the Panel, paras. 62-73.
[752] Indonesia's first written submission, paras. 520-522; and second written submission, paras. 410-430.
[753] Indonesia's first written submission, para. 520; and second written submission, paras. 398-409, 485-502, and 589-607.
[754] European Union's first written submission, para. 618.
[755] European Union's first written submission, paras. 619-634; and second written submission, paras. 344-350.
[756] European Union's first written submission, paras. 635-659 and 684-685.
[757] European Union's first written submission, paras. 638-659 and 677-688.
[758] European Union's first written submission, paras. 647-663 and 675-676.
[759] European Union's first written submission, paras. 664-674 and 687-691.
[760] European Union's first written submission, para. 690.
[761] European Union's first written submission, para. 691.

or imported from other countries) over others (imported from the complaining Member).[762] Otherwise, the obligation of no less favourable treatment could easily be circumvented by adopting measures that formally do not condition access to the market, but in other ways discriminate *de jure* or *de facto* against imported products by causing a detrimental impact on competitive opportunities for imported products that does not stem exclusively from a legitimate regulatory distinction.[763] This assessment should focus on the design and operation of the measure at issue taking into account the relevant regulatory context.

7.488. In section 2 of this Report, the Panel has set out the relevant regulatory background for both the 7% maximum share and the high ILUC-risk cap and phase-out. The Panel refers to that discussion in order to avoid unnecessary repetition. Here, the Panel merely recalls that Article 25(1) of RED II imposes on EU member States a target of at least 14% of the final consumption of energy in the transport sector from renewable energy sources to be achieved by 2030 at the latest. Article 7(4) of RED II identifies "biofuels, biomass fuels and renewable liquid and gaseous transport fuels of non-biological origin" as the renewable energy sources qualifying for the targets.[764] It follows that EU member States must consume sufficient "biofuels, biomass fuels and renewable liquid and gaseous transport fuels" in order to meet the target set in Article 25(1) of RED II. Data shows that biofuels, especially those made from food and feed crops, account for the vast majority of this consumption.[765]

7.489. Biofuels, biomass fuels and other gaseous and liquid fuels can be used in internal combustion engines. Petrol and diesel are by far the most popular fuels used in such engines. Evidence submitted by the parties shows that currently, biofuels are not cost-competitive with fossil fuels, and this is unlikely to change in the foreseeable future.[766] It is thus accepted that on a global scale, statutory blending requirements and other forms of support are the main driving force promoting the consumption of biofuels.[767] EU member States thus need to and do promote the consumption of biofuels either through mandating the minimum use or through support schemes in order to ensure they meet their national contributions towards the 14% target. It is on the basis of these considerations, that Indonesia argues that the renewable energy consumption targets create the market and demand for biofuels in the European Union which would otherwise not exist.[768]

7.490. Although the European Union contests the existence of such a dependency between the renewable energy consumption targets and biofuel demand[769], it acknowledges that "[t]here is a correlation between eligibility and demand"[770] on the one hand, and the 14% sectoral target and the advanced biofuel obligation on the other hand:

> [C]reate an advantage for renewables in the sense that they set a minimum target for the energy mix in each Member State. The extent of that advantage is not uniform

[762] See e.g. Panel Reports, *US – COOL*, para. 7.372 ("the COOL measure creates an incentive to use domestic livestock – and a disincentive to handle imported livestock – by imposing higher segregation costs on imported livestock than on domestic livestock"); Appellate Body Reports, *US – COOL*, para. 270 ("[w]hile a measure may not require certain treatment of imports, it may nevertheless create incentives for market participants to behave in certain ways, and thereby treat imported products less favourably"). See also Panel Reports *India – Solar Cells*, para. 7.95; and *Mexico – Taxes on Soft Drinks*, para. 8.117. An article concerning the RED II proposal submitted as evidence states that "technically what is being proposed by the EU and its member states is not a ban. Palm oil biodiesel could still be manufactured and sold, but it would be ineligible for biofuel programs and subsidies, which in essence means it will be pushed out of the various markets". (S. Pratt, "EU biofuel restrictions could benefit canola", 16 April 2021, (Exhibit IDN-345), p. 2.)

[763] Appellate Body Report, *US – Clove Cigarettes*, para. 215.

[764] Article 7(4)(a) of RED II.

[765] In 2019, biofuels constituted approximately 90% of the renewable energy consumed in the transport sector in the European Union, and food and feed crop-based biofuel accounted for 60% of the total consumption of renewable energy in the transport sector. (Eurostat, Consumption of renewable energy in the transport sector in the EU-27 in 2011-2019, (Exhibit IDN-317), p. 1.)

[766] A research paper by the Kiel Institute concludes that:

> Our findings lead to several conclusions. First, we find that given current fossil fuel prices, biofuels are not cost-competitive compared to fossil oil-based fuels … Without policies such as the RED II, biofuel consumption in the EU would return to a negligible level.

(Delzeit et al, Kiel Working Paper No. 2203, (Exhibit IDN-371), p. 17.)

[767] UFOP Global Market Supply 2019/2020, (Exhibit IDN-11), p. 36.

[768] Indonesia's first written submission, para. 520; and second written submission, paras. 589-607.

[769] European Union's first written submission, para. 623.

[770] European Union's response to Panel question No. 55, para. 281.

because it depends on the existing consumption patterns (some Member States already consume more than 14% renewables).[771]

7.491. Indeed, evidence submitted by the parties confirms that demand for biofuels in the European Union is "almost exclusively"[772] driven by the European Union's and its member States' renewable energy policies and that in the absence of blending mandates applying to biofuel made from a particular feedstock, there is no or little demand for biofuel made from that particular feedstock. Relatedly, the evidence on the record does not support the European Union's contention that environmental concerns would drive demand for biofuels regardless of any governmental support.[773]

7.492. Logically, it follows that if the EU member States cannot use biofuel made from a particular feedstock to meet their national contributions to the EU-wide renewable energy target, there will be no reason to promote its use as fuel. As a result, and given the price difference between fossil fuels and biofuels, there will be little to no demand for biofuels that are excluded from counting towards the renewable energy targets.

7.493. The Panel recalls that currently, the only biofuel deemed to be high ILUC-risk is that made from palm oil.[774] Pursuant to Article 26(2) of RED II, its eligibility to count towards the targets is capped at 2019 levels and those levels will be gradually reduced to zero by 2030, at the latest. This rule is mandatory in that it must be observed by EU member States who must set obligations on fuel suppliers for the purpose of calculating EU-wide and national renewable energy consumption in the transport sector. In sum therefore, limiting and gradually excluding the eligibility to count towards the targets by virtue of the high ILUC-risk cap and phase-out will result in a decrease if not complete absence of demand for palm oil-based biofuel on the EU market.

7.494. Certain arguments of the European Union, especially those made in the context of the measure's contribution to the pursued objectives, corroborate the existence of a link between the high ILUC-risk cap and phase-out and limiting or eliminating the demand for palm oil-based biofuels on the EU market. The European Union submits *inter alia* that slowing down the expansion of the production area of high ILUC-risk crops would be achieved through "[a] reduced consumption of biofuels produced from [such] crops".[775] A decrease in demand for biofuels made from high ILUC-risk feedstocks (only palm oil-based biofuel at present), is therefore an intended consequence of the design and operation of the measure. In the Panel's view, there is thus a genuine relationship between the high ILUC-risk cap and phase-out and the detrimental impact on the competitive opportunities for palm oil-based biofuel on the EU biofuel market.[776]

7.495. The Panel finds illustrative in this regard the evidence of decreasing consumption in the European Union's transport sector of biofuels not meeting the sustainability and GHG emissions saving criteria under RED I (non-compliant biofuels). As pointed out by Indonesia, the high ILUC-risk cap and phase-out has a similar design in that, analogous to non-compliant biofuels under RED I, it adversely impacts the eligibility of high ILUC-risk biofuel to be counted towards the renewable energy consumption targets.[777] The expected operation of the high ILUC-risk cap and phase-out on palm oil-based biofuel, including the effects on the biofuel's use in the transport sector, will thus be

[771] European Union's response to Panel question No. 54, para. 275.

[772] S. Pratt, "EU biofuel restrictions could benefit canola", 16 April 2021, (Exhibits IDN-345), pp. 2-3; Excerpt of USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit EU-219), p. 24; Wilmar Europe Trading B.V., Statement on the impact of RED II on the EU biofuel market, 7 December 2021, (Exhibit IDN-385), p. 2; and PHG Statement 2022, (Exhibit IDN-410).

[773] While the European Union submits evidence relating to moral concerns with climate change, this evidence does not show that consumers would buy more expensive fuel with the addition of biofuels. The single study on the Panel's record analysing consumers' willingness to pay for biofuels is limited in scope and the conclusions do not support the European Union's contention, indicating, among other things, that customers would be willing to pay more to get fuel closer to their place of residence than to use biodiesel. (A. Gracia, J. Barreiro-Hurlé, L. Pérez y Pérez, Consumers' willingness to pay for biodiesel in Spain, EAAE Congress, September 2011, (Exhibit IDN-189), p. 11). It is also unclear if the premium that some customers are willing to pay for biofuel exceeds the difference in the price of mineral diesel and biofuel.

[774] This is the result of the application of the requirements and formula in Article 3 of the Delegated Regulation.

[775] European Union's response to Panel question No. 83, para. 421.

[776] Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 134; *US – Clove Cigarettes*, fn 372; and *EC – Seal Products*, para. 5.105.

[777] Indonesia's first written submission, para. 572.

analogous to the sustainability and GHG emissions savings criteria. That consumption fell to negligible levels reaching 0.8% of the consumption of compliant biofuels in 2019.[778] The European Union argues that failing to meet the sustainability and GHG emissions savings criteria results not only in ineligibility to count towards the renewable energy targets but also impacts the possibility of using the fuel on the EU market pursuant to the Fuel Quality Directive.[779] However, the European Union does not point to any specific provision of that directive which would support this assertion.[780]

7.496. To demonstrate the detrimental impact of the measure, Indonesia submits an overview of adopted or proposed legislation in selected EU member States. These legislative acts and proposals aim to limit the possibility of counting towards national contributions to the renewable energy targets biofuels made from high ILUC-risk feedstocks, and envisage terminating support schemes for such biofuels or introducing limitations to placing them on the market.[781] In the Panel's view, the EU member States' policies implementing Article 26(2) of RED II constitute an additional illustration of the operation of the high ILUC-risk cap and phase-out on the EU biofuel market.

7.497. Furthermore, Article 26(2) of RED II contains a derogation from the high ILUC-risk cap and phase-out for biofuels certified as low ILUC risk. Specific yields can become eligible for counting towards EU renewable energy targets in the same manner as other crop-based biofuels only if they meet certain conditions set out in Articles 4 and 5 of the Delegated Regulation (the low ILUC-risk certification criteria) and undergo a certification procedure.[782] Low ILUC-risk certification thus applies to specific yields and not a crop as a whole. In that sense, low ILUC-risk certification does not alter the general characterization of a biofuel feedstock as high ILUC risk. Pursuant to the low ILUC-risk certification criteria, in order to qualify for certification, yields must meet certain specific conditions. First, only yields going beyond the so-called dynamic yield baseline are eligible for certification.[783] Second, such yields need to be obtained through measures that either pass the financial attractiveness or barriers test; are applied on abandoned or severely degraded land; or are applied by smallholders.[784]

7.498. As a result, only a limited amount of a high ILUC-risk crop can qualify for low ILUC-risk certification and thereby become eligible to count towards the renewable energy targets beyond the limitations imposed by the high ILUC-risk cap and phase-out. This means that any mitigation of the detrimental impact of the high ILUC-risk cap and phase-out is considerably limited. At the same time, the Panel does not consider that limiting low ILUC-risk certification to additional yields generates a detrimental impact of its own. In the Panel's view, any commercial disadvantage related to this requirement stems directly from and is a corollary of the classification of a crop as high ILUC risk. The Panel therefore disagrees with Indonesia that low ILUC-risk certification has an additional detrimental impact on palm oil-based biofuel, because it applies only to additional yield, while any yield of rapeseed oil- and soybean oil-based biofuels can count towards the renewable energy targets.[785]

7.499. In light of the above considerations, the Panel is unpersuaded by the European Union's argument that Indonesia presents a flawed analysis of the relevant market conditions. The Panel is of the view that by limiting and eventually excluding palm oil-based biofuel from eligibility to count towards renewable energy targets, the high ILUC-risk cap and phase-out modifies the conditions of competition to the detriment of this biofuel.

7.500. The Panel notes the European Union's additional argument in this regard that a WTO Member should be allowed to distinguish between products on the basis of the perceived differences relating to the measure's objectives.[786] The Panel agrees. However, the Panel considers that this argument

[778] Eurostat, Energy from renewable sources – SHARES, (Exhibit IDN-192).
[779] European Union's first written submission, paras. 626 and 658.
[780] European Union's response to Panel question No. 171, paras. 397-400.
[781] Examples of EU member States' measures restricting oil palm crop-based biofuel – Updated version of Exhibits IDN-369, IDN-329, IDN-315 and IDN-313, (Exhibit IDN-421).
[782] Section 2.3.3 above.
[783] Articles 2(6) and 4 of the Delegated Regulation.
[784] Article 5 of the Delegated Regulation.
[785] Indonesia's first written submission, para. 524.
[786] European Union's first written submission, paras. 655 and 1154 (referring to Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.2514.

is more appropriately addressed in the context of the analysis on whether the detrimental impact of the measure stems exclusively from a legitimate regulatory distinction.

7.1.2.4.4.2 *De facto* nature of the detrimental impact

7.501. Turning to the European Union's argument that the measure does not differentiate between palm oil-based biofuel imported from Indonesia and that of EU origin or other origin, the Panel agrees that the high ILUC-risk cap and phase-out does not distinguish expressly between palm oil-, rapeseed oil- and soybean oil-based biofuel based on their origin. However, the Panel notes that Indonesia's makes a claim of *de facto* discrimination.[787] A measure that appears on its face to be origin neutral can nevertheless discriminate *de facto* against imported products in contravention of Article 2.1.[788] A panel's analysis whether the measure has a *de facto* detrimental impact on the group of imported products must take into account the totality of the facts and circumstances before it, including the relevant features of the market at issue.[789] A panel has to determine on this basis whether there is a genuine relationship between the measure at issue and any adverse impact on competitive opportunities for imported versus like domestic products.[790] The European Union appears to agree with this approach insofar as it emphasizes the importance of assessing all aspects of the competition between like products on the relevant market.[791]

7.502. The Panel observes that the European Union is not only an importer but also a producer of palm oil-based biofuel (but not of palm oil as such).[792] In that sense, the Panel agrees with the European Union that the high ILUC-risk cap and phase-out also affects some of its domestic production. However, as noted above, an important factual consideration is that among all the biofuel products that compete in the market and which the European Union imports or produces itself, palm oil-based biofuel is the only one that Indonesia exports to that market. This means that the measure, while neutral on its face, disproportionally affects products imported from Indonesia.

7.503. This is the essence of *de facto* discrimination. Under these circumstances, the Panel must compare the treatment of the only product imported from the complainant with all domestic products and products of other origin found to be like.[793] Although Indonesia has demonstrated that palm oil-, rapeseed oil- and soybean oil-based biofuels are like, the European Union seems to be comparing only the treatment of domestically produced and imported palm oil-based biofuel.[794]

7.1.2.4.4.3 Attributability of the detrimental impact to the high ILUC-risk cap and phase-out

7.504. The Panel now turns to the European Union's argument that any detrimental impact on the palm oil-based biofuel should not be attributed to the EU measure, as the EU member States enjoy discretion in determining their energy mix and national contributions to the EU renewable energy target.[795] The European Union more specifically argues, the Panel has to determine whether any detrimental impact is attributable to the framework established at the EU level, or the national legislation of EU member States.[796]

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[787] Indonesia's response to Panel question No. 51, para. 132.
[788] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 225; and *US – COOL*, para. 269.
[789] Appellate Body Reports, *US – COOL*, para. 286.
[790] Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 134; and *US – Clove Cigarettes*, fn 372.
[791] European Union's first written submission, para. 617.
[792] ETC/CME Eionet Report, Greenhouse gas intensities of road transport fuels in the EU in 2018 - Monitoring under the Fuel Quality Directive, November 2020, (Exhibit EU-134), pp. 8-9. See also Indonesia's response to Panel question No. 52. Para. 133. European Union's response to Panel question No. 52, para. 264.
[793] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.70.
[794] In addition, for the reasons explained in preliminary considerations to the discussion of the like products analysis, the Panel is also unpersuaded by the European Union's argument that the outcome of Indonesia's detrimental impact analysis is skewed because of the complainant's focus on a subset of like products.
[795] European Union's first written submission, paras. 675-676.
[796] European Union's first written submission, para. 676.

7.505. It is true that some of the member States' measures submitted as evidence go further than appears to be required by RED II.[797] However, there is no doubt that they seek to implement, among other provisions, Article 26(2) of RED II.[798] RED II and the Delegated Regulation impose binding obligations on the EU member States, which they cannot derogate from and which have regulatory effects throughout the EU territory.[799] Therefore, while EU member States may enjoy some margin of discretion in adopting support schemes for renewable energy or regulate the use of certain fuels, they cannot count palm oil-based biofuel towards the renewable energy targets to the same extent as rapeseed oil- and soybean oil-based biofuel.[800]

7.506. In fact, EU member States are obliged to "set an obligation on fuel suppliers" to ensure meeting the 2030 target share of renewable energy, "calculated in accordance with the methodology set out in … Article 26" of RED II.[801] It follows that it is not only the EU member States that must observe the rules set out in Article 26 of RED II, but also that these rules become mandatory for fuel suppliers operating on the EU market.

7.507. Therefore, the Panel finds that the detrimental impact on palm oil-based biofuel can clearly be attributed to the high ILUC-risk cap and phase-out.

7.1.2.4.4.4 Conclusion on detrimental impact

7.508. In sum, the Panel finds that the high ILUC-risk cap and phase-out limits market opportunities for palm oil-based biofuel. By contrast, because rapeseed oil- and soybean oil-based biofuels are not subject to the measure, they can potentially benefit from the full scope of commercial opportunities provided within the 7% maximum share. In fact, evidence submitted by the parties suggests that rapeseed oil- and soybean oil-based biofuel may benefit from increased opportunities, as a result of demand shifting from oil palm crop-based biofuel.[802] Therefore the high ILUC-risk cap and phase-out has a detrimental impact on imported palm oil-based biofuel as compared to the group of domestic like products.

7.509. Contrary to the European Union's argument, this finding should not be understood as requiring the European Union to continue "to distort the competitive conditions" in favour of all types of biofuels, including those that do not meet European Union's policy objectives.[803] Rather, such support, if falling within the ambit of Article 2.1, should not lead to less favourable treatment of imported products *vis-à-vis* domestic like products and like products of other origins. In any event, as mentioned above, establishing a measure's detrimental impact on imported products is not sufficient to demonstrate a violation of the no less favourable treatment obligation in Article 2.1. A panel must also analyse whether the detrimental impact stems exclusively from a legitimate regulatory distinction, which is the next question the Panel will address.

7.1.2.4.5 Legitimate regulatory distinction

7.510. As noted above in the context of setting out the applicable legal standard under Article 2.1, a finding of a detrimental impact on imported products alone is not dispositive of whether there is less favourable treatment under Article 2.1. A panel must further analyse whether the detrimental

[797] Certain EU member States decided to exclude from counting towards the renewable energy targets not only palm oil-based biofuel but also soybean oil-based biofuel, while other prohibited using palm oil-based biofuel as transport fuel altogether. (Examples of EU member States' measures restricting oil palm crop-based biofuel – Updated version of Exhibits IDN-369, IDN-329, IDN-315 and IDN-313, (Exhibit IDN-421), pp. 11, 17, 35-36 and 37-38.)

[798] The translated text of the member States' measures either mimics the language of Article 26(2) of RED II or contains explicit references to that provision. (Examples of EU member States' measures restricting oil palm crop-based biofuel – Updated version of Exhibits IDN-369, IDN-329, IDN-315 and IDN-313, (Exhibit IDN-421).)

[799] Panel Report, *EU – Energy Package*, para. 7.397.

[800] With the exception of consignments of biofuels certified as low ILUC risk.

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

[802] S. Pratt, "EU biofuel restrictions could benefit canola", 16 April 2021, (Exhibits IDN-345), pp. 1-2; Delzeit et al, Kiel Working Paper No. 2203, (Exhibit IDN-371), p. 11; PHG Statement 2022, (Exhibit IDN-410); and Apical, Concerns about EU RED II and the Delegated Act and their effect on biodiesel market in the EU, 7 February 2022, (Exhibit IDN-411).

[803] European Union's first written submission, para. 655.

impact "stems exclusively from a legitimate regulatory distinction".[804] In making this determination, the Panel needs to assess the design, structure and operation of the measure at issue in order to determine whether the technical regulation is applied in an even-handed manner and, as a result, whether the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction.[805] Overall, the parties seem to be in agreement as regards the basic elements and nature of the legal test under Article 2.1.[806]

7.511. Indonesia submits that the detrimental impact on imports of palm oil-based biofuel does not stem exclusively from a legitimate regulatory distinction. More specifically, Indonesia argues that the high ILUC-risk cap and phase-out does not impose a regulatory distinction that is legitimate.[807] Indonesia further argues in the alternative that even if such *legitimate* regulatory distinction were to exist, it is applied in a manner that constitutes arbitrary or unjustifiable discrimination.[808]

7.512. The European Union maintains that any impact of the high ILUC-risk cap and phase-out on palm oil-based biofuel stems exclusively from a legitimate regulatory distinction.[809] The European Union submits that the measure pursues long-standing and legitimate policy goals of the EU Biofuels regime relating to climate change mitigation, environmental and biodiversity objectives and moral concerns.[810] The European Union relies in this regard on the scientific grounds underpinning the EU Biofuels regime generally and the high ILUC-risk cap and phase-out more specifically.[811] The European Union further contests that the measure is applied in a manner that constitutes arbitrary or unjustifiable discrimination, pointing to the existence of a rational relationship between the measure and its stated objective.[812]

7.513. Whether the detrimental impact stems exclusively from a particular legitimate regulatory distinction needs to be considered in light of the nature and object of the distinction at issue and the manner in which it operates. The parties' arguments focus on two main questions: whether the regulatory distinction based on high ILUC-risk is legitimate, and if so whether it is applied in a manner that constitutes arbitrary or unjustifiable discrimination.

7.514. The Panel notes that the specific arguments raised by the parties relating to these two questions largely overlap.[813] The Panel appreciates that these overlaps are largely a consequence of

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[804] Appellate Body Reports, *US – Clove Cigarettes*, para. 182; *US – Tuna II (Mexico)*, para. 215; *US – COOL*, para. 271; and *EC – Seal Products*, para. 5.311. This interpretation of Article 2.1 has been grounded in the context provided by other provisions of the TBT Agreement, in particular Article 2.2, which "suggests that 'obstacles to international trade' may be permitted insofar as they are not found to be 'unnecessary'" and the sixth recital of the Preamble. It is also consistent with the object and purpose of the TBT Agreement, which has been found to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate. (Appellate Body Report, *US – Clove Cigarettes*, paras. 171 and 174.)

[805] Appellate Body Reports, *US – Clove Cigarettes*, para. 182; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.33. Past panels and the Appellate Body have not elaborated on the meaning of "even-handedness". The Appellate Body has noted, however, that "there is no set formula as to how a complainant must make out its case" under Article 2.1 and cautioned against applying the rules on burden of proof in a formalistic or mechanistic fashion. In a similar vein, the first compliance panel in *US – Tuna II (Mexico)* understood "even-handedness" not as a separate criterion, but rather as an "analytical tool, a kind of rhetorical measure or test that deploys a fluid, broadly equitable concept as a proxy or gauge". (Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.33; and Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.93.)

[806] Indonesia's response to Panel question No. 46. European Union's response to Panel question No. 46.

[807] Indonesia's first written submission, paras. 525-547 and 566; and second written submission, paras. 632-641.

[808] Indonesia's first written submission, paras. 548-550; and second written submission, paras. 642-657.

[809] European Union's first written submission, paras. 702-766; and second written submission, paras. 354-365.

[810] European Union's first written submission, para. 705.

[811] European Union's first written submission, para. 713; and second written submission, paras. 355-357.

[812] European Union's second written submission, paras. 355-365.

[813] The Panel notes that when substantiating its alternative argument that the regulatory distinction is applied in a manner that constitutes an arbitrary or unjustifiable discrimination, Indonesia relies on the same arguments that it makes in support of the contention that the regulatory distinction at issue is not legitimate. In particular, with respect to both these contentions, Indonesia refers to the factual discussion of the concepts of ILUC, high ILUC risk, and low ILUC risk (including the formula and the use of data). (Indonesia's first written

apparent overlaps in aspects of the legal test under Article 2.1 at issue, either of which, if demonstrated, leads to the conclusion that the detrimental impact does not stem exclusively from a legitimate regulatory distinction. The Appellate Body has recognized these overlaps, observing that "where a regulatory distinction is not designed and applied in an even-handed manner – because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination – that distinction cannot be considered 'legitimate'".[814] The Panel recalls in this regard that it has "the discretion to address only those arguments it deems necessary to resolve a particular claim".[815] Therefore, the Panel does not consider that it is under an obligation to assess the parties' arguments formalistically, addressing each and every element raised by the parties following the order of their submissions.[816]

7.515. Having said this, the Panel will conduct its analysis following the general structure of the arguments as made by the parties, by focusing on the two main questions raised. The Panel will thus first identify the relevant regulatory distinction drawn by the high ILUC-risk cap and phase-out and address whether this distinction is *a priori* legitimate. To that end, the Panel will consider any aspects of the measure that, in the Panel's view, pertain to the very essence of the regulatory distinction at issue, irrespective of the exact context in which they were raised by the parties. If the Panel finds that the regulatory distinction based on high ILUC risk is *a priori* legitimate, it will then consider aspects of the measure that, in the Panel's view, are pertinent to assessing whether the distinction is applied in an even-handed manner, including whether it is applied in a manner that constitutes arbitrary or unjustifiable discrimination.

7.516. The Panel further notes that the parties' arguments made in relation to Indonesia's claim under Article 2.1 concern the scientific underpinnings of the concept of ILUC and high ILUC risk. The parties also extensively discuss the scientific studies produced as evidence, the underlying data, assumptions, their sources, as well as their use in the high ILUC-risk formula. The parties' views differ on the degree of scrutiny that the Panel should exercise in reviewing such evidence.[817]

7.517. The Panel recalls that its mandate to "make an objective assessment of the matter before it" under Article 11 of the DSU involves a duty to examine and consider all the evidence on the record and to evaluate the relevance and probative force of each piece thereof.[818] Insofar as discharging this duty could involve reviewing scientific evidence, the Panel considers that while it may not be in a position to draw definitive conclusions on the methodological merits of the approaches presented and the underlying scientific information, the Panel can consider whether the body of evidence, as a whole, provides a reasonable basis in support of the proposition for which it is being invoked.[819] To the extent that this Panel is called upon to review the robustness of such evidence, its assessment may include, where relevant:

> [A] consideration of whether such evidence 'comes from a qualified and respected source', whether it has the 'necessary scientific and methodological rigor to be considered reputable science' or reflects 'legitimate science according to the standards

submission, paras. 528 and 549.) Furthermore, in the discussion of the alleged arbitrary or unjustifiable discrimination, Indonesia refers to the arguments it makes in the context of Article 2.2, which largely overlap with those made to demonstrate that the regulatory distinction is not legitimate. (Indonesia's first written submission, para. 549.)

[814] Appellate Body Reports, *US – COOL*, para. 271.

[815] Appellate Body Report, *EC – Poultry*, para. 135.

[816] The Panel notes that the parties' arguments under Article 2.1 also cross-reference sections of their arguments under Article 2.2 and Article XX (and vice versa). All of these sections also cross-reference several up-front sections of their submissions setting forth extended discussions on the validity of the concepts of ILUC and high ILUC risk, as well as the scientific basis for the measures at issue, and the history and factual circumstances surrounding the measures at issue.

[817] Indonesia's second written submission, paras. 152-161; response to Panel question No. 15, paras. 42-49. European Union's first written submission, paras. 309-311; second written submission, paras. 37-50.

[818] Appellate Body Report, *Korea – Dairy*, para. 137.

[819] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.627. The Panel is mindful that in *Australia – Tobacco Plain Packaging*, the panel adapted the findings previously made in the context of Article 5.1 of the SPS Agreement for the purposes of assessing a claim made pursuant to Article 2.2 of the TBT Agreement. However, the Panel is of the view that the same considerations could be relevant, *mutatis mutandis*, in the context of an inquiry under Article 2.1.

> of the relevant scientific community', and 'whether the reasoning articulated on the basis of the scientific evidence is objective and coherent'.[820]

7.518. Acting within these parameters, panels may rely on evidence reflecting a minority scientific opinion, provided that this opinion emanates from respected sources and reflects legitimate and reputable science in light of the evidence on the record.[821] It would thus not be sufficient for the complainant to simply put forward a different scientific opinion or point out some imperfections in the approach adopted by the regulating Member, as long as the evidence on the record as a whole provides a reasonable basis for that approach.[822]

7.519. Therefore, the Panel is of the view that its task in this dispute is not to attempt to resolve scientific debates on the basis of the evidence submitted by the parties.[823] Rather, the Panel must determine whether, considering the entirety of the evidence, there is a reasonable basis for the regulatory distinction drawn by the high ILUC-risk cap and phase-out and the manner in which it is applied.

7.1.2.4.5.1 The regulatory distinction at issue

7.520. The starting point for determining whether the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction is a consideration of the regulatory distinction that explains the difference in treatment giving rise to the detrimental impact.[824] In this context, panels may examine not only the particular distinction causing the detrimental impact, but also other probative elements that may shed light on the design of the measure and its operation.[825] In *US – Tuna II (Mexico)*, the Appellate Body considered the difference in treatment resulting in the detrimental impact on imported tuna as the central element of the regulatory distinction at issue:

> The aspect of the measure that causes the detrimental impact on Mexican tuna products is thus the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand. The question before us is thus whether the United States has demonstrated that this difference in labelling conditions is a legitimate regulatory distinction, and hence whether the detrimental impact of the measure stems exclusively from such a distinction rather than reflecting discrimination.[826]

7.521. Moreover, the stated objectives of a measure identified for the purposes of an analysis under Article 2.2, if a claim concerning that provision is made in parallel, could further assist panels in identifying the relevant regulatory distinction at issue.[827]

7.522. The Panel has found above that the detrimental impact on palm oil-based biofuel stems from the classification of palm oil as a high ILUC-risk feedstock (currently the only one) and, as a result, subjecting palm oil-based biofuel to the cap and phase-out. This classification is a result of the application of the high ILUC-risk formula set out in Article 3 of the Delegated Regulation and relying on the data contained in its Annex. The details of the formula, including its different elements are explained in detail in the descriptive part of this Report.[828] The formula is designed to determine the degree of ILUC-risk for individual biofuel feedstocks using as proxy the observed share of a

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[820] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.516 (referring to Appellate Body Report, *US – Continued Suspension*, paras. 591-592).

[821] Appellate Body Report, *EC – Asbestos*, para. 178.

[822] Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.641-7.642.

[823] Panel Reports, *US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, paras. 7.150-7.151.

[824] Panel Reports, *EC – Seal Products*, para. 7.174; and Appellate Body Reports, *US – COOL*, para. 341.

[825] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.96.

[826] Appellate Body Report, *US – Tuna II (Mexico)*, para. 284.

[827] The Panel notes that in *US – Tuna II (Mexico)*, the Appellate Body relied in compliance proceedings on its earlier findings, as well as on the findings of the original panel, concerning the identification of the measure's objectives under Article 2.2 when examining Mexico's claim under Article 2.1. (See Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.16.)

[828] See the descriptive part of this Report above.

feedstock's production area expansion into land with high-carbon stock, adjusted for productivity.[829] If that share exceeds 10%, the biofuel feedstock is determined to be high ILUC risk.

7.523. The classification of palm oil as a high ILUC-risk feedstock is thus a reflection of the degree of the risk of ILUC and of ILUC-related GHG emissions associated with the feedstock's production.[830] Therefore, it is the high degree of ILUC risk that lies at the heart of the regulatory distinction at issue rather than, for example, quantification of the respective volumes of GHG emissions linked to ILUC caused by production of any particular biofuel feedstock.[831] In short, the measure draws a regulatory distinction between different types of biofuels based on whether the feedstock used for its production presents a high degree of ILUC risk.

7.524. Understood in this way, the regulatory distinction at issue is commensurate with the measures' objective identified in the context of Indonesia's claim under Article 2.2. The Panel has concluded in that context that the stated rationale for the 7% maximum share and the high ILUC-risk cap and phase-out is to limit the *risk* of ILUC-related GHG emissions associated with food and feed crop-based biofuels. The classification of palm oil as high ILUC-risk feedstock, as a result of the application of the high ILUC-risk formula, thus constitutes the key regulatory distinction that the measure draws between palm oil-based biofuel on the one hand, and biofuels made from other food and feed crops, including rapeseed oil and soybean oil, on the other hand.

7.525. The Panel's understanding of the regulatory distinction at issue is further confirmed by the design of the low ILUC-risk criteria, which, at least formally, are aimed at tempering the detrimental impact of the high ILUC-risk cap and phase-out. These criteria are designed to account for the fact that the risk of causing ILUC is mitigated with respect to consignments of feedstocks produced within schemes that avoid displacement effects.[832] The *risk* of ILUC associated with a specific consignment is thus a central element of the low ILUC-risk criteria (although low ILUC-risk certification does not change the classification of a feedstock as a whole as high ILUC-risk).

7.1.2.4.5.2 Legitimacy of the regulatory distinction

7.526. The Panel now turns to the issue of whether a regulatory distinction based on a feedstock's degree of ILUC risk cannot be *a priori* legitimate.

7.527. Indonesia submits that the regulatory distinction based on the concepts of ILUC and high ILUC-risk cannot be legitimate because both concepts have an insufficient scientific basis and specifically target palm oil-based biofuel.[833] To support this contention, Indonesia repeats a number of arguments it makes with respect to different elements of the legal test under Articles 2.2 and 2.4, including those pertaining to the legitimacy of the measure's objective and the treatment of ILUC under international standards. More specifically, Indonesia submits that ILUC cannot be observed or quantified and as such cannot form the basis of a legitimate regulatory distinction.[834] According to Indonesia, this is reflected in the exclusion of ILUC from being taken into account in the international standards on the calculation of carbon footprint.[835]

7.528. When examining regulatory distinctions at issue under Article 2,1, in past disputes, and especially when considering whether the distinctions at issue were legitimate, some panels and the

[829] The Panel understands the feedstock's production area to encompass the global production area of a crop used for biofuel production regardless of the specific purpose for which it is grown (i.e. including for non-biofuel applications).

[830] European Union's first written submission, paras. 172-173.

[831] In this report, the terms "crop" and "feedstock" are used interchangeably following such use of these terms by the parties in their submissions. The Panel notes in this regard that the references to feedstock's "production area" in the Delegated Regulation and other accompanying documents essentially mean the total cultivation area of the crop whether used to produce the feedstock or for other applications.

[832] Recital 37 to RED II. In a similar vein, Recital 12 to the Delegated Regulation stipulates that: Under certain circumstances, the ILUC impacts of biofuels, bioliquids and biomass fuels generally considered as high ILUC-risk can be avoided and the cultivation of the related feedstock can even prove to be beneficial for the relevant production areas. […] Certified low ILUC-risk biofuels, bioliquids or biomass fuels should be exempted from the limit and gradual reduction set for high-ILUC risk biofuels, bioliquids and biomass fuels.

[833] Indonesia's first written submission, paras. 529-539.

[834] Indonesia's first written submission, para. 531.

[835] Indonesia's first written submission, para. 532.

Appellate Body referred to conclusions reached regarding the existence of a "legitimate objective" of a measure under Article 2.2, if such claim was made in parallel.[836] The Panel recalls that in the context of Indonesia's claims under Article 2.2 it has concluded that the objective of limiting the risk of ILUC-related GHG emissions associated with food and feed crop-based biofuels is a "legitimate objective" within the meaning of that provision. In that context, the Panel has found that the risk of ILUC-related GHG emissions, while currently not directly observable or precisely quantifiable, is not a risk that appears to be theoretical, abstract or otherwise hypothetical.[837] In the context of its assessment of the claim under Article 2.4, which has informed the Panel's assessment under Article 2.2, the Panel has further found that ISO standards referred to by Indonesia do not "exclude ILUC from being taken into account" where measures seek to address the risk of GHG emissions.[838]

7.529. The Panel has thus found a reasonable basis for the European Union to consider that increasing demand for food and feed crop-based biofuels increases the risk of ILUC-related GHG emissions. In the Panel's view, all these considerations are equally relevant to the question whether the regulatory distinction drawn by the high ILUC-risk cap and phase-out is a legitimate one. However, the Panel has already explained in the context of its assessment under Article 2.2 that this conclusion leaves open any questions relating to estimating the degree of ILUC risk. In particular, this conclusion leaves open any questions relating to the specific aspects of the high ILUC-risk classification, including the elements of the high ILUC-risk formula. The Panel has indicated that it would return to the issue in the context of the "legitimate regulatory distinction" step of the analysis under Article 2.1.

7.530. Some of the parties' arguments concerning the high ILUC-risk classification relate to its conceptual underpinnings, including certain basic elements of the high ILUC-risk formula. Others focus on specific parameters or values on the basis of which the formula operates. The Panel considers the former to be relevant to the issue of the *a priori* legitimacy of the regulatory distinction, and therefore, will considers these in this section.

7.531. Based on the parties' arguments the Panel thus considers the following issues to present fundamental questions regarding the *a priori* legitimacy of the regulatory distinction based on high ILUC-risk: (i) the European Union's reliance on the share of expansion rate into land with high-carbon stock as proxy of ILUC risk; (ii) the relationship between EU biofuel demand and a specific share of feedstock's production area expansion; and (iii) distinguishing between different crops based on their degree of ILUC risk.[839] The Panel will address these issues in turn.

Share of expansion rate into land with high-carbon stock as proxy of ILUC risk

7.532. The formula uses, as a proxy for the level of ILUC risk, the observed share of a feedstock's production area expanding into land with high-carbon stock, adjusted for productivity.[840] If this share exceeds 10%, the feedstock is determined to be high ILUC risk. It is thus the past expansion rate of a feedstock's production area into land with high-carbon stock that is an indicator of the likelihood of causing ILUC and ILUC-related GHG emissions.

7.533. It is uncontested between the parties that ILUC and its effects currently cannot be observed or quantified with precision.[841] The parties seem, however, to draw opposite conclusions from this fact. Indonesia contends that because ILUC cannot be directly observed and quantified, it cannot form the basis of a regulatory distinction seeking to address ILUC-related GHG emissions associated

[836] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 242-243; and Panel Reports, *US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, paras. 7.186-7.187.

[837] See para. 7.316 above.

[838] See para. 7.299 above.

[839] The Panel notes that Indonesia raises some of these issues, or certain aspects thereof, to support its contention that the high ILUC-risk cap and phase-out is applied in manner that constitutes arbitrary or unjustifiable discrimination, or otherwise is not applied in an even-handed manner. However, in the Panel's view, these arguments relate to the very essence of the regulatory distinction based on the degree of ILUC risk, rather than the manner in which the distinction has been *applied* in the case at hand.

[840] The Panel understands the feedstock's production area to encompass the global production area of a crop used for biofuel production regardless of the specific purpose for which it is grown (i.e. including for non-biofuel applications).

[841] In the context of Indonesia's claim under Article 2.2, the Panel has found that "[t]he existence of large variability in the modelling estimates makes it difficult to assess with accuracy the specific quantity of ILUC-related GHG emissions by specific types of conventional biofuel crops". See para. 7.314 above.

with production of biofuel feedstocks.[842] The European Union argues, for its part, that due to the same considerations it had to opt for a different methodology that uses the observed expansion into land with high-carbon stock as a proxy of the risk of ILUC.[843]

7.534. Indonesia criticizes the methodology developed by the European Union and its use to estimate the risk of ILUC.[844] Indonesia submits that an expansion of a feedstock's production area into land with high-carbon stock (i.e. DLUC) is unrelated to GHG emissions associated with ILUC and that factors other than increased biofuel demand could lead to such an expansion.[845] In particular, Indonesia argues that the formula captures the DLUC caused by the production of commodities other than biofuel consumed in the European Union and the related DLUC emissions should not be attributed to biofuel production. Indonesia further submits that the formula overestimates ILUC effects.[846] According to Indonesia, there is no scientific evidence to support the proposition that where the production of certain crops leads to large DLUC effects, this also comes with a higher risk of ILUC.[847] Indonesia further submits that the concept of high ILUC-risk is unrelated to the prevention of ILUC or related GHG emissions.[848]

7.535. The European Union maintains that relying on a crop's share of expansion into land with high-carbon stock as a proxy of ILUC risk is justified due to the limitations of available techniques of precisely modelling ILUC-related GHG emissions.[849] The European Union contends that feedstocks for which LUC has been observed are more likely to expand their production area to meet an increasing demand than those for which such phenomena have not been observed.[850] Therefore, high levels of observable DLUC are, in the European Union's view, indicative of the risk of ILUC. The European Union adds that using observable expansion of a feedstock production area as proxy of ILUC risk suffers from a significantly lower degree of parametric uncertainty than the modelling approach.[851]

7.536. The Panel understands that under the high ILUC-risk formula, the share of a feedstock's production area expansion into land with high-carbon stock reflects land-use change that is relevant to both DLUC and ILUC effects of a given biofuel feedstock. The former takes place when additional demand for the crop directly causes expansion of its production area into land with high-carbon stock. The latter occurs when, to meet additional demand for biofuel, the existing agricultural production of the same crop is diverted from non-fuel purposes to producing biofuel feedstock. Because the demand for agricultural commodities is not diminishing and productivity improvements are insufficient to meet the additional demand, such diversion is likely to lead to expansion of non-biofuel agricultural production of the same crop, including into land with high-carbon stock. Such expansion resulting from the diversion of production between different applications within a single crop is what the high ILUC-risk formula is aimed at capturing.

7.537. The formula thus establishes a link between the observed DLUC and the likelihood of ILUC within a single crop by estimating that crop's pressure on the existing agricultural production resulting from increased biofuel demand. In the Panel's view, the existence of this link is reinforced taking into account the operation of the sustainability and GHG emissions saving criteria under RED II. These criteria exclude eligibility to count towards the renewable energy targets of biofuels produced as a result of DLUC into areas designated in Article 29 of RED II, including land with high-carbon stock. Arguably, the sustainability and GHG emissions savings criteria thus create an incentive to serve the EU biofuel market by expanding into existing agricultural land, instead of into land with high-carbon stock, including the same crop's production area used for non-fuel purposes.

7.538. The Panel further notes that Indonesia criticizes this aspect of the measure as assuming that the displaced crop is oil palm grown in Indonesia for food purposes, while accepting the global nature

[842] Indonesia's first written submission, para. 533; and second written submission, para. 637.
[843] European Union's second written submission, para. 179; response to question No. 20, para. 114.
[844] Indonesia's first written submission, paras. 276-292; second written submission, paras. 231-248.
[845] Indonesia's second written submission, paras. 243-248.
[846] Indonesia's first written submission, paras. 283, 289.
[847] Finkbeiner Expert Opinion, (Exhibit IDN-126), p. 18.
[848] Indonesia's first written submission, para. 535.
[849] European Union's second written submission, para. 179; and response to question No. 27, para. 140.
[850] European Union's second written submission, paras. 111-112; and responses to Panel questions No. 143, paras. 211-212 and No. 144, paras. 228-232.
[851] European Union's response to Panel question No. 143, paras. 210-219.

of agricultural markets.[852] According to Indonesia, it is impossible to establish a link between cultivation of food and feed crops for biofuel production in one geographical location and the growing of crops in another geographical location.[853] Indonesia observes in this regard that the European Union's methodology unduly assumes that whenever a crop is grown for biofuel production, it is grown in an area previously entirely destined for food and feed markets and that area is entirely replaced through expansion.

7.539. The Panel understands Indonesia's argument to mean that relying on palm oil's share of production area expansion into land with high-carbon stock may lead to extrapolating the situation of oil palm to the displaced crop, which can be grown anywhere in the world.[854] The Panel notes in this regard that it is uncontested between the parties that expansion of agricultural production triggered by ILUC of a biofuel feedstock can occur anywhere in the world.[855] Admittedly, the land-use change caused by expansion of non-biofuel agricultural production is not directly captured by the formula and thus cannot be attributed to any specific biofuel feedstock.

7.540. The Panel does not consider this aspect of the methodology to be problematic. The Panel recalls that the measure does not attempt to attribute to biofuel feedstocks any specific levels of ILUC-related GHG emissions. Instead, the measure seeks to estimate the pressure that an increased demand for a particular biofuel feedstock exerts on existing non-biofuel agricultural production. This pressure reflects the degree of the risk of causing ILUC. Estimating such a degree of risk does not require attributing land-use change to the expansion of any particular feedstock displacing non-biofuel agricultural production. Rather, there appears to be a reasonable basis for focusing on that feedstock's own land-use change effects reflecting its propensity to expand the production area in response to an increase in demand. This, in the Panel's view, confirms the existence of a rational connection between expansion of a feedstock's production area into land with high-carbon stock and the risk of ILUC-related GHG emissions.

7.541. The European Union acknowledges that addressing ILUC-related effects on the basis of the share of a feedstock's production area expansion is not a perfect methodology that is free from uncertainties. The Panel agrees and observes that the approach pursued by the measure requires making a number of assumptions concerning certain elements of the high ILUC-risk formula. The Panel notes, however, that the methodology is based on an observable phenomenon (the share of expansion into land with high-carbon stock), thereby increasing the probability that the formula captures the causal connection between the demand for the crop in question and ILUC risk. Therefore, as long as the methodology as a whole bears a rational connection to the measure's objective, the regulatory distinction cannot be said to be *a priori* not legitimate solely on the grounds that the European Union has decided to use observable land-use change effects as a proxy of ILUC.[856]

7.542. Accepting a contrary proposition would *de facto* deprive WTO Members of the right to regulate risks that do not lend themselves to quantitative analysis, or which are not sufficiently studied, even though such risks constitute a genuine cause of concern.[857] Nothing in the text of the TBT Agreement supports such an interpretation of Article 2.1. To the contrary, the Preamble to the TBT Agreement expressly recognizes that "no country should be prevented from taking measures necessary … for the protection … of the environment".[858] To that end, Article 2.2 lists as a relevant consideration for assessing regulatory risks "*available* scientific and technical information". This

[852] Indonesia's comments on the European Union's response to Panel question No. 142, para. 178.
[853] Indonesia's first written submission, para. 531.
[854] Indonesia's comments on the European Union's response to Panel question No. 142, para. 178.
[855] Indonesia's first written submission, para. 233. European Union's first written submission, para. 324; and response to Panel question No. 142, paras. 178-181.
[856] Insofar as Indonesia is challenging specific data and assumption used in the high ILUC-risk formula, they are addressed in the next section.
[857] The Panel recalls that in the context of Indonesia's claim under Article 2.2 it has found that the risk of ILUC-related GHG emissions, while currently not directly observable or precisely quantifiable, is not a risk that appears to be theoretical, abstract or otherwise hypothetical.
[858] Recital 6 to the Preamble to the TBT Agreement.

confirms, in the Panel's view, that the TBT Agreement does not require WTO Members to regulate only where perfect data is available.[859]

7.543. The Panel is further unconvinced by Indonesia's reliance on the expert report submitted in this dispute to support the contention that a crop's share of expansion into land with high-carbon stock cannot be used as a proxy of the risk of ILUC. The Panel notes that the expert report at issue considers reliance on ILUC from the perspective of estimating the levels of related GHG emissions using an LCA-based approach.[860] The premise of Indonesia's argument thus seems to be misguided, because, as explained at length in the preceding paragraphs, the measure focuses on the risk of ILUC instead of seeking to attribute specific GHG emissions levels to any feedstocks. The Panel thus considers that the measure does not need to establish a direct causal link between the production of biofuel feedstock in one geographical location and the growing of crops in another geographical location that leads to land-use change effects.

7.544. In sum, the Panel considers that the evidence on the record provides a reasonable basis for relying on the expansion of a feedstock's production area into land with high-carbon stock as a proxy of ILUC risk. The measure captures land-use change effects of crops used as biofuel feedstocks at least within biofuel and non-biofuel applications of a single crop, but also across different food and feed crops. As such, the measure establishes a rational connection between the expansion into land with high-carbon stock and the risk of ILUC. In the Panel's view, because the measure does not seek to attribute specific quantities of ILUC-related GHG emissions to any particular biofuel feedstock, it is not necessary to establish a direct causal link between the displacement of non-biofuel agricultural production by a crop used to produce biofuels and the ILUC-related GHG emissions.

The relationship between the share of crop's expansion into land with high-carbon stock and EU biofuel demand

7.545. Indonesia submits that the distinction based on the concepts of ILUC and high ILUC-risk in particular is not legitimate, because it is impossible to determine the share of a crop's expansion driven by an increase in EU biofuel demand as opposed to other factors.[861] The European Union acknowledges that it is impossible to attribute a specific rate of expansion to each driver given the multitude of different causes of the expansion.[862] The European Union maintains that its approach is justified because the impact of cultivating a particular crop is the same regardless of its use.[863] The European Union observes that because demand for agricultural commodities is not diminishing and cannot be met through productivity increases, an increase in biofuel demand will lead to expansion of non-biofuel agricultural production and, by implication, land-use change.[864]

7.546. In the preceding subsection, the Panel has found that because the measure does not seek to attribute specific levels of ILUC-related GHG emissions to any particular feedstocks, it does not need to establish a direct causal link between the displacement of non-biofuel agricultural production by a crop used to produce biofuels and the ILUC-related GHG emissions. In the Panel's view, a similar rationale applies to Indonesia's argument that the European Union's methodology fails to attribute ILUC-related GHG emissions to EU biofuel demand. The Panel agrees that the high ILUC-risk formula does not account for different drivers of demand for crops used to make biofuel feedstocks. However, attributing land-use change to specific factors should not matter insofar as the degree of ILUC risk is associated with the global average share of expansion into high-carbon stock land of a crop as a whole (i.e. for all applications). The degree of ILUC risk reflects the pressure that the crop production globally exerts on the agricultural land as a result of an increased demand in any particular sector. Therefore, whenever demand for a biofuel feedstock increases, it contributes to that pressure and, by implication, to the risk of ILUC. This also renders inapposite the argument

[859] The Panel notes that in the context of Article 5 of the SPS Agreement, prior panels and the Appellate Body have found that a Member can choose either a quantitative or qualitative methodology to conduct a risk assessment. (See e.g. Appellate Body Report, *EC – Hormones*, para. 187.) Sometimes a quantitative approach may not be appropriate, in particular when reliable specific numeric data is not available. (Panel Report, *Australia – Apples*, para. 7.441.) The Appellate Body has recognized that various elements of a Panel's analysis under Article 2.2 could likewise involve both a quantitative and qualitative assessment. (Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.211.)

[860] Finkbeiner Expert Opinion, (Exhibit IDN-126), pp. 9-10.

[861] Indonesia's second written submission, paras. 301-302.

[862] European Union's second written submission, para. 115.

[863] European Union's response to Panel question No. 144, para. 242.

[864] European Union's response to Panel question No. 18, para. 99.

that because the measure does not distinguish between different drivers of LUC, it might overestimate the contribution of biofuel demand to the LUC effects, where the crop is predominantly used for non-fuel purposes.[865]

7.547. The Panel thus concludes that it is not necessary to demonstrate a direct causal link between a specific share of a feedstock's production area expansion and demand for biofuel made from that feedstock in the European Union. The Panel further concludes that even though the measure does not distinguish between different drivers of the production area expansion, it is rationally related to its objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. This is because the measure applies only to biofuels consumed on the EU market.

Distinguishing between different biofuel feedstocks based on their degree of ILUC risk

7.548. Another defining feature of the high ILUC-risk cap and phase-out is that it seeks to attribute different degrees of ILUC risk (i.e. high and not high) to different biofuel feedstocks. This approach appears *a priori* consistent with the underlying assumption of the measure that the degree of ILUC risk is associated with a specific feedstock, and reflected in that feedstock's share of production area expansion into land with high-carbon stock, rather than with any specific condition causing the expansion.

7.549. According to Indonesia, differentiating between crops on the basis of their alleged ILUC-risk levels contradicts the evidence that ILUC effects cannot be measured or quantified.[866] Indonesia adds that the agricultural markets are global in nature and that there is a scientific consensus that ILUC effects are not crop-specific, which, it argues, is confirmed in the European Union's own approach taken in RED I and rejection of the results of the economic studies modelling the effects of ILUC in the Status Report.[867]

7.550. The European Union reiterates that the measure uses the share of expansion into land with high-carbon stock as a proxy of ILUC risk. It points out in this regard that different biofuel feedstocks are produced on land with varying carbon content and have different yields, impacting their overall levels of GHG emissions.[868] The degree of ILUC risk will thus vary from one feedstock to another as the share of production area expansion into land with high-carbon stock varies for each of them.[869] The European Union adds that differential ILUC effects are confirmed by the results of studies examined as part of the Impact Assessment for the ILUC Directive.[870]

7.551. The Panel considers that the difficulties in quantifying ILUC-related GHG-emissions for each feedstock with precision do not in and of themselves preclude the possibility that the degree of ILUC risk may vary from one feedstock to another. As observed by the Panel in this Report, quantifying ILUC-related GHG emissions and estimating the *risk* of ILUC and related GHG emissions are different issues that raise different sets of questions and cannot be approached from the same methodological perspective. Indeed, evidence submitted by the parties indicates that ILUC-related GHG emissions factors have been studied on a crop-by-crop basis.[871] The Impact Assessment prepared for the ILUC Directive confirms that "models tend to allocate different (indirect) land-use change emissions to different feedstocks".[872] Therefore, the fact that upon adoption of the ILUC Directive in 2015 the European Union decided not to differentiate at that time between different feedstocks based on the levels of their ILUC-related GHG emissions does not now preclude it from attributing different

[865] Indonesia's first written submission, para. 288.
[866] Indonesia's first written submission, paras. 266 and 601.
[867] Indonesia's first written submission, paras. 601; and second written submission, para. 636.
[868] European Union's first written submission, paras. 361-366.
[869] European Union's first written submission, paras. 362-363; second written submission, para. 112.
[870] European Union's first written submission, para. 362, fn 237.
[871] Study Report (2017), (Exhibit IDN-87), pp. 26-39. The very fact that the modelling studies relied on by both parties and analysed by the European Union in the Status Report consider ILUC effects on a crop-specific basis is, in the Panel's view, an indication that the risk of such effects vary across different crops. In fact, Indonesia seems to implicitly acknowledge that different crops can present different degrees of the risks of ILUC-related GHG emissions, insofar as it relies on the conclusions of these studies to argue that soybean has higher estimated levels of ILUC-related GHG emissions than oil palm. Indonesia's first written submission, para. 261; Indonesia's response to Panel question No. 38 c., paras. 96-102.
[872] Impact Assessment (2012), (Exhibit IDN-135), p. 85.

degrees of ILUC risk on a feedstock-by-feedstock basis.[873] For the same reasons, the Panel is unconvinced that there is a scientific consensus that effects of ILUC are not crop-specific. Such an assertion does not find support in the evidence submitted by the parties.[874]

7.552. Moreover, the Panel recalls that the measure seeks to estimate the degree of ILUC risk considered as a feedstock's pressure on existing agricultural land as a result of increased demand. This pressure is, in turn, estimated through the share of expansion into land with high-carbon stock. As evidenced in the Annex to the Delegated Regulation, different food and feed crops present different shares of expansion into such type of land, suggesting different levels of pressure on the existing agricultural land as a result of an increased demand. As noted by the European Union, these differences can be associated with the carbon content of the land on which expansion occurred, as well as the crop's yield, both of which are captured in the high ILUC-risk formula. Since these factors vary from one feedstock to another, they result in different levels of ILUC risk, as determined through the formula.

7.553. In light of the foregoing, the Panel finds that the evidence submitted by the parties provides a reasonable basis for distinguishing between different biofuel feedstocks based on their respective degrees of ILUC risk estimated on the basis of the share of expansion into land with high-carbon stock.

The alleged protectionist motive of the measure

7.554. The Panel notes Indonesia's further argument that the regulatory distinction is not legitimate because the concept of high ILUC-risk was developed to disguise the discrimination of oil palm-based biofuel.[875] According to Indonesia, this is reflected in the design and operation of the high ILUC-risk cap and phase-out, including the high ILUC-risk formula; the European Union's history of seeking to limit imports of palm oil-based biofuel, *inter alia* through trade defence measures; the measure's legislative history and the stated intentions of the European Parliament.[876]

7.555. The Panel observes that Indonesia's arguments pertaining to the design of the measure and in particular the high ILUC-risk formula are addressed throughout this and the following sections of this Report, and need not be repeated here. As regards Indonesia's arguments concerning the use of trade defence instruments against the imports of palm oil-based biofuel and the measure's legislative history, including statements by members of the European Parliament, the Panel has addressed them as part of its examination of the measure's objective under Article 2.2. The Panel has concluded that the evidence submitted in this regard, considered individually and together, does not support Indonesia's assertion that the measure has a protectionist motive. For the same reasons, the Panel does not consider the evidence on the record to show that the regulatory distinction at issue is *a priori* not legitimate.

7.556. Indonesia further submits that the protectionist motive of the high ILUC-risk cap and phase-out is manifest in the design of the low ILUC-risk certification.[877] On a conceptual level, Indonesia argues that low ILUC-risk is related to the notion of ILUC rather than high ILUC risk, as it was introduced in the ILUC Directive.[878] Indonesia also submits that because all feed and food crops lead to ILUC-related GHG emissions, all such crops should be subjected to low ILUC-risk certification, if the European Union genuinely sought to address such emissions.[879] Furthermore, Indonesia contends that the low ILUC-risk criteria cannot be satisfied and as such were designed to avoid certification of palm oil-based biofuel as low ILUC risk.[880]

7.557. The European Union contests that low ILUC-risk criteria are designed to target palm oil-based biofuel.[881] The European Union points out that classification of palm oil as high ILUC-risk

[873] As a result, ILUC was addressed in the ILUC Directive only through the 7% maximum share.
[874] See Indonesia's response to Panel question No. 38 a., para. 90. The Panel notes that Indonesia relies primarily on the results of modelling studies analysed in the Status Report and addressed by the Panel in this section of the Report.
[875] Indonesia's first written submission, para. 527.
[876] Indonesia's first written submission, paras. 527-528.
[877] Indonesia's first written submission, paras. 540-544.
[878] Indonesia's first written submission, para. 541.
[879] Indonesia's first written submission, para. 542.
[880] Indonesia's first written submission, paras. 543-544.
[881] European Union's first written submission, paras. 741-742.

feedstock results from the application of the formula and does not influence the formulation of the low ILUC-risk criteria, including the additionality pathways.[882] Finally, the European Union contests that the low ILUC-risk criteria are impracticable.[883]

7.558. Insofar as Indonesia's arguments concern the design and operation of the low ILUC-risk criteria, they will be addressed in more detail in the section relating to the application of the regulatory distinction below. At this stage of the assessment, the Panel considers the more conceptual argument by Indonesia that the concept of low ILUC-risk is related to ILUC rather than high ILUC risk, which allegedly reflects a protectionist motive of the measure.[884] The Panel is unconvinced by this argument. It is true that the notion of low ILUC-risk biofuels was introduced in the ILUC Directive, adopted in 2015 as an amendment to RED I. The ILUC Directive did not refer to the concept of high ILUC risk, nor did it set specific criteria for identifying low ILUC-risk feedstocks.[885] The Panel thus finds nothing in the provisions of the ILUC Directive that would contradict applying low ILUC-risk certification, which did not exist at the time that directive was adopted, to individual consignments of biofuel made from a high ILUC-risk feedstock, for which the risk of ILUC was at least partially mitigated. Moreover, neither the ILUC Directive, nor RED II, contains a derogation from the 7% maximum share for low ILUC-risk biofuels. In the Panel's view, this would likely be the case if the concept of low ILUC-risk related exclusively to ILUC and not high ILUC risk. Last but not least, the Panel notes that the concept of low ILUC-risk biofuels evolved between the adoption of the ILUC Directive and RED II.[886]

7.559. The Panel further notes that the regulatory distinction is drawn between biofuels made from high ILUC-risk feedstocks and other feed and food crop-based biofuels, which present some degree of ILUC risk, including low ILUC risk. The measure does not distinguish further within the latter category of biofuels based on their degree of ILUC risk. Because all of them present some risk of ILUC, they are all subject to the 7% maximum share.

7.560. The Panel further observes that palm oil-based biofuel requires low ILUC-risk certification to be eligible to count towards the EU renewable energy targets outside of the limitations imposed by the high ILUC-risk cap and phase-out as a result of it being made from a feedstock classified as high ILUC risk. This, in turn, is the result of the application of the formula in Article 3 of the Delegated Regulation. Therefore, Indonesia's argument that all food and feed crop-based biofuels should be subject to the low ILUC-risk certification appears to concern the application of the high ILUC-risk formula and the data. As such, it is addressed in the sections of this Report concerning different elements of the formula, as well as the underlying assumptions and data.

Conclusion on the a priori legitimacy of the regulatory distinction based on high ILUC-risk

7.561. In light of the foregoing, the Panel disagrees with Indonesia's position that, conceptually, a regulatory distinction based on a feedstock's degree of ILUC risk cannot be *a priori* legitimate. The Panel has found that the evidence submitted by the parties provides a reasonable basis for relying on the share of a feedstock's production area expansion into land with high-carbon stock as a proxy of the risk of ILUC associated with production of a particular biofuel feedstock. Because the measure seeks to estimate the degree of risk of ILUC rather than to attribute quantities of ILUC-related GHG emissions to specific biofuel feedstocks, it is not necessary to establish a direct causal link between EU biofuel demand, displacement of non-biofuel agricultural production and the resulting land use change effects. The Panel thus finds that, on a conceptual level, the regulatory distinction based on a high degree of ILUC risk is *a priori* legitimate.

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[882] European Union's first written submission, para. 743.

[883] European Union's first written submission, paras. 745-762.

[884] This is consistent with the Panel's approach outlined above to addressing the parties' overlapping arguments pertaining to the questions whether the regulatory distinction at issue in this dispute is legitimate and whether it is applied in an even-handed manner. The Panel notes in this regard that Indonesia repeats the arguments concerning the design of the low ILUC-risk certification criteria in the section of its submissions concerning the alleged application of the regulatory distinction in a manner constituting arbitrary or unjustifiable distinction. Indonesia's second written submission, paras. 651-654

[885] The ILUC Directive stipulated that the possibility of identifying such criteria would be explored in the Status Report, which was adopted in 2017. Article 3(2)(d) of the ILUC Directive.

[886] This evolution is reflected in the differences in the definitions of low ILUC-risk biofuels in the ILUC Directive (Article 1(1)) and in RED II (Article 2(37)).

7.1.2.4.5.3 Application of the regulatory distinction at issue

7.562. The Panel now turns to Indonesia's arguments, which, in the Panel's view, relate to the manner in which the regulatory distinction at issue is applied in the high ILUC-risk cap and phase-out. These arguments focus on certain aspects of the design, structure and operation of the measure that could result in the regulatory distinction based on high ILUC-risk not being applied in an even-handed manner or being applied in a manner that constitutes arbitrary or unjustifiable discrimination. The Panel notes that some of these arguments are also raised to substantiate Indonesia's contention that the regulatory distinction at issue is not legitimate. The Panel recalls, however, that it is not bound by the presentation of the arguments by the parties and enjoys discretion in structuring its analysis.[887]

7.563. Indonesia takes issue with a number of assumptions for the high ILUC-risk formula, as well as the variables and sources of the data incorporated therein.[888] Indonesia refers in this regard to factual sections of its submissions, where it addresses the scientific underpinnings of the measure.[889] Indonesia also argues that the European Union has not disclosed the exact calculations and sources relied on to arrive at the values, which applied in the formula lead to the determination of palm oil as currently the only high ILUC-risk feedstock.[890]

7.564. The Panel agrees with Indonesia that the sources of certain assumptions and values incorporated in the formula are not easily discernible from the Delegated Regulation and its Annex, as well as other documents relevant to the adoption of the measure.[891] However, in response to a number of questions from the Panel, the European Union indicates the relevant sources and explains how data is used in the formula.[892] The Panel notes that Indonesia has had an opportunity to comment on those responses and to a large extent availed itself of this opportunity.

7.565. Indonesia raises overall a number of issues concerning the high ILUC-risk formula and the underlying data and assumptions. More specifically, Indonesia contests the use of a relative, as opposed to an absolute, share of a feedstock's production area expansion into land with high-carbon stock to estimate ILUC risk, and relying in this regard on historical data.[893] Indonesia also contests the calculation of the share of palm oil's expansion into forestland and peatland, including the peat multiplier, as well as the productivity factor.[894] Last but not least, Indonesia takes issue with the calculation of the significant expansion threshold.[895]

7.566. The Panel will address these arguments in more detail when dealing with specific aspects of the high ILUC-risk formula. At this stage, the Panel recalls more generally that its task in this dispute is not to attempt to resolve scientific debates on the basis of the evidence submitted by the parties. Rather, as explained in more detail above, the Panel has to determine whether considering the entirety of the evidence, there is a reasonable basis for the regulatory distinction and the manner in which it is applied in the high ILUC-risk cap and phase-out.[896] The Panel recalls that nothing in the TBT Agreement precludes WTO Members from regulating areas in respect of which scientific information is not readily available. Indeed, Article 2.2 recognizes Members' right to address regulatory risks upon consideration of, *inter alia*, "*available* scientific and technical information".

7.567. With this background, the Panel now turns to the aspects of the measure which, in its view, are relevant to the manner in which the regulatory distinction has been applied. The Panel recalls

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[887] The Panel is also of the view that the practical significance of a finding that a particular aspect of a measure is inconsistent with Article 2.1 would be the same regardless of whether it is viewed as being indicative of the absence of a legitimate regulatory distinction, or of that distinction being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

[888] Indonesia's first written submission, paras. 535-536.

[889] Indonesia's first written submission, para. 535, fn 685.

[890] Indonesia's first written submission, para. 536.

[891] Primarily in Status Report (2019), Exhibit IDN-56; and Study Report (2017), Exhibit IDN-87.

[892] See, for example, European Union's responses to Panel questions No. 42, No. 43, No. 145, No. 148, and No. 149.

[893]Indonesia's first written submission, paras. 303-308; and second written submission, paras. 249-257.

[894] Indonesia's first written submission, paras. 296-317; and second written submission, paras. 261-295.

[895] Indonesia's first written submission, paras. 293-317; and second written submission, paras. 296-313.

[896] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.627.

that the central element of the formula relates to the share of a feedstock's production area expansion into land with high-carbon stock, adjusted for the crop's productivity. This share is calculated as the sum of the share of expansion into forestland and into wetland.[897] Both forests and wetlands, especially peatland, are known to contain high volumes of CO_2, which are released to the atmosphere when forests and wetlands are cleared.[898] If the total share of expansion exceeds 10%, the feedstock is considered as high ILUC-risk biofuel feedstock. On this very general level of the formula, two elements thus impact the classification of a feedstock as high ILUC-risk: the methodology and data used to calculate the share of expansion into high-carbon stock land and the 10% "significant expansion threshold".

Relative share of expansion rate into land with high-carbon stock

7.568. As noted above, to estimate the degree of ILUC risk associated with producing a particular feedstock, the measure uses as proxy the share of expansion of the feedstock's production area into land with high-carbon stock. As the measure relies on the *share* of expansion of a feedstock's global production area, this element of the formula is expressed in relative terms. This means that the central indicator of the degree of ILUC risk is not the absolute expansion of a crop's production area but rather a portion of that expansion that has taken place on land with high-carbon stock, expressed in percentage points.

7.569. Indonesia submits that relying on the relative share of expansion of a feedstock's production area into land with high-carbon stock, rather than on the absolute expansion of such production, area skews the analysis. According to Indonesia, this methodology disadvantages biofuels made from feedstocks commercialized more recently, such as palm oil, as compared to biofuels made from crops that have already reached significant levels of global production.[899] In support of this contention, Indonesia relies on an expert report suggesting that the absolute area of expansion is a better indicator of ILUC-related environmental effects.[900] According to this report, for crops with a significant global production area even a relatively small expansion of that area is likely to result in substantial impacts on the environment, including through land use change.[901] Indonesia provides the example of soybean, which has increased its production area by 3183.5 kha in absolute terms, which is 3.5 times more than oil palm, yet the relative increase of the production area of the two crops is 3% and 4% respectively.[902]

7.570. The European Union submits that the measure is intended to capture the overall impact of further stimulating demand for the agricultural commodity in question, including both the absolute and relative expansion.[903] In the European Union's view, a relative expansion is relevant because it is an indicator of demand.[904] The European Union explains that focusing on the relative share of expansion reflects the measure's objective to address the risk of ILUC-related GHG emissions associated with each additional unit of biofuel produced.[905] According to the European Union, the risk of ILUC associated with such additional demand is thus not a function of the total expansion of a crop, but rather of the portion of that expansion per unit of extra production of a feedstock that takes place on land with high-carbon stock.[906]

7.571. The Panel recalls that the high ILUC-risk cap and phase-out does not seek to estimate the quantities of GHG emissions resulting from land use change, but the risk of causing ILUC as a result of increasing demand for a particular biofuel feedstock. The European Union has thus opted for

[897] Article 3(b) of the Delegated Regulation.
[898] IPCC Report, "Climate Change and Land", (Exhibit IDN-393), p. 20.
[899] Indonesia's second written submission, paras. 254-257.
[900] Finkbeiner Expert Opinion, (Exhibit IDN-126), p. 18. The report states, *inter alia*, that "for climate change and the real world impact, it is not the relative effect that matters, it is the absolute effect as the absolute amount of land use change correlates with the associated GHG emissions".
[901] Indonesia's second written submission, para. 254; Finkbeiner Expert Opinion, (Exhibit IDN-126), p. 18.
[902] Indonesia's second written submission, para. 256; Finkbeiner Expert Opinion, (Exhibit IDN-126), p. 18.
[903] European Union's responses to Panel question No. 142, para. 192.
[904] European Union's response to Panel question No. 152, paras. 330-331.
[905] European Union's comments on Indonesia's response to Panel question No. 153, para. 88.
[906] European Union's comments on Indonesia's response to Panel question No. 153, para. 88.

addressing ILUC-related GHG emissions by identifying crops with the highest likelihood of expanding into high-carbon stock land for an additional unit of biofuel produced.

7.572. Since each unit of additional biofuel consumed will lead to a corresponding additional unit of feedstock produced (adjusted for productivity), identifying which crop has a higher risk of leading to land use change will also help determine which crop would lead to higher absolute amounts of land use change *for the same increase in units of additional biofuel consumed*. This is the case regardless of the current size of the feedstock's global production area. Relying on the "relative" share of expansion places the focus on the crop's propensity to expand into land with high-carbon stock, which is commensurate with the logic of the approach adopted in the measure. Indonesia's argument, and the conclusions of the expert report it relies on, appear thus to be based on an incorrect understanding of the operation of the measure. Therefore, the Panel observes that using a relative share of expansion into land with high-carbon stock is better suited to reflect the risk of ILUC related to a marginal increase in production of a given crop.

7.573. The Panel further observes that the measure takes into account the absolute expansion of the production area by requiring that the average annual expansion of the production area affects more than 100 000 hectares.[907] Therefore, the measure ensures that the share of expansion into land with high-carbon stock is considered only with respect to feedstocks presenting overall a sizeable expansion of the production area. The Panel notes that Indonesia does not contest this threshold as such. The Panel is thus not persuaded that there is anything arbitrary in the application of such a minimum threshold insofar as it allows the measure to focus on the most problematic biofuel feedstocks that could lead to land use change. In sum, the evidence submitted by the parties provides a reasonable basis for estimating the degree of ILUC risk based on the relative share of expansion into land with high-carbon stock.

Reliance on past data

7.574. In the preceding section, the Panel has discussed two elements of the formula conditioning classification of a feedstock as high ILUC risk. The first is the average annual expansion rate of a feedstock's production area, which has to exceed 1% and affect more than 100 000 hectares in order to be considered whether the feedstock can be associated with a high degree of ILUC risk.[908] The second is the share of that expansion into land with high-carbon stock, which is the proxy of the degree of ILUC risk.[909] Both of these values are estimated with respect to a 2008-2016 reference period.

7.575. Indonesia criticizes the reliance on data relating to this reference period and earlier, which it calls "historical". Indonesia argues that relying on such past data ignores recent trends and developments regarding the protection of forestland and wetland. According to Indonesia, these developments suggest that the more recent rate of forest loss in Indonesia has been well below the rates calculated for the 2008-2016 period.[910] Indonesia adds that using past data disregards the efforts of palm oil-producing countries to tame the expansion of oil palm plantations and reduce LUC-related GHG emissions more generally.[911] In Indonesia's view, the selection of the 2008-2016 reference period puts in focus oil palm, which expanded more rapidly during that period of time, while ignoring high expansion rates of production areas of other biofuel feedstocks recorded earlier in the past.[912]

7.576. The European Union submits that it is reasonable from a regulatory point of view to base forecasts about future developments on trends observed over a recent time-period.[913] The European Union contends that it relied on the data available at the time of preparing the Delegated Regulation and the Status Report and the cut-off dates were aligned with the introduction of the protection of land with high-carbon stock in RED I and the tabling of the European Commission's proposal for RED II.[914] The European Union adds that more data was available for the period 2008-

[907] Article 3(a) of the Delegated Regulation.
[908] Article 3(a) of the Delegated Regulation.
[909] Article 3(b) of the Delegated Regulation.
[910] Indonesia's second written submission, para. 252.
[911] Indonesia's second written submission, paras. 249-251.
[912] Indonesia's second written submission, para. 253.
[913] European Union's response to Panel question No. 144, para. 227.
[914] European Union's response to Panel question No. 150, paras. 309-310.

2016 than beyond 2016 and that more recent data does not contradict the conclusions reached on the basis of the data available for the reference period.[915]

7.577. The Panel notes the European Union's explanation that the beginning of the reference period corresponds with the introduction of the sustainability and GHG emissions saving criteria intended to protect land with high-carbon stock.[916] Following the entry into force of these criteria, which focus on DLUC-related effects, EU biofuel demand was expected to be met entirely by production coming from crops grown on existing agricultural land.[917] This has fuelled concerns about ILUC and its impact on the environment.[918] Indonesia does not appear to be contesting this rationale for choosing 2008 as the beginning of the reference period.

7.578. Rather, Indonesia argues that the reference period coincided with the expansion of oil palm, whereas other food and feed crops had reached the peak of their expansion earlier. However, Indonesia does not provide evidence concerning such peaks of expansion. In particular, Indonesia does not provide data on the expansion of the production area into land with high-carbon stock for other biofuel feedstocks coinciding with such peaks, or explain whether such data is available. As a result, the Panel is not in a position to assess whether relying on pre-2008 data would lead to a different high-ILUC risk classification of various food and feed crop-based biofuels. Moreover, the Panel considers that this argument contradicts Indonesia's position that the reference period ignores the most recent developments allegedly indicating declining deforestation rates in Indonesia.[919] In the Panel's view, relying on up-to-date data is of paramount importance for accurately assessing risks related to current and future trends.

7.579. This brings the Panel to Indonesia's argument that the European Union has ignored the most recent developments relevant to estimating the share of palm oil's production area expansion into land with high-carbon stock and, by implication, the degree of ILUC risk. In this regard, Indonesia refers to the international commitments and internal policies aimed at limiting deforestation.[920] The Panel acknowledges the importance of local efforts aimed at protecting the environment. The Panel notes that the effects of such policies would be reflected in the data on the expansion into land with high-carbon stock. This, in turn, raises the question whether the European Union should have relied on more recent evidence pertaining to expansion rates of biofuel feedstock's production areas.

7.580. The Panel notes that the Delegated Regulation and the Status Report, which contain the relevant requirements, data and assumptions resulting in the classification of palm oil as the only high ILUC-risk feedstock, were adopted in early 2019. Therefore, as regards the adoption of the high ILUC-risk cap and phase-out, the Panel considers as relevant data and scientific studies available not only during the 2008-2016 period but also past the 2016 cut-off date until the adoption of the Delegated Regulation.

7.581. With respect to the latter period, the parties produce as evidence three studies analysing deforestation rates in palm oil-producing countries, as well as a 2020-2029 FAO Agricultural Outlook.[921] The Panel notes that this evidence relates to deforestation rates more generally and does not provide information on expansion into land with high-carbon stock on a crop-by-crop basis. As a result, this evidence does not allow for a comparison with the data relied on by the European Union. It does not therefore corroborate Indonesia's assertion that the rate of oil palm's expansion into land

[915] European Union's response to Panel question No. 150, para. 313.

[916] The Status Report states that the 2008 year was chosen "to ensure policy coherence with the cut-off dates for the protection of highly biodiverse land and land with high carbon stock set out in Article 29 of the Directive." (Status Report (2019), (Exhibit IDN-56), p. 6).

[917] ILUC Directive, (Exhibits IDN-86), p. 2; and Status Report (2019), (Exhibit IDN-56), p. 4.

[918] ILUC Directive, (Exhibit IDN-86), Recital 5, p. 2.

[919] Indonesia's first written submission, paras. 307-309; and second written submission, para. 252.

[920] Indonesia's second written submission, paras. 249-252.

[921] Indonesia's first written submission, paras. 307-310. M. Weisse and E.D. Goldman, "The World Lost a Belgium-sized Area of Primary Rainforests Last Year", (Exhibit IDN-148), OECD/FAO, OECD FAO Agricultural Outlook 2020-2029 (OECD Publishing, 2020), pp. 138-141 and 200, (Exhibit IDN-35); D.L.A. Gaveau et al., "Rise and fall of forest loss and industrial plantations in Borneo (2000–2017)", Conservation Letters, Vol. 12:3 (2018), 1, (Exhibit IDN-150; and K.G. Austin et al., "What causes deforestation in Indonesia?", Environmental Research Letters, Vol. 14 (2019), 1, (Exhibit IDN-151). The Panel's analysis of this evidence is limited to the question whether it supports Indonesia's contention regarding the alleged lower rates of deforestation not being taken into account in the measure. The Panel will address the data relied on to calculate the share of palm oil's production area expansion into land with high-carbon stock is addressed in the next section of this Report.

with high-carbon stock was lower than it would appear from the measure at issue.[922] The Panel further notes that a 2021 study submitted by the European Union suggests that the expansion rate of oil palm into forestland in Indonesia had hardly changed between 2001 and 2019.[923] The Panel therefore considers that the evidence submitted by the parties does not put in question the data relied on by the European Union with regard to the 2008-2016 reference period.

7.582. However, the Panel stresses the importance of grounding the high ILUC-risk determination in the most recent available data to ensure a balanced and coherent application of the measure in its current design. The share of feedstock's production area expansion into land with high-carbon stock is a central element in the high ILUC-risk formula and one of the most significant factors that can impact the classification of a biofuel feedstock as high ILUC risk.[924] A balanced and coherent operation of the high ILUC-risk cap and phase-out is therefore premised on the accuracy of the data on expansion into land with high-carbon stock. This is all the more true given that the measure uses information on past trends to address current and future concerns. These trends may be subject to dynamic changes driven by market forces and the regulatory landscape, among other factors. The Panel considers particularly relevant in this context the efforts by Indonesia aimed at limiting the expansion of oil palm plantations, including into land with high-carbon stock, and deforestation more generally. It is therefore of paramount importance that the underlying data, as well as the related estimates and assumptions, are regularly reviewed to take due account of changes in the relevant circumstances.

7.583. Regular reviews of, and updates to, the underlying data seem also pertinent in light of the relatively short timeframe for the implementation of the high ILUC-risk cap and phase-out. To recall, the measure aims at excluding biofuels made from high ILUC-risk feedstocks from the eligibility to count towards the renewable energy targets by 2030 at the latest. In light of this timeline, an even-handed application of the measure would require a regular review of the data until that date and beyond.[925]

7.584. Moreover, the Panel notes that reviewing the data on expansion into land with high-carbon stock allows accounting for possible substitution effects between different biofuel feedstocks. The Panel notes in this regard Indonesia's argument that phasing out palm oil as biofuel feedstock could lead to substitution by biofuels made from other biofuel feedstocks.[926] An increased demand for such feedstocks, combined with lower productivity rates of the crops used to make them, will, in Indonesia's view, lead to further expansion of the production area reducing the effectiveness of the measure. While the evidence before the Panel suggests that excluding a particular biofuel from the eligibility to count towards the renewable energy targets may lead to some gradual substitution by other eligible biofuels, the extent of such substitution effects is difficult to predict.[927] If such substitution effects were to occur, they could indeed propel the production area expansion into land

[922] See European Union's response to Panel question No. 150, paras. 317-322.

[923] A 2021 study submitted by the European Union suggests that the share of oil palm's expansion into forestland in Indonesia peaked in 2016 and started slowing down in 2017-2019. However, the study concludes that the fall in the expansion of oil palm plantations in Indonesia is not related to the "the common drivers described for forest transitions" and that "there is no guarantee that the low levels of conversion seen in 2017-2019 will remain". (Gaveau D. &co., Slowing deforestation in Indonesia follows declining oil palm expansion and lower oil prices, Research Square, 15 January 2021, (Exhibit EU-273), pp. 7-8.) In addition, the study does not seem to address the expansion of oil palm into peatland. The Panel notes that this study is specific to the situation in Indonesia. The Panel recalls, however, that the share of a production area expansion is determined for the feedstock as a whole, irrespective of where the expansion occurs. The Panel remains mindful of this consideration when analysing other evidence concerning expansion of oil palm into land with high-carbon stock land in Malaysia and/or Indonesia.

[924] The Panel notes that it is much less likely that other elements of the high ILUC-risk formula, such as the productivity factor or the significant expansion threshold evolve significantly within a relatively short period of time.

[925] In the context of its findings under Article 2.4, the Panel observed that Article 2.4 is "not a static obligation and that there is an ongoing obligation to reassess technical regulations in light of new international standards that are adopted or revised", and that the obligation in Article 2.3 of the TBT Agreement contextually supports that view (referring to Panel Report, *EC – Sardines*, para. 7.81). The Panel considers that the same considerations inform the assessment of a technical regulation under Article 2.1.

[926] Indonesia's opening statement at the second meeting of the Panel, para. 41; and comments on the European Union's response to Panel question No. 139, para. 169.

[927] R. Delzeit, T. Heimann, F. Schünemann and M. Söder, "Who benefits really from phasing out palm oil-based biodiesel in the EU", Kiel Working Paper No. 2203, Kiel Institute for the World Economy, December 2021, (Exhibit IDN-371), p. 11. See also above section concerning the substitutability of palm oil-, rapeseed oil-, and soybean oil-based biofuels.

with high-carbon stock for feedstocks which would benefit from a shift of demand away from palm oil, potentially leading to an increase in their degree of ILUC risk. A periodical review of the data on the share of expansion into land with high-carbon stock could in principle capture LUC effects of a potential substitution of palm oil-based biofuel by other food and feed crop-based biofuels.

7.585. The European Union itself emphasizes the importance of a regular review of the available information in the absence of more recent data and points out that such a review mechanism is incorporated in Article 7 of the Delegated Regulation.[928] This provision requires the European Commission to review "all relevant aspects of the report on feedstock expansion", including the data on feedstock production area expansion and the low ILUC-risk certification criteria.[929] It thus appears to be of central importance to ensuring that the high ILUC-risk formula incorporates the most recent available data.[930] Indonesia does not question the scope of this review provision. It submits, however, that the review provided for in Article 7 has not been conducted and it is uncertain whether it would be carried out on a regular basis.[931]

7.586. Pursuant to Article 7 of the Delegated Regulation, the first review of the data on expansion into land with high-carbon stock was to be concluded by 30 June 2021. It is uncontested between the parties that this review has not taken place by the time the parties filed their last substantive submissions.[932] This means that the high ILUC-risk cap and phase-out was operating in 2022, and likely beyond, on the basis of data covering the 2008-2016 period, which had not been updated. During that time, new data may have become available that might have required adjustments to the operation of the measure and its application to any specific crop. Although the European Union contends that the delay was due to the COVID-19 pandemic, which affected many activity areas of the European Commission, it does not provide any specific arguments on how it affected the feasibility of reviewing the data underlying the high ILUC risk determination.[933] The Panel appreciates the difficulties that may arise in reviewing complex scientific information, especially in times of a global public health emergency. However, a general reference to the COVID-19 pandemic is insufficient to justify a delay in the review of data that is still ongoing at the time of drafting this report. This is all the more true, given that the European Union itself considered that the review could and should have been completed by 30 June 2021.[934]

7.587. Therefore, insofar as the review of data used as basis for the classification of feedstock(s) as high ILUC-risk is not undertaken in a regular and timely manner, the measure cannot be said to be applied in an even-handed manner. This is because the situation relevant to the assessment of the share of expansion into land with high-carbon stock may have changed since the determination was made on the basis of the 2008-2016 reference period. This finding of the Panel should not be understood as requiring the measure to be continuously updated to take account of any relevant new data sources that becomes available and that might change the measure's accuracy in determining high-ILUC risks and, consequently, its even-handedness. Rather, the regulatory design of the measure, with its heavy reliance on data and assumptions reflecting past events in order to address current and future risks requires the European Union to verify on a regular and timely basis whether the data supports the high ILUC-risk classification. Finally, the Panel notes that while its findings regarding the review of data take into account developments taking place after panel establishment, both parties, in particular the European Union, relied on such developments to support their respective positions.[935]

[928] European Union's first written submission, para. 897; and second written submission, para. 154.

[929] The full text of Article 7 of the Delegated Regulation is quoted in para. 2.55 above.

[930] The Panel notes that Article 26(2) subpara. 5 of RED II provides for a review of the low ILUC-risk certification criteria and the criteria for determining the high ILUC-risk feedstocks. This review seems, however, to be of a more general nature, while the review under Article 7 of the Delegated Regulation appears to be focusing on expansion into land with high-carbon stock, which is at the centre of the European Union's arguments.

[931] Indonesia comments on the European Union's response to Panel question No. 156, para. 298.

[932] European Union's response to Panel question No. 156, para. 347.

[933] European Union's response to Panel question No. 156, para. 344.

[934] The Panel is unpersuaded by the European Union's argument that the provision indicates an "indicative deadline", given its normative language. European Union's response to Panel question No. 156, para. 347.

[935] See section 7.1.1 of this Report, setting out preliminary considerations, above. The Panel notes that the European Union in particular reiterates on multiple occasions that the review provision ensures that newly available data will be duly taken into account in the high ILUC-risk formula.

7.588. The Panel therefore finds that the European Union has applied the high ILUC-risk cap and phase-out inconsistently with Article 2.1 of the TBT Agreement by failing to conduct a timely review of the data used to determine which biofuels are high ILUC risk, as this results in arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

Calculation of the share of expansion rate into land with high-carbon stock

7.589. The Panel further notes that Indonesia raises arguments contesting certain specific values and assumptions used to calculate the share of palm oil's production area expansion into land with high-carbon stock, as well as their sources. These arguments concern the method of calculation of the share of expansion into forestland and peatland, including the application of the peat multiplier, as well as the productivity factor.[936] All these factors are incorporated in the high ILUC-risk formula, as described in the descriptive part of this Report. More specifically, the productivity-adjusted share of a feedstock's production area expansion into land with high-carbon stock reflects the feedstock's propensity to cause LUC effects, including ILUC. As noted above, the formula considers as land with high-carbon stock two main types of land: forests and wetland, in particular peatland. Therefore, the share of a feedstock's production area expansion into land with high-carbon stock is the sum of expansion into forestland and into peatland. In addition, to take account of a particularly significant volume of carbon contained in peatland, the formula includes a peatland multiplier. The share of a feedstock's production area expansion into peatland is thus multiplied by 2.6 before being summed with the expansion into forestland. Finally, the overall share of expansion into land with high-carbon stock is adjusted for the crop's productivity, as explained in more detail further below.

7.590. Insofar as Indonesia's arguments contest the data that serves as the basis for the calculation of these values, the Panel recalls its finding above regarding the absence of a timely review of the data on the share of expansion into land with high-carbon stock, which implies that the data in question might have required revisions. Nevertheless, the Panel considers that addressing arguments of the parties relating to the nature of such data and their use in the high ILUC-risk formula is appropriate in the circumstances of this dispute. Assessing these arguments is relevant to the question whether the regulatory distinction has been applied in an even-handed manner and is therefore necessary to assist the DSB in making recommendations and providing rulings in these proceedings. The Panel is also of the view that such findings will be relevant for the implementation of the recommendations and rulings of the DSB.

7.591. Starting with the calculation of the share of palm oil's production area expansion into forests and peatland, Indonesia contests the methodology followed by the European Union and the underlying data. To recall, this share has been estimated at 45% for expansion into forests and 23% for the share of expansion into wetland, including peatland.[937] The Panel has reviewed the arguments and evidence adduced by the parties in relation to this criticism, in particular the data relied on for the calculation of the respective values and their sources.[938] The Panel considers that data relied on

[936] Indonesia's first written submission, paras. 293-318; second written submission, paras. 261-295.

[937] The share of expansion into peatland is further multiplied by 2.6 to account for the high carbon content of peat, before summing up with the share of expansion into forestland.

[938] Y. Basiron, "Palm oil production through sustainable plantations", European Journal of Lipid Science and Technology, Vol. 109 (2007), 289, (Exhibit IDN-8); Status Report (2019), (Exhibit IDN-56); Law Nr. 41 of the year 1999 of the Republic of Indonesia concerning forestry, published on 30 September 1999, State Gazette of the Republic of Indonesia, 1999 167, (Exhibit IDN-58); USDA FAS, "Commodity Intelligence Report - Indonesia: Palm Oil Production Prospects Continue to Grow", 31 December 2007, (Exhibit IDN-139); M. Weisse and E.D. Goldman, "The World Lost a Belgium-sized Area of Primary Rainforests Last Year", (Exhibit IDN-148); D.L.A. Gaveau et al., "Rise and fall of forest loss and industrial plantations in Borneo (2000–2017)", Conservation Letters, Vol. 12:3 (2018), 1, (Exhibit IDN-150); K.G. Austin et al., "What causes deforestation in Indonesia?", Environmental Research Letters, Vol. 14 (2019), 1, (Exhibit IDN-151); White Paper Nr. 17 by J. Miettinen et al., "Historical Analysis and Projection of Oil Palm Plantation Expansion on Peatland in Southeast Asia" (International Council on Clean Transportation, 2012), (Exhibit IDN-152); J. Miettinen, C. Shi, and S.C. Liew, "Land Cover Distribution in the Peatlands of Peninsular Malaysia, Sumatra, and Borneo in 2015 with Changes since 1990", Global Ecology and Conversation, Vol. 6 (2016), 67, (Exhibit IDN-153); K.G. Austin et al., "Shifting patterns of palm oil driven deforestation in Indonesia and implications for zero-deforestation commitments", Land Use Policy, Vol. 69 (2017), 416, (Exhibits EU-198, IDN-155); J. Xu et al., "PEATMAP: Refining estimates of global peatland distribution based on a meta-analysis", Catena, Vol. 160 (2018), 134, (Exhibit IDN-156); Jukka Miettinen et al, From carbon sink to carbon source: extensive peat oxidation in insular Southeast Asia since 1990, Environ. Res. Lett., 12 024014, 2017, (Exhibit EU-170); Hooijer, A., Page, S., Jauhiainen, J., Lee, W. A., Lu, X. X., Idris, A., and Anshari, G.: Subsidence and carbon loss in drained

by the European Union come from "qualified and respected" sources, which do not lack the "necessary scientific and methodological rigour to be considered reputable science".

7.592. However, some of Indonesia's arguments raise the question whether the European Union's use of the data contained in such studies was "objective and coherent". More specifically, Indonesia submits that the robustness and comparability of the data on oil palm's share of expansion rate into peatland are undermined by aggregating the studies covering a range of time periods for the same feedstock and across different feedstocks.[939] Indonesia also argues that for the calculation of the productivity factor, the European Union should have focused on the average oil yields rather than on average crop yields.[940] The Panel will address these arguments in turn.

7.593. The Panel recalls that land with high-carbon stock is defined in the Delegated Regulation as "wetlands, including peatland, and continuously forested areas" within the meaning of the relevant provisions of RED II.[941] A share of a feedstock's production expansion is thus calculated on the basis of expansion into forestland and peatland.[942] The European Union has considered wetlands and in particular peatland as land with high-carbon stock because such land contains significant amounts of carbon that are emitted as CO_2 when this type of land is drained to establish a plantation.[943] Indonesia does not contest the inclusion of peatland in the definition of land with high-carbon stock. However, Indonesia submits that the literature review aggregates studies from a range of time periods among studies of the same crop and between crops, dating as far back as 1989.[944] This, according to Indonesia, severely undermines the robustness of the conclusions and the comparability between different crops.[945]

7.594. The European Union explains that in the absence of more precise data it had to weigh the average from the data on GHG emissions related to peatland drainage by the area of oil palm's expansion into peatland in Indonesia and Malaysia.[946] The European Union adds that its methodology likely underestimates GHG emissions from drained peatland.[947]

7.595. The Panel notes that the data on the expansion of oil palm into peatland is only partially available for the whole reference period.[948] The Panel also notes that Indonesia does not produce data that would be more precise or more reliable for the purposes of estimating such an expansion

tropical peatlands, Biogeosciences, 9, pp. 1053–1071, (Exhibit EU-190); Page, S. E., Morrison, R., Malins, C., Hooijer, A., Rieley, J. O., and Jauhiainen, J.: Review of peat surface greenhouse gas emissions from oil palm plantations in Southeast Asia (ICCT White Paper 15), International Council on Clean Transportation, Washington, 2011, (Exhibit EU-191); Tonks A. J., Aplin, P., Beriro, D.J., Cooper, H., Evers, S, Vane, C.H. and Sjögersten, S.- Impacts of conversion of tropical peat swamp forest to oil palm plantation on peat organic chemistry, physical properties and carbon stocks, Geoderma, Volume 289, 2017, Pages 36-45, ISSN 0016-7061, (Exhibit EU-194); Vijay V., Pimm S.L., Jenkins C.N., Smith S.J., The Impacts of Oil Palm on Recent Deforestation and Biodiversity Loss, Plos One, 27 July 2016, (Exhibit EU-233); and Bioenergy International, "Total starts up La Mède Biorefinery", 4 July 2019, (Exhibit IDN-424).

[939] Indonesia's second written submission, para. 280

[940] Indonesia's second written submission, paras. 293-295; and response to Panel question No. 146, paras. 39-42.

[941] Article 2(8) of the Delegated Regulation.

[942] These are the two variables used in the numerator of the high ILUC-risk formula, in addition to the peat multiplier. For description of the formula, see the descriptive part of this Report above.

[943] European Union's first written submission, paras. 111-112.

[944] Indonesia's second written submission, para. 280.

[945] Indonesia's second written submission, para. 280.

[946] European Union's response to Panel question No. 149, para. 298.

[947] European Union's response to Panel question No. 149, paras. 301-307.

[948] White Paper Nr. 17 by J. Miettinen et al., "Historical Analysis and Projection of Oil Palm Plantation Expansion on Peatland in Southeast Asia" (International Council on Clean Transportation, 2012), (Exhibit IDN-152); Jukka Miettinen et al, From carbon sink to carbon source: extensive peat oxidation in insular Southeast Asia since 1990, Environ. Res. Lett., 12 024014, 2017, (Exhibit EU-170); Tonks A. J., Aplin, P., Beriro, D.J., Cooper, H., Evers, S, Vane, C.H. and Sjögersten, S.- Impacts of conversion of tropical peat swamp forest to oil palm plantation on peat organic chemistry, physical properties and carbon stocks, Geoderma, Volume 289, 2017, Pages 36-45, ISSN 0016-7061, (Exhibit EU-194); Gaveau, D.L.A., Locatelli, B., Salim, M.A., Yaen, H., Pacheco, P. and Sheil, D. - Rise and fall of forest loss and industrial plantations in Borneo (2000–2017). Conservation Letters. 2018;e12622, (Exhibit EU-197); and K.G. Austin et al., "Shifting patterns of palm oil driven deforestation in Indonesia and implications for zero-deforestation commitments", Land Use Policy, Vol. 69 (2017), 416, (Exhibits EU-198, IDN-155).

area.[949] Under these circumstances, it appears reasonable to base the share of oil palm's expansion into peatland on a weighted average of the aggregated data stemming from different available studies. The Panel further observes that the European Union has made a number of conservative assumptions concerning the area of oil palm's expansion into peatland, which in the Panel's view reflect a balanced and objective approach to the use of the data on expansion into peatland.[950]

7.596. The Panel now turns to the methodology for calculating the productivity factor. The high ILUC-risk formula contains a productivity factor in the denominator to adjust the share of production area expansion into land with high-carbon stock for the productivity of the crop used as biofuel feedstock. The productivity factor reflects the differences in the amount of energy that could be obtained from a given quantity of feedstock and production area. This adjustment allows for the making of an appropriate comparison of the shares of expansion into land with high-carbon stock of crops with different productivity levels. Otherwise, less productive crops used as biofuel feedstocks could be considered as presenting the same level of ILUC-risk as more productive crops for which the same share of expansion has been calculated. However, such less productive crops would need to expand into more area than more productive crops to produce the same additional unit of biofuel. Different productivity factors are thus calculated for each crop by adjusting the average yields with the respective share of area harvested and with the energy content for the main product as well as by-products associated with the same crop.[951]

7.597. Indonesia essentially challenges the European Union's methodology of comparing yields of different crops to calculate their respective productivity factors. According to Indonesia, the European Union should only have compared oil yields per hectare for all relevant crops.[952] Indonesia argues that considering by-products is irrelevant to EU biofuel demand, because it is oil that is used as feedstock for biofuel production.[953] Indonesia also submits that the European Union's data does not account for some of palm oil's by-products, such as kernel oil, kernel meal, palm shell, mesocarp fibres and fruit bunches.[954]

7.598. The European Union contends that accounting for main products and economically used by-products reflects the fact that the demand for certain crops is driven by all co-products rather than only oil.[955] The European Union explains this by referring to the example of soybean production, which is driven in the largest part by demand for soybean meal rather than oil.[956] The European Union further submits it has relied on the data for palm oil yield only and adjusted it to account for other co-products, because such data is more reliable than data on fresh oil palm fruit bunches.[957]

7.599. The Panel recalls that the purpose of incorporating the productivity factor in the high ILUC-risk formula is to ensure that the comparison of different crops' shares of expansion into land with high-carbon stock takes account of the fact that some crops have higher productivity levels than others. This requires that where crops yield multiple co- or by-products, their inclusion in the

[949] The Panel notes Indonesia's argument that the European Union has not attached enough weight to a study by Austin et al. (2017), which suggests lower rates of oil palm's expansion into peatland than the data relied on by the European Union. This is because the peat maps relied on in that study do not account for peat shallower than 0.5 m and thus underestimate the peat area in Indonesia. Status Report (2019), (Exhibit IDN-56), p. 28.

[950] For example, in estimating GHG emissions related to peat drainage, the European Union calculates only the difference between the annual emissions from the oil palm plantations on peat and the annual emissions from the partially drained peat in the immediately preceding land cover. This leads to attributing about half the emissions to a previous land cover. In addition, the measure does not consider emissions from peat fires used to clear the land and the Status Report assumes zero peatland drainage for oil palm outside of Indonesia and Malaysia. European Union's response to Panel question No. 149, paras. 303 and 306-307.

[951] European Union's response to Panel question No. 145, paras. 244-263.

[952] Indonesia's second written submission, paras. 293-294.

[953] Indonesia's comments on the European Union's responses to Panel questions No. 145 and No. 146, para. 237.

[954] Indonesia's second written submission, para. 295; and comments on the European Union's responses to Panel questions No. 145 and No. 146, paras. 245-248.

[955] European Union's response to Panel question No. 145, para. 260.

[956] European Union's response to Panel question No. 145, paras. 260-261. The European Union points out that soybean oil accounts for 40% of the value of soybeans.

[957] European Union's response to Panel question No. 145, para. 262.

determination of the energy content needs to be conducted in a consistent manner across all relevant crops.

7.600. The Panel further recalls that the high ILUC-risk formula does not differentiate between the drivers of expansion. As a result, it is impossible to identify a specific share of expansion that results from increased demand for biofuels in the European Union. Rather, this parameter of the formula applies to the crop as a whole. It thus seems reasonable that the productivity adjustment factor found in the denominator of the formula equally relates to the crop as a whole. This is all the more relevant given that expansion of some food and feed crops is driven by the demand for co-products other than oil.

7.601. Taking the example of soybean, the Panel notes that the demand is driven primarily by the demand for soybean meal (approximately 60%, according to European Union) and to a lesser extent by soybean oil (40%, according to the European Union).[958] Ignoring this fact would, in the Panel's view, skew the analysis by accounting for different drivers of demand in the nominator of the high ILUC-risk formula (the global share of production area expansion of a crop as a whole) and different drivers in the denominator of the formula (productivity measured as oil yield only). The Panel is thus unconvinced by Indonesia's argument that if biofuel production accounts for 40% of the demand for soybean, then only that portion of energy should be included in determining the product's productivity. Therefore, the evidence submitted by the parties provides a reasonable basis for the European Union to consider all relevant co- and by-products in the determination of the productivity factor.

7.602. The Panel further notes that the source data on average yield results used as the basis for the calculation of the productivity factor includes data on oil yield for oil palm and seed yield for other crops.[959] Consistent with the approach set out in the preceding paragraph, calculation of the productivity factor has to be based on yield data for all relevant co- and by-products. The Panel notes that the European Union has adjusted the source data to account for all by-products other than waste and residues.[960] Indonesia does not seem to contest these adjustments.[961]

7.603. However, Indonesia questions the European Union's use of raw data on palm oil yield instead of available Food and Agriculture Organization Statistics (FAOSTAT) data on fresh oil palm fruit bunches for the calculation of the productivity factor.[962] The Panel notes that the FAOSTAT data has been derived from the same raw data on palm oil yield, that the European Union relies on. This raw data has then been adjusted by assuming certain local crushing yields which, according to the European Union, have not been disclosed.[963] The Panel further notes that Indonesia does not explain why it would be more appropriate to use the FAOSTAT data on fresh fruit bunches, other than that it is "possible and simple".[964] Nor does Indonesia explain why it does not regard the raw palm oil yield data to be of higher quality.[965] In the Panel's view, there is nothing arbitrary or otherwise unusual in the European Union relying on raw data on palm oil yield instead of relying on the same data subject to certain adjustments made according to a methodology that is not entirely clear.

7.604. Finally, the Panel notes Indonesia's argument that the calculation of oil palm's productivity factor does not account for certain residues, which are sizeable.[966] It is not clear from the parties' arguments exactly which residues are not accounted for other than "excess nutshells".[967] In any event, the Panel is not convinced, and Indonesia has not shown, how not accounting for such residues could affect the calculation of oil palm's productivity factor.

7.605. In light of the foregoing, and bearing in mind the Panel's conclusion regarding the absence of timely review of the data, the Panel finds that the evidence submitted by the parties provides a

[958] European Union's response to Panel question No. 145, para. 260. These approximate values provided by the European Union are not contested as such by Indonesia.
[959] European Union's response to Panel question No. 145, para. 250.
[960] European Union's response to Panel question No. 145, para. 253 and Table 2.
[961] Indonesia's comments on the European Union's response to Panel question No. 146, paras. 237-248.
[962] Indonesia's comments on the European Union's response to Panel question No. 146, paras. 240-241.
[963] European Union's response to Panel question No. 145, para. 262. Indonesia does not address in its comments this rationale for the European Union's decision to rely on raw palm oil yield data.
[964] Indonesia's comments on the European Union's response to Panel question No. 146, para. 240.
[965] Indonesia's comments on the European Union's response to Panel question No. 146, para. 240.
[966] Indonesia's comments on the European Union's response to Panel question No. 146, para. 245.
[967] European Union's response to Panel question No. 145, para. 257.

reasonable basis for the European Union's methodology of calculating the share of expansion of feedstock's production area into land with high-carbon stock, including the shares of expansion into forestland and wetland, the peat multiplier and the productivity factor. The Panel further notes that even if it were to accept some or many of the alternative values proposed by Indonesia, the outcome of the application of the measure would remain the same, meaning that palm oil would remain the only biofuel feedstock classified as high ILUC risk.

Significant share of expansion threshold

7.606. Pursuant to Article 3 of the Delegated Regulation, a biofuel feedstock is considered high ILUC-risk if its share of expansion into land with high-carbon stock, adjusted for productivity, exceeds 10%.[968] This value of 10% has been calculated through a number of steps, which on their own could constitute a separate formula. These steps essentially consist in comparing carbon emissions savings from replacing fossil fuels with biofuels, feedstock's energy content and average net loss of carbon stock from land use change.[969] The resulting value of approximately 14% indicates the estimated share of a biofuel feedstock production area expansion into land with high-carbon stock at which LUC-related emissions will negate the direct GHG savings resulting from fossil fuel replacement.[970] To this figure of 14% a discount factor of 30% is further applied, based on the precautionary principle, "to guarantee both that biofuels achieve net sizable GHG emission savings and that biodiversity loss associated to ILUC is minimized".[971] The application of the significant expansion threshold thus seeks to ensure that the GHG emissions savings achieved by replacing fossil fuels with biofuels are not negated by the ILUC-related GHG emissions.

7.607. Indonesia contests the methodology leading to the calculation of the significant expansion threshold, including the application of the 30% discount factor.[972] More specifically, Indonesia submits that the application of the 30% discount factor is neither based on a full risk assessment and all available information, nor on the precautionary principle.[973] In its submissions, the European Union explains in detail the methodology it has followed to arrive at the significant expansion threshold.[974] The European Union points out in this regard that it has made conservative assumptions, which could underestimate the net carbon loss value for oil palm.[975] The European Union adds that the application of the 30% discount factor was a regulatory choice ensuring that biofuels achieve sizeable GHG emissions savings.[976]

7.608. The Panel has reviewed the evidence submitted by the parties in relation to the calculation of the significant expansion threshold, including the available source data, assumptions and methodology.[977] This evidence provides, in the Panel's view, a reasonable basis for arriving at the

[968] Article 3(b) of the Delegated Regulation.
[969] Status Report (2019), (Exhibit IDN-56), p. 14. European Union's response to Panel question No. 43, paras. 199-202.
[970] Status Report (2019), (Exhibit IDN-56), p. 14.
[971] Status Report (2019), (Exhibit IDN-56), p. 13.
[972] Indonesia's second written submission, paras. 296-313.
[973] Indonesia's comments on the European Union's response to Panel question No. 154, paras. 294-297.
[974] European Union's response to Panel question No. 148, paras. 268-289.
[975] European Union's response to Panel question No. 148, paras. 277-283.
[976] European Union's responses to Panel questions No. 142, para. 200, and No. 154, para. 337.
[977] European Union's responses to Panel questions No. 43, paras. 199-202, No. 148, paras. 268-289 and No. 154, paras. 337-338. Indonesia's second written submission, paras. 296-313; and comments on the European Union's responses to Panel questions No. 148, paras. 249-253 and No. 154, paras. 289-297; Status Report (2019), (Exhibit IDN-56), pp. 13-14; Chapter 2, Volume 4, Generic Methodologies Applicable To Multiple Land-Use Categories, in 2006 IPCC Guidelines for National Greenhouse Gas Inventories, page 2.31, (Exhibit EU-181); Gaveau, D.L.A., Sheil, D., Husnayaen, Salim, M.A., Arjasakusuma, S., Ancrenaz, M., Pacheco, P., Meijaard, E., 2016. Rapid conversions and avoided deforestation: examining four decades of industrial plantation expansion in Borneo. Nature - Scientific Reports 6, 32017, (Exhibit EU-199); RSPO GHG Assessment Procedure for New Development Version 3, 30 October 2016, (Exhibit EU-271); N. Khasanah et al., "Aboveground carbon stocks in oil palm plantations and the threshold for carbon-neutral vegetation conversion on mineral soils", Cogent Environmental Science, Vol. 1:1 (2015), 1, (Exhibit IDN-141); J. Miettinen and S.C. Liew, "Estimation of biomass distribution in Peninsular Malaysia and in the islands of Sumatra, Java and Borneo based on multi-resolution remote sensing land cover analysis", Mitigation and Adaptation Strategies for Global Change, Vol. 14 (2009), 357, (Exhibit IDN-142); White Paper Nr. 17 by J. Miettinen et al., "Historical Analysis and Projection of Oil Palm Plantation Expansion on Peatland in Southeast Asia" (International Council on Clean Transportation, 2012), (Exhibit IDN-152); Commission Decision of 10 June 2010 on guidelines for the calculation of land carbon stocks for the purpose of Annex V to Directive

threshold value of 14%, beyond which the average net carbon stock loss from expansion into land with high-carbon stock is likely to cancel out any emission saving from replacing fossil fuels with biofuels. In particular, the Panel notes that the evidence and arguments put forward by Indonesia do not undermine the European Union's calculation or the underlying data and assumptions.

7.609. Regarding the 30% discount factor, the Panel notes that it serves the purpose of ensuring that the use of biofuels delivers sizeable GHG emissions savings that are not cancelled out by ILUC-related GHG emissions associated with EU biofuel demand. The Panel is mindful that given the complexity of estimating the significant expansion threshold and the lack of readily available data for some of its elements, the value of 14% is an estimate. The Panel understands that in light of these uncertainties, the European Union chooses to err on the side of caution and has applied the 30% discount factor to ensure that the measure is effective for its purpose. The Panel notes in this regard that nothing in the TBT Agreement prevents WTO Members from protection against regulatory risks at the level they consider appropriate. The TBT Agreement recognizes this right of WTO Members in its preamble:

> [N]o country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, *at the levels it considers appropriate*.[978]

7.610. The Panel further notes that the European Union's efforts to ensure that the use of biofuels delivers sizeable GHG emissions savings that are not cancelled out by ILUC-related GHG emissions associated with EU biofuel demand is a corollary of the measure's objective to "limit the risk of ILUC-related GHG emissions associated with food and feed crop-based biofuels".

7.611. The Panel thus sees nothing in the application of the 30% discount factor that would result in arbitrary or unjustifiable discrimination or otherwise the measure not being applied in an even-handed manner. More specifically, the Panel observes that, if anything, the application of the discount factor makes it more likely for other biofuel feedstocks to exceed the significant expansion threshold, should the share of their production area expansion into land with high-carbon stock increase in the future.[979] The Panel recalls in this regard that the high ILUC-risk formula estimates palm oil's share of expansion into land with high-carbon stock, adjusted for productivity, at 41.92%. Therefore, the application of the 30% discount factor does not in any event impact the classification of palm oil as a high ILUC-risk feedstock.

7.612. In light of the foregoing, the Panel considers that the evidence submitted by the parties provides a reasonable basis for the application of the significant expansion threshold of 10%, including the 30% discount factor.

The low ILUC-risk criteria

7.613. As noted above, Article 26(2) of RED II contains an exemption from the high ILUC-risk cap and phase-out for individual consignments of biofuels certified as low ILUC risk. Insofar as this exemption mitigates the detrimental impact of the high ILUC-risk cap and phase-out on palm oil-based biofuel, it is relevant to the Panel's assessment whether the regulatory distinction at issue is applied in a manner that constitutes arbitrary or unjustifiable discrimination. This is consistent with the Panel's approach outlined in the preliminary considerations section of this Report discussing the relationship between the high ILUC-risk cap and phase-out and the low ILUC-risk certification that

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2009/28/EC (2010/335/EU), OJ L 151, 17 June 2010, pp. 19-41 (excerpts), (Exhibit IDN-368); K.G. Austin et al., "Shifting patterns of palm oil driven deforestation in Indonesia and implications for zero-deforestation commitments", Land Use Policy, Vol. 69 (2017), 416, (Exhibits EU-198, IDN-155); IPCC, 2006 IPCC Guidelines for National Greenhouse Gas Inventories, Volume 4: Agriculture, Forestry and Other Land Use, Chapter 4. Forest Land, p. 4.53, Table 4.7, (Exhibit IDN-337); and Guillaume, T., Kotowska, M.M., Hertel, D. et al. Carbon costs and benefits of Indonesian rainforest conversion to plantations. Nat Commun 9, 2388 (2018), (Exhibit EU-228).

[978] Recital 6 to the Preamble of the TBT Agreement. (emphasis added)

[979] The Panel notes that the share of production area expansion into land with high-carbon stock of the three biofuel feedstocks with the highest estimated degree of ILUC-risk is currently estimated at 8% (soybean), 5% (sugar cane), and 4% (maze). Annex to the Delegated Regulation.

the potential for low ILUC-risk certification is relevant to the assessment of whether the high ILUC-risk cap and phase-out is consistent with Article 2.1.

7.614. With these considerations in mind, the Panel will now assess whether the aspects of the low ILUC-risk certification criteria criticized by Indonesia are indicative of the high ILUC-risk cap and phase-out being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

Overview of the low ILUC-risk criteria

7.615. As explained above, the low ILUC-risk criteria are laid down in two sets of requirements.[980]

7.616. First, in order to qualify for low ILUC-risk certification, biofuel has to comply with the sustainability and GHG emissions savings criteria and it has to be made from an "additional feedstock".[981] "Additional feedstock" is defined as the additional amount of a food and feed crop produced in a clearly delineated area compared to the dynamic yield baseline that is the direct result of applying a so-called "additionality measure".[982] This means that only those yields obtained from productivity improvements exceeding the increases that would already be achieved in a business-as-usual scenario are eligible for low ILUC-risk certification.[983]

7.617. Second, the additional yields submitted for low ILUC-risk certification should further be obtained only through a limited category of measures "as a further guarantee of the positive effects of low ILUC-risk certification".[984] These categories of measures are set out in Article 5(a) of the Delegated Regulation:

i. they become financially attractive or face no barrier preventing their implementation only because the biofuels produced from the additional feedstock can be counted towards the renewable energy targets (the parties refer to this criterion as "financial additionality");

ii. they allow for cultivation of food and feed crops on abandoned land or severely degraded land; or

iii. they are applied by small holders.

7.618. The Delegated Regulation further stipulates that the additional feedstock can only be certified as low ILUC-risk within 10 years of the adoption of the additionality measure.

7.619. The Panel recalls that in the context of Indonesia's claim under Article 2.1, its task is to assess whether any aspect of the low ILUC-risk criteria results in the regulatory distinction based on high ILUC-risk not being applied in an even-handed manner. The alleged impracticability of the low ILUC-risk criteria could provide such an indication if it resulted in a discrimination of palm oil-based biofuel that could not be explained by the measure's objective.

7.620. The Panel notes that Indonesia makes a general assertion that the low ILUC-risk criteria are impracticable and cannot be satisfied.[985] In this regard, Indonesia argues that: (a) there is an absence of detailed rules concerning the criteria and the process, thus preventing certification[986]; (b) limiting low ILUC-risk certification to the "additional feedstock" is unjustified as any increase in

[980] Articles 4 and 5 of the Delegated Regulation. For further details and texts of these provisions, see descriptive part of this Report above.

[981] Article 5 of the Delegated Regulation. Subpara. (c) further stipulates that evidence identifying the additional feedstock has to be duly collected and thoroughly documented.

[982] Article 2(6) of the Delegated Regulation. The Delegated Regulation further defines "additionality measures" as "any improvement of agricultural practices leading, in a sustainable manner, to an increase in yields of food and feed crops on land that is already used for the cultivation of food and feed crops; and any action that enables the cultivation of food and feed crops on unused land, including abandoned land, for the production of biofuels, bioliquids and biomass fuels". Article 2(5) of the Delegated Regulation.

[983] Recital 13 to the Delegated Regulation. See also recital 81, para. 2 to RED II.

[984] Recital 14 to the Delegated Regulation.

[985] Indonesia's first written submission, para. 543; Indonesia's opening statement at the second substantive meeting of the Panel, para. 79.

[986] Indonesia's second written submission, paras. 321-327.

yield on existing agricultural land should be eligible for certification[987] and the amount of additional feedstock from a yield increase is uncertain and difficult to predict due to a variety of factors, including weather[988]; (c) the "financial additionality" pathway is unlikely to attract investment from farmers due to the difficulties in demonstrating there is no business case for undertaking productivity-improving measures other than for the prospects of selling the product as biofuel feedstock for the EU market, as well as the uncertainty of such prospects[989]; (d) the notions of abandoned and severely degraded land are not clearly defined in the Delegated Regulation and seem overly restrictive[990]; (e) the category of smallholders is defined too narrowly and imposes significant evidentiary requirements[991]; and (f) other evidentiary requirements are unduly burdensome, in particular limiting the availability of low ILUC-risk certification to 10 years from the adoption of the additionality measure for perennial crops.[992]

7.621. The European Union contests that low ILUC-risk certification is impracticable and submits that the requirements in the mechanism are formulated neutrally and apply to all feedstocks.[993] In this regard, it argues that: (a) with regard to the alleged absence of sufficient detail in the certification criteria, there is no need for certification prior to entry into force of the phase-out aspect of the measure in 2023[994]; and, in any event, the detailed rules governing the application of the additionality pathways will be set out in implementing rules soon to be adopted and that certification is already possible through voluntary schemes[995]; (b) the concept of "additionality", as used in the Delegated Regulation, is designed to avoid exacerbating existing rates of expansion into high-carbon stock land related to displacement effects[996]; (c) the "financial additionality" pathway further ensures that measures taken by farmers or producers go beyond the business-as-usual scenario, by excluding those that are sufficiently financially attractive and which would have been implemented regardless of the low ILUC-risk certification scheme[997]; (d) it has not been demonstrated that the cost of converting abandoned or severely degraded land would be prohibitive[998]; (e) the term "smallholder" was defined in the legislation by reference to the characteristics of farmers producing all types of feedstocks and not only palm oil[999]; and (f) the 10-year period of eligibility was chosen on the basis that the criteria would apply to any perennial or annual crop and it was not devised specifically for the lifecycle of oil palm[1000], and, in any event, the 10-year period is sufficiently long for the benefits of the additionality measures to materialize, including for crops that take up to a few years to become productive or to reach their productivity peak.[1001] The Panel will address these arguments in turn.

The additionality requirement and the related evidentiary requirements

7.622. Starting with the concept of additionality, as used in the low ILUC-risk criteria, it is based on the premise that, given the non-diminishing demand for food, any additional demand for biofuel feedstocks creates the risk of displacing non-fuel agricultural production. This is due to food and biofuel feedstock production competing for agricultural land, the availability of which is limited. The Status Report explains in this regard that:

[987] Indonesia's second written submission, paras. 333 and 337.
[988] Indonesia's first written submission, para. 358; and second written submission, paras. 334-335.
[989] Indonesia's first written submission, paras. 340-345; and second written submission, paras. 341-347.
[990] Indonesia's first written submission, paras. 368-376; and second written submission, paras. 357-363.
[991] Indonesia's first written submission, paras. 377-389.
[992] Indonesia's first written submission, paras. 392-396; and second written submission, paras. 374-378.
[993] European Union's first written submission, paras. 147 and 743-745.
[994] European Union's response to Panel question No. 3, para. 20.
[995] European Union's first written submission, para. 135; and response to Panel question No. 123, paras. 15-16.
[996] European Union's response to Panel question No. 45, paras. 207-209.
[997] European Union's response to Panel question No. 45, para. 211.
[998] European Union's first written submission, paras. 137 and 752-753.
[999] European Union's first written submission, para. 138. The European Union adds that that smallholders have the option of a group certification and that the financial additionality criterion does not apply to smallholders due to their prevailing economic profile.
[1000] European Union's first written submission, para. 130.
[1001] European Union's first written submission, paras. 130-131 and 758.

> Producing biofuels from … additional feedstock will not cause ILUC because that feedstock is not in competition with food and feed production and displacements effects are avoided.
>
> …
>
> Average increases in productivity are still not sufficient to avoid all risks of displacement effects, though, because agricultural productivity is constantly improving while the concept of additionality, which is at the heart of the low ILUC certification, requires taking measures going beyond business as usual.[1002]

7.623. It follows that even ordinary productivity improvements within the business-as-usual scenario do not guarantee that displacement effects related to increased biofuel demand can be avoided. The Panel thus finds unconvincing Indonesia's argument that any additional yield of a food or feed crop should qualify for low ILUC-risk certification.[1003] The Panel observes that the concept of additionality is thus rationally related to the measure's objective of limiting the risk of ILUC-related GHG emissions associated with feed and food crop-based biofuels.

7.624. Indonesia points to the difficulties in the record-keeping requirements concerning the average yield during the three years preceding the adoption of the additionality measure.[1004] The European Union submits that reducing the administrative burden, while desirable, should not jeopardize the measure's effectiveness and reiterates that the detailed rules on certification criteria be elaborated further in the implementing act.[1005]

7.625. The Panel notes that Article 4(2) of the Delegated Regulation contains a general requirement to present evidence of the average yield over three years preceding application of the additionality measure. This requirement is commensurate with the calculation method of the dynamic yield baseline which concerns three years immediately preceding the application of the additionality measure.[1006] The Panel notes Indonesia's argument that farmers may not have been keeping records of the yield, including that obtained prior to the adoption of the Delegated Regulation and, as a result, may not be able to apply for low ILUC-risk certification when it enters into force.[1007] However, Indonesia does not explain how to determine the dynamic yield baseline without information on the average yield on a given land without compromising the effectiveness of the measure. Therefore, as the concept of additionality as reflected in the design of the low ILUC-risk criteria does not result in arbitrary or unjustifiable discrimination, then the same is true for the requirement in Article 4(2).

7.626. The Panel notes, however, that certain elements of the additionality criterion remain vague and ambiguous to such an extent that the Panel has serious doubts about the feasibility of low ILUC-risk certification under such conditions. More specifically, it is not clear from the Delegated Regulation how certain elements pivotal to determining the dynamic yield baseline should be established for different feedstocks, including palm oil. In particular, it is unclear how the average yield increase or the lifetime yield curves should be determined. Considering that the notion of dynamic yield baseline is central to the determination of the additional feedstock that can be certified as low ILUC risk, it would appear that no crop could be certified without further clarifying these and potentially other related concepts as well as the specific methodology used for quantifying them.

[1002] Status Report (2019), (Exhibit IDN-56), p. 16. These observations in the Status Report are corroborated by an Ecofys report prepared at the request of the European Commission and relied on by Indonesia:

> The reason why low ILUC risk feedstock production relies on creating additionality is the fact that demand for biofuels is not the only driver of agricultural crop yield increases or of sustainable agricultural expansion on unused land. In fact, also the food sector drives increases in agricultural production, which can be assumed to be the case in the future as well. This means that not all increases in agricultural productivity will be low ILUC risk, but only those that are achieved in excess of yield increases driven by the food and feed sectors.

(Ecofys, Methodologies for the identification and certification of Low ILUC risk biofuels (European Commission, 2016), (Exhibit IDN-157), p. 6.)

[1003] Indonesia's second written submission, para. 337.

[1004] Indonesia's first written submission, paras. 393-395.

[1005] European Union's comments on Indonesia's response to Panel question No. 187, para. 149.

[1006] Article 2(7) of the Delegated Regulation.

[1007] Indonesia's second written submission, paras. 375-377.

7.627. Moreover, it is not clear what type of evidence would be required to demonstrate the average yield over the three-year period preceding the application of the additionality measure. The Panel notes the European Union's acknowledgement that detailed rules on the additionality criterion and the evidentiary requirements will be elaborated in an implementing act.[1008] This, in the Panel's view, confirms that the additionality criterion and the evidentiary requirements as reflected in the Delegated Regulation are overly vague and ambiguous, as well as incomplete.[1009]

The financial additionality pathway

7.628. The Panel now turns to the first of the three additionality pathways that can be used to obtain the additional feedstock qualifying for low ILUC-risk certification, which the parties refer to as "financial additionality".

7.629. The financial additionality pathway requires that productivity-improving measures qualifying for low ILUC-risk certification would not have been taken in a business-as-usual scenario but for the financial incentive relating to the prospect of selling the feedstock on the EU biofuel market.[1010] This, in turn, assumes the existence of a premium on a crop sold for the EU market as low ILUC-risk-certified feedstock, compared to that same crop sold as, e.g. food.[1011] This premium is expected to render profitable productivity-improving measures that are otherwise financially not attractive, or which present significant barriers of a non-financial nature (e.g. the lack of skills or technology). The rationale for this approach rests on the premise that if such measures were financially attractive regardless of the product's use, then food and biofuel demand would compete for the additional yield and displacement effects could not be avoided.

7.630. The Panel notes that Indonesia considers the existence of any premium on a crop used as biofuel feedstock uncertain and depending exclusively on access to the EU biofuel market.[1012] Indeed, it is not entirely clear that such premium could be guaranteed on a market for an agricultural commodity, including used as a biofuel feedstock. As pointed out by Indonesia, and corroborated by evidence, a feedstock's price may vary from one year to another due to weather events or market fluctuations.[1013] As a result, farmers, who frequently operate on thin margins, may be unwilling to take the financial risk linked to investing in additionality measures without the return on such investment being sufficiently certain.[1014] The evidence thus confirms that the financial additionality criterion is narrowly tailored and, as a result, may be very difficult to meet.

7.631. The narrow scope of an exemption alone is not, however, sufficient to demonstrate arbitrary or unjustifiable discrimination, or more generally that the measure is not applied in an even-handed manner. If one accepts that production of a biofuel feedstock can lead to displacement effects insofar as it competes with food and feed production, and given the non-diminishing global demand for food and feed, then the risk of ILUC does not seem to be mitigated even with respect to the additional yield, if that yield was not produced solely to benefit from the premium related to selling it on the EU biofuel market. In other words, the low ILUC-risk criteria require a link between the additional yield and the premium on the EU biofuel market, which in the case of financial additionality is ensured by the premium on biofuel feedstock. In sum, the Panel finds that there is a reasonable basis for the European Union to rely on the concept of financial additionality in the low ILUC-risk criteria.

7.632. For the same reasons, the Panel does not consider that certain adjustments to the financial additionality pathway suggested by Indonesia, such as allowing additionality measures to be implemented after requesting low ILUC-risk certification or on low-carbon stock land, would meet

[1008] European Union's first written submission, para. 135; and second written submission, para. 149.
[1009] Indonesia has not presented any arguments on the substantive consistency of those detailed rules with the TBT Agreement or the GATT 1994. In the absence of any such arguments and taking account that the measure was not in existence at the time of the panel's establishment, none of the Panel's findings in this Report should be taken as implying any view on the substantive consistency of those detailed rules with the European Union's obligations under the TBT Agreement, or with the European Union's obligations under the GATT 1994.
[1010] Status Report (2019), (Exhibit IDN-56), pp. 16-17.
[1011] European Union's first written submission, para. 645.
[1012] Indonesia's first written submission, para. 343.
[1013] Guidehouse, Low ILUC-risk certification, Update and learnings from low ILUC pilots, Stakeholder webinar, 19 May 2021, (Exhibit IDN-331), pp. 37-38.
[1014] Guidehouse, Low ILUC-risk certification, Update and learnings from low ILUC pilots, Stakeholder webinar, 19 May 2021, (Exhibit IDN-331), p. 38.

the measure's objectives, taking into account the chosen level of protection. This is because neither of these proposed adjustments ensure that biofuel and non-biofuel demand do not compete for the additional yield and that displacement effects can be avoided. As a result, the high risk of ILUC associated with the feedstock would not be mitigated.

7.633. The Panel notes, however, that certain aspects of this pathway are overly vague and ambiguous to such an extent that the Panel has serious doubts whether the financial additionality pathway, as reflected in the Delegated Regulation, could effectively be used for the purposes of low ILUC-risk certification. It is not clear from the Delegated Regulation how the relevant authorities will apply the financial attractiveness test and assess non-financial barriers. The very basis for determining that the additionality measure fulfils the financial additionality requirements is thus unclear. The European Union also acknowledges that "the evidential requirements for [the financial attractiveness and barrier analysis tests] are not specified in the Delegated Regulation but will be addressed in the implementing rules".[1015] This, in the Panel's view, casts serious doubts on the feasibility of using this pathway to certify biofuel as low ILUC-risk (and assuming that the additionality criterion was operational in the first place), as reflected in the Delegated Regulation.

The abandoned or severely degraded land pathway

7.634. Pursuant to Article 5(1)(a)(ii) of the Delegated Regulation, a consignment of biofuel can be certified as low ILUC risk, if the additional feedstock was cultivated on abandoned or severely degraded land. As noted in the Status Report, with respect to projects using such land, "additionality can be assumed … as this situation of the land already reflects the existence of barriers that are preventing cultivation".[1016]

7.635. The underlying rationale for the abandoned or severely degraded land pathway is thus similar to the financial additionality pathway and similar considerations apply *mutatis mutandis*. More specifically, cultivating crops on such types of land present obstacles of financial and non-financial nature, which prevent farmers from using that land for growing crops under the business-as-usual scenario. A premium related to selling crops as biofuel feedstocks on the EU market could, however, provide for an additional incentive that would compensate for the cost of converting abandoned or severely degraded land into productive agricultural land.

7.636. The Panel agrees with the European Union that the same assumption cannot be made with respect to other types of land with low-carbon stock, which, as Indonesia argues, should have been included in the second additionality pathway.[1017] The Panel understands that the high ILUC-risk formula already takes into account production on low-carbon stock land as part of the determination of the share of expansion into *high*-carbon stock land. If the feedstock's production area expands into *low*-carbon stock land, then it lowers the share of expansion into high-carbon stock land, and thus the feedstock's degree of ILUC risk.

7.637. Furthermore, producing biofuel feedstocks on land other than abandoned or severely degraded does not present barriers that could be compensated only by the premium associated with EU biofuel market. Excluding such types of land from low ILUC-risk criteria seems thus commensurate with the objective of avoiding displacement effects between biofuel and non-biofuel agricultural production. As long as displacement effects between biofuel and non-biofuel agricultural production cannot be avoided, the high risk of ILUC is not mitigated. Therefore, the conceptual design of the abandoned or severely degraded land pathway is not reflective of the regulatory distinction not being applied in an even-handed manner.

[1015] European Union's first written submission, para. 136.

[1016] Status Report (2019), (Exhibit IDN-56), p. 18. This is further confirmed by Recital 15 to the Delegated Regulation:

> [I]t is appropriate not to apply the financial additionality criterion to the additional feedstock cultivated on abandoned or severely degraded land or by independent small farm holders. This would in fact amount to an unreasonable administrative burden in light of the significant potential for productivity improvements and the barriers faced to finance the necessary investments.

[1017] Indonesia's second written submission, para. 359; and response to Panel question No. 187, para. 159.

7.638. However, the Panel notes that, as argued by Indonesia[1018], certain elements of this pathway are expressed in terms that are overly vague and ambiguous, raising serious doubts whether the abandoned and severely degraded land pathway can effectively be used for the purposes of the certification. For example, it is not clear what circumstances would qualify as "biophysical or socioeconomic constraints" due to which cultivation of crops had been stopped on abandoned land. The Panel notes that the European Union appears to acknowledge the vague and ambiguous nature of the specific requirements of the abandoned and severely degraded land pathway insofar as it confirms that details governing its application will be set out in implementing rules to be adopted.[1019] It is thus unclear how the second additionality pathway would operate given the overly vague and ambiguous formulation of some of its central concepts.

The smallholder pathway

7.639. The last of the three additionality pathways concerns small farm holders, who cultivate agricultural products on relatively small areas of land. The Delegated Regulation defines smallholders as:

> [F]armers who conduct independently an agricultural activity on a holding with an agricultural area of less than 2 hectares for which they hold ownership, tenure rights or any equivalent title granting them control over land, and who are not employed by a company, except for a cooperative of which they are members with other small holders, provided that such a cooperative is not controlled by a third party.[1020]

7.640. The primary rationale for including the smallholder pathway in the low ILUC-risk certification criteria is the lack of "the administrative capacity and knowledge [of small farm holders] to conduct an in-depth [financial additionality] assessments while evidently facing barriers that hinder the implementation of productivity-increasing measures".[1021] This pathway thus seems to be an expression of a balance struck in the EU legislation to allow productivity increases with a limited risk of displacement effects, which could be foregone if smallholder farmers were required to demonstrate financial additionality.[1022] At the same time, small farm holders can certify as low ILUC-risk only the feedstock additional to what would be produced under a business-as-usual scenario. This is meant to ensure a relatively low risk of displacement effects potentially caused by producing additional feedstock by smallholders. Therefore, the approach appears to be consistent with the overall design of *low* ILUC-risk certification, which is concerned with mitigating rather than eliminating the risk of ILUC.

7.641. The Panel notes Indonesia's argument that the smallholder pathway is excessively narrow, as the definition of a "smallholder" is limited to farmers cultivating less than two hectares.[1023] According to Indonesia, smallholder producers also face a range of challenges hindering their ability

[1018] Indonesia's first written submission, paras. 369-371; and second written submission, paras. 351-356.

[1019] European Union's first written submission, para. 135.

[1020] Article 2(9) of the Delegated Regulation.

[1021] Status Report (2019), (Exhibit IDN-56), p. 18.

[1022] The Delegated Regulation recognizes that applying the financial additionality criterion to small farm holders "[w]ould in fact amount to an unreasonable administrative burden in light of the significant potential for productivity improvements and the barriers faced to finance the necessary investments". Recital 15 to the Delegated Regulation.

[1023] Indonesia argues that smallholder definitions vary across countries and points to the fact that the number of eligible smallholders in oil palm producing countries will be very low. It further submits that the study on which the Status Report relies, rests on a simplistic notion of land size of all farms and does not take into account the relevant definitions or the circumstances of production in the countries where feedstock is produced. In essence, Indonesia takes issue with the fact that the European Union did not consider what types of plantations exist in Indonesia and other countries concerned and what is the minimum size of plantation for it to be economically viable for smallholders. In support of its argument, Indonesia provides reference to definitions of smallholders in several relevant jurisdictions. Indonesia further notes that many smallholders lack official legal title to the land, which poses another obstacle under the low ILUC-risk certification requirements. Nucleus smallholders would be also excluded from smallholder certification under the Delegated Regulation. (Indonesia's first written submission, paras. 377-390; and second written submission, paras. 364-372, 1036; response to Panel question 209, para. 219.)

to invest in additionality measures to enhance yields and thus do not have the capacity to avail themselves of the certification due to the complexity of its requirements.[1024]

7.642. The Panel observes that the definition of a "smallholder" incorporated in the Delegated Regulation is based on a study, which has found that an estimated 84% of the world's farms are managed by smallholders cultivating less than 2 hectares of land.[1025] A significant number of farmers around the world could thus in principle avail themselves of the smallholder pathway. Although Indonesia argues that the Delegated Regulation does not take into account the definitions of a small farm holder in the feedstock-producing countries[1026], the complainant has not shown, and the Panel does not consider, that, in the circumstances of this dispute, a definition based on a global average is arbitrary.

7.643. The Panel notes that the facts of this case are different from those that gave rise to the finding of violation in *EC – Seal Products*, where the "indigenous community exception" was found to be *de facto* available only to Inuit hunts in Greenland and not in Canada.[1027] The evidence submitted by the parties provides no indication that the definition of a "smallholder" disadvantages production of biofuels in Indonesia, as compared to other countries.

The 10-year limit on eligibility for low ILUC-risk certification

7.644. The Panel recalls that pursuant to the low ILUC-risk certification criteria, any additional feedstock is eligible for low ILUC-risk certification for a maximum of 10 years from the adoption of the additionality measure.[1028] Limiting the eligibility of yield obtained through a particular additionality measure to 10 years is meant to ensure that productivity improvements exceed the general productivity increase under a business-as-usual scenario over time.

7.645. Indonesia submits that such a time-limit is unjustified and disadvantages palm oil producers because of the time it takes for an oil palm to bear fruit and achieve maturity.[1029] This is because oil palm has an average lifespan of 25 years and starts bearing fruits at around four years with the maximum yield potential normally reached between the age of 7 and 16.[1030] According to Indonesia, this problem is particularly acute for feedstock made from crop grown on abandoned or severely degraded land, which requires additional time to convert it into arable land.[1031]

7.646. The European Union argues that the 10-year limit on the eligibility for low ILUC-risk certification is justified because with time additionality measures become part of standard baseline practices.[1032] The European Union maintains that, in any event, this period is sufficiently long for the benefits of additionality measures to materialize.[1033]

7.647. In the Panel's view, the evidence submitted by the parties provides a reasonable basis for imposing a time-limit on the eligibility of a yield obtained through application of a specific additionality measure for low ILUC-risk certification. Such a limit seems justified by the increasing global food demand and general improvements in agricultural practices over time.[1034] This means that the additional incentive related to selling feedstock on the EU biofuel market gradually

[1024] Ibid.
[1025] Status Report (2019), (Exhibit IDN-56), p. 18.
[1026] Indonesia's second written submission, paras. 367-368.
[1027] As discussed above, the wording of sixth Recital to the TBT Agreement is similar to that of the *chapeau* of the GATT Article XX. (Appellate Body Reports, *EC – Seal Products*, para. 5.310.)
[1028] Article 5(1)(b) of the Delegated Regulation.
[1029] Indonesia's first written submission, paras. 391-392; second written submission, para. 374.
[1030] T. Mielke, "World Markets for Vegetable Oils: Status and Prospects", in M. Kaltschmitt (ed.), Energy from Organic Minerals (Biomass), 2019, (Exhibit IDN-2), p. 264.
[1031] Indonesia's first written submission, para. 392; and second written submission, para. 357.
[1032] European Union's first written submission, para. 130.
[1033] European Union's first written submission, para. 130.
[1034] Status Report (2019), (Exhibit IDN-56), p. 16; and Ecofys, Methodologies for the identification and certification of Low ILUC risk biofuels (European Commission, 2016), (Exhibit IDN-157), p. 9. The Panel notes that the Ecofys report questions the appropriateness of limiting the duration of additionality with respect to biofuel production and not, for example, food production. The approach taken in the report seems, however, to focus on the perspective of a specific consignment certified as low ILUC-risk and thus the relevance of that part of the report for the discussion on limiting the duration of additionality is unclear. The report concludes with a recommendation that "certification of low ILUC risk biofuels [be] valid for a 10-year period. After this period, the low ILUC-risk certificate expires and the project no longer results in low ILUC feedstock".

disappears with time and displacement effects between biofuel and non-biofuel production cannot be avoided with respect to that yield.

7.648. Nevertheless, the Panel considers that the 10-year limit, even if in principle justified, could still disadvantage certain types of biofuel feedstocks compared to others. The types of feedstocks that could potentially be subject to low ILUC-risk certification are made from annual and perennial crops. Annual crops terminate their lifecycle within a year and are replanted after harvest for the following season. Perennial crops, by contrast, do not need to be replanted after harvest and grow back or continue growing. Of the eight food and feed crops used as biofuel feedstocks listed in the Annex to the Delegated Regulation, and thus subject to the high ILUC-risk formula (and, therefore, potentially also to low ILUC-risk certification), only oil palm is a perennial crop. Due to their nature, annual crops are more frequently subject to productivity-improving additionality measures than perennial crops, thus increasing their opportunities to benefit from low ILUC-risk certification within the 10-year period.

7.649. The Panel notes the European Union's argument that the 10-year limit would be applicable to any perennial or annual crop and that, in the European Union's view, it is sufficiently long for the benefits of low ILUC-risk certification to manifest.[1035] However, the European Union fails to explain why, for example, extending the eligibility period by the time necessary for perennial crops to start bearing fruits or achieve maturity would be difficult to reconcile with the objective of the measure. The disadvantage for feedstocks made from perennial crops in terms of benefitting from low ILUC-risk certification do not seem to be explained by the measure's objective. This indicates that the regulatory distinction at issue is applied in a manner that constitutes arbitrary and unjustifiable discrimination. This is all the more so, as currently the only perennial crop on the list of eight is subject to the high ILUC-risk cap and phase-out and thus could potentially benefit from low ILUC-risk certification.

7.650. Therefore, the 10-year limit on the eligibility for low ILUC-risk certification disadvantages perennial crops in a manner that constitutes arbitrary and unjustifiable discrimination.

Summary of findings on low ILUC-risk criteria and temporal issues

7.651. The Panel has found that, apart from the 10-year limit on the eligibility for low ILUC-risk certification, the conceptual design of the low ILUC-risk criteria does not result in the regulatory distinction being applied in a manner constituting arbitrary or unjustifiable discrimination or otherwise not being applied in an even-handed manner. As for the 10-year eligibility limit, the Panel has found that it disadvantages perennial crops, such as oil palm, in a manner that constitutes arbitrary and unjustifiable discrimination.

7.652. Moreover, the Panel has found that in the preceding sections of its analysis that several of the low ILUC-risk criteria are formulated in overly vague and ambiguous terms, which cast serious doubts as to whether these criteria could have been effectively used when the high ILUC-risk cap and phase-out became operational.

7.653. The Panel notes the European Union's acknowledgement that the provisions of the Delegated Regulation concerning low ILUC-risk criteria are incomplete and that they would be complemented with detailed rules to be adopted in the Implementing Regulation.[1036] The Panel further notes that the Draft Implementing Regulation referred to by the European Union was adopted on 14 June 2022 and submitted as Exhibit EU-215 at a late stage of the proceedings. The substantive arguments of the parties do not address the contents of the Draft Implementing Regulation. The Panel therefore is not ruling on the design of the low ILUC-risk criteria as complemented or modified in the Implementing Regulation.

7.654. The Panel observes, however, that the draft act contains very detailed disciplines concerning evidentiary requirements[1037], detailed rules for demonstrating additionality, including determining specific aspects of the dynamic yield baseline[1038], eligibility for low ILUC-risk certification of

[1035] European Union's first written submission, para. 130.
[1036] European Union's first written submission, paras. 135 and 740.
[1037] Article 24 of the Draft Implementing Regulation.
[1038] Articles 25 and 27 of the Draft Implementing Regulation.

production on unused, abandoned or severely degraded land.[1039] This, in the Panel's view, confirms that the low ILUC-risk criteria, as reflected in the Delegated Regulation, were not operational and did not allow for certification of palm oil-based biofuel, prior to the adoption of the Implementing Regulation.

7.655. The Panel further notes the European Union's argument that the low ILUC-risk certification could be carried out prior to the adoption of detailed rules on low ILUC-risk criteria through voluntary certification schemes.[1040] The Panel is not convinced by this argument, given that, as explained in more detail in the section addressing Indonesia's claims under Article 5 of the TBT Agreement, there is no evidence that voluntary schemes for low ILUC-risk certification were operational at the time of filing the last round of substantive arguments by the parties.

7.656. The Panel is further unconvinced by the European Union's argument that there is no need for low ILUC-risk certification prior to December 2023, when the phase-out element of the measure becomes operational. This argument of the European Union presupposes that the low ILUC-risk certification is relevant only to the phase-out and not also to the cap. This assertion is contradicted by the text of Article 26(2) of RED II, where the exemption for biofuels made from feedstocks certified as low ILUC-risk immediately follows the description of the cap:

> For the calculation of a Member State's gross final consumption of energy from renewable sources referred to in Article 7 and the minimum share referred to in the first subparagraph of Article 25(1), the share of high indirect land- use change-risk biofuels, bioliquids or biomass fuels produced from food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed shall not exceed the level of consumption of such fuels in that Member State in 2019, *unless they are certified to be low indirect land-use change- risk biofuels, bioliquids or biomass fuels pursuant to this paragraph.*[1041]

7.657. Recital 12 to the Delegated Regulation also suggests that the exemption applies to the cap and the phase-out alike:

> Certified low ILUC-risk biofuels, bioliquids and biomass fuels should be exempted from *the limit and the gradual reduction* set for high ILUC-risk biofuels, bioliquids and biomass fuels produced from food and feed crops, provided that they meet the relevant sustainability and greenhouse gas emissions saving criteria laid down in Article 29 of [RED II][1042]

7.658. The exemption thus necessarily applies to the cap and to the phase-out, which is essentially the cap that is gradually reduced to 0 by the end of 2030, at the latest. There can therefore be no doubt that certifying consignments of a biofuel as low ILUC-risk becomes relevant not with the entry into force of the phase-out aspect of the measure, but as soon as the high ILUC-risk cap became operational. In addition, the Panel notes that several EU member States have accelerated the gradual phase-out of palm oil-based biofuel from eligibility to count towards renewable energy targets.[1043]

Conclusion on the application of the regulatory distinction at issue

7.659. In sum, the Panel finds that the regulatory distinction based on high ILUC-risk is not applied in the high ILUC-risk cap and phase-out in an even-handed manner because (i) the European Union has failed to conduct a timely review of the data used as a basis for the determination whether a crop is high ILUC-risk; (ii) the additionality criterion as well as the financial additionality and the

[1039] Article 26 of the Draft Implementing Regulation. Annex VIII further lays down the minimum requirements on the process and method for certifying low ILUC-risk biomass, relating to the content of the application, assessing additionality on the basis of the financial attractiveness and barriers test, guidelines on setting the dynamic yield baseline for annual and perennial crops. Consultation on Draft Implementing Regulation, (Exhibit EU-215), pp. 49-59.

[1040] European Union's second written submission, para. 164; and responses to Panel questions No. 4, para. 22 and No. 123, paras. 15-16.

[1041] Article 26(2) of RED II. (emphasis added)

[1042] Recital 12 to the Delegated Regulation. (emphasis added)

[1043] This appears to be the case, among other EU member States, of Austria, France, Germany, Malta, etc. (Exhibit IDN-421, pp. 4, 25, 28, 36).

abandoned or severely degraded land pathways are formulated in overly vague and ambiguous terms which do not provide for an effective opportunity to certify specific consignments of palm oil-based biofuel as low ILUC-risk; and (iii) the design of the 10-year time-limit for low ILUC-risk certification is a further deficiency in the design and implementation of the low ILUC-risk criteria as it unjustifiably disadvantages biofuels made from perennial crops, currently only from oil palm, as regards commercial opportunities linked to the EU biofuel market. Therefore, the regulatory distinction drawn by the high ILUC-risk cap and phase-out cannot be said to stem exclusively from a legitimate regulatory distinction.

7.1.2.4.6 Conclusion on Article 2.1

7.660. The Panel concludes that the European Union has administered the high ILUC-risk cap and phase-out inconsistently with Article 2.1 of the TBT Agreement by failing to conduct a timely review of the data used to determine which biofuels are high ILUC risk, and because there are deficiencies in the design and implementation of the low ILUC-risk criteria, which results in arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

7.661. One panelist has reached a different conclusion, as set out in section 7.3 of this Report.

7.1.2.5 Article 2.5 (first sentence) – Explanation of justification for technical regulation

7.1.2.5.1 Introduction

7.662. Having addressed the claims under the substantive obligations in Articles 2.4, 2.2 and 2.1 of the TBT Agreement, the Panel now turns to Indonesia's claim that the European Union failed to comply with the procedural obligation in the first sentence of Article 2.5 of the TBT Agreement.

7.663. Indonesia submits[1044] that the European Union has violated Article 2.5 by failing to explain the justification for preparing, adopting or applying the high ILUC-risk cap and phase-out in terms of Articles 2.2 to 2.4 of the TBT Agreement. More specifically, Indonesia argues with reference to the elements of Article 2.5, that the high ILUC-risk cap and phase-out have a "significant effect" on trade in palm oil and oil palm crop-based biofuel of WTO Members other than the European Union, including but not limited to Indonesia, and that Indonesia, as well as other WTO Members, repeatedly requested an explanation of the justification of the measures in the TBT Committee. However, in responding to these repeated requests from Indonesia and other WTO Members, the European Union has not gone further than stating that the measures are not technical regulations.

7.664. The European Union submits[1045] that the Panel should reject the claims under Article 2.5. The European Union does not dispute that Indonesia made requests for an explanation of the justification of the high ILUC-risk cap and phase-out within the meaning of the first sentence of Article 2.5. However, the European Union states that it "is not accepted" that the measures "have a significant effect on trade", and that in any event the European Union has "explained the justification" for the measures on multiple occasions in multiple fora.

7.1.2.5.2 Legal standard

7.665. The first sentence of Article 2.5 sets forth the obligation that:

> A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4.

[1044] Indonesia's first written submission, paras. 778-821; second written submission, paras. 907-924; and comments on the European Union's responses to the Panel's second set of questions, paras. 435-451.

[1045] European Union's first written submission, paras. 921-927; and responses to the Panel's second set of questions, paras. 583-594. The European Union also argues that the challenged measures are not technical regulations within the meaning of Annex 1.1, and are therefore not subject to any substantive or procedural obligations in the TBT Agreement.

7.666. This obligation in the first sentence of Article 2.5 has only been the subject of a claim of inconsistency in one prior case, namely *US – Clove Cigarettes*.[1046] In the present dispute both parties present their respective understandings of the applicable legal standard with reference to that case.

7.667. To establish a violation of the first sentence of Article 2.5, it must be shown that the Member in question is preparing, adopting or applying a technical regulation and that the following three elements[1047] are satisfied:

a. the measure "may have a significant effect on trade of other Members";

b. there is a "request of another Member"; and

c. the Member in question is to "explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4" of Article 2.

7.668. These elements are cumulative, and thus each must be satisfied to establish an inconsistency with the first sentence of Article 2.5.

7.669. The Panel will elaborate further on the elements of the legal standard in Article 2.5 as necessary in the course of its assessment of the issues in dispute.

7.1.2.5.3 "may have a significant effect on trade of other Members"

7.670. The procedural obligation in the first sentence of Article 2.5 applies only to those technical regulations "which may have a significant effect on trade of other Members".

7.671. The Panel notes that the procedural obligations in Article 2.9 and Article 5.6, which concern the publication, notification and commenting procedure for technical regulations and conformity assessment procedures respectively, are also subject to the same triggering condition (as is the set of parallel procedural obligations in Annex B(5) to the SPS Agreement). In its analysis below, therefore, the Panel will draw on relevant guidance regarding these provisions. Furthermore, the Panel's conclusion and reasoning in this section of the Report apply *mutatis mutandis* to this element of Indonesia's claims under Articles 2.9 and 5.6.

7.672. Indonesia argues that the high ILUC-risk cap and phase-out may have a "significant effect" on trade in palm oil and palm oil-based biofuel of WTO Members other than the European Union, including but not limited to Indonesia. In this regard, Indonesia submits that it is the largest exporter of palm oil to the European Union (and provides information on volumes of its exports of palm oil to the European Union over the period 2010-2020); that a competitive market for biofuel exists in the European Union only insofar as those biofuels are eligible to meet EU renewable energy targets; and that measures limiting access of palm oil and palm oil-based biofuel to that market can therefore have important effects on trade in those products from other WTO Members to the European Union.[1048] Indonesia adds that several other WTO Members have also confirmed, notably in the TBT Committee, the significant effects of the EU measures on their trade.[1049]

[1046] In *EC – Sardines*, the Appellate Body referred to the first sentence of Article 2.5 as context for its views on the legal standard for the allocation of the burden of proof for a claim under Article 2.4. In that case, the complainant had argued that it rested on the respondent to explain the reasons why it had not used the international standard at issue (i.e. its lack of "appropriateness"), and to "spell out" the legitimate objective of the technical regulation. The Panel reasoned that this had to be so because these issues "involve[] considerations which are properly the province of the Member adopting or applying a technical regulation" and not the complaining party. The Appellate Body disagreed and stated that:

> The *TBT Agreement* affords a complainant adequate opportunities to obtain information about the objectives of technical regulations or the specific considerations that may be relevant to the assessment of their appropriateness. A complainant may obtain relevant information about a technical regulation from a respondent under Article 2.5 of the *TBT Agreement*, which establishes a *compulsory* mechanism requiring the supplying of information by the regulating Member. (Appellate Body Report, *EC – Sardines*, para. 277. (emphasis original))

[1047] Panel Report, *US – Clove Cigarettes*, para. 7.449.

[1048] Indonesia's first written submission, paras. 788-791.

[1049] Indonesia's first written submission, paras. 792-794.

7.673. The European Union responds by stating that it "is not accepted" that the measures identified "have a significant effect on the trade of other Members". The European Union states that the "alleged trade-restrictiveness" of these measures "is precisely one of the matters that Indonesia must demonstrate", and that "[t]his has been addressed in response to the claims under Article 2.1 and Article 2.2 of the TBT Agreement."[1050] The European Union adds that statements by other Members such as Ecuador as to the quantities of their exports of palm oil "are not probative that measures addressing eligibility to contribute to renewable energy targets will affect those Members significantly. Indeed, as is explained, palm oil is exported predominantly for use as a food product and the market for biofuels is comparatively small".[1051]

7.674. The Panel notes that each party's arguments on the question of whether the measures have "a significant effect on the trade of other Members" for the purposes of Article 2.5 incorporate by reference (or otherwise reiterate) its arguments on whether the measures are "trade-restrictive" within the meaning of Article 2.2 and/or have a "detrimental impact" on imports for the purposes of Article 2.1. The Panel sees no reason to proceed any differently and proceeds on the understanding that its findings on whether a given measure is "trade-restrictive" under Article 2.2 and/or have a "detrimental impact" on imports under Article 2.1 would in principle be highly relevant to, if not determinative of, the question of whether the same measure "may have a significant effect on the trade of other Members" within the meaning of Article 2.5.

7.675. The Panel has already found, in the context of its assessment of Indonesia's claim under Article 2.2, that the measures are "trade-restrictive" on the grounds that they have, by design, a "limiting effect on trade" in biofuels made from food and feed crops (as regards the 7% maximum share) and palm oil-based biofuels (as regards the high ILUC-risk cap and phase-out). The Panel has also found, in the context of its assessment of Indonesia's claim under Article 2.1, that the high ILUC-risk cap and phase-out has a "detrimental impact" on imported palm oil-based biofuels. The Panel sees no need to repeat the same reasoning that led to those findings in this section.

7.676. The Panel considers that it follows from its earlier findings under Articles 2.2 and 2.1 that the 7% maximum share and the high ILUC-risk cap and phase-out are in principle measures that "may have a significant effect on the trade of other Members". As elaborated below, there is nothing in the ordinary meaning of these terms, in the prior interpretations of panels interpreting and applying that condition, that would suggest otherwise.

7.677. First, the Panel considers that the words "may have" must be given their ordinary meaning in the context of the phrase "may have a significant effect on trade of other Members". As the panel in *US – Clove Cigarettes* observed when interpreting and applying this condition in the context of Article 2.9 of the TBT Agreement:

> [This] condition for the applicability of Article 2.9 is that the technical regulation "*may* have a significant effect on trade of other Members" as opposed to "will have a significant effect" or "has a significant effect". "May" is used to express a possibility as opposed to a certainty.[897] We therefore interpret these terms to mean that Article 2.9 of the *TBT Agreement* does not require proving actual trade effects. Rather, this condition encompasses situations in which a technical regulation *may* have a significant effect on trade of other Members.[1052]

[897] Oxford English Dictionary Online, accessed on 30 April 2011. See also Shorter Oxford English Dictionary, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 1725, defining "may" to mean, among other things, "have the possibility, opportunity, or suitable conditions to; be likely to"; Webster's Online Dictionary, accessed on 30 April 2011, defining "may" to mean, among other things, "used to indicate possibility or probability".

7.678. Second, the Panel agrees with prior panels that the ordinary meaning to be given to the term "significant" in this context is "sufficiently great or important to be worthy of attention;

[1050] European Union's first written submission, para. 924.
[1051] European Union's first written submission, para. 924.
[1052] Panel Report, *US – Clove Cigarettes*, para. 7.529 and fn 897. (emphasis original)

noteworthy"[1053], and a "significant effect" may thus be understood as encompassing "all non *de minimis* effects on trade" or at least those that are "substantial and noteworthy".[1054] This would certainly include an outright prohibition on the importation or sale of specified products, which was the circumstance in several prior disputes[1055], but there is nothing in the terms of this triggering condition that somehow limits it to "the most restrictive measure a Member could take with respect to trade".[1056]

7.679. Third, the terms "trade of other Members" may be understood as referring to the trade of other Members either individually or collectively. As already discussed in the context of its assessment of the claim under Article 2.2, the panel in *Australia – Plain Packaging* concluded that there was no basis to accept the respondent's argument that the effects of a technical regulation on international trade, and specifically the existence and extent of a "trade-restrictive" effect for the purposes of Article 2.2, should be assessed only on the basis of the effect of the measure on trade of *all* WTO Members, in all products that are the subject of the technical regulation.[1057] The Panel considers it useful to highlight here that, in the course of its analysis under Article 2.2, the panel in *Australia – Plain Packaging* found useful guidance in the relevant TBT Committee Recommendation[1058] interpreting the terms "may have a significant effect on trade of other Members" in the context of Article 2.9 and stated:

> The TBT Committee Recommendation suggests that the concept of "significant effect on trade of other Members", under Article 2.9, may be understood to refer to *inter alia*, the effect on trade in a specific product, group of products or products in general and *the effect on trade between two or more Members*. Furthermore, when assessing the significance of these effects on trade, Members are invited to consider the value or other importance of imports in respect of the importing and/or exporting Members concerned, *whether from other Members individually or collectively*. We consider that this interpretation confirms our observation … that the "trade-restrictiveness" of a technical regulation need not be assessed only on the basis of the effect of the measure on trade between *all* WTO Members, in *all products* that are the subject of the technical regulation.[1059]

7.680. Finally, the Panel sees nothing in that TBT Committee Recommendation that would call into question the conclusion that the 7% maximum share and the high ILUC-risk cap and phase-out are measures that "may have a significant effect on the trade of other Members". The Panel notes that the TBT Committee Recommendation in question provides that:

> i. for the purposes of Articles 2.9 and 5.6, the concept of "significant effect on trade of other Members" may refer to the effect on trade:
>
> – of one technical regulation or procedure for assessment of conformity only, or of various technical regulations or procedures for assessment of conformity in combination;

[1053] Panel Report, *US – Clove Cigarettes*, para. 7.530 (referring to relevant dictionary definitions, including Oxford English Dictionary (OED) Online, accessed on 30 April 2011). See also *Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. II, p. 2835, defining "significant" to mean, among other things, "[i]mportant, notable; consequential"; *Webster's Online Dictionary*, accessed on 30 April 2011, defining "significant" to mean, among other things, "of a noticeably or measurably large amount"); and Panel Report, *India – Agricultural Products*, para. 7.773 (referring to OED Online).

[1054] Panel Report, *US – Clove Cigarettes*, para. 7.530.

[1055] Panel Reports, *US – Clove Cigarettes*, para. 7.530; and *India – Agricultural Products*, para. 7.773.

[1056] Panel Report, *India – Agricultural Products*, para. 7.773.

[1057] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1078. The Panel considered that the adoption of that interpretation "would have the effect that a WTO Member could have no recourse to Article 2.2 of the TBT Agreement in respect of a particular product in which its trade were being restricted, in the event that the trade of (an)other Member(s) increased", and that "following Australia's logic, in order to succeed in a claim under Article 2.2, a Member would in all cases need to establish the existence of a limiting effect not only in respect of its own exports, but in respect of the entirety of exports from all Members." (ibid.)

[1058] TBT Committee, Secretariat Note, "Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995", WTO Document G/TBT/1/Rev.12 (21 January 2015), Section 4.3.1.1, p. 20 (entitled "Significant effect on trade of other Members").

[1059] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1088.

- in a specific product, group of products or products in general; and
- between two or more Members.

ii. when assessing the significance of the effect on trade of technical regulations, the Member concerned should take into consideration such elements as:

- the value or other importance of imports in respect of the importing and/or exporting Members concerned, whether from other Members individually or collectively,
- the potential growth of such imports, and
- difficulties for producers in other Members to comply with the proposed technical regulations.

iii. the concept of a significant effect on trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant.

7.681. In light of the foregoing, the Panel finds that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations that "may have a significant effect on the trade of other Members".

7.1.2.5.4 "upon the request of another Member"

7.682. The procedural obligation in the first sentence of Article 2.5 to explain the justification for a technical regulation in terms of the provisions of paragraphs 2 to 4 applies only "upon request of another Member".

7.683. Indonesia argues that Indonesia and other Members repeatedly requested the European Union to explain the justification for the technical regulations at issue at multiple TBT Committee meetings beginning from the second half of 2018, during the European Union's legislative process for RED II and the Delegated Regulation. In its first written submission[1060], Indonesia summarizes and sets out selected passages from statements that it made at the TBT Committee meetings held in November 2018 (regarding the proposed amendment to RED I); March 2019 (following the release of the Delegated Regulation proposal); June 2019 (regarding the Delegated Regulation); November 2019 (reiterating its concerns); and December 2019 (after filing its consultations request). According to Indonesia, these statements to the TBT Committee qualify as the relevant "requests" for an explanation of the justification of the measures triggering the procedural obligation in the first sentence of Article 2.5.

7.684. The European Union does not dispute that Indonesia made "requests" for an explanation of the justification of the high ILUC-risk cap and phase-out within the meaning of the first sentence of Article 2.5. In this regard, the Panel notes that the European Union has presented no arguments on this element of the claim under the first sentence of Article 2.5. Furthermore, the European Union did not correct Indonesia in its understanding that the European Union "does not contest that Indonesia requested an explanation of the technical regulations under Articles 2.2 to 2.4 of the TBT Agreement".[1061]

7.685. The Panel considers that, as part of its assessment of whether Indonesia has made a *prima facie* case of inconsistency under Article 2.5, the Panel may give some weight to the fact that the European Union does not contest that there was a "request" within the meaning of Article 2.5. However, the absence of refutation from the European Union does not absolve the Panel from conducting an independent assessment[1062] of whether Indonesia made "requests" for an explanation of the justification of the high ILUC-risk cap and phase-out within the meaning of the first sentence of Article 2.5. The Panel has reviewed the various statements to the TBT Committee referenced by

[1060] Indonesia's first written submission, paras. 800-810.
[1061] Indonesia's first written submission, para. 918.
[1062] See e.g. Panel Report, *US – Shrimp (Ecuador)*, paras. 7.9-7.11.

Indonesia and considers that there may be grounds to doubt whether Indonesia's statements to the TBT Committee can be characterized, in form or in substance, as a "request" for the European Union to "explain the justification" of the technical regulations "in terms of the provisions of paragraphs 2 to 4". The Panel's reasons are as follows.

7.686. The Panel first observes that none of the statements invoke or otherwise expressly refer to Article 2.5, except for the statement made by Indonesia in December 2019, which was made after the filing of its consultations request (in which it alleged that the European Union had acted inconsistently with Article 2.5). Furthermore, none of the questions directed at the European Union in these statements are formulated in terms of a "request" for an "explanation of the justification" of the high ILUC-risk cap and phase-out, let alone an explanation of the justification "in terms of the provisions of paragraphs 2 to 4" of Article 2.

7.687. In addition, the principal focus of Indonesia's statements, including its related questions to the European Union, is alleged *discrimination* against palm oil-based biofuels that would be relevant to Article 2.1, not the obligations in paragraphs 2 to 4 of Article 2. While Indonesia's first written submission highlights selected elements of these statements that set out assertions that the impugned measures are more trade-restrictive than necessary, and not consistent with "international standards", it remains the case that the principal focus of these statements relates to alleged *discrimination* under Article 2.1. To that extent, this does not suggest that Indonesia was seeking an explanation of the justification in terms of the provisions of Articles 2.2, 2.3, or 2.4.

7.688. Finally, Indonesia's statements made to the TBT Committee are generally in the nature of *arguments* or *statements of concern*, not requests to explain how the measure was justified, let alone a request to explain how the measure was justified in terms of the provisions of Articles 2.2, 2.3 or 2.4. Indeed, the Panel's review of Indonesia's statements leads it to conclude that each is essentially in the nature of an extended *refutation* of the European Union's ILUC-related justification of its measures, not a request for the European Union to explain the relevant justification of the measures.

7.689. The circumstances of this case therefore present certain similarities to the circumstances in the only prior case in which a claim under Article 2.5 was considered, and rejected on the grounds that there was no "request" within the meaning of Article 2.5. In *US – Clove Cigarettes*, a set of 10 questions from Indonesia to the United States relating to the challenged technical regulation was found to be neither in form nor in substance a "request" within the meaning of Article 2.5, because the set of questions (a) made no mention of Article 2.5, (b) was not formulated in the terms used in Article 2.5, and (c) related to various issues regulated by provisions of the WTO covered agreements other than Articles 2.2, 2.3 and 2.4.[1063]

7.690. The Panel recognizes that despite the apparent similarities with the circumstances *in US – Clove Cigarettes*, Indonesia's statements include multiple questions to the European Union, and that certain aspects of these questions reference or implicate either Article 2.2 or Article 2.4. In any event, the Panel does not consider it necessary to definitively rule on this issue, as it would not change the outcome of the Panel's assessment of the claim under Article 2.5.

7.1.2.5.5 "explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4" of Article 2

7.691. The Panel now considers, on the *arguendo* assumption that there was a "request" within the meaning of Article 2.5, whether the European Union discharged its obligation to "explain the justification" of the high ILUC-risk cap and phase-out "in terms of the provisions of paragraphs 2 to 4" of Article 2.

7.692. Indonesia argues that, in responding to repeated requests from itself and other WTO Members for an explanation of the justification of the relevant measures, the European Union has

[1063] Panel Report, *US – Clove Cigarettes*, paras. 7.451-7.461. Indonesia argues that the panel's analysis in *US – Clove Cigarettes* supports the view that a request pursuant to Article 2.5 may be made implicitly. (Indonesia's first written submission, para. 797.)

not gone further than stating that the measures are not technical regulations.[1064] Indonesia submits that Article 2.5 requires more, namely that "[t]he explanation of the justification of the measure at issue must be adequate to ensure that other Members understand those reasons and can assess the rationale behind the measure at issue."[1065] Indonesia adds that the European Union does not cease to be subject to the obligation under Article 2.5 by simply arguing that the measures are not "technical regulations".[1066]

7.693. The European Union responds that it has adequately explained the justification for the measures in terms of the provisions of paragraphs 2 to 4 of Article 2. In responses to questions from the Panel, it summarizes and sets out selected passages from: (a) letters or other materials (e.g. fact sheets) that EU officials provided to the complainants during this period in response to concerns raised; and (ii) the European Union's statements to the TBT Committee made in response to the concerns raised in that forum. It also refers to various meetings and consultations held at various points in time in other fora between relevant officials.[1067] The European Union clarifies that it does not dispute that if a panel "were to find that a measure qualifies as a technical regulation, the obligation contained in the first sentence of Article 2.5 would apply despite the contrary position taken by the concerned Member".[1068]

7.694. The Panel notes that the rationale behind the measures was explained as early as 2015, in the form of the ILUC Directive which amended RED I for the stated purpose of "address[ing] the impact of indirect land use change given that current biofuels are mainly produced from crops grown on existing agricultural land".[1069] The Panel recalls and hereby incorporates by reference the discussion at paragraphs 2.15 to 2.22 of this Report, which reference the ILUC Directive, the European Commission's 2016 proposal for a "recast" Directive to address ILUC, and the Study Report (2017) relating to ILUC.

7.695. Furthermore, in its statements to the TBT Committee on this matter dating at least as far back as June 2018, Indonesia itself has addressed the European Union's ILUC-related justification for the proposed (at the time) 7% maximum share and the high ILUC-risk cap and phase-out. Indeed, Indonesia and other Members raising concerns with the measures at the TBT Committee meetings have repeatedly demonstrated their familiarity with the ILUC-related studies done and commissioned by the European Commission, and specific issues arising in connection with the European Union's attempt to calculate GHG emissions associated with ILUC.[1070] As already indicated further above, the Panel's review of Indonesia's statements leaves it with the impression that each is essentially in the nature of an extended *refutation* of the European Union's ILUC-related justification of its measures, not a request for the European Union to explain the relevant justification of the measures.

7.696. The Panel further recalls that the text of RED II itself, in particular Recitals 80 and 81, quite clearly explains the ILUC-related justification for the measures at issue. The Delegated Regulation reiterates that the measures are taken to address the issue of ILUC and begins with 16 Recitals that explain the measures by reference to ILUC. The Panel has already reviewed these and other aspects of the regulatory framework in the context of identifying the specific "objective" of the 7% maximum share and the high ILUC-risk cap and phase-out in the context of Article 2.2. Indeed, in the context of its arguments under Article 2.2, Indonesia itself places considerable emphasis on the relevance of the Recitals of RED II for the purposes of defining the specific objectives of the technical

[1064] Indonesia's first written submission, para. 818 (referring to WTO TBT Committee, Minutes of the Meeting of 6-7 March 2019, G/TBT/M/77 (15 May 2019), para. 3.135; WTO TBT Committee, Minutes of the Meeting of 20-21 June 2018, G/TBT/M/75 (14 September 2018), para. 4.245; WTO TBT Committee, Minutes of the Meeting of 20-21 June 2019, G/TBT/M/78 (17 April 2018), para. 3.183; and WTO TBT Committee, Statement by the European Union to the Committee on Technical Barriers to Trade - 21 and 22 March 2018, G/TBT/W/474 (17 April 2018), para. 4.)

[1065] Indonesia's first written submission, para. 817.

[1066] Indonesia's first written submission, para. 819.

[1067] European Union's response to Panel question No. 199, paras. 585-594.

[1068] European Union's response to Panel question No. 198, para. 584.

[1069] ILUC Directive, (Exhibit IDN-86), Recital (4), p. 2.

[1070] See e.g. WTO TBT Committee, Minutes of the Meeting of 20-21 June 2018, G/TBT/M/75 (14 September 2018), paras. 4.236-4.237 (Indonesia); Statement by Malaysia to the TBT Committee dated 5 July 2018, G/TBT/W/548, paras. 5-6.

regulations at issue, and the Panel has already expressed its agreement with this approach to identifying the objective of the challenged measures.[1071]

7.697. It is clear that Indonesia does not agree with the ILUC-related justification for the measures and does not consider that the measures are justified under the relevant provisions of the TBT Agreement. However, the procedural obligation in Article 2.5 is not an obligation to *justify* the measures to the satisfaction of the complainants or the wider membership – it is a procedural obligation to "explain the justification" so as to enable other Members to better assess, for themselves, whether the technical regulation is consistent with Articles 2.2, 2.3 and 2.4.

7.698. In the Panel's view, the only issue that remains in light of the clear explanations of the justification of the measures, which are already reflected in the text of the relevant legal instruments themselves, is whether these justifications serve to explain the justification of the technical regulations "in terms of the provisions of paragraphs 2 to 4" of Article 2. For the reasons that follow, the Panel does not see an adequate basis to fault the European Union in this regard.

7.699. First, the Panel considers that the explanation of the justification of the measures provided by the European Union (through the text of RED II itself and other relevant legal instruments) is directly relevant to identifying the "objective" of the measures within the meaning of Articles 2.2, 2.3 and 2.4. This is significant because each of the obligations in Articles 2.2, 2.3 and 2.4 is formulated by reference to a technical regulation's objective, making this the common denominator in "the provisions of paragraphs 2 to 4" of Article 2.

7.700. In addition to being the common denominator to these provisions, the explanation of a technical regulation's "objective" would appear to be central to understanding the reasons and rationale for the challenged measures, and ultimately its justification under paragraphs 2 to 4 of Article 2. The reason is that the identification of a technical regulation's objective serves as "the benchmark against which a panel must assess the degree of contribution made by a challenged technical regulation, as well as by proposed alternative measures"[1072] for the purposes of Article 2.2. It also constitutes a central point of reference for the obligations in Article 2.3[1073] and Article 2.4.[1074]

7.701. Accordingly, the Panel considers that a sufficiently clear explanation of a measure's "objective" by the regulating Member could plausibly qualify as a justification for a technical regulation "in terms of provisions of paragraphs 2 to 4". It bears repeating that in the context of its arguments under Article 2.2, Indonesia places considerable emphasis on the relevance of the Recitals of RED II for the purposes of defining the specific objectives of the technical regulations at issue, and the Panel has already expressed its agreement with this approach.

7.702. Further, the Panel considers that any assessment of the adequacy of a regulating Member's "explanation of the justification" of a technical regulation "in terms of the provisions of paragraphs 2 to 4" of Article 2 will necessarily be informed by the nature of the "request" made by the complaining Member. This view stems from the fact that the provisions of Articles 2.2, 2.3 and 2.4 set out numerous distinct obligations, with each involving many distinct elements and analytical steps. This implies that the assessment of the adequacy of the form and content of a regulating Member's "explanation of the justification" of a technical regulation "in terms of the provisions of paragraphs 2 to 4" of Article 2 must necessarily be conducted on a case-by-case basis and will necessarily be informed by reference to the form and content of the request(s) that triggered the explanation. In this case, Indonesia's various statements to the TBT Committee did not specify in respect of which precise aspects of "the provisions of paragraphs 2 to 4", if any, an explanation of the justification of the measures was being requested. In these circumstances, it would lack even-handedness to subject the European Union to an asymmetrically strict and formalistic standard for

[1071] The Panel recalls and hereby also incorporates by reference the discussion at section 7.1.2.3.3 of this Report.

[1072] Appellate Body Reports, *US – COOL*, para. 387.

[1073] Article 2.3 provides that technical regulations shall not be maintained if the circumstances or "objectives giving rise to their adoption" no longer exist or if the changed circumstances or "objectives" can be addressed in a less trade-restrictive manner.

[1074] Article 2.4 provides that Members shall use relevant international standards as the basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the "legitimate objectives" pursued.

assessing whether the justification it provided is formulated "in terms of the provisions of paragraphs 2 to 4" of Article 2.

7.703. The Panel has reviewed the letters or other materials (e.g. fact sheets) that EU officials provided to the complainants during this period, as well as the European Union's statements made in the TBT Committee, and considers that there may be grounds to doubt whether the various materials and statements would satisfy the obligation to "explain the justification" of the technical regulations at issue "in terms of the provisions of paragraphs 2 to 4".

7.704. The European Union's response to Indonesia's stated concerns is principally focused on disputing that the measures at issue are "technical regulations" and insisting that these measures do not "ban" or even "restrict" imports of palm oil or palm oil-based biofuel into the European Union. It is not clear that such considerations can be characterized as explanations of the justification of the measure, in terms of the provisions of paragraphs 2 to 4 of Article 2 or otherwise. The European Union's responses also include statements that could be characterized more as general descriptions of the basic features of the measures, rather than elements of justification. The European Union highlights the following information that was provided across these responses:

> (i) that the alleged technical regulation aims at reducing the carbon footprint of the transport sector; (ii) that the contribution of certain categories of biofuels, (bioliquids and biomass fuels, namely those with high indirect land-use change (ILUC) risk and from food or feed crops for which a significant expansion of the production area into land with high carbon stock is observed) will be limited to the 2019 consumption levels; (iii) that this contribution is later to be gradually reduced until 2030; (iv) that low indirect land-use change-risk biofuels are excluded from this limit; (v) that the outcome does not constitute a ban or even a restriction on the imports of palm oil or palm-oil based biofuels.[1075]

7.705. The Panel does not consider it necessary to rule on whether the letters or other materials on record suffice to "explain the justification" for the purposes of Article 2.5. For the reasons stated above, the text of the relevant legal instruments clearly "explain the justification" for both the 7% maximum share and the high ILUC-risk cap and phase-out.

7.706. In light of the foregoing, the Panel finds that Indonesia has failed to establish that the European Union failed to "explain the justification" of the high ILUC-risk cap and phase-out in terms of the provisions of paragraph 2 to 4 of Article 2.

7.1.2.5.6 Conclusion on Article 2.5

7.707. The Panel concludes that Indonesia 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 high ILUC-risk cap and phase-out in terms of Articles 2.2 to 2.4 of the TBT Agreement.

7.1.2.6 Article 2.8 – Requirements specified in terms of performance

7.1.2.6.1 Introduction

7.708. The Panel now turns to the claim under Article 2.8 of the TBT Agreement, regarding the obligation to specify technical regulations in terms of "performance" rather than "design or descriptive" characteristics wherever appropriate.

7.709. Indonesia submits[1076] that the European Union violates Article 2.8 because the high ILUC-risk cap and phase-out regulates trade in biofuel based on "descriptive" characteristics of product requirements instead of performance. More specifically, Indonesia contends that "high ILUC-risk" is a "descriptive" characteristic for which there is no scientific basis and does not relate to

[1075] European Union's response to Panel question No. 199, para. 591.

[1076] Indonesia's first written submission, paras. 822-841; second written submission, paras. 925-946; responses to the Panel's second set of questions, paras. 191-192; and comments on the European Union's responses to the Panel's second set of questions, paras. 452-455.

environmental performance. Furthermore, Indonesia argues that if the European Union seeks to address the GHG emissions of biofuel, it is proper to rely on relevant ISO standards that expressly enable the European Union to regulate such biofuel based on its environmental performance rather than on a description of the product.

7.710. The European Union submits[1077] that Indonesia has not established that there is a violation of Article 2.8. More specifically, the European Union submits that the application of environmental performance standards would not fulfil the spectrum and balance of policy objectives pursued.

7.1.2.6.2 Legal standard

7.711. Article 2.8 sets forth the obligation that:

> Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.

7.712. Article 2.8 has been interpreted and applied in one prior case, namely *US – Clove Cigarettes*, and both parties present their respective understandings of the applicable legal standard with reference to that case.

7.713. To establish an inconsistency with Article 2.8, a complainant must demonstrate that:

a. the technical regulation at issue specifies product requirements in terms of "design or descriptive characteristics" rather than in terms of "performance"; and

b. it is "appropriate" to specify those product requirements in terms of performance rather than design or descriptive characteristics.

7.714. The Panel will elaborate further on the elements of the legal standard in Article 2.8 as necessary in the course of its assessment of the issues in dispute.

7.1.2.6.3 Assessment by the Panel

7.715. The Panel first addresses whether the technical regulation at issue specifies product requirements in terms of design or descriptive characteristics rather than in terms of performance.

7.716. As established in section 7.1.2.1 above, the high ILUC-risk cap and phase-out is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement. The Panel has concluded that it sets out a "product characteristic" of biofuel, namely that of being produced from a particular feedstock that has been identified to be high ILUC risk, and based on that product characteristic, provides for specific rules on the extent to which that biofuel may be counted towards EU renewable energy targets.

7.717. The Panel understands the term "product requirements" in Article 2.8 to refer to the "product characteristics" laid down in a technical regulation and sees no disagreement between the parties on this point. Thus, what Indonesia must demonstrate is that the above product characteristic, namely being produced from a particular feedstock that has been identified to be high ILUC risk, is a product characteristic that has been specified in terms of "design or descriptive" characteristics rather than in terms of "performance". In this regard, the Panel notes, and sees no problem in Indonesia focusing specifically on a feedstock's classification as high ILUC risk as part of the above product requirement, for the purposes of this claim.

7.718. Indonesia submits that high ILUC-risk has no scientific basis and does not relate to environmental performance.[1078] The European Union does not directly contest Indonesia's assertion that high ILUC-risk does not relate to what it terms "environmental performance".

[1077] European Union's first written submission, paras. 903-924; responses to the Panel's second set of questions, paras. 595-599; and comments on Indonesia's responses to the Panel's second set of questions, paras. 161-162.

[1078] Indonesia's first written submission, para. 833; and second written submission, para. 925.

7.719. The Panel sees two issues with Indonesia's arguments that individually and collectively raise the question whether Indonesia has made a *prima facie* case, which, even in the absence of any refutation by the European Union, the Panel needs to address.[1079] The first issue is that Indonesia's arguments under Article 2.8 seem to merely repeat points made under other claims without properly developing or substantiating them for the purposes of this claim. In particular, Indonesia does not explain why the alleged lack of a scientific basis or the alleged unrelatedness to what it terms "environmental performance" makes the product requirement one that is specified in terms of "design or descriptive" characteristics. The Panel notes in this regard that it is not a panel's task, but that of the complainant, to relate alleged facts to legal arguments that support a claim of inconsistency.[1080]

7.720. The second issue is Indonesia's reliance on the concept of "environmental performance" – a concept which it does not explain. The Panel assumes that this term refers to the effects, i.e. the negative impact, of a given product on the environment. If so, the question may arise whether this falls within the meaning of "performance" intended in Article 2.8.

7.721. The Panel notes that, as Indonesia itself points out, the ordinary meaning of "performance", which the panel in *EC – Sardines* relied on in interpreting that term in Article 2.8, is "the operation or functioning, usually with regard to effectiveness".[1081] As that definition makes clear, "performance" is focused on the operation and functioning of the product itself. This is confirmed by the French and Spanish language versions of the treaty text, which translate "performance" respectively as "*propriétés d'emploi*" and "*propiedades de uso y empleo*".[1082] In light of this meaning it may be questionable whether a product's "environmental performance", at least when it comes to indirect environmental effects as discussed here, qualifies as "performance" within the meaning of Article 2.8. However, assuming that it does, then the question arises why a high ILUC-risk classification (as opposed to the quantification of GHG emissions based on the LCA analysis that Indonesia proposes, as elaborated below) would not also qualify as "environmental performance". This, Indonesia has not explained.

7.722. The Panel considers it unnecessary to definitively rule on these issues, because in any event, even if Indonesia had demonstrated that high ILUC-risk is specified in terms of "design or descriptive" characteristics rather than in terms of "performance", it would still have had to demonstrate that it is *appropriate* to specify the product requirement in terms of performance rather than design or descriptive characteristics. For the reasons that follow, the Panel concludes that Indonesia has not done so.

7.723. Indonesia bases its argument in this regard on the existence of the four ISO standards discussed in section 7.1.2.2 above. These standards, as discussed above, provide for an LCA-based quantification of GHG emissions of biofuels, from which they explicitly exclude ILUC effects. Indonesia argues that the four standards illustrate how to determine the environmental performance of a product and specifically the sustainability of bioenergy; that, in other words the four ISO standards show that it is possible to base a technical regulation on environmental performance and how this can be done.[1083] Indonesia adds that its argument does not preclude that other means of ensuring that the EU measures are based on product requirements in terms of performance rather than descriptive characteristics could be available.[1084] The European Union submits that the

[1079] A *prima facie* case is one which in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case. (Appellate Body Report, *US – Wool Shirts and Blouses*, p.14.) A complainant has to make a *prima facie* case even in the absence of *any* refutation by the respondent. Thus, notwithstanding the fact that the European Union does not contest this particular point, the Panel can only find in favour of Indonesia if it is satisfied that Indonesia has presented sufficient evidence and argument on, i.e. has sufficiently substantiated, the point as part of a valid *prima facie* case of violation. (See Panel Report *US – Shrimp (Ecuador)*, paras. 7.9-7.11.)

[1080] Appellate Body Report, *US – Gambling*, para. 140.

[1081] Indonesia's first written submission, para. 828 (referring to Panel Report, *EC – Sardines*, para. 7.81).

[1082] In *US – Clove Cigarettes*, the panel also understood "performance" to be an issue of "function" and in this context referred to the French and Spanish translations of "performance" in Article 2.8. (Panel Report, *US – Clove Cigarettes*, para. 7.493 and fn 863.)

[1083] Indonesia's response to Panel question No. 200, para. 191.

[1084] Indonesia's response to Panel question No. 200, para. 192.

respective ISO standards are irrelevant, inappropriate and ineffective for the fulfilment of legitimate objectives pursued by the challenged measures and that, therefore, Indonesia's claim falls.[1085]

7.724. The Panel notes that it has already examined whether the measures should have been based on the four ISO standards in the context of Indonesia's claim under Article 2.4. The Panel recalls that Article 2.4 contains the obligation to use relevant international standards as a basis for technical regulations, and that this obligation is found in the TBT Agreement. The obligation in Article 2.8 is different from Article 2.4, as it is about specifying product characteristics in terms of performance where appropriate. The term "appropriate" in that context has been understood to mean "suitable, proper, or fitting".[1086]

7.725. While Article 2.8 is not about international standards *per se*, the Panel accepts that a complainant may establish a *prima facie* case under Article 2.8 by referring to relevant international standards as an argument for, and evidence of, why it is appropriate to specify a particular product characteristic in terms of performance. This is what the Panel understands Indonesia to have done. While there may be other ways to establish "appropriateness", Indonesia has not made any other arguments in this regard.

7.726. In the context of Article 2.4, however, the Panel found that the four ISO standards are not relevant under Article 2.4 because they do not address what is being addressed by the measures at issue, namely the taking into account of ILUC.[1087] ILUC – and more specifically high ILUC-risk – is also at issue here as (part of) the "product requirement" that allegedly was not specified in terms of "performance" and that according to Indonesia should have been. Given that the four standards do not address the taking into account of ILUC, they cannot say why it is appropriate – or, for that matter, how - to specify high ILUC-risk in terms of "performance". In fact, rather than targeting *how* ILUC is to be specified, the Panel understands Indonesia's argument to ultimately target eliminating ILUC altogether as a product requirement precisely on the grounds that the ISO standards do not address it. In Article 2.8, however, the issue is not whether a given "product requirement" should *exist at all*, but only *how* it should be specified.

7.727. Indonesia's reliance on the four ISO standards is therefore misplaced, as the ISO standards do not address ILUC, and for this reason are not pertinent to whether it is appropriate to specify high ILUC-risk in terms of performance (where it is allegedly not specified in such terms). As noted above, Indonesia has not presented any other argument on this issue.

7.1.2.6.4 Conclusion on Article 2.8

7.728. The Panel concludes that Indonesia has failed to establish 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.

7.1.2.7 Articles 2.9.2 and 2.9.4 – Proposed technical regulations

7.1.2.7.1 Introduction

7.729. The Panel now turns to the claims under Article 2.9 of the TBT Agreement, which include the distinct transparency obligations in Article 2.9.2 and Article 2.9.4. The Panel addresses these claims together given the relationship between these provisions and the manner in which the parties have developed their arguments in this case.

7.730. Indonesia submits[1088] that the European Union violates Articles 2.9.2 and 2.9.4 by failing to (i) notify proposals of RED II and the Delegated Regulation and (ii) organize a meaningful commenting process in respect of the proposals for RED II and the Delegated Regulation. More specifically, Indonesia submits that: (i) the *chapeau* conditions in Article 2.9 are met; (ii) there was

[1085] European Union's response to Panel question No. 200, para. 598.
[1086] Panel Report, *US – Clove Cigarettes*, para. 7.489 (referring to Appellate Body Report, *EC – Sardines*, para. 285).
[1087] See para. 7.186 above.
[1088] Indonesia's first written submission, paras. 842-880; responses to the Panel's first set of questions, para. 248; and second written submission, paras. 947-953.

no notification of the proposed RED II and Delegated Regulation in the TBT Information Management System (TBT IMS) contrary to Article 2.9.2; and (iii) because there was no notification of the proposed measures, there could be no meaningful commenting process pursuant to Article 2.9.4. Further, the design and length of the informal feedback process for the Delegated Regulation was deficient because it would not have been sufficient for WTO Members to make comments, and for the European Union to discuss them and take into account any comments and discussions in its process, and material relating to the proposed Delegated Regulation was not available for comment.

7.731. The European Union submits[1089] that it was not required to fulfil the procedural requirements in Articles 2.9.2 and 2.9.4 because the measures at issue are not technical regulations and that Indonesia has not otherwise demonstrated a violation of these provisions. The European Union states that "in factual terms", it acknowledges that there was no notification pursuant to Article 2.9.2 and no formal commenting process pursuant to Article 2.9.4.[1090] The European Union refers to extensive "stakeholder consultations" held during the preparation of the legislative proposals but makes no comment on to the nature and extent of the "commenting process".[1091]

7.1.2.7.2 Legal standard

7.732. Article 2.9 sets forth several separate transparency obligations in relation to proposed technical regulations:

> 2.9 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:
>
> 2.9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;
>
> 2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
>
> 2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;
>
> 2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

7.733. Article 2.9 has been interpreted and applied in one prior case, *US – Clove Cigarettes*, and both parties present their respective understandings of the applicable legal standard with reference to that case.

7.734. The Panel will elaborate further on the elements of the legal standard in Article 2.9 as necessary in the course of its assessment of the issues in dispute.

7.1.2.7.3 *Chapeau* of Article 2.9

7.735. The obligations under Article 2.9 apply in respect of a technical regulation when the two conditions of the *chapeau* of Article 2.9 are met, namely:

[1089] European Union's first written submission, paras. 928-934.
[1090] European Union's first written submission, para. 930.
[1091] European Union's first written submission, para. 932.

a. a relevant international standard does not exist, or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards; and

b. the proposed technical regulation may have a significant effect on trade of other Members.

7.736. With respect to the first condition, Indonesia argues that the 7% maximum share[1092] and high ILUC-risk cap and phase-out are not in accordance with relevant international standards. Indonesia argues in the alternative that no relevant international standards exist.[1093]

7.737. The European Union argues that the 7% maximum share and the high ILUC-risk cap and phase-out are not technical regulations, such that the procedural obligations in Article 2.9 do not apply.[1094] Beyond this, the European Union does not specifically respond to Indonesia's argument with respect to the first condition.

7.738. The Panel recalls its finding, made above in the context of addressing Indonesia's claim under Article 2.4 of the TBT Agreement, that there are no relevant international standards for the 7% maximum share and the high ILUC-risk cap and phase-out. Accordingly, the first condition of the *chapeau* is satisfied.

7.739. As to the second condition in the *chapeau*, Indonesia contends that the technical regulations at issue have a significant effect on Indonesia's trade with the European Union.[1095]

7.740. The European Union does not specifically respond to Indonesia's argument on this condition.

7.741. The Panel recalls its finding, made above in the context of addressing Indonesia's claim under Article 2.5 of the TBT Agreement, that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations that "may have a significant effect on the trade of other Members" for the purposes of Articles 2.5 and 2.9 of the TBT Agreement.

7.742. On that basis, the Panel finds that the conditions of the *chapeau* of Article 2.9 are satisfied.

7.1.2.7.4 Article 2.9.2 – notification of proposed technical regulations

7.743. The Panel recalls that "transparency is a cornerstone of the TBT Agreement"[1096], and Article 2.9.2 is "at the core of the TBT Agreement's transparency provisions: the very purpose of the notification is to provide opportunity for comment before the proposed measure enters into force, when there is time for changes to be made before 'it is too late'".[1097]

7.744. More specifically, Article 2.9.2 requires that Members "notify other Members through the Secretariat" of the products to be covered by a proposed technical regulation, with a brief indication of its objective and rationale. Notification under Article 2.9.2 must occur at a multilateral level to the WTO Secretariat, e.g. through what is now the "ePing SPS&TBT Platform" (and previously, the TBT IMS).[1098] That the same information is otherwise publicly available is insufficient to discharge this obligation. Moreover, notification is not tied to another Member's request.[1099] The notification obligation applies at an "early appropriate stage", when amendments can still be introduced and

[1092] The Panel notes that Indonesia refers to the 7% maximum share and high ILUC-risk cap and phase-out as the technical regulations in respect of which it claims a violation of Article 2.9, but does not make specific arguments on the 7% maximum share in the context of the *chapeau* conditions. (See Indonesia's first written submission, paras. 842 and 846; response to Panel question No. 92, para. 248.) Nevertheless, based on the Panel's findings under Articles 2.4 and 2.5 of the TBT Agreement, the Panel considers that the *chapeau* conditions vis-à-vis the 7% maximum share have been established.

[1093] Indonesia's first written submission, paras. 844-849 (referring to ibid., Section VI.E concerning Indonesia's arguments under Article 2.4 of the TBT Agreement).

[1094] See European Union's first written submission, para. 929.

[1095] Indonesia's first written submission, para. 848 (referring to ibid., Section VI:F i.e. its arguments under Article 2.5 to this effect).

[1096] https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm.

[1097] Panel Report, *US – Clove Cigarettes*, para. 7.536.

[1098] The TBT IMS has now been replaced by the ePing SPS&TBT Platform. See https://eping.wto.org/; https://www.wto.org/english/tratop_e/tbt_e/tbt_notifications_e.htm.

[1099] Panel Report, *US – Clove Cigarettes*, paras. 7.535, and 7.540-7.541.

comments can be taken into account; therefore the technical regulation(s) at issue cannot have been enacted or adopted prior to notification.[1100]

7.745. Indonesia argues that the RED II and Delegated Regulation proposals were not notified to the WTO Secretariat via the TBT IMS.[1101] The European Union acknowledges that "in factual terms", there was no notification pursuant to Article 2.9.2.[1102]

7.746. The Panel concludes that, absent any notification of the RED II and Delegated Regulation proposals (which set out the high ILUC-risk cap and phase-out and the 7% maximum share)[1103], confirmed by Indonesia's search of the TBT IMS and the European Union's own statement, the European Union failed to comply with its obligations under Article 2.9.2 of the TBT Agreement.

7.1.2.7.5 Article 2.9.4 – commenting process for proposed technical regulations

7.747. Article 2.9.4 requires, with respect to proposed technical regulations, that Members allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account. The wording of Article 2.9.4 indicates that this obligation is to provide an opportunity for comments and discussion, and for taking such comments and discussions into account at the domestic level.

7.748. Article 2.9.4 has not been addressed in any prior WTO dispute. However, the TBT Committee has at various intervals provided guidance with respect to time-limits for the presentation of comments on notified technical regulations under Article 2.9.4.

7.749. In 2000 and 2003, the TBT Committee agreed: (i) that the normal time limit for comments on notifications should be 60 days. Any Member able to provide a time-limit beyond 60 days, such as 90 days, is encouraged to do so and should indicate this in the notification[1104]; and (ii) in order to improve the ability of developing country Members to comment on notifications, and consistent with the principle of special and differential treatment, developed country Members are encouraged to provide more than a 60-day commenting period.[1105]

7.750. In 2009, the TBT Committee agreed[1106]: (i) to recall its earlier recommendation that the normal time-limit for the presentation of comments should be at least 60 days, and its encouragement to Members to provide, whenever possible, a time-limit beyond 60 days, such as 90 days; (ii) to recall that developed country Members are encouraged to provide more than a 60-day commenting period, to improve the ability of developing country Members to make comments on notifications consistent with the principle of special and differential treatment; and (iii) to reiterate that an insufficient period of time for presentation of comments on proposed technical regulations and conformity assessment procedures may prevent Members from adequately exercising their right to submit comments.[1107]

7.751. Indonesia argues that there was no meaningful commenting process because of the lack of notification under Article 2.9.2.[1108] Indonesia further argues that the European Union failed to discharge its obligations by organizing an informal feedback process during which citizens and stakeholders could submit comments on the proposed Delegated Regulation using an electronic platform; the process was limited to inviting the public (i.e. including WTO Members) to fill in a

[1100] Panel Report, *US – Clove Cigarettes*, paras. 7.536. The Panel notes that the circumstances of this dispute are not (and are not argued to be) those in Article 2.10, whereby Members are exempt from the obligations under Article 2.9 under certain circumstances.

[1101] Indonesia's first written submission, paras. 857-858 (referring to Exhibits IDN-258 and IDN-259).

[1102] European Union's first written submission, para. 930.

[1103] See the Panel's description of the high ILUC-risk cap and phase-out and 7% maximum share in Section 2.3 of this Report.

[1104] TBT Committee, Second triennial review of the operation and implementation of the TBT Agreement, G/TBT/9, 13 November 2000 (G/TBT/9), para. 13 and Annex 3, p. 22.

[1105] TBT Committee, third triennial review of the operation and implementation of the TBT Agreement G/TBT/13, 11 November 2003 (G/TBT/13), para. 26.

[1106] TBT Committee, Fifth triennial review of the operation and implementation of the TBT Agreement, G/TBT/26, 13 November 2009 (G/TBT/26), paras. 39-40.

[1107] The Panel notes that the same guidance applies *mutatis mutandis* to the obligation in Article 5.6.4, which concerns the equivalent commenting process for proposed conformity assessment procedures.

[1108] Indonesia's first written submission, para. 868.

comments section on a webpage.[1109] Indonesia notes that the feedback period ran from 8 February 2019 to 8 March 2019, during which 68,564 comments were filed, and the Delegated Regulation was adopted on 13 March 2019 (including the finalizing and making available of the Status Report (2019)).[1110] The European Union therefore could not have read all the comments, identified those which had been filed by WTO Members, considered whether WTO Members requested a discussion of their comments (and organized a discussion), and taken into account any written comments in adopting the Delegated Regulation and reviewing and finalizing the Status Report (2019) that "supposedly contains the factual basis" for the Delegated Regulation.[1111]

7.752. The European Union responds that it was not required to fulfil the procedural requirements in Article 2.9.4 because the measures at issue are not technical regulations, but acknowledges that "in factual terms", no notification pursuant to Article 2.9.2 was made and no formal commenting process pursuant to Article 2.9.4 was organised.[1112] The European Union also refers to "extensive stakeholder consultations" during the "preparation of the legislative proposals", but does not comment on the nature and extent of the commenting process.[1113]

7.753. The Panel notes that Article 2.9.4 concerns a commenting period for proposed technical regulations. The sequence of obligations in Articles 2.9.2 (multilateral notification of a complete draft technical regulation) and 2.9.4 (the commenting process foreshadowed in Article 2.9.2) indicates that such a commenting period should take place after a complete draft technical regulation has been notified and before that draft is adopted and published pursuant to Article 2.11 of the TBT Agreement. This stems from the fact that the obligation to notify in Article 2.9.2 is concerned with and impacts the obligation to provide for a commenting period under Article 2.9.4. Thus, not notifying a draft technical regulation at an early stage, in the manner required by Article 2.9.2, impacts a Member's ability to discharge its obligations under Article 2.9.4.[1114]

7.754. Moreover, even if a commenting period had started at a reasonably early stage (absent any notification under Article 2.9.2), in the present case it is undisputed that there was only a one-month feedback period. This is short of the recommended *minimum* 60-day commenting period. Further, having only four days to process comments or hold discussions falls short of the period foreseen to give effect to the obligations under Article 2.9.4. This is notwithstanding the current TBT Committee recommendations that developing country Members be given a period greater than 60 days under Article 2.9.4.[1115]

7.755. These factors taken together, and the European Union's statement that "in factual terms" it acknowledges that no publication, formal notification or organization of a commenting procedure for the purposes of Article 2.9.4 has taken place, establish a violation of Article 2.9.4.

7.1.2.7.6 Conclusion on Articles 2.9.2 and 2.9.4

7.756. The Panel concludes that the European Union has acted inconsistently with Article 2.9.2 by failing to notify the proposed 7% maximum share and the proposed high ILUC-risk cap and phase-out measures.

[1109] Indonesia's first written submission, paras. 871-872.

[1110] Indonesia's first written submission, paras. 873-874 (referring to Draft Delegated Regulation, (Exhibit IDN-99); and Communication by the European Commission, "Published Initiatives, "High and low Indirect Land-Use Change (ILUC) - risks biofuels, bioliquids and biomass fuels", (Exhibit IDN-261).

[1111] Indonesia's first written submission, para. 874. Indonesia makes an additional argument that WTO Members were unable to comment on the entirety of the proposed Delegated Regulation because an essential part of the proposed technical regulation, the (draft) Status Report (2019), was not made available despite various references in the explanatory memorandum. Indonesia notes that the Status Report (2019) was only made publicly available on 13 March 2019, on the date of adoption of the Delegated Regulation. See ibid., paras. 876-877 (referring to Communication by the European Commission, "Published Initiatives, "High and low Indirect Land-Use Change (ILUC) - risks biofuels, bioliquids and biomass fuels", (Exhibit IDN-261); and Draft Delegated Regulation, (Exhibit IDN-99)), and 879.

[1112] European Union's first written submission, paras. 928-934.

[1113] European Union's first written submission, para. 932.

[1114] See also Panel Report, *India – Agricultural Products*, where the panel followed similar reasoning in assessing a claim under Annex B(5)(d) of the SPS Agreement, which contains an almost identical notification obligation to that under Article 2.9.4. (ibid., para. 7.795.)

[1115] G/TBT/26, paras. 39-40.

7.757. The Panel finds that the European Union acted inconsistently with Article 2.9.4 by having failed to organize a commenting process in respect of the proposed 7% maximum share and the proposed high ILUC-risk cap and phase-out measures in accordance with the requirements of that provision.

7.1.3 Claims under Article 5 of the TBT Agreement

7.1.3.1 Annex 1.3 – Existence of a "conformity assessment procedure"

7.1.3.1.1 Introduction

7.758. The Panel now turns to the claims under Article 5 of the TBT Agreement. The Panel begins with the threshold issue of whether the provisions relating to low ILUC-risk certification qualify as a "conformity assessment procedure" within the meaning of Annex 1.3 of the TBT Agreement. The Panel then considers whether the remaining conditions for the applicability of Article 5 are present.

7.759. Indonesia submits[1116] that the provisions relating to low ILUC-risk certification qualify as a "conformity assessment procedure" within the meaning of Annex 1.3. More specifically, Indonesia argues that Articles 4 to 6 of the Delegated Regulation impose general conditions or overarching rules on the certification of low ILUC-risk biofuels, which in turn determine whether such biofuels are eligible to count towards renewable energy targets within the 7% maximum share without any limitation imposed by the cap and phase-out. Indonesia clarifies that, while Articles 4 and 5 of the Delegated Regulation lay down the criteria for certifying high ILUC-risk biofuel as low ILUC-risk biofuel, Article 6 contains the (incomplete) certification procedure.[1117]

7.760. The European Union submits[1118] that the EU Biofuels regime is not a conformity assessment procedure, and that the provisions relating to low ILUC-risk certification do not qualify as a conformity assessment procedure, in particular because there are no underlying technical regulations with which to assess conformity. The European Union also argues that Indonesia has not adequately articulated what the alleged conformity assessment procedure is, as distinct from the alleged technical regulation with which it seeks to establish compliance; in this connection, the European Union argues that Indonesia cannot rely on the same provisions as amounting to both a technical regulation and conformity assessment procedure.[1119]

7.1.3.1.2 Legal standard

7.761. As indicated in its title, Article 5 applies to "conformity assessment procedures". Article 1.2 provides that "for the purposes of this Agreement the meaning of the terms given in Annex 1 applies." Annex 1.3 defines "conformity assessment procedures" as:

> Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

7.762. The *Explanatory note* to Annex 1.3 states:

> Conformity assessment procedures include, *inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.

[1116] Indonesia's first written submission, paras. 881-899; responses to the Panel's first set of questions, paras. 268-271; second written submission, paras. 961-963; and responses to the Panel's second set of questions, paras. 193-198.

[1117] Indonesia's second written submission, para. 536; responses to the Panel's first set questions, paras. 167-180; and responses to the Panel's second set of questions, paras. 193-198.

[1118] European Union's first written submission, paras. 505, and 936-940; second written submission, para. 367; and comments on Indonesia's responses to the Panel's second set of questions, para. 163.

[1119] European Union's first written submission, paras. 939-940; and second written submission, paras. 11-22, 367, 974 and 1001.

7.763. The definition of "conformity assessment procedures" in Annex 1.3 has been interpreted and applied in prior cases[1120], to which both parties refer when presenting their respective understandings of the applicable legal standard for assessing this definition. While the parties' arguments reflect their divergent views on how findings in prior cases are relevant to the facts of this dispute, there appears to be no fundamental disagreement between the parties on the elements of that standard as described below.

7.764. The following components are discernible from Annex 1.3 and its *Explanatory note:*

a. "any procedure", including, *inter alia*, "procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations";

b. which is "used directly or indirectly" to "determine" that relevant "requirements in technical regulations… are fulfilled".

7.765. In other words, Annex 1.3 indicates that whether a measure amounts to a conformity assessment procedure depends on its nature and purpose. With respect to its *nature*, the TBT Agreement defines conformity assessment procedures very broadly since "any" procedure is in principle covered, though specific examples are identified. With respect to its *purpose*, the procedure must be one designed with the specific function of being used directly or indirectly to determine that relevant requirements in a technical regulation or a standard are fulfilled.[1121]

7.766. The definition in Annex 1.3 distinguishes "conformity assessment procedures" from the "relevant requirements in technical regulations or standards" with which they serve to establish compliance. While a single measure or document may contain both a technical regulation and a conformity assessment procedure, they are distinct concepts; one establishes conformity with the requirements of the other.[1122] In other words, a conformity assessment procedure is separate from, but also dependent on, the existence of an underlying technical regulation containing the "requirements" with which the procedure was designed to determine conformity.

7.767. The Panel will elaborate further on the elements of the legal standard in Annex 1.3 as necessary in the course of its assessment of the issues in dispute.

7.1.3.1.3 "any procedure"

7.768. Indonesia refers to Articles 4 to 6 of the Delegated Regulation, both in its identification of a low ILUC-risk certification measure alleged to be a conformity assessment procedure and the substance of its claims under Article 5. The Panel first considers the meaning of the term "procedure" in Annex 1.3, before assessing whether the provisions identified as low ILUC-risk certification amount to "any procedure" within the meaning of Annex 1.3. In doing so, the Panel will identify the measure considered by Indonesia to be the alleged conformity assessment procedure before examining whether and to what extent it is a "procedure" under Annex 1.3.

7.769. The term "procedure" is not defined in Annex 1.3.[1123] However, Annex 1.3 expressly identifies examples of relevant procedures, i.e. sampling, testing, inspection, verification,

[1120] Appellate Body Report, *Russia – Railway Equipment*, paras. 5.119-5.120; Panel Reports, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.511 -7.513; and *Russia – Railway Equipment*, paras. 7.240-7.241 and 7.249. See also Panel Reports, *EC – Seal Products*, paras. 7.506-7.507 and 7.510.

[1121] The function of a conformity assessment procedure is to ensure that the underlying technical regulations or standards are complied with. This is also confirmed by the language of Article 5.1.2 of the TBT Agreement, which requires that conformity assessment procedures not be more strict or applied more strictly than is necessary to "give the importing Member adequate confidence that products conform with the applicable technical regulations or standards". (Appellate Body Report, *Russia – Railway Equipment*, fn 338.)

[1122] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.511-7.513.

[1123] The TBT Agreement sets out the following hierarchical order of definitions: (i) the specific definitions in Annex 1 apply and prevail over any other conflicting ones in other instruments (Article 1.2, Annex 1.1 and Annex 1.2); followed by (ii) any definitions in the sixth edition of the ISO/IEC Guide 2:1991 (*General Terms and Their Definitions Concerning Standardization and Related Activities*) that do not conflict with those in Annex 1 (Appellate Body Report, *US – Tuna II (Mexico)*, paras. 184, 353-354); and finally (iii) any further

registration, accreditation and approval procedures.[1124] While ISO/IEC Guide 2:1991 (the definitions of which apply to the TBT Agreement when not in conflict with those in Annex 1[1125]) does not define "procedure", subsequent ISO/IEC instruments do. In particular, ISO/IEC 17000:2004 (Conformity Assessment – vocabulary and general principles) sets out terminology and definitions related to conformity assessment procedures[1126], including a definition of "procedure". The Panel notes that this definition does not seem to conflict with either Annex 1 or ISO/IEC Guide 2:1991. While not discussed by the parties, these definitions are relevant to the Panel's assessment of whether Indonesia identified a measure that is a conformity assessment procedure.[1127]

7.770. In ISO/IEC 17000:2004, a "procedure" is defined as a "specified way to carry out an activity or a process". The notion of "procedure" is therefore very broad, given that the carrying out of an activity or process can be specified in many ways. Annex 1.3 refers to "any" procedure, and the list of examples in the *Explanatory note* to Annex 1.3 is non-exhaustive. These factors suggest that the term "procedure" has a broad scope, with respect to the *form* a procedure might take. Moreover, the list in the *Explanatory note* provides further guidance on the types of relevant procedures, based on their *function*.

7.771. The Panel now turns to consider whether the provisions identified as low ILUC-risk certification amount to "any procedure" within the meaning of Annex 1.3.

7.772. The Panel understands that Indonesia ultimately identifies a low ILUC-risk certification procedure, set out in Article 6 of the Delegated Regulation, as the measure it argues is a conformity assessment procedure under the TBT Agreement. First, Indonesia distinguishes in its panel request between the criteria for classification and certification of low ILUC-risk biofuels (the low ILUC-risk criteria)[1128], and what it considers is required to establish conformity with these criteria.[1129] Indonesia's reference to establishing conformity with the low ILUC-risk criteria and obtaining certification suggests that the measure it identifies certifies compliance with the low ILUC-risk criteria.[1130] In outlining the legal basis for its claims under Article 5, Indonesia further refers to "conformity assessment procedures for certifying (only) oil palm crop-based biofuels as low ILUC-risk" and the "conformity assessment procedures for low ILUC-risk certification".[1131] On this basis, the Panel understands Indonesia to challenge a low ILUC-risk certification *procedure* (as distinct from the *criteria* examined in the certification process).

7.773. The Panel also considers that the identification of a low ILUC-risk certification *procedure* as distinct from certification *criteria* is also evident in Indonesia's written submissions:

a. While Indonesia refers to Articles 4 to 6 of the Delegated Regulation as setting "general conditions applicable for determining whether biofuel complies with the product characteristic (product composition) laid down in the Delegated Regulation"[1132] for

definitions by the "UN system" or "international standardizing bodies" that neither conflict with those in Annex 1 nor ISO/IEC Guide 2:1991 (See Article 1.1; and e.g. Appellate Body Reports, *US – Tuna II (Mexico)*, paras. 184, 353-354, and fn 702 to para. 353; and *EC – Sardines*, paras. 224-225). The Panel considers that any non-conflicting definitions in subsequent editions of ISO/IEC Guide 2:1991, or other relevant separate ISO/IEC definitions, would fall under the third group.

[1124] This list is non-exhaustive, exemplified by the use of the terms "include" and "*inter alia*" in the *Explanatory note*.

[1125] Annex 1 provides that the terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in the TBT Agreement, have the same meaning as given in the definitions in the said Guide, subject to the definitions of certain terms set forth in Annex 1.

[1126] See ISO/IEC 17000:2004 (*Conformity Assessment - vocabulary and general principles*), para. 4.3. The Panel notes that ISO/IEC Guide 2:1991 was replaced in 1996 and 2004. In 2004, when the last and current version (ISO/IEC Guide 2:2004 (8th edition)), all sections related to conformity assessment procedures were deleted.

[1127] Prior panels and the Appellate Body also relied on certain ISO/IEC definitions not discussed by the parties. See e.g. Appellate Body Report, *US – Tuna II (Mexico)*, paras. 353-362.

[1128] Indonesia's panel request, paras. 32-33.

[1129] Indonesia's panel request, para. 33. See also Indonesia's panel request, paras. 31-32.

[1130] Indonesia's panel request, para. 33.

[1131] Indonesia's panel request, paras. 47(vii)-(x) and (xii).

[1132] Indonesia's first written submission, para. 887. See also e.g. Indonesia's first written submission, paras. 439, 934, 998, and 1018.

certification, it also states that "[t]he (incomplete) conformity assessment procedure for obtaining certification is found in Article 6 of the Delegated Regulation."[1133]

b. Indonesia's statements detailing low ILUC-risk certification also reflects its nature as a certification process or procedure. Indonesia notes that additional feedstock must be "certified and audited" pursuant to Article 6 of the Delegated Regulation[1134], the Delegated Regulation imposes "overarching rules" on certification[1135], certification occurs according to procedures adopted and applied at EU level[1136], and that Articles 30(1)-(4) of RED II require the European Union or its member States to "administer the examination themselves or certify 'voluntary national or international schemes'".[1137]

c. Indonesia's submissions on its claims under Article 5 also distinguish between the low ILUC-risk *criteria* and certification *procedure*. For example, under Article 5.1.2, Indonesia distinguishes between "clearly defined conditions governing the certification procedure" and "clearly defined criteria with which conformity must be established."[1138]

d. In response to questions from the Panel, Indonesia clarifies that Articles 4 and 5 lay down *criteria* for identifying low ILUC-risk biofuel, and Article 6 contains the certification *procedure* itself.[1139]

7.774. Overall, the Panel considers that Indonesia's complaint in relation to low ILUC-risk certification as a "conformity assessment procedure" relates to the requirements established by the European Union governing the *procedure* (as provided for in the Delegated Regulation and detailed in its Article 6) through which biofuels may be certified as conforming with the requirements for biofuels made from oil palm to be counted towards EU renewable energy targets.[1140] This includes any "additional rules" to be adopted by the EU Commission for the certification of biofuels as low-ILUC risk as part of its complaint.[1141]

7.775. Although Indonesia expressly limits its identification of the conformity assessment procedure to the procedure itself (as provided for and detailed in Article 6 of the Delegated Regulation), some of Indonesia's complaints under Article 5 relate to both low ILUC-risk certification as a *procedure* and the *criteria*, as contained, respectively, in Article 6 and in Articles 4 and 5 of the Delegated Regulation. As discussed above[1142], insofar as Indonesia's arguments concern the low ILUC-risk *criteria*, they are addressed under Article 2, together with the Panel's assessment of the high ILUC-risk cap and phase-out.

7.776. The Panel further notes that despite the European Union's arguments that Indonesia does not identify a measure that could be a conformity assessment procedure that is distinct from the technical regulations at issue, the European Union also dedicates a portion of its written submissions to low ILUC-risk certification, referring to it as a "certification process" or "certification scheme".[1143]

7.777. Having identified the alleged conformity assessment procedure as the low ILUC-risk certification procedure detailed in Article 6 of the Delegated Regulation, the Panel now turns to consider whether this amounts to "any procedure" within the meaning of Annex 1.3. In this respect, the Panel refers to section 2.3.3 of this Report, which sets out the relevant legal provisions concerning low ILUC-risk certification.

7.778. Low ILUC-risk certification is referred to in Article 26(2) of RED II, as well as Recitals 17 and 18 of RED II. As described by Indonesia, the criteria for certification are detailed in Articles 4 and 5 of the Delegated Regulation, while Article 6 addresses "Auditing and verification requirements for

[1133] Indonesia's first written submission, paras. 439, 963 and 975.
[1134] Indonesia's first written submission, para. 363 and fn 508 to para. 363.
[1135] Indonesia's first written submission, para. 892.
[1136] Indonesia's first written submission, para. 889 (referring to recital 17 of the preamble to the Delegated Regulation).
[1137] Indonesia's first written submission, para. 894.
[1138] Indonesia's first written submission, paras. 936, 954, 972, and 983.
[1139] Indonesia's response to Panel question No. 74, paras. 167-180.
[1140] Indonesia's panel request, paras. 33 and 39.
[1141] Indonesia's panel request, para. 33. (emphasis added)
[1142] See Section 7.1.1 of this Report.
[1143] European Union's first written submission, paras. 125 and 181.

certification of low indirect land use change-risk biofuels, bioliquids and biomass fuels". Article 30 of RED II (in particular Article 30(8)), which is referred to in Article 6(3) of the Delegated Regulation, provides further detail on "implementing acts" to be adopted by the Commission to ensure compliance with the provisions on "low or high direct and indirect land-use change-risk biofuels".

7.779. In the course of these proceedings, the European Union provided some information about further implementation of the low ILUC-risk certification criteria and procedure, while for the most part, acknowledging that implementing acts in the form of guidelines on the certification of low ILUC-risk biofuels had yet to be adopted.[1144] Although these guidelines were eventually adopted in June 2022, no "overarching" implementing rules had been adopted for low ILUC-risk certification by the end of the written procedure in early 2022.

7.780. The information presented by the parties to the Panel shows that:

a. On 29 June 2021, a draft implementing act on "rules to verify sustainability and greenhouse gas emissions saving criteria and low indirect land-use change-risk criteria" was published for stakeholders' feedback.[1145] The European Union informed the Panel that the detailed criteria for certification would be set out in an implementing act[1146], whose adoption was foreseen for the first quarter of 2022.[1147]

b. On 3 February 2022, the RED II Committee on the Sustainability of Biofuels, Bioliquids and Biomass Fuels gave a positive opinion on the decisions to recognize 13 voluntary schemes and indicated that the Commission would soon adopt decisions recognizing them. Three of these voluntary schemes also cover low-ILUC risk certification.[1148]

7.781. Notably, the European Union stated that the "implementing act on the certification guidelines will provide further information on the methodology for the auditing of the application of the criteria set in the Delegated Regulation".[1149]

7.782. The Panel now turns to consider whether these provisions amount to "any procedure" within the meaning of Annex 1.3.

7.783. By their express terms, Articles 4 to 6 of the Delegated Regulation concern low ILUC-risk "certification". Articles 4 and 5 set out the requirements and criteria for certification, while Article 6 details *how* to demonstrate that the requirements for certification are met. Articles 4 and 5 indicate that there is a general requirement for "certification", and Article 6 provides for "[a]uditing" and "verification" requirements for certification of low ILUC-risk biofuels. The "[a]uditing and verification requirements for certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels" identified in Article 6 are expressly intended to serve as a means of verifying that "all requirements" set out in Articles 4 and 5 have been "duly fulfilled"[1150] and to "verify"[1151] and "demonstrate"[1152] compliance with them.

7.784. While "verification"[1153] is one of the examples of specific procedures listed in the *Explanatory note* to Annex 1.3, "certification" and "auditing" are not mentioned in Annex 1.3 or ISO/IEC Guide

[1144] With respect to the further implementation of the low ILUC-risk certification criteria and procedure, the Panel refers to section 7.1.1 of this report, which outlines the steps and timeline for implementation that the European Commission was required to take pursuant to RED II and the Delegated Regulation. European Union's second written submission, paras. 162-164.

[1145] European Union's response to Panel question No. 4, para. 21.

[1146] European Union's comments on Indonesia's response to Panel question No. 187, para. 149.

[1147] European Union's response to Panel question No. 122, para. 14 (referring to Consultation on Draft Implementing Regulation, (Exhibit EU-215)).

[1148] European Union's comments on Indonesia's response to Panel question No. 206, para. 166 (referring to European Commission website on voluntary schemes, (Exhibit EU-283), p.3). The European Union adopted and published the Implementing Act on Certification Guidelines (Implementing Regulations) in June 2022.

[1149] European Union's second written submission, para. 164.

[1150] Article 6.1(a) of the Delegated Regulation.

[1151] Article 6.2 of the Delegated Regulation.

[1152] Article 6.3 of the Delegated Regulation.

[1153] "Verification" is mentioned in Annex 1.3 and defined in ISO/IEC Guide 2:1991 as the "[c]onfirmation, by examination of evidence, that a product, process or service fulfils specified requirements."

2:1991. "Audit" is defined in ISO/IEC 17000:2004 as the "systematic, independent, documented process for obtaining records, statements of fact or other relevant information and assessing them objectively to determine the extent to which specified requirements are fulfilled".[1154] "Certification" is also defined in ISO/IEC 17000:2004 as a "third-party *attestation* related to products, processes, systems or persons".[1155] An "attestation" is the "issue of a statement, based on a decision following review, that fulfilment of specified requirements has been demonstrated".[1156]

7.785. The foregoing definitions suggest that the references to "verification" (listed in Annex 1.3), "certification" and "auditing" (while not listed in Annex 1.3, appear comparable as they point to verification processes), can be seen as referring to a "procedure" of the type covered under the definition in Annex 1.3. These appear to be precisely the types of evaluations, verifications and assurances of conformity that the *Explanatory note* to Annex 1.3 identifies as constitutive of a conformity assessment procedure. Moreover, these procedures, as detailed in the Delegated Regulation appear to be consistent with the definitions of "verification", "auditing" and "certification" provided above.

7.786. In sum, the Panel finds that Indonesia has established that the procedure for verifying whether biofuels meet the requirements for low ILUC-risk certification, the key features of which are detailed in Article 6 of the Delegated Regulation, is a "procedure" of the type falling within the meaning of this term under Annex 1.3 to the TBT Agreement.

7.787. The Panel considers that the fact that at the time of the Panel's establishment and by the end of the written procedure, this certification procedure may still have been "incomplete" insofar as not all relevant implementing actions had yet been taken by the European Union, does not detract from the fact that a procedure of the type covered under Annex 1.3 is referred to in Article 26(2) of RED II, the key features of which are set out in Article 6 of the Delegated Regulation.[1157]

7.1.3.1.4 "used, directly or indirectly, to determine that relevant requirements in technical regulations are fulfilled"

7.788. Having established that the provisions setting out a low ILUC-risk certification procedure amount to "any procedure", the Panel turns to consider the *purpose* or use of that procedure. Annex 1.3 covers conformity assessment procedures that serve to determine compliance with "requirements of technical regulations or standards" "directly or indirectly". In other words, a procedure is a conformity assessment procedure if it is used for the purpose of (i) directly or indirectly (ii) determining the fulfilment of "relevant requirements" (iii) contained in a technical regulation or standard.

7.789. The term "*relevant requirements*" (of technical regulations or standards) is not elaborated on or explained further in Annex 1.3. The dictionary meaning of "relevant" is "[b]earing on or connected with the matter in hand; closely relating to the subject or point at issue; pertinent to a specified thing".[1158] "Requirement" means "a condition which must be complied with".[1159] The term "relevant requirements" in Annex 1.3 thus suggests that a conformity assessment procedure needs to be related to the subject-matter of the conditions of the technical regulation which need to be complied with. This interpretation supports a view that a procedure could be a conformity assessment procedure under Annex 1.3 even if it serves to establish fulfilment of only *some* of the

[1154] ISO/IEC 17000:2004, 4.4.
[1155] ISO/IEC 17000:2004, 5.5.
[1156] ISO/IEC 17000:2004, 5.2.
[1157] See also section 7.1.1 of this Report. The Panel also notes, in this respect, that Article 1.6 of the TBT Agreement states that "[a]ll references in this Agreement to technical regulations, standards and *conformity assessment procedures* shall be construed to include any amendments thereto and any additions to the rules or the product coverage thereof, except amendments and additions of an insignificant nature." (emphasis added)
[1158] Oxford English Dictionary online, definition of "relevant" (https://www.oed.com/view/Entry/161893?redirectedFrom=relevant#eid) (accessed on 21 September 2023).
[1159] Oxford English Dictionary online, definition of "requirement" (https://www.oed.com/view/Entry/163260?redirectedFrom=requirement#eid) (accessed on 21 September 2023).

requirements in a technical regulation or a standard (and by implication, not all requirements in a technical regulation will always need to be verified through a conformity assessment procedure).[1160]

7.790. The relationship between the procedure and the "relevant requirements" of a technical regulation (or standard) is qualified by the terms "directly" "or" "indirectly". Annex 1.3 does not define or explain further what types of situations might constitute "direct" or "indirect" use of a procedure. According to the ordinary meaning of the term, "directly" means "in a direct manner or way", and "without the intervention of a medium or agent; immediately; by a direct process or mode".[1161] "Indirectly" is defined as "in an indirect way or manner; not directly", "not in a straight line or with a straight course; circuitously: obliquely" and "by indirect action, means, connection, agency, or instrumentality; through some intervening person or thing; mediately".[1162] In the context of Annex 1.3, the terms "directly" and "indirectly" are used to characterize the connection between the use that is made of a procedure and the determination that relevant requirements in a technical regulation are fulfilled.

7.791. That a procedure may constitute a conformity assessment procedure where it serves to determine compliance with requirements "directly or indirectly" suggests an intention to cover a broad range of modalities through which a procedure might be used in relation to a technical regulation. Accordingly, the Panel considers that a conformity assessment procedure may be understood as including a range of situations not limited to the most immediate type of connection where the procedure "directly" ascertains whether certain requirements of a technical regulation (or a standard) are met.

7.792. The Panel now turns to consider whether Indonesia has demonstrated that the low ILUC-risk certification procedure is used, "directly or indirectly" to determine whether "relevant requirements" of a "technical regulation" are fulfilled.[1163]

7.793. Indonesia submits that low ILUC-risk certification is linked to the technical regulations laid down in Article 26 of RED II, namely the 7% maximum share and the high ILUC-risk cap and phase-out.[1164] According to Indonesia, low ILUC-risk certification serves to establish that a consignment of palm oil-based biofuel is low ILUC-risk and therefore complies with the exemption and is not subject to the high ILUC-risk cap and phase-out.[1165] Indonesia further considers that the limited (and impracticable) exception for low ILUC-risk biofuel forms part of the high ILUC-risk cap and phase-out.[1166] Indonesia also refers to the use of low ILUC-risk certification as relevant for a biofuel's eligibility to count towards renewable energy targets.[1167] The Panel understands Indonesia to refer to the eligibility of high ILUC-risk biofuels to count towards the renewable energy consumption targets (i.e. to not be subject to the high ILUC-risk cap and phase-out and be counted within the 7% maximum share without any limitation imposed by the cap and phase-out).

7.794. Based on the above, the Panel understands Indonesia to identify the "relevant requirements" as those that serve to determine low ILUC-risk status, as contained in Articles 4 and 5 of the Delegated Regulation. The Panel further understands Indonesia to identify the relevant "technical regulation" as the high ILUC-risk cap and phase-out. Moreover, the Panel understands Indonesia to argue that low ILUC-risk certification is used to establish the compliance of consignments of high

[1160] The Panel notes, as discussed above in the context of the claim under Article 2.8 of the TBT Agreement, that the term "product requirement", as used in that provision, is understood to mean "product characteristics". The Panel considers that the deliberate use of the word "relevant" instead of "product" here also serves as a distinguishing factor, indicating that "relevant requirements" is broader, and not coterminous with, "product requirements" or "product characteristics".

[1161] Oxford English Dictionary online, definition of "directly" (https://www.oed.com/view/Entry/53307?redirectedFrom=directly#eid) (accessed on 21 September 2023).

[1162] Oxford English Dictionary online, definition of "indirectly" (https://www.oed.com/view/Entry/94534?redirectedFrom=indirectly#eid) (accessed on 21 September 2023).

[1163] The Panel recalls its description of low ILUC-risk certification in section 2.3.3 of this Report, which also sets out the text of Articles 4 to 6 of the Delegated Regulation. The Panel also refers to its discussions on low ILUC-risk certification and its place within the EU Biofuels regime in section 7.1.1 of this Report.

[1164] Indonesia's first written submission, para. 934; and second written submission, para. 318.

[1165] Indonesia's second written submission, paras. 438-439; Indonesia's responses to Panel question Nos. 73-75, paras. 164-184.

[1166] Indonesia's panel request, paras. 31 and 47, and p. 4; first written submission, para. 149 (referring to RED II, (Exhibit IDN-19), Recital 81 in the preamble); and responses to Panel question Nos. 74 and 201-202.

[1167] See Indonesia's response to Panel question No. 72.

ILUC-risk biofuels with the low ILUC-risk limited exemption to the cap and phase-out, thereby affecting their eligibility to contribute to renewable energy targets.

7.795. The Panel notes that the European Union describes low ILUC-risk certification in terms similar to Indonesia.[1168] For example, in the European Union's words, low ILUC-risk biofuels "are not subject to the phase-out provisions in Article 26(2) of RED II… [a]s the certification process is applicable to fuels produced from feedstock which is designated as 'high ILUC-risk', under the EU legislative regime, biofuel produced from palm oil production can be certified as low ILUC-risk".[1169]

7.796. This points to a common understanding between the parties as to how low ILUC-risk certification operates, and its relationship with low ILUC-risk classification and the high ILUC-risk cap and phase-out, and ultimately, the extent of the eligibility of the biofuel to be counted towards renewable energy targets. Indeed, the European Union does not appear to challenge Indonesia's identification of the "relevant requirements" of the technical regulation as such.

7.797. The Panel therefore turns to consider whether the low ILUC-risk *certification procedure* can be said to "directly or indirectly" determine whether the low ILUC-risk *criteria* (i.e. the "relevant requirements" identified by Indonesia) are fulfilled. In this respect, the Panel refers to section 7.1.1 of this Report where it sets out the relationship between the 7% maximum share, the high ILUC-risk cap and phase-out, and low ILUC-risk certification.

7.798. Article 6(1)(a) of the Delegated Regulation states that low ILUC-risk certification is used to substantiate claims "that all requirements set out in Articles 4 and 5 have been duly fulfilled". Thus, the low ILUC-risk certification procedure clearly serves to determine whether the requirements of Article 4 and 5 of the Delegated Regulation have been fulfilled.

7.799. The Panel recalls its finding above that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations. The Panel further recalls its findings that the low ILUC-risk criteria must be taken into account in the assessment of the high ILUC-risk cap and phase-out.

7.800. Taking these technical regulations as a starting point, the factor that determines in the first instance whether they apply to a given biofuel is the determination of whether it is "high ILUC-risk", based on the criteria contained in Article 3 of the Delegated Regulation. The low ILUC-risk certification procedure verifies compliance with different criteria contained in Articles 4 and 5 of the Delegated Regulation, so that consignments of biofuels determined in the first instance to be high ILUC-risk may be exempted from the application of the high ILUC-risk cap and phase-out. Low ILUC-risk certification by definition results in certain consignments of high ILUC-risk biofuel not being treated as high ILUC-risk biofuel.

7.801. The Panel considers that it may thus be a matter of semantics whether the low ILUC-risk certification procedure has a "direct" or "indirect" connection to the high ILUC-risk cap and phase-out. It is clear that the low ILUC-risk certification procedure has a bearing on whether a consignment of biofuel is subject to the high ILUC-risk cap and phase-out, or is instead eligible to count towards renewable energy targets within the 7% maximum share without any limitation imposed by the cap and phase-out.

7.802. These factors indicate that the overarching purpose of the high ILUC-risk cap and phase-out and the low ILUC-risk criteria and certification is the same, i.e. to determine, in combination, the conditions of eligibility of conventional biofuels to count towards renewable energy targets. The low ILUC-risk criteria and certification procedure do not exist in isolation, but as elements on the path to determining the eligibility of a conventional biofuel to count towards renewable energy targets. While the immediate and "*direct*" purpose of the low ILUC-certification procedure is to establish that the biofuels at issue meet the criteria for low ILUC-risk certification (as set out in Articles 4 and 5 of the Delegated Regulation), *indirectly,* this is intended to determine whether biofuels are subject to the high ILUC-risk cap and phase-out, and as a result, the extent of their eligibility to count towards EU renewable energy targets.

[1168] European Union's first written submission, paras. 123-140, and 151.
[1169] European Union's first written submission, paras. 124-125.

7.803. The Panel therefore considers, that there is a sufficient relationship between these elements – the low ILUC-risk certification procedure, the low ILUC-risk criteria, the high ILUC-risk cap and phase-out, the 7% maximum share, and overall eligibility to count towards EU renewable energy targets – for the Panel to conclude that the low ILUC-risk certification procedure determines, directly or indirectly, whether relevant requirements in the technical regulations at issue (i.e. the high ILUC-risk cap and phase-out and 7% maximum share) are fulfilled.

7.1.3.1.5 Other requirements for the applicability of Article 5

7.804. Having established that the low ILUC-risk certification procedure is a conformity assessment procedure within the meaning of Annex 1.3, the Panel turns to consider the two remaining conditions which must be met for Article 5 to apply.

7.805. First, the low ILUC-risk certification procedure must be a conformity assessment procedure that is prepared, adopted or applied by a "central government body". As indicated in its title, Article 5 concerns obligations with respect to conformity assessment procedures by "Central Government Bodies".[1170] Annex 1.6 defines "central government bodies" as including not only "[c]entral government, its ministries and departments" but also "any body subject to the control of the central government in respect of the activity in question". The *Explanatory note* to Annex 1.6 also clarifies that "[i]n the case of the European Communities the provisions governing central government bodies apply." Voluntary certification procedures established at EU member State level or by a private body would not fall within the scope of Article 5, but may be addressed by Articles 7 or 8 of the TBT Agreement.

7.806. The parties do not dispute that the European Union is a central government body for the purposes of Article 5, and do not raise arguments in this respect.[1171] Insofar as the low ILUC-risk procedure is established in provisions of RED II and the Delegated Regulation, both EU instruments, the low ILUC-risk certification appears to be a procedure by a central government body for the purposes of Annex 1.6 and Article 5. Insofar as certification schemes are subject to the control of the European Commission, Article 5 also applies, regardless of whether these schemes are run by national or non-government entities. The potential availability of voluntary certification schemes (or the fact that the establishment of such schemes is provided for in the measure) does not in the Panel's view detract from the fact that the low ILUC-risk certification procedure is a conformity assessment procedure falling within the scope of Article 5.

7.807. However, given the complexities introduced to the implementation of low ILUC-risk certification through an EU structure which mobilizes member States and private actors (e.g. through national and non-government certification schemes), including the possibility for purely private voluntary schemes to be part of the certification process, the Panel limits its analysis and conclusions of the claims under Article 5 to EU-level aspects of the low ILUC-risk certification procedure.[1172]

7.808. Second, according to the introductory sentence of Article 5.1, Article 5 applies in cases where a "positive assurance of conformity" with technical regulations (or standards) is "required". Article 5.1 has been interpreted by the panel in *Russia – Railway Equipment* as meaning that Article 5 only covers conformity assessment procedures that are "mandatory".[1173]

[1170] Appellate Body Report, *Russia – Railway Equipment*, para. 5.120; and Panel Report, *Russia – Railway Equipment*, para. 7.249. See also Annex 1.6 of the TBT Agreement and the *Explanatory note* to Annex 1.6.

[1171] See Indonesia's first written submission, paras. 892, 885 and 889. Indonesia refers to "overarching rules" on certification of low ILUC-risk biofuels according to procedures adopted and applied at EU level. The European Union itself also refers to the introduction of further EU-level implementing measures. See European Union's second written submission, para. 164; responses to Panel question No. 4, para. 21 and No. 122, para. 14; and comments on Indonesia's response to Panel question No. 187, paras. 149 and 166.

[1172] The Panel notes, without making any further assessment in this dispute, that Article 8.2 of the TBT Agreement provides that "Members shall ensure that their central government bodies rely on conformity assessment procedures operated by non-governmental bodies only if these latter bodies comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures."

[1173] Panel Report, *Russia – Railway Equipment*, para. 7.249. This interpretation was not reviewed by the Appellate Body, which referred to the text of the introductory paragraph of Article 5.1 of the TBT Agreement

7.809. The Panel notes that in this dispute, the European Union submits that low ILUC-risk certification is "not mandatory" in the sense that nobody is required to apply for certification. The European Union recognizes, however, that low ILUC-risk certification becomes "binding" the moment an application is made, i.e. "in the event that a producer wishes to avail themselves of the scheme".[1174] The Panel considers that the ordinary meaning of the term "required", in the context of the introductory sentence of Article 5.1, covers situations in which an exporter wishes to avail itself of flexibilities and other exemptions.[1175] Accordingly, and in this sense, the Panel considers that a positive assurance of conformity is "required", i.e. is "mandatory", in order to obtain low ILUC-risk certification.

7.1.3.1.6 Conclusion on Annex 1.3

7.810. The Panel concludes that the low ILUC-risk certification procedure is a "conformity assessment procedure" within the meaning of Annex 1.3 to the TBT Agreement.

7.811. The Panel notes that the European Union reiterates its view that the low ILUC-risk certification procedure is not a "conformity assessment procedure" when responding to each of the claims made under Article 5. The Panel also appreciates that the way the European Union responds to certain of the claims under Article 5 is informed by its view that the low ILUC-risk certification procedure is not a conformity assessment procedure. However, having already addressed this issue at the outset, and with a view to avoiding repetition, the remainder of the Panel's findings proceed on the assumption that the low ILUC-risk certification procedure is a conformity assessment procedure within the meaning of Annex 1.3.

7.1.3.2 Article 5.1.1 – Non-discrimination

7.1.3.2.1 Introduction

7.812. Having concluded that the low ILUC-risk certification *procedure* qualifies as a "conformity assessment procedure" within the meaning of Annex 1.3, and is thus subject to the obligations in Article 5 of the TBT Agreement, the Panel now addresses the claims under Article 5.

7.813. Indonesia submits[1176] that the European Union violates Article 5.1.1 because the conformity assessment procedure for certifying palm oil biofuel as low ILUC-risk discriminates against Indonesian suppliers of palm oil-based biofuel. More specifically, Indonesia argues that the relevant like products are palm oil-based biofuel and other oil crop-based biofuel, and that suppliers of such biofuel are in a comparable situation.[1177] According to Indonesia, discrimination arises from the fact that unlike suppliers of palm oil-based biofuel, other oil crop-based biofuel suppliers do not need to access any conformity assessment procedure for their biofuel to be eligible to count towards EU renewable energy targets within the 7% maximum share.[1178] Indonesia further contends that discrimination also arises because certification may not be obtained as long as the European Union has not adopted the anticipated implementing regulations which detail elements of the certification procedure.[1179]

7.814. The European Union submits that low ILUC-risk certification applies to high ILUC-risk biofuels, such that the scope of the assessment is not between producers of oil crop-based biofuels

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without any further elaboration on the meaning of these terms, limiting the coverage and scope of measures captured by Article 5. (Appellate Body Report, *Russia – Railway Equipment*, para. 5.120).

[1174] European Union's first written submission, para. 504.

[1175] By way of illustration, the Panel notes that it is well established that in the context of Article III:4, the term "requirement" includes not only those obligations which an enterprise is "legally bound to carry out" or that apply "across the board", but also conditions that an enterprise voluntarily accepts "in order to obtain an advantage". (See e.g. Panel Report, *India – Autos*, paras. 7.174 and 7.190, 7.191.)

[1176] Indonesia's first written submission, paras. 883-922; responses to the Panel's first set of questions, paras. 272-276; second written submission, paras. 954-966; and comments on the European Union's responses to the Panel's second set of questions, paras. 444-467.

[1177] Indonesia's first written submission, paras. 906-908.

[1178] Indonesia's first written submission, para. 914.

[1179] Indonesia's first written submission, paras. 916-922, and 964-965.

and palm oil-based biofuels.[1180] Moreover, the focus of the non-discrimination obligations is on the conditions for access to a procedure; here, all suppliers of high ILUC-risk biofuels have equal access to the certification mechanism, and any issues with the degree of implementation affect all such suppliers equally.[1181]

7.1.3.2.2 Legal standard

7.815. Article 5.1.1, read in conjunction with the introductory clause in Article 5.1, sets forth the obligation that:

> 5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:
>
> > 5.1.1 conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system;

7.816. Article 5.1.1 has been interpreted and applied in one prior case, *Russia – Railway Equipment*, and both parties present their respective understandings of the applicable legal standard with reference to that case.

7.817. Based on the wording of Article 5.1.1, violations of this provision may arise from the preparation or adoption of a conformity assessment procedure, or from its application.[1182]

7.818. An importing Member acts inconsistently with the non-discrimination obligations in Article 5.1.1 in respect of a covered conformity assessment procedure if three elements are established[1183]:

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

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

c. the importing Member grants access under conditions less favourable for suppliers of like products "in a comparable situation".

7.819. The Panel will elaborate further on the elements of the legal standard in Article 5.1.1 as necessary in the course of its assessment of the issues in dispute.

7.1.3.2.3 Assessment by the Panel

7.820. The Panel turns to consider whether Indonesia's claim concerns the granting of access to the low ILUC-risk certification procedure, to suppliers of like products in a comparable situation,

[1180] European Union's first written submission, paras. 954-963. For the European Union's other arguments on Article 5.1.1 concerning the applicability of Article 5, see European Union's first written submission, paras. 935-968; second written submission, paras. 369-372, and 388; and responses to the Panel's second set of questions, paras. 602-619.

[1181] European Union's first written submission, para. 964; second written submission, para. 372.

[1182] Panel Report, *Russia – Railway Equipment*, para. 7.250.

[1183] Panel Report, *Russia – Railway Equipment*, para. 7.251.

under conditions no less favourable than those accorded to domestic or other third-country suppliers. The Panel addresses these requirements together given the degree of interconnectedness between the meaning of these requirements and the parties' arguments. In doing so, the Panel sets out the legal standard and relevant arguments, followed by its assessment.

7.821. The second clause of Article 5.1.1 makes clear that the focus of the non-discrimination obligations in Article 5.1.1 is on the "*conditions for access* to a conformity assessment granted to suppliers".[1184] The Appellate Body in *Russia – Railway Equipment* explained that the focus is therefore on the "factors or circumstances under which the opportunity to benefit from conformity assessment is accorded to those suppliers".[1185] Whether conditions for access are no less favourable turns on whether the conditions for access to the conformity assessment procedure for suppliers of domestic or third-country products modify the conditions of competition to the detriment of suppliers of like imported products.[1186] The panel in *Russia – Railway Equipment* considered that this necessitates a "comparative analysis of the conditions of access granted to suppliers of products from the complaining Member, on the one hand, and suppliers of like domestic products, or of like products from any other country, on the other hand". Only if this assessment "reveals a difference in the access conditions granted to suppliers of the complaining Member", should a panel go on to consider whether that difference amounts to granting access under 'less favourable' conditions".[1187] In reaching this conclusion, the panel underscored that Article 5.1.1 "focuses on suppliers and their conditions of access to a conformity assessment procedure" and "not the manner in which a Member treats imported products from another Member". Moreover, a "mere difference" in access conditions is not sufficient to establish a violation; that difference must modify the conditions of competition, or competitive opportunities, among relevant suppliers of like products to the detriment of suppliers of the complaining Member.[1188]

7.822. Further, the relevant treatment is that accorded to suppliers of like products in "a comparable situation".[1189] In assessing whether there is a comparable situation, relevant factors are those which have a bearing on the conditions for granting access (e.g. the rules of the conformity assessment procedure, nature of the products at issue, and the situation in a particular country or supplier), and the "ability of the regulating Member to ensure compliance with the requirements in the underlying technical regulation or standard". This analysis should be made on a case-by-case basis in light of the measure at issue and circumstances of the case.[1190]

7.823. Indonesia argues that the conditions for access to the low ILUC-risk certification procedure granted to suppliers of domestic or third-country products modify the conditions of competition to the detriment of suppliers of like Indonesian products in a comparable situation.[1191] Indonesia focuses on the treatment of suppliers of low ILUC-risk palm oil-based biofuel, and considers that the relevant like products are "oil palm crop-based biofuel" and "other oil crop-based biofuel".[1192] Further, Indonesia submits that all suppliers of oil palm crop-based biofuel and other oil crop-based biofuel are in a comparable situation.[1193]

7.824. In substantiating its claim, Indonesia argues that "[t]wo types of discrimination result from the preparation and adoption" of low ILUC-risk certification.[1194] First, Indonesia refers to the fact that suppliers of other oil crop-based biofuel do not need to access any conformity assessment procedure for their biofuel to be eligible to count towards renewable energy targets within the 7% maximum share without any limitation imposed by the cap and phase-out, i.e. there is "no

[1184] Appellate Body Report, *Russia – Railway Equipment*, para. 5.123; and Panel Report, *Russia – Railway Equipment*, para. 7.257. Both the panel and Appellate Body drew on the ordinary meaning of "access" as well as the text of the second clause in Article 5.1.1 which states that access entails the "suppliers' right to an assessment of conformity under the rules of the procedure". (Ibid.).

[1185] Appellate Body Report, *Russia – Railway Equipment*, para. 5.123.

[1186] Appellate Body Report, *Russia – Railway Equipment*, para. 5.123.

[1187] Panel Report, *Russia – Railway Equipment*, para. 7.258.

[1188] Panel Report, *Russia – Railway Equipment*, para. 7.260.

[1189] Appellate Body Report, *Russia – Railway Equipment*, para. 5.124; and Panel Report, *Russia – Railway Equipment*, para. 7.283.

[1190] Appellate Body Report, *Russia – Railway Equipment* paras. 5.128 and 5.135. See also Panel Report, *Russia – Railway Equipment*, para. 7.283.

[1191] Indonesia's first written submission, paras. 900-922.

[1192] Indonesia's first written submission, paras. 905 and 907.

[1193] Indonesia's first written submission, paras. 906-908.

[1194] Indonesia's first written submission, para. 913.

certification requirement" for such biofuel.[1195] In this connection Indonesia argues that Article 5.1.1 applies where a WTO Member imposes a technical regulation and requires only suppliers of *certain* products falling within the scope of that technical regulation to demonstrate a positive assurance of conformity.[1196] Indonesia considers that if the question of whether access to the conformity assessment procedure is granted to suppliers "in a comparable situation" were to be premised entirely on the situation created by the measure at issue, the effectiveness of the national treatment and most favoured nation obligations under Article 5.1.1 would be undermined. According to Indonesia, its reading of Article 5.1.1 prevents a WTO Member from imposing a technical regulation and then circumventing the MFN and national treatment obligations under Article 2.1 by requiring a positive assurance of conformity with that technical regulation for suppliers of certain products but not others.[1197]

7.825. Second, Indonesia points out that the European Union effectively denies suppliers of palm oil-based biofuel the opportunity to make use of the certification procedure, as the elements which have been prepared and adopted are impracticable, and certification may not be obtained as long as the European Union has not adopted further implementing measures.[1198] Indonesia outlines general barriers to certification[1199] arising from the design of the low ILUC-risk criteria, specific issues related to each of the additionality pathways[1200], and additional barriers in the form of "significant evidentiary requirements and the need for farmers to hold significant amounts of data that they typically do not keep".[1201] Indonesia further clarifies that the conditions for access to "conformity assessment" modify the conditions of competition to the detriment of suppliers of like Indonesian products in a comparable situation because suppliers who are required to certify their products cannot access the conformity assessment procedure.[1202]

7.826. The European Union submits that the low ILUC-risk certification procedure is not a conformity assessment procedure.[1203] The European Union alternatively submits that Article 5.1.1 does not apply as Indonesia's claim does not concern granting access under conditions less favourable to suppliers of like products of national or third-country origin in a comparable situation.[1204] Rather, the obligation in Article 5.1.1 applies where there are suppliers of like products which are subject to conformity assessment in the first place. The European Union explains that under the EU Biofuels regime, low ILUC-risk certification applies to a subset of conventional biofuels ("those associated with a high ILUC-risk of expansion into areas of high-carbon stock"); "access" to the conformity assessment procedure is therefore only relevant to producers of biofuels produced from high ILUC-risk feedstock. At present, this means that low ILUC-risk certification is "only relevant to producers (and suppliers) of palm oil-based biofuel".[1205] Moreover, Article 5.1.1 focuses on the "conditions for access" to a conformity assessment procedure.[1206] In this case, all suppliers of palm oil-based biofuels, irrespective of their origin, have equal access to the low ILUC-risk certification mechanism.[1207] Moreover, the degree of implementation affects all suppliers equally.[1208]

7.827. In light of the requirements of Article 5.1.1, the Panel considers that Indonesia's claim under Article 5.1.1 does not concern the *granting of access* to a conformity assessment procedure to *suppliers of like products that* are *in a comparable situation*. At a general level, Indonesia's

[1195] Indonesia's first written submission, para. 914 (referring to Article 26(1) of RED II).
[1196] Indonesia's first written submission, para. 915.
[1197] Indonesia's first written submission, para. 915; second written submission, para. 959; response Panel question No. 97, para. 275; response to Panel question No. 205, paras. 205-206; and comments on the European Union's response to Panel questions No. 225.
[1198] Indonesia's first written submission, para. 916. On the lack of further implementing measures, see ibid., para. 922; Indonesia's comments on the European Union's response to Panel question No. 204, paras. 458-460.
[1199] Indonesia's first written submission, para. 917.
[1200] Indonesia's first written submission, paras. 918-920.
[1201] Indonesia's first written submission, para. 921.
[1202] Indonesia's second written submission, para. 965.
[1203] European Union's first written submission, para. 937.
[1204] European Union's response to Panel question No. 203, para. 605.
[1205] European Union's first written submission, para. 955. See also European Union's second written submission, para. 371: "Only those suppliers of products which are subject to the same procedures are in a comparable position for that purpose."
[1206] European Union's response to Panel question No. 203, para. 605.
[1207] European Union's first written submission, para. 964; second written submission, para. 372; and response to Panel question No. 204, para. 611.
[1208] European Union's second written submission, para. 372.

arguments concern the imposition of a certification requirement *per se* and the criteria for access to certification (i.e. the low ILUC-risk criteria) as distinct from conditions of *access to* the low ILUC-risk certification procedure. The Panel understands that the fundamental basis for this claim is the fact that palm oil-based biofuel is subject to low ILUC-risk certification, while other oil crop-based biofuels are not subject to low ILUC-risk certification.

7.828. The Panel agrees with the European Union that Article 5.1.1 concerns the *conditions of access* to a conformity assessment procedure with respect to the products which are actually subject to the conformity assessment procedure itself.[1209] The Panel's understanding is supported by the example provided in the second clause of Article 5.1.1 of what is meant by "access": i.e. that "access entails suppliers' right to an assessment of conformity under the rules of the procedure". In other words, the focus of the non-discrimination obligations in Article 5.1.1 is on the *conditions for access* to a conformity assessment procedure, being the "factors or circumstances under which the opportunity to benefit from conformity assessment is accorded to those suppliers".[1210] This is a distinct question from the identification of which products (and in turn, suppliers) are – or are not – subject to certification.

7.829. Low ILUC-risk certification applies to all high ILUC-risk biofuels. The fact that currently only palm oil-based biofuel is designated as high ILUC-risk does not alter this understanding of the operation of low ILUC-risk certification. There is thus no difference in treatment with respect to access among the products to which certification applies. The group of relevant products is high ILUC-risk biofuels; any such biofuel has the "right" of access to a conformity assessment procedure and there is no question of less favourable treatment.

7.830. The Panel's analysis is supported by the meaning of suppliers of like products "in a comparable situation". In light of the measures at issue, the Panel considers that the relevant factor for determining the existence of "a comparable situation" and therefore granting a right to assessment of conformity, is the alleged high ILUC-risk associated with a particular feedstock. This is evident from the rules of the low ILUC-risk certification procedure, which is available only to high ILUC-risk feedstocks. Moreover, if the requirement under Article 5.1.1. protects equal opportunity to be certified among products requiring certification, the situation is "comparable" only among suppliers of products that are equally subject to the certification procedure. The Panel therefore also agrees with the European Union that the universe of the like products of suppliers in "a comparable situation" is limited to those which are subject to the conformity assessment procedure, i.e. biofuels produced from high ILUC-risk feedstocks.

7.831. The Panel recalls that insofar as Indonesia's arguments made under Article 5.1.1 concern the low ILUC-risk criteria, they are addressed under Article 2, together with the Panel's assessment of the high ILUC-risk cap and phase-out. To the extent any deficiencies alleged concern the incompleteness of the low ILUC-risk certification procedure to be remedied by any implementing rules, the Panel agrees with the European Union that such deficiencies would affect all certification procedure users and so do not result in any different (let alone less favourable) treatment under Article 5.1.1.

7.832. The Panel agrees with Indonesia's argument that Article 5.1.1 should not be interpreted in a manner that would allow a regulating Member to circumvent the non-discrimination obligations in Article 2.1 by adopting a technical regulation that applies to a group of like products on a non-discriminatory basis, and yet require a positive assurance of conformity with the relevant requirements of that technical regulation only for suppliers of a subset of those products. However, the Panel does not consider it necessary or appropriate to adopt an expansive interpretation of the obligation in Article 5.1.1 to prevent such a scenario from arising. Such a scenario would seem to involve a regulating Member discriminating among like products that are, in the words of Article 5.1.1, in "a comparable situation". In the Panel's view, the requirements set out in the text of Article 5.1.1 are sufficient to safeguard against such potential circumvention.

[1209] The Panel notes that this interpretation is also consistent with the findings made in *Russia – Railway Equipment.* (See e.g. Panel Report, *Russia – Railway Equipment*, para. 7.257; and Appellate Body Report, *Russia – Railway Equipment*, paras. 5.121, and 5.123-5.124.)

[1210] Appellate Body Report, *Russia – Railway Equipment*, para. 5.123.

7.1.3.2.4 Conclusion on Article 5.1.1

7.833. The Panel concludes that Indonesia 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.

7.1.3.3 Article 5.1.2 – Unnecessary obstacles to international trade

7.1.3.3.1 Introduction

7.834. The Panel now turns to the claim under Article 5.1.2 of the TBT Agreement.

7.835. Indonesia submits[1211] that the European Union violates Article 5.1.2 by imposing a conformity assessment procedure for certifying palm oil-based biofuel as low ILUC-risk which creates unnecessary obstacles to international trade. More specifically, Indonesia argues that the low ILUC-risk certification procedure is (i) an unnecessary obstacle to international trade, and (ii) more strict (or applied more strictly) than necessary to give the European Union adequate confidence that products conform with the applicable technical regulations, taking account of the risks non-conformity would create.[1212] Indonesia explains that the European Union has created unnecessary obstacles to international trade by imposing a certification requirement without establishing how certification may be obtained and failing to explain the meaning of the low ILUC-risk criteria.[1213] In other words, by adopting a conformity assessment procedure while making it impossible to apply it, the European Union created an unnecessary obstacle to international trade.

7.836. The European Union submits that Indonesia does not take issue with the preparation, adoption or application of the future implementing rules for low ILUC-risk certification, but their current absence. For the European Union, this means that such claims "fall outside the scope" of Article 5.1.2.[1214] As to these future implementing rules, the European Union notes that it was not required to act in this respect before 30 June 2021. Moreover, the European Union notes that it has taken steps to prepare these rules, and argues that such rules are not indispensable for carrying out low ILUC-risk certification, which could be conducted on the basis of national or voluntary schemes.[1215] The European Union further submits that the low ILUC-risk criteria in the Delegated Regulation are sufficiently detailed for certification to operate.[1216] Moreover, the European Union contends that it cannot be that any form of verification amounts to an obstacle to trade, especially before "the actual scope of the requirements" is fully defined.[1217]

7.1.3.3.2 Legal standard

7.837. Article 5.1.2, read in conjunction with the introductory clause in Article 5.1, sets forth the obligation that:

[1211] Indonesia's first written submission, paras. 924-957; responses to the Panel's first set of questions, paras. 249-251, 253-254, 258-262, 267; second written submission, paras. 75-108, and 967-989; responses to the Panel's second set of questions, paras. 207-208; and comments on EU responses to the Panel's second set of questions, paras. 452 and 461-462.

[1212] Indonesia's first written submission, para. 928.

[1213] Indonesia's first written submission, paras. 927, 936 and 967; response to the second set of questions from the Panel, para. 207; and comments on the European Union's response to the second set of Panel questions, para. 453.

[1214] European Union's first written submission, para. 976; second written submission, para. 377; and responses to the Panel's second set of questions, para. 612. For the European Union's other arguments concerning the applicability of the TBT Agreement, see European Union's first written submission, paras. 969-984; second written submission, paras. 369, 377-385, 387; responses to the Panel's second set of questions, para. 612; and comments on Indonesia's responses to the Panel's second set of questions, para. 166.

[1215] European Union's first written submission, paras. 978-979; and second written submission, paras. 378-380.

[1216] European Union's second written submission, para. 380; and responses to the Panel's second set of questions, para. 607.

[1217] European Union's first written submission, para. 980; second written submission, para. 384; and responses to the Panel's second set of questions, para. 612.

> 5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:
>
> …
>
> 5.1.2 conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, inter alia, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.

7.838. Article 5.1.2 has been interpreted and applied in prior cases, and both parties present their respective understandings of the applicable legal standard with reference to those cases.

7.839. Article 5.1.2 addresses the necessity of a conformity assessment procedure by a central government body. The particular meaning of "necessity" in this context is informed by Article 5.1.2 itself. The first sentence of Article 5.1.2, referring to "unnecessary obstacles to international trade", sets out a general obligation. The second sentence, referring to the strictness or strict application of a conformity assessment procedure, is an example ("*inter alia*") of the general obligation.[1218]

7.840. The Panel will elaborate further on the elements of the legal standard in Article 5.1.2 as necessary in the course of its assessment of the issues in dispute.

7.1.3.3.3 Preparation, adoption or application of a conformity assessment procedure

7.841. At the outset, the Panel considers whether Indonesia's claim concerns the "preparation, adoption or application" of a conformity assessment procedure under Article 5.1 and therefore falls within the scope of Article 5.1.2.

7.842. The Panel understands Indonesia to argue that the European Union created an unnecessary obstacle to international trade by adopting the low ILUC-risk certification procedure, which despite an active certification requirement for high ILUC-risk biofuels to be eligible to count towards renewable energy consumption targets[1219], is impossible to use. The Panel understands Indonesia to argue that this is so, because this procedure, as set out in Article 6 of the Delegated Regulation, is incomplete owing to a lack of detail, which, as Indonesia claims and the European Union admits, is to be provided by certain implementing rules.

7.843. The Panel understands the European Union to admit that the implementing regulations will provide the missing detail, but to argue that insofar as Indonesia's claim is directed at the TBT-consistency of those implementing regulations themselves the claim is "hypothetical and premature". As a consequence, the European Union argues that this claim falls "outside the scope" of Article 5.1.2.[1220]

7.844. The Panel recalls that Article 5.1.2 applies to the "preparation, adoption and application" of conformity assessment procedures. The Panel considers that the terms "prepared, adopted or applied" mean that what occurs across the spectrum of preparation, adoption and application of a

[1218] Appellate Body Report, *Russia – Railway Equipment*, paras. 5.182-5.183.

[1219] The Panel refers to its discussion of the temporal scope of issues arising from the ongoing implementation of RED II and the Delegated Regulation in section 7.1.1 of this Report, and in particular the entry into force of the requirements imposed by the high ILUC-risk cap and phase-out.

[1220] Throughout the dispute, the European Union refers to a number of developments with respect to the implementation of the low ILUC-risk certification procedure, including the publishing of draft implementing regulations, the recognition of several voluntary schemes (some of which offer low ILUC-risk certification) and the adoption and publication of the Implementing Regulation. The European Union also states variously that the low ILUC-risk certification procedure need only be in place by the end of 2023, when the high ILUC-risk "phase-out" element enters into force, and that it was not required to act before 30 June 2021. (European Union's first written submission, paras. 981-982; second written submission, paras. 378, 380-381, and 384; response to Panel question No. 204, paras. 607 and 612; and comments on Indonesia's response to Panel question No. 206, para. 166; European Commission website on voluntary schemes, (Exhibit EU-283)).

conformity assessment procedure (i.e. its regulatory lifecycle[1221]), is captured by Article 5.1.2. Thus, the Panel considers that Article 5.1.2 applies where certain elements of a conformity assessment procedure have been adopted while others have not yet been adopted, and e.g. remain in a preparatory phase. Therefore, a conformity assessment procedure which suffers from a partial absence of detailed rules or incompleteness falls within the preparation and adoption of conformity assessment procedures, and within scope of Article 5.1.2.

7.845. The Panel understands that this interpretation of Article 5.1.2 is in keeping with the findings of the panel in *EC – Seal Products*. In that case, the conformity assessment procedure was found to not be capable of allowing trade in conforming products to occur on the date of its entry into force and therefore posed an unnecessary obstacle to international trade.[1222] Further, the panel in *EC – Seal Products* found that the obligation in Article 5.1.2 applies to third-party accreditation, as part of a conformity assessment procedure.[1223]

7.846. On that basis, the Panel considers that Indonesia's claim that an incomplete conformity assessment procedure (including its impact on third-party accreditation i.e. voluntary schemes) might cause an unnecessary obstacle to international trade falls within the scope of Article 5.1.2. This claim, which is based on the low ILUC-risk certification procedure as set out in Article 6 of the Delegated Regulation, falls within the spectrum of steps constituting the preparation and adoption of a conformity assessment procedure. This is notwithstanding the fact that the low ILUC-risk certification procedure also anticipates that certain elements will be devised or come into force in the future. The Panel therefore disagrees with the European Union's argument that this claim is hypothetical, premature, and falls outside the scope of Article 5.1.2. Rather, this claim concerns the low ILUC-risk certification procedure, as set out in Article 6 of the Delegated Regulation.[1224]

7.847. At the same time, the Panel considers that Article 5.1.2 only captures obstacles to trade arising from the conformity assessment procedure *itself*, and not obstacles to trade arising from the *substantive criteria* in the underlying technical regulation or standard with which a procedure assesses compliance. In this regard, the Panel understands Indonesia to challenge not only aspects relating to the low ILUC-risk certification *procedure* but also the low ILUC-risk *criteria*, including the obstacles it identifies with respect to each of the additionality pathways, as the relevant "obstacles" under Article 5.1.2. In particular, the Panel understands Indonesia to argue that the low ILUC-risk *criteria* are impracticable (also because they are incomplete and otherwise inadequate) and that low ILUC-risk certification is consequently unavailable.

7.848. Having identified the scope of Article 5.1.2 as referring to the preparation, adoption or application of a conformity assessment *procedure*, the Panel considers that Article 5.1.2, by its wording and in its context of Article 5, targets aspects of the procedure. This is distinct from the "relevant requirements"[1225] in the technical regulation (or standard) with which a procedure assesses conformity. The Panel therefore finds that its task under this claim is limited to assessing whether the preparation, adoption [or application] of the low ILUC-risk certification *procedure* itself (and not the underlying low ILUC-risk *criteria*) is consistent with the European Union's obligations under Article 5.1.2. Insofar as Indonesia's arguments concern the low ILUC-risk criteria, they are addressed under Article 2.1 together with the Panel's assessment of the high ILUC-risk cap and phase-out.

7.1.3.3.4 Unnecessary obstacle to international trade

7.849. Having found that Indonesia's claim with respect to the low ILUC-risk certification *procedure* falls within the scope of Article 5.1.2, the Panel turns to consider whether Indonesia has substantiated its claim that by adopting an "incomplete" conformity assessment procedure (as set out in Article 6 of the Delegated Regulation), the European Union has created an *obstacle* to trade.

[1221] See TBT Handbook (WTO Secretariat, 2021), Fig. 10 ("Applying GRP to the lifecycle of a TBT measure: an illustration"), p. 47. Available at: https://www.wto.org/english/res_e/booksp_e/tbt3rd_e.pdf.

[1222] Panel Reports, *EC – Seal Products*, para. 7.528.

[1223] Panel Reports, *EC – Seal Products*, para. 7.524.

[1224] In this respect, the Panel refers to section 7.1.1 of this Report and its discussion there of its jurisdiction and ability to take into account developments that occurred subsequent to panel establishment.

[1225] TBT Agreement, Annex 1.3.

7.850. The Panel recalls that in *EC – Seal Products*, the conformity assessment procedure at issue was not capable of allowing trade in conforming products to occur on the date of its entry into force. Similarly, in this instance, a conformity assessment procedure which is not capable of allowing trade in conforming products to occur on the date of its entry into force, or at least the date of entry into force of the underlying requirement to use a conformity assessment procedure, is capable of being an obstacle to international trade.[1226] Therefore, if the low ILUC-risk certification procedure as set out in Article 6 of the Delegated Regulation, in the absence of implementing regulations, is not capable of allowing trade in conforming products to occur at the date of entry into force of the low ILUC-risk certification requirement, such a procedure would be capable of being an "obstacle" to trade. As is also the case in Article 2.2, being an "obstacle" to international trade does not, alone, render a procedure inconsistent with Article 5.1.2. Instead, such an inconsistency is only limited to conformity assessment procedures that create obstacles that are, in addition, "unnecessary".[1227]

7.851. The Panel considers that, based on the evidence before it, certain detailed rules are missing from the low ILUC-risk certification procedure as set out in Article 6 of the Delegated Regulation. Recital 18 in the preamble to the Delegated Regulation and Article 30(8) of RED II both anticipate such further rules to be stipulated in implementing acts. In support of this, the Panel refers to the European Commission's implementation obligations and the progress made in this area.[1228] In these proceedings, the European Union acknowledged that it had not yet adopted the required implementing rules[1229], nor recognized voluntary or national certification schemes under RED II.[1230] This, in the Panel's view, highlights the importance of detailed implementing rules for conducting low ILUC-risk certification.

7.852. The Panel next considers whether the incomplete low ILUC-risk certification procedure (as set out in Article 6 of the Delegated Regulation) has, in light of its relationship with the high ILUC-risk cap and phase-out, created an *unnecessary* obstacle to international trade within the meaning of Article 5.1.2.[1231] The Panel recalls that in *EC – Seal Products*, a conformity assessment procedure that could not be used at all (putting aside the role of voluntary schemes) was found to be an unnecessary obstacle to international trade.

7.853. The Panel understands Indonesia to argue that the absence of detailed rules on the low ILUC-risk certification procedure as set out in Article 6 of the Delegated Regulation prevents there from being any certification whatsoever; this is because without such detailed rules, it is impossible to design a national or voluntary certification scheme. According to Indonesia, this means that the European Commission cannot recognize such schemes and that, as a result, economic operators cannot apply for certification (e.g. by collecting necessary financial and agricultural data, which need to span at least three years of operation). Ultimately, Indonesia argues, no low ILUC-risk certified biofuel is able to be used to meet renewable energy consumption targets, because certification is the only means by which palm oil-based biofuel (at present the only high ILUC-risk biofuel) is exempted from the high ILUC-risk cap and phase-out.

7.854. The Panel recalls the following facts:

[1226] In this respect, the Panel refers to its findings above in section 7.1.1 of this Report on the relationship between the 7% maximum share, high ILUC-risk cap and phase-out, and their effect on trade under Articles 2.1 and 2.5 of the TBT Agreement. The Panel also refers to its findings under Article 5.6 which consider the effect on trade of the low ILUC-risk certification procedure.

[1227] As the Appellate Body observed with respect to Article 2.2, the context of Article 2.2 "suggests that 'obstacles to international trade' may be permitted insofar as they are not found to be 'unnecessary', that is, 'more trade-restrictive than necessary to fulfil a legitimate objective'[, and this in turn] supports a reading that Article 2.1 does not operate to prohibit *a priori* any obstacle to international trade." (Appellate Body Report, *US – Clove Cigarettes*, para. 171). See also Appellate Body Reports, *US – Tuna II (Mexico)*, para. 319; and *Indonesia – Import Licensing Regimes*, para. 5.49. The Panel considers that this same reasoning applies to Article 5.1.2.

[1228] See section 7.1.1 of this Report.

[1229] European Union's second written submission, para. 381. As noted in the Descriptive Part of this Report, however, in its comments on the Draft Descriptive Part of the Report Indonesia submitted the information that the European Commission adopted the Implementing Regulation on 14 June 2022.

[1230] European Union's comments on Indonesia's response to Panel question No. 206 (referring to European Commission website on voluntary schemes, (Exhibit EU-283), p. 3.) The Panel notes that these draft decisions recognizing certification schemes state they are to be reassessed once the Implementing Regulation is adopted and enters into force.

[1231] On the relationship between these measures, see section 7.1.1 of this Report.

a. the high ILUC-risk cap and phase-out, which gave rise to the need for low ILUC-risk certification, came into force in 2019;

b. the implementation deadline for EU member States was 30 June 2021;

c. the European Union recognized some voluntary certification schemes in April 2022; and

d. the Implementing Regulation was adopted, published and entered into force in June 2022.

7.855. The Panel notes that the high ILUC-risk cap and phase-out and the low ILUC-risk criteria and certification procedure have been in force since 10 June 2019.[1232] Although EU member States did not have to incorporate these requirements into their national laws until 30 June 2021, they were not precluded from doing so.[1233] It was therefore not possible to make use of low ILUC-risk certification (as set out in Article 6 of the Delegated Regulation) in situations where such certification was mandated over a three-year period. Even if one were to take 30 June 2021 (i.e. the date for transposition of the high ILUC-risk cap across all EU member States) as the date when low ILUC-risk certification became relevant, it would not have been possible to complete the process for designing a certification scheme, having that scheme recognized by the European Union, and actually applying and obtaining certification.

7.856. The Panel considers that these circumstances are even more significant given that low ILUC-risk certification, whether through the designated authorities of EU member States or through voluntary schemes, is the *only* means by which consignments of a high ILUC-risk biofuel may benefit from an exemption to the high ILUC-risk cap and phase-out. Given that the low ILUC-risk certification procedure was non-operational, there were simply no means by which low ILUC-risk certification could be granted.

7.857. The Panel observes that while there are a limited number of certification schemes (~13) that were pending for approval during these proceedings, and a small number of these (~3) concerned low ILUC-risk certification[1234], the Panel does not consider this to demonstrate that the low ILUC-risk certification procedure was available or workable from the date of entry into force (or latest implementation) of the low ILUC-risk certification requirement.

7.858. The Panel has some sympathy with the fact that designing and setting up a certification scheme is itself a timely and costly exercise. This is all the more so, when such design and operation needs to be revised following the late publishing of legislation, at an additional cost to the scheme organizers and users. Therefore, the Panel does not consider that the option to design (at the risk of doing so incorrectly) a voluntary certification scheme based on the framework provided by Article 6 of the Delegated Regulation, which explicitly acknowledges missing detailed rules, would have been a reasonable course of action to expect.

7.859. The Panel does not consider it necessary to proceed to consider whether there are one or more less trade-restrictive alternative measures to establish that deficiencies in the implementation of the low ILUC-risk procedure have created unnecessary obstacles to international trade. The Panel recalls that the claim in *EC – Seal Products* was also based on the first sentence of Article 5.1.2, and that panel did not consider alternative measures in finding that a conformity assessment procedure that was not capable of allowing trade in conforming products to occur, despite the entry into force

[1232] Despite initially insisting that certification only becomes necessary in 2023 with the entry into force of the "phase-out", the European Union itself clarifies that the "cap" introduced a need for certification for low ILUC-risk biofuels, if they are to be eligible to count towards renewable energy targets beyond the limitations imposed by the high ILUC-risk cap and phase-out. See e.g. European Union's second written submission, para. 152.

[1233] European Union's second written submission, para. 381. The Panel notes that this deadline for implementation did not in theory or practice prevent earlier EU member State implementation, and this is not contested by the parties. For example, Austria introduced the cap on high ILUC-risk biofuels as of 1 January 2021 and a complete phase-out as of 1 July 2021, i.e. much earlier that the 2023-2030 period in RED II. (See Indonesia's comments on the European Union's response to Panel question No. 169, para. 339 (referring to Examples of EU member States' measures restricting oil palm crop-based biofuel – Updated version of Exhibits IDN-369, IDN-329, IDN-315 and IDN-313, Exhibit IDN-421).)

[1234] European Union's comments on Indonesia's response to Panel question No. 206, para. 166 (referring to European Commission website on voluntary schemes, (Exhibit EU-283), p.3).

of the EU Seal Regime, created an unnecessary obstacle to international trade.[1235] The Panel observes that this approach is also entirely consistent with the approach followed in the context of necessity tests under Article 2.2 of the TBT Agreement and Article XX of the GATT 1994.[1236] Therefore, the Panel does not consider it necessary to address the parties' arguments concerning alternative measures under Article 5.1.2 any further.

7.1.3.3.5 Strictness and strict application of low ILUC-risk certification

7.860. The Panel recalls that Indonesia also argues that low ILUC-risk certification is more strict or applied more strictly than necessary, to give the European Union adequate confidence that products conform with the applicable technical regulations, taking account of the risks non-conformity would create.[1237] The Panel understands that this argument also turns on the argument that the European Union requires certification in order to benefit from the limited low ILUC-risk exception but makes it impossible to obtain certification, given the absence of further detailed rules with respect to the low ILUC-risk certification.[1238] Indonesia makes further submissions with respect to the objective of this measure, its trade-restrictiveness and presents a range of alternative measures.

7.861. Indonesia essentially argues that the same aspects of low ILUC-risk certification (as set out in Article 6 of the Delegated Regulation) considered under the first sentence of Article 5.1.2 also illustrate a violation of the second sentence of Article 5.1.2. The Panel recalls that Article 5.1.2 addresses the "necessity" of a measure, the particular meaning of which is informed by Article 5.1.2 itself. The first sentence of Article 5.1.2, referring to unnecessary obstacles to international trade, sets out a general obligation, whereas the second sentence, referring to the strictness or strict application of a conformity assessment procedure, is an example of the general obligation. This is clear from the wording "this means, *inter alia*".[1239] Therefore, a complainant need not show that a measure is both an unnecessary obstacle to international trade *and* that it is more strict than necessary or applied more strictly than necessary. Further, while the strictness or strict application of a conformity assessment procedure may amount to an unnecessary obstacle to international trade, these are not the only ways of demonstrating that there is an unnecessary obstacle to international trade under Article 5.1.2.

7.862. The Panel has found above that Indonesia has demonstrated that a lack of completeness surrounding the low ILUC-risk certification procedure as set out in Article 6 of the Delegated Regulation meant that it could not be used as an exemption to the high ILUC-risk cap and phase-out as intended, and there is therefore an unnecessary obstacle to international trade. Thus, it is not necessary for the Panel to make further findings with respect to the second sentence of Article 5.1.2 in order to resolve this dispute, especially as the claim under the second sentence of Article 5.1.2 is based on the same alleged deficiencies of low ILUC-risk certification.

7.1.3.3.6 Conclusion on Article 5.1.2

7.863. The Panel concludes that the low ILUC-risk certification procedure, as set out in Article 6 of the Delegated Regulation, is inconsistent with Article 5.1.2 of the TBT Agreement since deficiencies

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[1235] Panel Reports, *EC – Seal Products*, paras. 7.527-7.528.

[1236] In the context of Article XX of the GATT 1994, panels may conduct a threshold inquiry to assess whether the challenged measure is designed to protect the interest in the subparagraph invoked. Where a panel finds that a measure is incapable of meeting the stated objective, the analysis need not go further to determine whether this measure is "necessary" to protect this objective, let alone whether there are one or more less trade-restrictive alternative measures. (See e.g. Appellate Body Report, *Colombia – Textiles*, para. 5.68.) In the context of the necessity test under Article XX and Article 2.2, a panel need not continue with a comparison of the measure against the proposed alternative measures if the measure "makes *no* contribution to the achievement of the legitimate objective". (Appellate Body Report, *US – Tuna II (Mexico)*, fn 647 to para. 322.)

[1237] Indonesia's first written submission, para. 928.

[1238] Indonesia's second written submission, para. 967. See also Indonesia's response to Panel question No. 206, para. 207: "it is an unnecessary obstacle to trade to adopt an (incomplete) conformity assessment requirement but to make it impossible to apply it"; Indonesia's comments on the European Union's response to Panel question No. 204, para. 453.

[1239] Appellate Body Report, *Russia – Railway Equipment*, para. 5.182-5.183; and Panel Report, *Russia – Railway Equipment*, para. 7.413.

in the implementation of the low ILUC-risk procedure have created unnecessary obstacles to international trade.

7.1.3.4 Article 5.2.1 – As expeditiously as possible

7.1.3.4.1 Introduction

7.864. The Panel now turns to the claim under Article 5.2.1 of the TBT Agreement.

7.865. Indonesia submits[1240] that the European Union violates Article 5.2.1 by failing to ensure, when implementing Article 5.1, that the conformity assessment procedure for certifying palm oil-based biofuel as low ILUC-risk is undertaken and completed as expeditiously as possible. More specifically, Indonesia argues that because of the European Union's failure to adopt implementing rules setting out clearly defined certification criteria and clearly defined conditions governing the certification procedure, the European Union has created an impediment for any individual certification to be requested, undertaken and completed, despite the entry into force of a certification requirement.[1241]

7.866. The European Union submits[1242] that there is no violation of Article 5.2.1. While the European Union acknowledges that in factual terms it has not adopted detailed implementing rules on certification[1243], it maintains that the adoption of such rules is not indispensable to carrying out certification.[1244]

7.1.3.4.2 Legal standard

7.867. Article 5.2.1, read in conjunction with the introductory clause in Article 5.2, sets forth the obligation that:

> 5.2 When implementing the provisions of paragraph 1, Members shall ensure that:
>
> > 5.2.1 conformity assessment procedures are undertaken and completed as expeditiously as possible and in a no less favourable order for products originating in the territories of other Members than for like domestic products[.]

7.868. Article 5.2.1 has been interpreted and applied in one prior case, *EU – Seal Products*, and both parties present their respective understandings of the applicable legal standard with reference to that case.

7.869. To establish a violation of Article 5.2.1, the following elements must be established[1245]:

a. the regulating Member is implementing the provisions of Article 5.1; and

b. the regulating Member has failed to ensure that conformity assessment procedures are "undertaken and completed" "as expeditiously as possible"; or

c. the regulating Member has undertaken and completed conformity assessment procedures in a "less favourable order" for products originating in the territories of other Members than for like domestic products.

7.870. Article 5.2.1 therefore contains two separate obligations for Members implementing the provisions of Article 5.1. A violation can be established if a Member either (i) fails to ensure that conformity assessment procedures are undertaken and completed as expeditiously as possible; or

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[1240] Indonesia's first written submission, paras. 958-973; second written submission, paras. 991-100.
[1241] Indonesia's first written submission, paras. 971-972.
[1242] European Union's first written submission, paras. 985-992; second written submission, paras. 366-388.
[1243] European Union's first written submission, para. 987.
[1244] European Union's second written submission, para. 386.
[1245] Panel Reports, *EC – Seal Products*, para. 7.556.

(ii) undertakes or completes conformity assessment procedures in a less favourable order for products of foreign vs domestic origin. The Panel understands that Indonesia's claim is based on the first obligation ("as expeditiously as possible") only.

7.871. The Panel will elaborate further on the elements of the legal standard in Article 5.2.1 as necessary in the course of its assessment of the issues in dispute.

7.1.3.4.3 Assessment by the Panel

7.872. The Panel considers that Indonesia's claim under Article 5.2.1 turns on the moment at which the obligation in this provision can be said to apply.

7.873. The Panel understands that Indonesia's claim is premised on an interpretation of Article 5.2.1 that suggests there is a violation in circumstances where, owing to incomplete rules governing a certification procedure, certification cannot occur.[1246] The Panel notes Indonesia's explanation that, without clearly defined conditions governing the certification procedure, certification schemes cannot be designed, recognized and used to provide certification, despite there being a certification requirement in force.[1247] The Panel understands that it is on this basis that Indonesia contends that the European Union fails to ensure that the low ILUC-risk certification procedure is "undertaken and completed" "as expeditiously as possible". The Panel therefore understands the relevant interpretative question to be whether an "incomplete" certification procedure, which in Indonesia's view, cannot be undertaken at all, engages the obligation in Article 5.2.1.

7.874. As a matter of interpretation, Indonesia submits that Article 5.2.1 applies to all aspects of a conformity assessment procedure, including individual applications for certification as well as applications for accreditation to carry out conformity assessment procedures, in keeping with the illustrative list of conformity assessment procedures in the *Explanatory note* to Annex 1.3.[1248] Indonesia further submits that, while the obligation in Article 5.2.1 is engaged where an individual application has been received, it should not be confined to such cases.[1249] Indonesia explains that Article 5.2.1 must be capable of applying to a conformity assessment procedure that has not been "fully completed" as otherwise, this obligation would be redundant.[1250]

7.875. The European Union responds that it does not engage with Indonesia's submissions on the nature and extent of the obligations under Article 5.2.1 and makes no concession as to their validity.[1251] Nevertheless, the European Union submits that Article 5.2.1 presupposes that there has been at least "partial implementation" of a conformity assessment procedure, and requires that low ILUC-risk certification schemes be already in operation, otherwise there could be no comparison of "less favourable treatment" or an assessment of whether procedures are being carried out or undertaken "as expeditiously as possible" under Article 5.2.1.[1252] At the time of its second written submission, the European Union confirms that low ILUC-risk certification schemes are not in operation.[1253]

7.876. The Panel observes that the text of the introductory clause of Article 5.2 indicates that Article 5.2.1 applies to Members "[w]hen implementing the provisions of paragraph 1" (i.e. Article 5.1). The Panel recalls that the provisions of Article 5.1 concern the "preparation, adoption and application" of a conformity assessment procedure. This, in turn, could be taken to mean that the act of "implementing" under Article 5.2 might concern not just the "application" of a conformity assessment procedure, but also its "preparation" and "adoption". However, the Panel considers that because Article 5.2.1 contains an obligation to ensure that "procedures are undertaken and

[1246] Indonesia's first written submission, para. 972; second written submission, para. 998. The Panel does not consider any arguments concerning the low ILUC-risk *criteria*, given the Panel's finding that these do not form part of the low ILUC-risk certification procedure, which is the measure at issue alleged to be a conformity assessment procedure. (See the Panel's findings in the context of Annex 1.3 above.)

[1247] Indonesia's first written submission, para. 972; second written submission, para. 998.

[1248] Indonesia's first written submission, para. 964 (referring to Panel Reports, *EC – Seal Products*, para. 7.563). See section 7.1.3.1 for the full illustrative list in the *Explanatory note* to Annex 1.3.

[1249] Indonesia's first written submission, paras. 965-967.

[1250] Indonesia's second written submission, para. 979.

[1251] European Union's first written submission, paras. 988-989.

[1252] European Union's second written submission, paras. 375-376.

[1253] European Union's second written submission, para. 376.

completed" as expeditiously as possible, this implies that the conformity assessment procedures already exist and that Article 5.2.1 is only concerned with their application and imminent completion.

7.877. This reading is supported by the panel's analysis in *EC – Seal Products.* That panel also considered the point in time at which the obligation to "undertake and complete" a conformity assessment procedure is triggered during the implementation process of a conformity assessment procedure. The panel considered that the obligation in Article 5.2.1 is "limited to the application of a CAP".[1254] The panel also referred to Annex C(1)(a) of the SPS Agreement, which refers to undertaking and completing approval procedures without "undue delay", and recalled that in the context of the SPS Agreement, the panel in *EC – Approval and Marketing of Biotech Products* concluded that the obligation therein "covers all stages of approval procedures and should be taken as meaning that, *once an application has been received*, approval procedures must be started and then carried out from beginning to end".[1255] The panel in *EC – Seal Products* concluded that the obligation in Article 5.2.1 likewise applies to the implementation of a conformity assessment procedure "from the moment when an application for recognition has been received and through the completion of the process".[1256]

7.878. The Panel recalls Indonesia's argument that the lack of detailed rules governing the certification procedure (as set out in Article 6 of the Delegated Regulation) means that the procedure cannot even begin owing to an inability to design certification schemes in the first place, such that a certification scheme is in both theory and practice inoperable. A certification scheme, on this view, is incapable of operating, regardless of whether the relevant application is one for accreditation or conformity. The Panel understands Indonesia to argue that it follows, as a consequence of this inoperability, that the regulating Member fails to ensure that the conformity assessment procedures are undertaken and completed as expeditiously as possible.

7.879. The Panel considers that Indonesia's understanding would require it to go beyond the interpretation of Article 5.2.1 set out above. The wording of Article 5.2.1 limits, by its reference to the implementation of the application of conformity assessment procedures, its scope to a subset of conformity assessment procedures: i.e. only those which are themselves capable of application (i.e. can be "undertaken" and "completed"). In the Panel's view, there does not necessarily have to be "full implementation" of a conformity assessment procedure, provided such procedures are capable of being applied, and provided that pursuant to those procedures, individual applications can be undertaken and completed.

7.880. The Panel is not suggesting that the scope of the obligation in Article 5.2.1 is limited to individual applications.[1257] Nor does the Panel exclude the possibility of an as such claim in circumstances where there are elements of a conformity assessment procedure which, by their terms, prevent relevant authorities from undertaking and completing them as expeditiously as possible. The Panel considers however that, in all cases, Article 5.2.1 is, in principle, only applicable where there are conformity assessment procedures that are capable of being applied, pursuant to which individual applications can be undertaken and completed.

7.881. The Panel considers that Indonesia's claim is effectively that the European Union has failed to "undertake and complete" the adoption of *a functional conformity assessment procedure* "as expeditiously as possible". For the reasons set out above, such a contention, even if correct, falls outside the scope of the obligation in Article 5.2.1.[1258]

[1254] Panel Reports, *EC – Seal Products*, para. 7.558.

[1255] Panel Reports, *EC – Seal Products*, para. 7.562 (referring to Panel Reports *EC – Approval and Marketing of Biotech Products*, para. 7.1494 (emphasis added)).

[1256] Panel Reports, *EC – Seal Products*, para. 7.563.

[1257] The Panel notes in this respect that, unlike Article 5.1.2, Article 5.2.2 contains terms which relate to individual applications (e.g. "*the* applicant", "*the* application", "*each* conformity assessment procedure"). See e.g. Panel Report, *Russia – Railway Equipment*, paras. 7.553-7.565, 7.783, 7.588-7.590, 7.794, 7.797, and 7.800-7.801.

[1258] For that reason, the Panel does not consider it necessary to address the European Union's additional arguments that the detailed implementing regulations are not indispensable for carrying out certification; that the recognition of voluntary schemes is not necessary for the functioning of low ILUC-risk certification; and the arguments concerning the lack of requests for recognition of voluntary schemes.

7.1.3.4.4 Conclusion on Article 5.2.1

7.882. The Panel concludes that Indonesia has failed to establish that the European Union has acted inconsistently with the obligation in Article 5.2.1 of the TBT Agreement to ensure that conformity assessment procedures are undertaken and completed as expeditiously as possible.

7.1.3.5 Articles 5.6.1, 5.6.2 and 5.6.4 – Proposed conformity assessment procedures

7.1.3.5.1 Introduction

7.883. The Panel now turns to the claims under Article 5.6 of the TBT Agreement, which include the distinct transparency obligations in Articles 5.6.1, 5.6.2 and 5.6.4. The Panel addresses these claims together given the relationship between these provisions and the manner in which the parties have developed their arguments in this case.

7.884. Indonesia submits[1259] that the European Union violates these separate obligations in Article 5.6. More specifically, Indonesia claims that the European Union violates (i) Article 5.6.1, by failing to publish a notice at an early appropriate stage that it proposes to introduce a particular conformity assessment procedure, in such a manner as to enable interested parties in Indonesia and other WTO Members to become acquainted with it; (ii) Article 5.6.2, by failing to notify proposals of RED II and the Delegated Regulation; and (iii) Article 5.6.4, by having failed to organize a meaningful commenting process in respect of the proposal for RED II and that for the Delegated Regulation.

7.885. The European Union submits[1260] that it is not subject to the procedural requirements in Article 5.6 because low ILUC-risk certification is not a conformity assessment procedure. The European Union does not respond to Indonesia's submissions on the nature and extent of the obligations under Article 5.6. Instead, it considers that, because the measures complained of will not take effect until December 2023 and detailed implementing rules have yet to be adopted, Indonesia's claims are "hypothetical and premature". Nevertheless, the European Union acknowledges that in factual terms, no publication, formal notification, or organization of a commenting procedure for the purposes of Articles 5.6.1, 5.6.2 and 5.6.4 has taken place.

7.1.3.5.2 Legal standard

7.886. Article 5.6 sets forth several separate transparency obligations in relation to proposed conformity assessment procedures:

> 5.6 Whenever a relevant guide or recommendation issued by an international standardizing body does not exist or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardizing bodies, and if the conformity assessment procedure may have a significant effect on trade of other Members, Members shall:
>
> > 5.6.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular conformity assessment procedure;
> >
> > 5.6.2 notify other Members through the Secretariat of the products to be covered by the proposed conformity assessment procedure, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
> >
> > 5.6.3 upon request, provide to other Members particulars or copies of the proposed procedure and, whenever possible, identify the parts which in

[1259] Indonesia's first written submission, paras. 974-1029; second written submission, paras. 1001-1010.

[1260] European Union's first written submission, paras. 993-999.

substance deviate from relevant guides or recommendations issued by international standardizing bodies;

5.6.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

7.887. Article 5.6 has not been interpreted or applied in prior cases. However, the obligations therein regarding proposed conformity assessment procedures mirror those found in Article 2.9 of the TBT Agreement (concerning proposed technical regulations) and there appears to be no fundamental disagreement between the parties on the elements of that standard as described below.

7.888. The Panel will elaborate further on the elements of the legal standard in Articles 5.6.1, 5.6.2 and 5.6.4 as necessary in the course of its assessment of the issues in dispute.

7.1.3.5.3 *Chapeau* of Article 5.6

7.889. The obligations under Article 5.6 apply in respect of a conformity assessment procedure when the two conditions of the *chapeau* of Article 5.6 are met, namely:

a. a relevant guide or recommendation issued by an international standardizing body does not exist, or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardizing bodies; and

b. the proposed conformity assessment procedure may have a significant effect on trade of other Members.

7.890. As to the first condition of the *chapeau*, Indonesia argues that the low ILUC-risk certification procedure is non-compliant with a relevant guide or recommendation, namely ISO/IEC 17007:2010. According to Indonesia, this is because the European Union failed to adopt and/or make publicly available all the relevant elements of this procedure, such that certification schemes are unable to be designed and applications for conformity assessment cannot be made.[1261]

7.891. The Panel understands that ISO/IEC 17007:2010, entitled "*Conformity assessment – Guidance for drafting normative documents suitable for use for conformity assessment*", is relevant to all conformity assessment procedures.[1262] ISO/IEC 17007:2010 lays down several principles as guidance for preparing conformity assessment procedures.

7.892. According to principle 2, *all interested parties* such as a *manufacturer, supplier, user or purchaser* of a product or an independent body, *must be able to assess the conformity of products* with the relevant specifications based on a written document. According to principle 4, the requirements for the objects of conformity assessment, and the requirements for the conformity assessment activities, should be specified in a *clear and unambiguous manner*, with sufficient detail to ensure that conformity assessment results will be comparable and reproducible. Moreover, paragraph 5.2.2 states that specified requirements should be written so that they are *clear, direct and precise and will result in accurate and uniform interpretation*, so that parties making use of the normative documents are able to derive from the contents of the normative document a common understanding of its meaning and intent. Paragraph 5.2.9 further states that specified requirements should be stated *unambiguously using wording that is objective, logical, valid and specific*.

[1261] Indonesia's first written submission, paras. 977-997 (referring to ISO/IEC 17007:2010, (Exhibit IDN-270), paras. 4.3, 4.5, 5.2.2, and 5.2.9).

[1262] The Panel notes that Clause 1 ("Scope") of ISO/IEC 17007:2010 does not appear to limit the guidance in this document to certain types of conformity assessment procedures. While Clause 4.4 ("Principle 3: functional approach to conformity assessment") acknowledges that each of the various kinds of users of conformity assessment has specific needs, and as a result, there is much variety in the way conformity assessment is performed, all types of conformity assessment follow the same general approach, characterized by the functions listed above.

7.893. The European Union states that low ILUC-risk certification is not a conformity assessment procedure, such that it is not subject to the procedural requirements in Article 5.6.[1263] Beyond this, it does not specifically respond to Indonesia's contention that ISO/IEC 17007:2010 is a "relevant guide or recommendation" within the meaning of the *chapeau* of Article 5.6, and that the low ILUC-risk certification procedure is not "in accordance with" the principles above.

7.894. The Panel recalls its finding above that the low ILUC-risk certification procedure as set out in Article 6 of the Delegated Regulation, in the absence of detailed rules which the European Union admits are to follow in implementing regulations, is incomplete and non-functional. The Panel also recalls its findings with respect to Article 2.1, that certain elements of the low ILUC-risk criteria are not sufficiently defined. Accordingly, the Panel is satisfied that the principles of ISO/IEC 17007:2010 set out above have not been complied with, and thus, the low ILUC-risk certification procedure is not "in accordance with" it.[1264]

7.895. With respect to the second condition of the *chapeau*, the Panel recalls its earlier finding, in the context of the claim under Article 2.5, that the 7% maximum share and the high ILUC-risk cap and phase-out are technical regulations that "may have a significant effect on the trade of other Members" for the purposes of Articles 2.5 and 2.9.

7.896. Although that reasoning focuses on the 7% maximum share and the high ILUC-risk cap and phase-out, the Panel considers that its reasoning also leads to the conclusion that the low ILUC-risk certification procedure may by extension have a significant effect on trade of other Members. This is because the high ILUC-risk cap and phase-out is connected with the low ILUC-risk certification procedure, which the Panel has found above to directly or indirectly determine whether "relevant requirements" in that technical regulation are fulfilled.[1265] Thus, the low ILUC-risk certification procedure has an impact on whether the high ILUC-risk cap and phase-out applies to certain consignments of high ILUC-risk biofuel. To the extent that the possibility of low ILUC-risk certification mitigates the effect of the high ILUC-risk cap and phase-out on the trade of other Members, it qualifies as a conformity assessment procedure that "may have a significant effect on trade of other Members".

7.897. On that basis, the Panel considers that the conditions in the *chapeau* of Article 5.6 are satisfied.

7.1.3.5.4 Article 5.6.1 – notification of an intention to regulate

7.898. Article 5.6.1 requires notification of an intention to regulate at domestic level by means of a proposed conformity assessment procedure. This obligation precedes, temporally, the obligation in Article 5.6.2 to notify multilaterally to the WTO Secretariat a draft conformity assessment procedure and the subsequent obligation in Article 5.6.4 to provide for a commenting process before the adoption of a proposed conformity assessment procedure.

7.899. Indonesia argues that publication under Article 5.6.1 should occur where a proposed conformity assessment procedure has not yet been made effective but is still in draft form, such that parties can become acquainted with it and prepare for implementation.[1266] Indonesia argues that the European Union failed to publish a notice for a "particular conformity assessment procedure which it proposes to introduce".[1267] Specifically, Indonesia explains that the European Union introduced a certification requirement without having published the particular details of the certification process.[1268] Indonesia refers in particular to detail in the implementing rules which are essential to the certification procedure, as having not been published, and certainly not at an early

[1263] European Union's first written submission, para. 994.
[1264] The Panel notes the obligation in Article 5.6.3 of the TBT Agreement that Members shall whenever possible, identify the parts of a proposed conformity assessment procedure which in substance deviate from relevant guides and recommendations. The Panel does not understand Article 5.6.3 to qualify the requirement in the *chapeau* to necessarily require a respondent Member to have made its own assessment that a proposed conformity assessment procedure deviates from a relevant guide or recommendation.
[1265] The Panel refers to the relationship between the measures at issue, set out in sections 7.1.1 and 7.1.3.1 of this Report.
[1266] Indonesia's first written submission, para. 999.
[1267] Indonesia's first written submission, paras. 999-1009.
[1268] Indonesia's first written submission, para. 1005.

appropriate stage.[1269] Indonesia notes that although the low ILUC-risk certification requirement is "operational", there has been no full publication of the low ILUC-risk certification procedure (including the detail in the implementing regulations) such that it is now "too late" for any early notification to be given under Article 5.6.1.[1270] The European Union states that "in factual terms", there was no publication for the purposes of Article 5.6.1.[1271]

7.900. The Panel notes the European Union's statement that in factual terms, there was no publication of the low ILUC-risk certification procedure for the purposes of Article 5.6.1, in keeping with the European Union's view that it was not subject to the procedural requirements under Article 5.6.1. Having found that the procedural requirements in Article 5.6 apply, the Panel considers that there is a violation of Article 5.6.1.[1272]

7.1.3.5.5 Article 5.6.2 – notification to the WTO Secretariat

7.901. The Panel considers that Article 5.6.2 (together with Article 2.9.2) is "at the core of the TBT Agreement's transparency provisions: the very purpose of the notification is to provide opportunity for comment before the proposed measure enters into force, when there is time for changes to be made before 'it is too late'".[1273]

7.902. More specifically, Article 5.6.2 requires Members to notify other Members through the WTO Secretariat of proposed conformity assessment procedures, at an early appropriate stage, when amendments can still be introduced and comments taken into account. This obligation runs parallel to that in Article 2.9.2, and should apply regardless of whether another Member has requested notification and whether any information regarding the draft conformity assessment procedure was otherwise publicly available.[1274]

7.903. The Panel notes that, as pointed out by Indonesia, the RED II and Delegated Regulation proposals (the Delegated Regulation containing the proposed low ILUC-risk certification procedure), were not notified to the WTO Secretariat, evidenced by a search of the TBT IMS for notifications.[1275] The Panel further notes the European Union's statement that in factual terms, no formal notification for the purposes of Article 5.6.2 has yet taken place.[1276] On that basis, the Panel finds there is a violation of Article 5.6.2.

7.1.3.5.6 Article 5.6.4 – commenting process

7.904. Article 5.6.4 requires Members to allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account when finalizing proposed conformity assessment procedures. As noted above, Article 5.6.4 contains an equivalent obligation to the commenting process for proposed technical regulations under Article 2.9.4. The Panel recalls the TBT Committee guidance[1277] on time-limits for the presentation of comments on notified conformity assessment procedures and considers these factors to be relevant here: (i) the normal time-limit for the presentation of comments should be at least 60 days, but Members are encouraged to provide, whenever possible, a time-limit beyond 60 days, such as 90 days; (ii) developed country Members are encouraged to provide more than a 60-day comment period, to improve the ability of developing country Members to make comments on notifications consistent with the principle of special and differential treatment; and (iii) an insufficient period of time for presentation of comments on proposed conformity assessment procedures may prevent Members from adequately exercising their right to submit comments.

[1269] Indonesia's first written submission, paras. 1008-1009.
[1270] Indonesia's second written submission, paras. 1007-1009.
[1271] European Union's first written submission, para. 995.
[1272] The Panel reaches this conclusion without expressing a view as to whether early notification of the Delegated Regulation, alleged to contain the incomplete certification procedure, would have been sufficient, as such a view is not pertinent to the Panel's finding of violation.
[1273] Panel Report, *US – Clove Cigarettes*, para. 7.536.
[1274] Panel Report, *US – Clove Cigarettes*, paras. 7.535 and 7.540-7.541.
[1275] Indonesia's first written submission, para. 1013.
[1276] European Union's first written submission, para. 995.
[1277] Committee on Technical Barriers to Trade, Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4, G/TBT/26, paras. 39-40.

7.905. Indonesia's arguments largely mirror those made under Article 2.9.4, given that it is the draft Delegated Regulation that contained the proposed low ILUC-risk certification procedure.[1278] In particular, Indonesia argues that, having failed to notify the proposed conformity assessment procedure under Article 5.6.2, the European Union also failed to comply with the obligations under Article 5.6.4.[1279] Indonesia also argues that the informal feedback process for the proposed Delegated Regulation, by its timeframe and design was insufficient to discharge the European Union's obligations under Article 5.6.4. Given the timeframe of the feedback window and adoption of the Delegated Regulation, there was not enough time to read comments, identify Members' comments, consider whether there were any requests for a discussion, to hold discussions, or to take into account written comments between 9 and 12 March 2019. The European Union responds that in factual terms, no organization of a commenting procedure for the purposes of Article 5.6.4 has yet taken place.[1280]

7.906. The Panel agrees with Indonesia's argument that there was no meaningful commenting process as envisaged by Article 5.6.4. One month for feedback is short of the recommended minimum 60-day comment period, and four days to process comments or hold discussions is too short to give effect to the obligations under Article 5.6.4. On this basis, together with the European Union's statement that in factual terms, no organization of a commenting procedure for the purposes of Article 5.6.4 has yet taken place, the Panel considers that the European Union failed to comply with its obligations under Article 5.6.4.[1281]

7.1.3.5.7 Conclusion on Articles 5.6.1, 5.6.2 and 5.6.4

7.907. The Panel concludes that the European Union has acted inconsistently with Article 5.6.1 of the TBT Agreement by failing to publish a notice of the proposed low ILUC-risk certification procedure at an early appropriate stage in such a manner as to enable interested parties in Indonesia and other WTO Members to become acquainted with it.

7.908. The Panel concludes that the European Union has acted inconsistently with Article 5.6.2 of the TBT Agreement by failing to notify the proposed low ILUC-risk certification procedure.

7.909. The Panel concludes that the European Union has acted inconsistently with Article 5.6.4 of the TBT Agreement by having failed to organize a commenting process in respect of the proposed low ILUC-risk certification procedure in accordance with the requirements of that provision.

7.1.3.6 Article 5.8 – Publication of adopted conformity assessment procedures

7.1.3.6.1 Introduction

7.910. The Panel now turns to the claim under Article 5.8 of the TBT Agreement.

7.911. Indonesia submits[1282] that the European Union violates Article 5.8 by failing to promptly publish or otherwise make available the conformity assessment procedure for certifying oil palm crop-based biofuel as low ILUC risk. More specifically, Indonesia contends that, while some elements of the conformity assessment procedure have been published (i.e. Article 26 of RED II and Articles 4 to 6 of the Delegated Regulation), other elements (e.g. the detailed rules on low ILUC-risk certification in any anticipated implementing regulations) have not been published or made available within the meaning of Article 5.8.[1283] Indonesia also points to the European Union's factual concession that it has not yet adopted, published or made available, detailed implementing rules on low ILUC-risk certification, and notes that the low ILUC-risk certification requirement has been

[1278] On Article 5.6.4, see Indonesia's first written submission, paras. 1021-1028.
[1279] Indonesia's first written submission, para. 1021.
[1280] European Union's first written submission, para. 995.
[1281] The Panel also considers that its reasoning, that the obligation to notify in Article 2.9.2 is concerned with and impacts the obligation to provide for a commenting period under Article 2.9.4, applies *mutatis mutandis* in this context. In this respect, see also Panel Report, *India – Agricultural Products*, para. 7.795, where the panel referred to Annex B5(a), B5(b) and B5(d) to the SPS Agreement, which contain obligations similar to Articles 5.6.1, 5.6.2, and 5.6.4.
[1282] Indonesia's first written submission, paras. 1030-1049; second written submission, paras. 1011-1020.
[1283] Indonesia's first written submission, para. 1048.

effective from 10 June 2019.[1284] Indonesia consider that this absence of detail means it is not possible to design national or voluntary schemes, such that the conformity assessment procedure cannot be considered to be published as promptly as possible.[1285]

7.912. Indonesia makes this claim in the alternative, should the Panel reject its claim under Article 5.1.2 on the grounds that the European Union has already adopted all elements of the low ILUC-risk certification procedure, as Article 5.8 concerns the publication or making available of such a procedure.[1286]

7.913. The European Union submits[1287] that Indonesia has not established a violation of Article 5.8. More specifically, the European Union argues that low ILUC-risk certification cannot properly be characterized as a conformity assessment procedure and so was "not subject to the procedural requirements" under the TBT Agreement.[1288] For that reason, the European Union does not engage with Indonesia's submissions on the "nature and extent" of the obligations under Article 5.8, but also does not concede their validity.[1289] However, "in factual terms", the European Union "acknowledges that it has not yet published or made available" the low ILUC-risk certification procedure for the purposes of Article 5.8.[1290] The European Union also states that the measures complained of do not take effect "until December 2023" and that it has not adopted the detailed implementing rules, such that Indonesia's claims are "hypothetical and premature".[1291]

7.1.3.6.2 Legal standard

7.914. Article 5.8 sets forth the obligation that:

> Members shall ensure that all conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

7.915. Article 5.8 has not been interpreted or applied in prior cases. However, the obligation mirrors to some extent the more general obligation relating to the publication of trade regulations set out in Article X:1 of the GATT 1994, and there appears to be no fundamental disagreement between the parties on the elements of that standard as described below.[1292]

7.916. The language of Article 5.8 indicates the following elements must be present to establish a violation of Article 5.8:

a. the conformity assessment procedure at issue has been adopted; and

b. the conformity assessment procedure has not been "published promptly" or "otherwise made available", in "such a manner as to enable interested parties in other Members to become acquainted with them".

7.917. The Panel will elaborate further on the elements of the legal standard in Article 5.8 as necessary in the course of its assessment of the issues in dispute.

[1284] Indonesia's second written submission, paras. 1012, 1015 and 1018.
[1285] Indonesia's second written submission, para. 1018.
[1286] Indonesia's first written submission, paras. 1032 and 1039; second written submission, paras. 1014 and 1020.
[1287] European Union's first written submission, paras. 1000-1006.
[1288] European Union's first written submission, para. 1001.
[1289] European Union's first written submission, para. 1003.
[1290] European Union's first written submission, para. 1002.
[1291] European Union's first written submission, para. 1004.
[1292] Article 5.8 also mirrors to some extent the obligation in Annex B(1) of the SPS Agreement, which requires Members to ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them. See Appellate Body Report, *Korea – Radionuclides*, paras. 5.153-5.157.

7.1.3.6.3 Assessment by the Panel

7.918. The Panel has found above that Indonesia has established a violation of Article 5.1.2 on grounds that the low ILUC-risk certification procedure, as set out in Article 6 of the Delegated Regulation, lacks detailed rules allowing low ILUC-risk certification to take place.[1293]

7.919. The Panel notes that Indonesia does not take issue with the publication of elements of the low ILUC-risk certification procedure set out in Article 6 of the Delegated Regulation, and otherwise contained in RED II and the Delegated Regulation, but the elements yet to be adopted and contained e.g. in any implementing regulations.[1294] The Panel has already found that not all elements of the low ILUC-risk certification procedure have been adopted.[1295] On that basis, and in keeping with the fact that Indonesia's claim is made in the alternative to its claim under Article 5.1.2, the Panel does not make any findings with respect to Indonesia's claim under Article 5.8.

7.1.3.6.4 Conclusion on Article 5.8

7.920. The Panel concludes that it is unnecessary to rule on Indonesia's alternative claim that the European Union acted inconsistently with the obligation in Article 5.8 of the TBT Agreement to ensure that conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

7.1.4 Claims under Article 12 of the TBT Agreement

7.1.4.1 Introduction

7.921. Having addressed the claims under Article 2 and Article 5, the Panel now turns to Indonesia's claims under Article 12 of the TBT Agreement, entitled "Special and Differential Treatment of Developing Country Members". More specifically, Indonesia has raised claims under two provisions: Article 12.1 and Article 12.3.

7.922. The Panel notes that Article 12.1 requires a demonstration that the Member concerned has failed to provide the "differential and more favourable treatment" to developing country Members that is required under other provisions of Article 12, or through relevant provisions of other Articles of the TBT Agreement. Accordingly, the Panel first addresses the claim under Article 12.3, and then turns to Article 12.1 in light of its findings under Article 12.3.

7.1.4.2 Article 12.3 – Taking account of special needs

7.1.4.2.1 Introduction

7.923. Indonesia submits[1296] that the European Union violated Article 12.3 by failing to take into account the circumstances specific to developing countries[1297] when preparing the technical regulations and the conformity assessment procedure at issue. More specifically, Indonesia argues that it is a developing country Member, and that it has "special development, financial and trade needs" affected by the measures at issue. Indonesia argues that the European Union has failed to "take account of" those needs, in a manner that has resulted in unnecessary obstacles to exports from developing countries such as Indonesia.

[1293] See section 7.1.3.3 of this Report.
[1294] Indonesia's first written submission, paras. 1047-1048.
[1295] See section 7.1.3.3 of this Report.
[1296] Indonesia's first written submission, paras. 1050-1099; responses to the Panel's first set of questions, paras. 277-286; second written submission, paras. 1021-1048; responses to the Panel's second set of questions, paras. 209-238; and comments on the European Union's responses to the Panel's second set of questions, paras. 469-506.
[1297] Indonesia's first written submission, paras. 402 (last bullet), 1050, 1099, and 1431 (12th bullet); second written submission, paras. 435, 1021, and 1568 (12th bullet). The Panel understands Indonesia's references to the European Union's failure to take into account "the circumstances specific to developing countries" to be a paraphrasing of the terms of Article 12.3, which refer to the "special development, financial and trade needs of developing country Members".

7.924. The European Union submits[1298] that the Panel should reject Indonesia's claims under Article 12.3. More specifically, while the European Union does not dispute that Indonesia is a developing country Member or that it has "special development, financial and trade needs" in relation to palm oil, the European Union disputes that those needs are affected by the measures at issue. It further disputes that Indonesia has demonstrated that the European Union failed to "take account of" those special needs.

7.1.4.2.2 Legal standard

7.925. Article 12.3 sets forth the obligation that:

> Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

7.926. Article 12.3 has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.927. For the purposes of the present dispute, in order to establish a violation of Article 12.3, it must be established that the European Union is preparing, adopting or applying a technical regulation and conformity assessment procedure, and that the following three elements[1299] are satisfied:

a. Indonesia is a "developing country Member";

b. Indonesia has "special development, financial and trade needs" related to the measures at issue; and

c. the European Union has failed to "take account of" those needs.

7.928. The panels in *US – Clove Cigarettes* and *US – COOL* both considered the meaning and function of the final clause in Article 12.3 ("with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members"). Those panels concluded that this language merely serves the purpose of clarifying *how* and *why* the Member preparing or applying the technical regulation or conformity assessment procedure should "take account of" these special needs.[1300] As expressed by the panel in *US – COOL*, the final part of Article 12.3 "specifies the objective to be achieved by the obligation contained in the operational part".[1301]

7.929. In the present dispute, Indonesia and the European Union both agree that the focus under Article 12.3 is on whether a Member has failed to "take account of" the special development, financial, and trade needs of developing country Members.[1302] The Panel sees no reason to disagree, and considers that the final clause simply suggests that the failure to take account of the special development, financial and trade needs of developing country Members *may result* in that the specific measure at issue creates unnecessary obstacles to exports from developing country Members.[1303]

[1298] European Union's first written submission, paras. 1007-1030; responses to the Panel's first set of questions, paras. 458-463; second written submission, paras. 389-394; responses to the Panel's second set of questions, paras. 626-656; and comments on Indonesia's responses to the Panel's second set of questions, paras. 167-175.

[1299] See Panel Report, *US – Clove Cigarettes*, para. 7.620.

[1300] See Panel Reports, *US – Clove Cigarettes*, paras. 7.614-7.619; and *US – COOL*, paras. 7.754-7.766.

[1301] Panel Reports, *US – COOL*, para. 7.783.

[1302] Indonesia's first written submission, paras. 1071-1073; Indonesia's second written submission, para. 1032; and European Union's response to Panel question No. 98, paras. 458-460, and No. 218, paras. 651-652.

[1303] See Indonesia's response to Panel question No. 98, para. 281.

7.930. The Panel will elaborate further on the elements of the legal standard in Article 12.3 as necessary in the course of its assessment of the issues in dispute.

7.1.4.2.3 "developing country Members"

7.931. The obligation in Article 12.3 applies only in respect of the special development, financial, and trade needs of "developing country Members".

7.932. In *US – Clove Cigarettes*, the complaining Member (Indonesia) indicated that it was a developing country and noted that the World Bank classified it as a developing country and that its status as a developing country Member of the WTO was recognized in a previous panel proceeding. The panel considered these facts, together with the fact that the responding Member did not contest the point, to be "more than sufficient to conclude" that the complaining Member was a "developing country Member".[1304]

7.933. In this case, Indonesia identifies several bases for the conclusion that it is a developing country Member, including that: (a) according to the World Economic Situation and Prospects (WESP) dataset, it is considered to be a developing economy in the Asian region; (b) the United Nations Conference on Trade and Development (UNCTAD) lists it as a developing country; (c) its status as a developing country has never been contested in the framework of the WTO; and (d) previous panels have accepted that Indonesia is a developing country.[1305]

7.934. The European Union states that it does not challenge Indonesia's status as a developing country for the purpose of applying WTO law.[1306]

7.935. The Panel is of the view that the foregoing is more than sufficient to conclude that Indonesia is a "developing country Member", and accordingly finds that the first element under Article 12.3 is satisfied.

7.1.4.2.4 "special development, financial and trade needs"

7.936. The obligation in Article 12.3 applies only where there are "special development, financial and trade needs" of developing country Members.

7.937. The panel in *US – Clove Cigarettes* considered that "[w]hatever the exact meaning of the terms 'special development, financial and trade needs'", Indonesia had satisfied the requirement of being a developing country that had "'special development, financial and trade needs' affected by the ban on clove cigarettes".[1307] The panel reached that conclusion on the grounds that Indonesia had explained the importance of clove cigarettes to its economy and its people: clove cigarettes have been produced in Indonesia for over a century; approximately 6 million Indonesians were employed directly or indirectly in the manufacture of cigarettes and the growing of tobacco; and the cigarette industry, including clove, accounted for approximately 1.66% of Indonesia's total GDP.[1308] That panel added, after setting out the above considerations, that "[i]t is also not in dispute that, as a result of the ban, U.S. imports of clove cigarettes produced in Indonesia have declined from approximately $15 million in 2008 to zero in 2010."[1309]

7.938. In the present case, Indonesia submits that the challenged technical regulations and the conformity assessment procedure "have significant effects on"[1310] the development, financial and trade needs of Indonesia. Indonesia relies on data demonstrating the importance of its palm oil

[1304] Panel Report, *US – Clove Cigarettes*, paras. 7.621-7.624.
[1305] Indonesia's first written submission, para. 1056 (referring to Panel Reports, *US – Clove Cigarettes*, para. 7.624; *Indonesia – Autos*, paras. 14.157 and 14.169; United Nations, "World Economic Situation and Prospects 2020 Statistical annex," (United Nations, 2020), Table C "Developing economies by region", pp. 163 – 171,(Exhibit IDN-273); UNCTADSTAT, "Development status groups and composition: Developing economies", (Exhibit IDN-274)).
[1306] European Union's first written submission, para. 1012.
[1307] Panel Report, *US – Clove Cigarettes*, para. 7.628.
[1308] Panel Report, *US – Clove Cigarettes*, paras. 7.627-7.629.
[1309] Panel Report, *US – Clove Cigarettes*, paras. 7.627-7.629.
[1310] Indonesia's first written submission, para. 1060.

industry, and the importance of exports to the EU market, to substantiate this point.[1311] Among other things, Indonesia indicates that its palm oil industry employs as many as 8 million people, corresponding to around 4.4% of the country's working age population. It notes that the palm oil industry made up 1.5% of its GDP. It explains that smallholder plantations account for around 40% of its oil palm production area.

7.939. The European Union acknowledges Indonesia's detailed submissions concerning the importance of the palm oil sector to the Indonesian economy and indicates that it does not dispute that Indonesia produces and exports palm oil and that the cultivation of oil palm has an increasing impact on the agricultural sector. However, the European Union argues that Indonesia has not established that the effect of the measures in RED II would affect its "development, financial and trade needs", even were it accepted that they could affect the level of exports of palm oil-based biofuels to the European Union (*quod non*). In this connection, the European Union takes issue with certain of Indonesia's assertions regarding the anticipated effects of the measures at issue, noting that Indonesia itself argues that the market for palm oil is significant and exports are not solely to the European Union nor is palm oil exported exclusively for use to produce biofuels.

7.940. The Panel observes that Indonesia's submissions regarding the second element under Article 12.3 not only address its "special development, financial and trade needs" in respect of palm oil, but also argue that the challenged technical regulations and the conformity assessment procedures "have significant effects on" those needs. The Panel further notes that the European Union's arguments contesting this element appear to be directed not at the question of whether Indonesia has demonstrated that it has "special development, financial and trade needs" in respect of palm oil, which is something the European Union appears not to contest, but rather to the question of whether the measures at issue have significant *effects* on those needs.

7.941. The Panel recalls that in *US – Clove Cigarettes*, the second element of the legal test under Article 12.3 was formulated in terms calling for a demonstration that the complaining Member has special development, financial and trade needs "that are affected by the measures at issue".[1312] In the Panel's view, however, the relevant question at this juncture of the analysis under Article 12.3 is simply whether Indonesia has demonstrated that it has special development, financial and trade needs that are relevant from the perspective of the measures at issue. Such needs may be relevant from the perspective of the measures if, for example, those needs are linked to trade in one or more product(s) that are regulated by the measures at issue – and in that sense may be referred to as special needs affected by the measures at issue.[1313] In other words, the Panel considers that Article 12.3 simply requires that there be a nexus between the measures and the special development, financial and trade needs of developing country Members.

7.942. The Panel notes that the text of Article 12.3 does not call for an assessment of the trade effects of the challenged measures, or of whether, and if so how, the measures at issue otherwise impact the special needs of developing country Members identified. Indeed, in response to a question from the Panel, the European Union points out that neither Article 12.1 nor 12.3 contains the term "affect"[1314], and Indonesia argues that "the obligation under Article 12.3 applies to all technical regulations, standards and conformity assessment procedures to the extent they have or are *capable of having an effect* on the special needs of developing countries".[1315]

[1311] Indonesia's first written submission, paras. 1060-1068.

[1312] Panel Report, *US – Clove Cigarettes*, para. 7.620. (emphasis added)

[1313] Indeed, the panel in *US – Clove Cigarettes* appeared to focus its analysis of this element of the standard on whether the complaining Member in that case had established that it had "special development, financial and trade needs" in respect of the product at issue, not on whether, and if so how, the measure at issue affected those "needs". (See Panel Report, *US – Clove Cigarettes*, para. 7.620.) In *US – Clove Cigarettes*, the panel found that Indonesia had explained the importance of clove cigarettes to its economy and its people. (Panel Report, *US – Clove Cigarettes*, paras. 7.627-7.629.) The panel in *US – COOL* did not separately consider or address the issue of what Mexico's "special development, financial or trade needs" were. The panel in *US – Animals*, which addressed a similar provision in the SPS Agreement (Article 10.1), stated that "[w]ith regard to the phrase 'special needs of developing country Members', … the provision is written broadly so as to encompass both the needs of developing country Members generally, and the needs of a particular developing country Member". That panel considered that it "may be that a product is so central to the economy of a developing country that its special need could be precisely that the approval procedures need priority consideration". (Panel Report, *US – Animals*, paras. 7.692 and 7.702.)

[1314] European Union's response to Panel question No. 212, para. 635.

[1315] Indonesia's response to Panel question No. 212, para. 222.

7.943. The Panel considers that Indonesia's detailed submissions concerning the importance of the palm oil sector to the Indonesian economy make clear that it has "special development, financial and trade needs" related to trade in palm oil and palm oil-based biofuel. Panels in previous cases have proceeded on the premise that a measure may implicate the special needs of developing country Members insofar as the products affected are of particular export interest[1316] to one or more developing country Members.[1317] The Panel does not understand the European Union to argue otherwise, and the Panel sees no reason to disagree in light of the detailed explanations provided by Indonesia in its first written submission.

7.944. However, assuming *arguendo* that consideration of the extent to which the measures at issue have an effect on Indonesia's trade in palm oil and palm oil-based biofuel is germane to the assessment of whether Indonesia has demonstrated that it has relevant "special development, financial and trade needs" related to trade in palm oil and palm oil-based biofuel, the Panel finds that any such condition is also fulfilled. The Panel recalls its earlier findings in the context of its assessment of the claims under Articles 2.2, 2.1, 2.5 and 2.9. In those contexts, it found that: (a) the measures are "trade-restrictive" within the meaning of Article 2.2 on the grounds that they have, by design, a "limiting effect on trade" in crop-based biofuels (as regards the 7% maximum share) and palm oil-based biofuels (as regards the high ILUC-risk cap and phase-out); (b) that the high ILUC-risk cap and phase-out has a "detrimental impact" on imported palm oil-based biofuels for the purposes of Article 2.1; and (c) the 7% maximum share and the high ILUC-risk cap and phase-out are measures that may have a significant effect on the trade of other Members within the meaning of Articles 2.5 and 2.9.[1318]

7.945. The Panel finds that Indonesia has demonstrated that it has relevant "special development, financial and trade needs" related to trade in palm oil and palm oil-based biofuel.

7.1.4.2.5 "take account of"

7.946. The obligation in Article 12.3 is to "take account of" the special development, financial and trade needs of developing country Members.

7.947. In *US – Clove Cigarettes*, Indonesia argued that the United States disregarded its repeated concerns about the effect the US ban on flavoured cigarettes would have on Indonesia's trade and development. The panel explained that the evidence before it consisted of a series of letters between key figures in the Indonesian and US Governments. After reviewing these letters, the panel concluded that Indonesia was able to communicate its concerns to key figures in the US Government on multiple occasions, over a period of several years, and that Indonesia's concerns were subsequently raised on a number of occasions by key officials within the US Government. The panel concluded that the exchanges among key US officials referencing Indonesia's concerns showed that the United States "actively took account of" Indonesia's concerns.[1319]

7.948. In *US – COOL*, Mexico argued that the United States acted inconsistently with Article 12.3 by not having given Mexico an opportunity to comment on the preparation of the COOL measure, and by ignoring Mexico's comments and the impact that it knew the COOL measure would have on Mexican exports. The panel found that Mexico did not substantiate those assertions, and that in fact the United States actively reached out to discuss the development of the COOL measure with Mexico on several occasions in the context of stakeholder consultations. It also found that Mexico had

[1316] The Panel notes in this respect that, consistent with the notion that the focus is simply on products of trade *interest* and not on trade *effects*, Article 10.6 of the TBT Agreement states that the WTO Secretariat "shall, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Members […] and *draw the attention of developing country Members* to any notifications relating to *products of particular interest* to them." (emphasis added)

[1317] In *EC – Approval and Marketing of Biotech Products*, the panel's assessment under Article 10.1 of the SPS Agreement appeared to accept Argentina's argument that it had "special needs" by virtue of the fact that some of the products affected by the European Communities' general moratorium on approvals were "of particular export interest to Argentina as a major developing country". (Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1619.)

[1318] The Panel notes that in the context of these other claims, the European Union similarly argued that a decrease in EU biofuel demand for palm oil from Indonesia may be compensated by an increase in exports of palm oil or palm oil-based biofuels to other markets such as India or China and also exports to the European Union for uses other than biofuel production.

[1319] Panel Report, *US – Clove Cigarettes*, paras. 7.635-7.645.

submitted comments, and that US officials had indicated that such input would be taken into account. Furthermore, the panel found that the United States actually introduced certain modifications to certain elements of the COOL measure in response to concerns expressed by Mexico, namely by softening certain record-keeping requirements and by introducing the commingling flexibility in part in response to Mexico's comments. On that basis, the panel found that Mexico failed to establish that the United States did not "take account of" its special needs.[1320] Further, in *US – COOL*, the panel concluded that the obligation to "take account of" the special needs of developing country Members requires "active and meaningful consideration" of those needs.[1321]

7.949. In this case, Indonesia emphasizes that Article 12.3 requires active and meaningful consideration[1322] of the needs of developing country Members. Indonesia argues that the following establishes that the European Union did not take account of the special needs of developing country Members: (a) the European Union was well aware of Indonesia's special needs which were raised in multiple letters to EU institutions[1323]; (b) there is no mention of the needs of developing countries in the measures at issue or related documents (the explanatory memorandum to the initial proposal for RED II, RED II itself, the impact assessment for RED II, the Delegated Regulation, and the Status Report (2019))[1324], and the provisions on independent smallholders in the Delegated Regulation are inoperative and ineffective[1325]; and (c) the European Union failed to carry out an impact assessment when adopting the Delegated Regulation, contrary to EU law.[1326]

7.950. The European Union argues that the obligation to "take account of" the needs of developing country Members means "merely to give active and meaningful consideration".[1327] For the European Union, this means that this obligation is met if the developing country communicated its concerns, including in the context of a public consultation, and then if, in response, the regulating Member: (a) discussed these concerns, either internally or in exchanges or consultations with the developing country; or (b) responded to these concerns in the context of the measure's rule-making process.[1328]

7.951. With respect to the measures at issue in this case, and based on its articulation of what the obligation to "take account of" means, the European Union argues that: (a) it duly responded to the correspondence from Indonesia's officials on multiple occasions, and these exchanges (and the bilateral discussions they reference) are evidence that the concerns were taken into account[1329]; (b) while WTO case law does not impose an obligation of result or require that the respective Member must agree with or accept those needs[1330], a provision on smallholders was introduced in the Delegated Regulation[1331]; and (c) conducting an impact assessment for the Delegated Regulation would have reflected nothing more than the expression of a best practice for law-making procedures in the European Union, and in any event the impact assessment for RED II examined a number of relevant issues including impacts on third countries and describes the breadth and depth of the public consultation that preceded the proposal.[1332]

[1320] Panel Reports, *US – COOL*, paras. 7.789- 7.800.
[1321] Panel Reports, *US – COOL*, para. 7.786.
[1322] Indonesia's first written submission, para. 1074 (quoting Panel Reports, *US – COOL*, para. 7.786). See also Indonesia's second written submission, para. 1039 (referring to Indonesia's response to Panel question No. 99, para. 285.)
[1323] Indonesia's first written submission, paras. 1094-1098; second written submission, para. 1044.
[1324] Indonesia's first written submission, paras. 1087-1093; second written submission, para. 1043.
[1325] Indonesia's first written submission, para. 1093. See also Indonesia's second written submission, para. 1036; responses to Panel question Nos. 209 and 215; and comments on the European Union's responses to Panel question Nos. 216 and 217.
[1326] Indonesia's first written submission, paras. 1079-1086; second written submission, paras. 1041-1042.
[1327] European Union's comments on Indonesia's response to Panel question No. 214, para. 170.
[1328] European Union's first written submission, para. 1021; response to Panel question No. 99, para. 463; and second written submission, para. 390.
[1329] European Union's first written submission, para. 1021; second written submission, para. 392; and comments on Indonesia's response to Panel question No. 214, paras. 170-171.
[1330] European Union's first written submission, para. 1019; second written submission, para. 393.
[1331] European Union's response to Panel question No. 216; comments on Indonesia's response to Panel question No. 209, para. 169.
[1332] European Union's first written submission, paras. 1022-1028.

7.952. The Panel notes that the parties' arguments under Article 12.3 turn on the applicable legal and evidentiary standard for assessing whether the special development, financial and trade needs of developing country Members were "take[n] account of".

7.953. According to the European Union, *US – Clove Cigarettes* and *US – COOL* confirm its view that the obligation to "take account of" the needs of developing country Members means "merely to give active and meaningful consideration"[1333], and confirm the European Union's view that this standard is met if the developing country Member communicated its concerns, including in the context of a public consultation, and if the Member discussed these concerns, either internally or in exchanges or consultations with the developing country Member, or it responded to the concerns of the developing country Member in the context of the measure's rule-making process.[1334]

7.954. Indonesia submits that it "strongly disagrees" with the legal and evidentiary standard advanced by the European Union.[1335] While Indonesia refers[1336] to the statement made by the panel in *US – COOL* that there is no obligation on a WTO Member "to document specifically in their legislative process and rule-making process how they actively considered the special development, financial and trade needs of developing country Members", it argues that it is neither sufficient nor necessary to show that processes were organized to receive comments from developing country Members or that, in the abstract, impact studies and assessments were ordered and replies were written to letters from developing countries expressing their concerns. According to Indonesia, "[s]uch evidence says nothing about the substantive content of a respondent's active and meaningful engagement with the needs of developing country Members." Indonesia submits that "[e]vidence in rebuttal of a claim under Article 12.3 must make it possible to identify the special development, financial and trade needs that were considered and to ascertain the respondent's position in respect of the relevance and merits of those needs."[1337]

7.955. The Panel will make several related observations before turning to the facts of this case. First, two prior panels have ruled on claims under Article 12.3, i.e. *US – COOL* and *US – Clove Cigarettes*, and two other panels have ruled on claims under the parallel obligation in Article 10.1 of the SPS Agreement, namely *EC – Approval and Marketing of Biotech Products* and *US – Animals*. In each of those prior cases, the panels gave the terms "take account of" their ordinary meaning, which is to "consider along with other factors before reaching a decision"[1338], and considered that the obligation to "take account of" the special needs of developing country Members does not prescribe any particular result.[1339] All of these panels confirmed that the burden of proof is on a complaining Member to establish that the regulating Member did not take account of such needs.[1340]

7.956. Second, both parties agree that Article 12.3 requires "active and meaningful consideration" of the special needs of developing country Members, but they do not agree on what that legal and evidentiary standard entails. Both parties have presented arguments that merit careful consideration in this respect. With a view to ensuring a thorough and careful analysis of Indonesia's claim under Article 12.3, the Panel posed several questions to the parties inviting further elaboration of their views on the meaning and scope of the obligation. The Panel considers that the parties' arguments confirm that it may be difficult to identify precisely, in the abstract, a legal and evidentiary benchmark to assess whether the regulating Member complied with its obligation to "take account of" the special needs of developing country Members under Article 12.3.

7.957. Third, an assessment of whether a regulating Member has failed to "take account of" the special needs of developing country Members will generally require a panel to reach a conclusion

[1333] European Union's comments on Indonesia's response to Panel question No. 214, para. 170.
[1334] European Union's first written submission, para. 1021; response to Panel question No. 99, para. 463; and second written submission, para. 390.
[1335] Indonesia's comments on the European Union's response to Panel question No. 218, para. 496.
[1336] Indonesia's first written submission, para. 1076; second written submission, para. 283; and response to Panel question No. 99, para. 283 (all quoting Panel Reports, *US – COOL*, para. 7.787).
[1337] Indonesia's response to Panel question No. 99, paras. 283-286.
[1338] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1620; *US – Clove Cigarettes*, paras. 7.632-7.634; *US – COOL*, paras. 7.779-7.781; and *US – Animals*, para. 7.694.
[1339] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1620; *US – Clove Cigarettes*, paras. 7.632-7.634 and 7.646; *US – COOL*, paras. 7.776 and 7.781; and *US – Animals*, para. 7.694.
[1340] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1622; *US – Clove Cigarettes*, para. 7.634; and *US – Animals*, paras. 7.695-7.700.

based on circumstantial evidence and inferences, rather than direct evidence. By way of elaboration, requiring a complainant to adduce direct evidence – i.e. in the form of letters or other documents in which a regulating Member would expressly state that it refused to consider the needs of developing country Members when preparing a technical regulation – would entail a potentially insurmountable burden of proof.[1341] Previous panels have likewise been reluctant to impose on a regulating Member a duty to provide direct evidence – i.e. to document in their legislative process and rule-making process – of how they actively considered the special development, financial and trade needs of a developing country Member.[1342] The Panel considers that requiring such direct evidence of a regulating Member would not be consistent with the text of the obligation or with the normal allocation of the burden of proof, and disagrees with Indonesia insofar as its arguments imply that prior panels have been too undemanding in this respect.

7.958. Fourth, while there is nothing unusual about a panel making findings on the basis of inferences that are reasonably drawn from circumstantial rather than direct evidence[1343], the typical circumstances giving rise to a claim of inconsistency under Article 12.3, and the typical forms of circumstantial evidence available, make it difficult to conclusively eliminate opposing inferences that may be reasonably drawn from the same facts. When a regulating Member is made aware that a proposed technical regulation or conformity assessment procedure is apt to have an adverse impact on the special needs of developing country Members, and ultimately no modifications are made to the measure to avoid or substantially mitigate those impacts despite those concerns having been communicated, one inference that might be drawn is that the regulating Member did not take account of the special needs of developing country Members contrary to the requirements of Article 12.3. However, without more, it is equally plausible to draw the reasonable inference that the regulating Member did take account of those special needs, as required by Article 12.3, and simply decided to not make any such modification to the measure.

7.959. The Panel considers that in such circumstances, which may be expected to be the typical circumstances when claims of inconsistency under Article 12.3 are raised, a relevant consideration that must inform what inference should most reasonably be drawn is the nature of the modifications to the measure that the regulating Member would have had to introduce to accommodate the special needs of developing country Members. Where a regulating Member is made aware that a proposed technical regulation or conformity assessment procedure is apt to have an adverse impact on the special needs of developing country Members, and the regulating Member could modify the proposed measure to accommodate those concerns without undermining the measure's contribution to its objective or its chosen level of protection, then the absence of any such modifications may, all things being equal, strengthen the inference that those special needs were not taken into account. In

[1341] See e.g. Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1625; *US – Clove Cigarettes*, fn 1022; and *US – Animals*, para. 7.698.

[1342] See Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1621 ("[t]he fact that there is no indication that between June 1999 and August 2003 the European Communities accorded Argentina special and differential treatment – e.g. by approving the marketing of biotech products exported from Argentina – does not in and of itself constitute prima facie evidence that the European Communities has failed to 'take account' of Argentina's needs."); *US – COOL*, para. 7.787 (finding no requirement to "to document specifically in their legislative process and rule-making process how they actively considered the special development, financial and trade needs of developing country Members"); *US – Clove Cigarettes*, paras. 7.596-7.597 and 7.645 (finding that an exchange of letters showed that the United States "actively took account of" Indonesia's concerns and did not separately address Indonesia's argument that the US "cannot point to anywhere in the Act or its legislative history where the Congress even said the word 'developing country'"); and *US – Animals*, paras. 6.45-6.47, and 7.697-7.698 (rejecting Argentina's argument that compliance with the obligation to "consider" particular factors in the context of an injury determination requires an importing Member to document how it did so, and the same approach should be followed under Article 10.1 of the SPS Agreement. The panel rejected this argument, noting that the Anti-Dumping and SCM Agreements have very specific obligations with respect to publication and documentation of decisions and it was thus not appropriate to transplant that interpretation to the context of Article 10.1).

[1343] In *Canada – Aircraft*, the Appellate Body observed that "panels routinely draw inferences from the facts placed on the record. The inferences drawn may be inferences of fact: that is, from fact A and fact B, it is reasonable to infer the existence of fact C. […] The facts must, of course, rationally support the inferences made, but inferences may be drawn whether the facts already on the record deserve the qualification of a *prima facie* case. The drawing of inferences is, in other words, an inherent and unavoidable aspect of a panel's basic task of finding and characterizing the facts making up a dispute." (Appellate Body Report, *Canada – Aircraft*, para. 198.) In *US – Continued Zeroing*, the Appellate Body reiterated that "a panel may have a sufficient basis to reach an affirmative finding regarding a particular fact or claim on the basis of inferences that can be reasonably drawn from circumstantial rather than direct evidence." (Appellate Body Report, *US – Continued Zeroing*, para. 357.)

contrast, when it is not apparent how the regulating Member could modify the proposed measure to address those concerns without undermining the measure's contribution to its objective or its chosen level of protection, this would weaken the inference that the special needs were not taken into account, and suggest instead that "in weighing and balancing the various interests at stake,"[1344] the regulating Member decided to give priority to the competing objectives of the measures.[1345]

7.960. Turning to the facts of this case, in the various communications to EU officials that Indonesia refers the Panel to, its officials repeatedly communicated their view that the proposed EU measures relating to palm oil-based biofuels were fundamentally discriminatory and in violation of WTO obligations, and made clear that the desired outcome was for the European Union to not move forward with the proposed cap and phase-out of palm oil-based biofuels. It is not apparent how the European Union could have modified the proposed measures to address those concerns without the complete withdrawal of the measures at issue. The Panel notes its finding, in the context of Article 2.2, that none of the alternative measures proposed by Indonesia would have made an equivalent contribution to the objective of limiting ILUC-related GHG emissions associated with the production of biofuels from food and feed crops.

7.961. Insofar as the only clear way to have accommodated Indonesia's concerns would have entailed the complete withdrawal of the measures at issue, the absence of any modification of this kind does not imply that the European Union failed to take account of the special needs of developing country Members. It suggests instead that "in weighing and balancing the various interests at stake,"[1346] the European Union decided to give priority to the competing objectives of the measures.

7.962. This inference is only strengthened by the European Union's express acknowledgement of Indonesia's concerns on multiple occasions, in terms that suggest they were weighed and balanced against other interests. In its first written submission, Indonesia states that various letters of President Widodo and other senior members of the Indonesian Government prompted the following responses from several EU institutions[1347]:

a. On 27 February 2018, the High Representative and Vice President of the European Commission, Mrs Mogherini, wrote to the Minister for Foreign Affairs, Ms Retno Marsudi, and stated: "I appreciate your concerns, not least due to the importance of the palm oil sector in Indonesia including for the livelihoods of smallholders. Additionally, I am well aware of the essential role that this product plays in Indonesia's economy, and in reaching poverty reduction goals. The outcome of the vote in the European Parliament reflects the deep concerns of EU stakeholders on sustainability, in particular as regards deforestation caused by palm oil production."

b. On 20 March 2018, the President of the Council, Mr Tusk, wrote to President Widodo, that "the European Union is aware of the importance of the palm oil sector for the Indonesian economy and for the livelihood of many Indonesians, and is giving this due consideration. … I understand your concerns over an amendment by the European Parliament which proposes not to count palm oil based biofuels towards the EU's future renewable energy target. … In line with the proposal by the European Commission, any distinguishing of different types of conventional biofuels should be based, in the Council's view, on objective and transparent criteria to measure their environmentally sustainable production."

[1344] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1621; *US – COOL*, paras. 7.780-7.781; and *US – Animals*, para. 7.703.

[1345] Similarly, even in circumstances where the modification of a measure to accommodate the special needs of developing country Member could in principle be effected without undermining the objective of the measure, depending on the circumstances, such modification could result in *de facto* or *de jure* discrimination with respect to like products from Members other than those whose special needs were taken into account.

[1346] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1621; *US – COOL*, paras. 7.780-7.781; and *US – Animals*, para. 7.703.

[1347] Indonesia's first written submission, paras. 1096-1097 (referring to Letter, dated 27 February 2018, from High Representative and Vice President of the European Commission, Ms. Mogherini, to Ms. Retno Marsudi, (Exhibit IDN-283); Letter, dated 20 March 2018, from Council President Tusk to President Widodo (Exhibit IDN-285); Letter, dated 24 July 2018, from Commissioner Arias Cañete to President Widodo (Exhibit IDN-286); Letter, dated 4 June 2019, from Mr Donald Tusk and Mr. Jean-Claude Juncker to President Widodo and President bin Mohamad (Exhibit IDN-287); and Letter, dated 11 September 2019, from Commissioner Malmström to Minister Lukita (Exhibit IDN-288).)

c. On 24 July 2018, EU Commissioner Arias Cañete wrote to President Widodo, stating that: "We appreciate the importance of the palm oil sector as a source of growth and employment in producing countries, including for smallholders. At the same time, there are legitimate concerns on the possible negative implications of palm oil production, such as deforestation and biodiversity loss, as well as greenhouse gas emissions."

d. In a letter dated 4 June 2019, addressed to the Presidents of Indonesia and Malaysia, the (then) Presidents of the European Council and the European Commission stated: "We fully recognise the importance of palm oil for Indonesia and Malaysia as producing countries, in terms of economic growth, employment and development, including for smallholders. At the same time we also recognise as a key objective the enhancement of the sustainability of palm oil production to address legitimate concerns over the possible negative impacts of such production, for instance with regard to deforestation…".

e. Likewise, in a letter, dated 11 September 2019, addressed to Minister Lukita, EU Commissioner Malmström stated: "I am well aware that palm oil and palm oil related products such as biofuels are key export items for Indonesia and are hence given the highest attention I am equally aware that the Indonesian Government has strong reservations about [the measures]. We discussed this at our last encounter in the margins of the G20 Trade Ministers Meeting in Japan."

7.963. The Panel has also considered Indonesia's argument that there is no mention of the needs of developing countries in the measures at issue or related documents (the explanatory memorandum to the initial proposal for RED II, RED II itself, the impact assessment for RED II, the Delegated Regulation, and the Status Report (2019)), and that the provisions on independent smallholders in the Delegated Regulation are inoperative and ineffective.

7.964. The Panel does not consider that the absence of any reference to the special needs of developing country Members in the text of the measure *itself* would support an inference that the European Union did not take account of the special needs of developing country Members. The Panel recalls that in *EC – Approval and Marketing of Biotech* Products and *US - COOL*, the panels considered that:

> [T]he absence of a reference to developing country needs in the text of the EC approval legislation does not demonstrate that that legislation itself fails to take account of these needs, or that the European Communities is precluded from taking account, or has not taken account, of these needs when applying that legislation.[1348]

7.965. In any event, it appears that the smallholder pathway was introduced in the Delegated Regulation in light of the concerns raised during the legislative process. Many of the letters from EU officials quoted above expressly acknowledge the situation of smallholders. The Delegated Regulation states, in its Recital 15, that "it is appropriate not to apply the financial additionality criterion to the additional feedstock cultivated on abandoned or severely degraded land or by independent small farm holders. This would in fact amount to an unreasonable administrative burden in light of the significant potential for productivity improvements and the barriers faced to finance the necessary investments." The European Union explains that the smallholder pathway was introduced at least in part in light of concerns raised by developing countries.[1349]

7.966. The Panel is unable to agree with Indonesia's argument that the provisions on independent smallholders in the Delegated Regulation are inoperative and ineffective and, for that reason, cannot qualify as evidence that the European Union met its obligation to "take account of" the special needs of developing country Members with respect to the situation of independent smallholders. Rather, in the Panel's view, the inherently narrow scope of the smallholder pathway reasonably supports the inference that the European Union considered that administrative simplification for smallholders cannot come at the expense of jeopardizing the objective the measures seek to achieve.

[1348] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1623, cited in Panel Reports, *US – COOL*, paras. 7.787.

[1349] European Union's response to Panel question No. 216; comments on Indonesia's response to Panel question No. 209, para. 169.

7.967. Nor is the Panel persuaded by Indonesia's argument that the European Union's decision to not conduct an impact assessment for the Delegated Regulation is necessarily relevant to whether it complied with its obligation to "take account of" the special needs of developing country Members. Indonesia has not demonstrated that any such impact assessment would have been a central mechanism, let alone the exclusive mechanism, for the European Union to have taken account of the special development, financial and trade needs of developing country Members. Indeed, Indonesia argues that the impact assessment conducted for RED II and other related documents contains no mention of the comments received from developing countries and only vague references to impacts on third countries.[1350]

7.968. The Panel considers that the exchange of letters referred to above confirms that formal impact assessments for RED II and the Delegated Regulation were not, and would not have been, the exclusive mechanisms through which the European Union could have taken account of the concerns raised by Indonesia. The Panel notes that the parties have engaged in a robust exchange of arguments on the relevance or probative value of certain references to third countries contained in the impact assessment conducted for RED II and other related documents. In the absence of any argument that the impact assessment would have been the exclusive mechanism for the European Union to take account of the special needs of developing country Members, the Panel does not consider it necessary to consider them further.

7.969. The Panel has considered the relevance of the obligation in Article 2.9.4 of the TBT Agreement to the interpretation and application of the obligation in Article 12.3, and the parties have developed arguments on this issue in response to questions from the Panel. For reasons set out earlier in this Report, the Panel has concluded that the European Union acted inconsistently with the obligation in Article 2.9.4 to "allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account". The Panel considers that the scope of the obligation in Article 12.3 is different from the scope of the obligation in Article 2.9.4, and that it does not follow from its finding of inconsistency with Article 2.9.4 that Indonesia has demonstrated that the European Union acted inconsistently with its obligation to take account of the special needs of developing countries in the preparation of the technical regulations and the conformity assessment procedure at issue.

7.970. Before concluding, the Panel observes that although the obligation in Article 12.3 requires a regulating Member to take account of the special needs of developing countries in both the initial preparation and subsequent application of technical regulations and conformity assessment procedures, Indonesia's arguments under Article 12.3 are directed to the *preparation* of the measures at issue.[1351] In the absence of any arguments from Indonesia specifically directed at the European Union failing to take account of the special needs of developing countries in the *application* of the measures at issue, the Panel considers it appropriate to confine the scope of its assessment under Article 12.3 accordingly.

7.971. Based on its review of the evidence and the arguments of the parties, the Panel concludes that the more reasonable inference to be drawn from the facts is that the European Union gave active and meaningful consideration to the special needs of developing country Members identified by Indonesia and ultimately accorded more weight to the objective pursued through the measures at issue. The Panel therefore finds that Indonesia has failed to demonstrate that the European Union acted inconsistently with Article 12.3 by failing to take account of the special development, financial and trade needs of developing country Members in its preparation of the measures at issue.

7.1.4.3 Article 12.1 – General obligation

7.972. Article 12.1 sets forth the obligation that:

[1350] Indonesia's first written submission, para. 1091.

[1351] In response to a question from the Panel, Indonesia confirmed that "Indonesia's claim under Article 12.3 of the TBT Agreement focuses on the *preparation* of the technical regulations and the conformity assessment by the European Union. In this regard Indonesia submits that to find a violation of Article 12.3 it is sufficient for the Panel to find that the European Union did not take into account the special needs of developing countries, such as Indonesia, in the preparation of the technical regulations and the conformity assessment at issue." (Indonesia's response to Panel question No. 221, para. 238.) (emphasis original)

> Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.

7.973. It follows from the terms of Article 12.1 that a finding of inconsistency with that provision requires a demonstration that the Member concerned has failed to provide the differential and more favourable treatment to developing country Members that is required under other provisions of Article 12, or through relevant provisions of other articles of the TBT Agreement.[1352] Article 12.1 does not establish a self-standing or unqualified obligation to provide "differential and more favourable treatment to developing country Members". Rather, as the panel in *EC – Approval and Marketing of Biotech Products* stated, "Article 12.1 is relevant whenever there is a violation of one of the other provisions of Article 12, such as Articles 12.2, 12.3 or 12.7."[1353]

7.974. The Panel therefore shares Indonesia's understanding that Article 12.1 sets out a general obligation to provide differential and more favourable treatment to developing country Members, and "[t]his is to be done by complying with, notably, the obligations set out in Articles 12.2 to 12.10. Thus, where there is a violation of one those provisions of Article 12, the general obligation under Article 12.1 is also implicated."[1354]

7.1.4.4 Conclusion on Article 12

7.975. The Panel concludes that Indonesia has failed to establish that the European Union has acted inconsistently with Articles 12.3 or 12.1 of the TBT Agreement.

7.1.5 Claims under GATT 1994

7.1.5.1 Article XI:1 – Restrictions on importation

7.1.5.1.1 Introduction

7.976. Having addressed the claims under the TBT Agreement, the Panel now turns to the claims against the EU measures under the GATT 1994. The Panel addresses the claim under Article XI:1 first, and then proceeds to address the claims under Articles III:4, I:1, and X:3(a) of the GATT 1994, in that order, for reasons already set out in the Panel's discussion of its order of analysis.

7.977. Indonesia submits[1355] that the European Union violates Article XI:1 by imposing the high ILUC-risk cap and phase-out which makes effective quantitative prohibitions or restrictions on imports of palm oil. More specifically, as regards the relationship between Article XI:1 and Article III:4, Indonesia argues that an internal measure that puts into effect a prohibition or restriction on importation may be subject to Article XI:1, especially when the affected imported goods[1356] are not

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[1352] The TBT Agreement contains numerous provisions on special and differential treatment. While most such provisions are indeed contained in Article 12, there are various others providing for such treatment in the TBT Agreement. These include, for instance, Article 11 (several provisions on technical assistance), Articles 2.12 and 5.9 (special attention to producers in developing countries when allowing a "reasonable interval" between the publication and entry into effect of technical regulations or conformity assessment procedures) or Article 15.4 (TBT Agreement Triennial Reviews, or any amendments to the Agreement, should be undertaken without prejudice to the provisions of Article 12).

[1353] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.47, subpara. 77. In *US – COOL*, which is the only prior dispute to involve a finding under Article 12.1, Mexico submitted a consequential claim of violation under Article 12.1, arguing that the challenged measure's inconsistency with Article 12.3 also resulted in its inconsistency with Article 12.1. After rejecting Mexico's claim under Article 12.3, the panel rejected Mexico's consequential claim under Article 12.1. (Panel Reports, *US – COOL*, paras. 7.744 and 7.802-803.)

[1354] Indonesia's first written submission, para. 1052. In response to a question from the Panel, Indonesia adds that "[w]hether or not there exist circumstances in which no further subparagraph or other provision of the TBT Agreement is breached but nonetheless there could be a violation of Article 12.1 does not arise in the present case." (Indonesia's response to Panel question No. 207, para. 212.)

[1355] Indonesia's first written submission, paras. 1101-1133; responses to the Panel's first set of questions, paras. 287-298; and second written submission, paras. 1050-1084.

[1356] Indonesia submits that the measure that has a detrimental impact on competitive opportunities for imported products may, at the same time, also result in a limiting effect on importation of a different product, e.g. an input, which is not and cannot be produced domestically and thus is exclusively imported into the regulating Member. (Indonesia's second written submission, paras. 1058-1066.)

and cannot be domestically produced. Indonesia further argues that it does not challenge the same aspect of the measure under both Articles XI:1 and III:4, as the challenge under the former is in respect of palm oil, whereas the challenge under the latter is in respect of palm oil-based biofuel. In terms of the measure's limiting effects on trade, Indonesia refers to its arguments under Article 2.2 of the TBT Agreement.

7.978. The European Union submits[1357] that only measures that directly affect importation itself fall within the scope of Article XI and that Indonesia has not demonstrated that this is the case here. The European Union submits that Indonesia, for the purposes of this claim, has simply recast the same arguments and factual circumstances it has put forward under Article III, and has neither challenged different aspects of the measure nor shown specific circumstances that would warrant the application of both Article XI:1 and Article III:4. For the European Union, any hypothetical effects on importation are the consequence of a purely internal event, i.e. a supposed decrease in domestic demand for that product. Furthermore, the European Union points out that palm oil is imported for different purposes and that importation is not restricted in any way.

7.1.5.1.2 Legal standard

7.979. Article XI is entitled "General Elimination of Quantitative Restrictions". Article XI:1 sets forth the obligation that:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member.

7.980. Article XI:1 thus requires that Members do not institute or maintain "prohibitions or restrictions … on the importation" of any product in their territory. Article XI:1 has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.981. In fact, these understandings differ widely and lie at the heart of Indonesia's claim. The Panel will therefore elaborate further on this below.

7.1.5.1.3 Assessment by the Panel

7.982. The high ILUC-risk cap and phase-out is, as is clear from the Panel's assessment of Indonesia's claims under Articles 2.1 and 2.2 of the TBT Agreement, a measure that has trade-restrictive effects. The Panel recalls its finding under Article 2.2, that the high ILUC-risk cap and phase-out is a measure that, by design, has a "limiting effect on trade" in palm oil-based biofuel. In the context of Article 2.1, the Panel found that this measure has a detrimental impact on imported palm oil-based biofuel as compared to the group of domestic like products.[1358]

7.983. The parties' disagreement essentially turns on whether these trade-restrictive effects suffice to bring the measure under Article XI:1. In this regard the parties have different understandings of the terms "restrictions … on the importation" in Article XI:1. For Indonesia, these terms refer to "limiting effects on importation" and therefore bring within the scope of Article XI any measure that may have such effects. For the European Union, these terms qualify the measures falling within the scope of Article XI as those directly limiting importation itself.

7.984. The Panel also understands the parties to disagree about the relationship between Article XI:1 and Article III:4. The Third parties have also offered different views on this issue. The Panel considers that this relationship becomes relevant only if a measure appears to fall within the scope

[1357] European Union's first written submission, paras. 1031-1077; responses to the Panel's first set of questions, paras. 465-480; second written submission, paras. 399-425; and opening statement at the second meeting of the Panel, paras. 136-151.

[1358] The Panel notes that it reaches a similar finding further below, in the context of assessing the claims under Articles III:4 and I:1, in respect of both palm oi-based biofuel and palm oil.

of both provisions. In other words, that relationship only matters where both provisions appear to apply to the same measure based on their respective terms.[1359]

7.985. The first question for the Panel is therefore whether the high ILUC-risk cap and phase-out falls within the scope of Article XI:1. This, in turn, is linked to the interpretation of the terms "restrictions… on the importation" in Article XI:1. Several factors support the European Union's interpretation that the terms "restrictions on the importation" qualify the measures falling within the scope of Article XI as being those directly limiting importation itself. First, the Panel observes that Article XI:1 refers to "restrictions … *on* the *importation*" of any product. The ordinary meaning of the term "on" ("with regard to", "in connection with" or "in relation to"[1360]) suggests that the obligation in Article XI:1 is not meant to cover restrictions merely *affecting* the importation of products. Similarly, the ordinary meaning of the term "importation" ("the action or practice of importing a commodity, merchandise, goods, etc."[1361]) suggests that the obligation in Article XI:1 is not meant to cover any restrictions on (let alone those *merely affecting*) for instance, "products imported from the territory of" another Member. The object of the obligation in Article XI:1 is the action of importing a good.

7.986. Second, the Panel considers that this interpretation is supported by analysing the term "restriction" in the context of Article XI:1. As noted by prior panels and the Appellate Body, "restriction" means "something that restricts a person or thing; a limitation on action; a limiting condition or regulation".[1362] This definition describes an act ("limitation" "condition", "regulation") (as distinct from an effect) and, therefore, a measure. This reading is confirmed by the phrase "other than duties, taxes or other charges". As Indonesia rightly points out, these are the only measures expressly identified as not covered by Article XI:1 which makes for a broad scope of the "restrictions" that are covered by Article XI:1.[1363] However, it also confirms that restrictions are measures, just as these duties, taxes and other charges are. Finally, it is "restrictions", together with "prohibitions", that "shall [not] be instituted or maintained". This phrase, by its two verbs in passive form, also denotes an act rather than the result or effect of such act.[1364] The term "restriction", therefore, clearly designates a measure.

7.987. This said, the above definition of the term "restriction" not only describes an act ("condition", "regulation") but also qualifies that act as one that is "limiting". The Appellate Body therefore concluded that "restriction" has to be understood "generally, as something that has a limiting

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[1359] The Panel understands Japan to hold a similar view when stating the following:

> [W]hether a measure falls within the scope of a particular provision of the GATT 1994 should be primarily determined through interpretation of the text of that provision in the context of the facts presented in a particular dispute.
>
> There may be instances in which the plain reading of the language of respective articles appears to suggest that the scope of application of two or more articles overlaps. In some of these instances, it might become necessary, as required in settling a specific dispute, to contemplate on the exclusivity of application of these articles in order to avoid contradictory consequences.

(Japan's third-party response to Panel question No. 3, para. 7. Other third parties also highlight the difference in scope between Article XI and Article III. See Brazil's third-party response to Panel question No. 3, para. 11; Colombia's third-party response to Panel question No. 3.)

[1360] Panel Reports, *India -Autos*, paras. 7.257, 7.261; *Colombia – Ports of Entry*, para. 7.227; and *Brazil – Retreaded Tyres*, para. 7.371.

[1361] More specifically, the relevant definition reads in full "The action or practice of importing a commodity, merchandise, goods, etc., from another country or territory for use or resale in the domestic market; an instance of this." (Oxford English Dictionary online, definition of "importation" (https://www.oed.com/dictionary/importation_n?tab=meaning_and_use#875896) (accessed on 21 September 2023).)

[1362] Appellate Body Reports, *China – Raw* Materials, para. 319; and *China – Rare Earths*, para. 5.91, see also Oxford English Dictionary online, definition of "restriction" (https://www.oed.com/dictionary/restriction_n?tab=meaning_and_use#25718816) (accessed on 21 September 2023).

[1363] Indonesia's first written submission, paras. 1105-1106.

[1364] "Institute" means "to set up, establish, found, ordain; to introduce, bring into use or practice", see Oxford English Dictionary online, definition of "institute" (https://www.oed.com/dictionary/institute_v?tab=meaning_and_use#382143) (accessed on 21 September 2023); "maintain" means " to uphold, back up, stand by", see Oxford English Dictionary online, definition of "maintain" (https://www.oed.com/dictionary/maintain_v?tab=meaning_and_use#38643862) (accessed on 21 September 2023).

effect".[1365] The term "restriction" thus not only designates a measure, but it also qualifies that measure by describing its effect. Like past panels and the parties in this proceeding, this Panel has a broad understanding of what such limiting effects may be and how they can be demonstrated.[1366] Indeed, the Panel does not see a material difference between demonstrating such limiting effects in Article XI and demonstrating trade-restrictiveness, e.g. under Article 2.2 of the TBT Agreement. However, and importantly, the Panel considers that any such limiting effects only become relevant, if and where the measure at issue has been shown to be a measure "on the importation" of a product.

7.988. Thus, the Panel considers that the term "restriction" contains two different elements that must be established, for a measure to fall within the scope of Article XI:1: there must be a *measure* "on" importation, and that measure must have *limiting effects* on the importation of one or more products. Indeed, a measure may well regulate importation without having any limiting effect[1367] and there may well be limiting effects on trade without there being any measure "on" importation.[1368] In either case, there is no "restriction … on the importation" within the meaning of Article XI:1.

7.989. Indonesia advances several arguments in support of its view that the terms "restrictions … on the importation" may be interpreted as referring to a measure's limiting effects only. For Indonesia, the measure causing them does not need to be related to importation and may well be an internal measure, such as in this case. Indonesia submits that "the phrase 'whether made effective through quotas, import or export licences or other measures' makes clear that the 'prohibitions or restrictions' that are the subject of the obligation under Article XI:1 can either overlap or be separate from the measures that impose them or make them operative".[1369] Furthermore, Indonesia contends that the terms "on the importation" is a "condition [that] qualifies the prohibition or restriction and *not* the measures through which they are made operative."[1370] Finally, Indonesia, sees its reading as supported by the French and Spanish language versions of Article XI:1, which translate the above phrase ("whether made effective through…") as "*que l'application en soit faite au moyen de contingents, de licences d'importation ou d'exportation ou de tout autre procédé*" and "*ya sean aplicadas mediante contingentes, licencias de importación o de exportación, o por medio de otras medidas*" respectively.[1371]

7.990. The Panel is not persuaded by this reasoning. The above phrase ("whether made effective through quotas….") does not indicate that there is a restriction on the one hand and a measure "imposing" or "making it operative", on the other. The term "made effective", as the Appellate Body explained, "describes measures brought into operation, adopted, or applied".[1372] This reading makes clear that the restriction *itself* is the measure that is brought into operation, adopted, or applied. The term "made effective" is then followed by the preposition "through", the meaning of which is

[1365] Appellate Body Reports, *China – Raw* Materials, para. 319; and *China – Rare Earths*, para. 5.91, fn 548.

[1366] As summarized by the panel in *Colombia – Ports of Entry*:

> Thus, as evidenced above, a number of GATT and WTO panels have recognized the applicability of Article XI:1 to measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly, all of which have implications on the competitive situation of an importer. Moreover, it appears that findings in each of these cases were based on the design of the measure and its potential to adversely affect importation, as opposed to a standalone analysis of the actual impact of the measure on trade flows.

(Panel Report, *Colombia – Ports of Entry*, para. 7.240.)

[1367] See for example the Appellate Body's discussion on import formalities and requirements within the meaning of Article VIII of the GATT 1994 in *Argentina – Import Measures*:

> In our view, not every burden associated with an import formality or requirement will entail inconsistency with Article XI:1 of the GATT 1994. Instead, only those that have a limiting effect on the importation of products will do so.

(Ibid., para. 5.243.)

[1368] The Panel notes that the measure at issue in *Australia – Plain Packaging* may serve as an example. It was found to have trade-restrictive effects within the meaning of Article 2.2. However, the complainants did not challenge the measure under Article XI:1. (Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1255.)

[1369] Indonesia's first written submission, para. 1109.

[1370] Indonesia's first written submission, para.1110; second written submission, para. 1063; and response to Panel question No. 100, para. 293.

[1371] Indonesia's response to Panel question No. 100, para. 293.

[1372] Appellate Body Reports, *China – Raw Materials*, para. 356; and *China – Rare Earths*, para. 5.92.

"by means of".[1373] What follows is a specific reference to certain types of measures ("quotas, import or export licences") and a broad reference to "other measures". These measures, therefore, describe the "means" through which the restriction is applied. In other words, the restriction takes the form of one of these measures which may be any form (other than duties, taxes or other charges which, as discussed above, are excluded from the scope of Article XI:1).[1374] This reading is confirmed by the French and Spanish versions which rely on wording similar to "applied" ("*application*" and "*aplicadas*") and convey the same meaning as "by means of" through the terms "*au moyen de*" and "*mediante*". Indonesia has not explained how these terms support its own reading.

7.991. The Panel also finds confirmation in prior cases, that the terms "restrictions … on the importation" require that a *measure* applies on or in relation to the action of importation, in addition to having trade-limiting effects. These cases include those that Indonesia refers to as supporting its own interpretation. The measures at issue in these cases, which were found to fall within the scope of Article XI:1, all concerned measures in relation to the action of importation. Some of these measures were directly related to the process of importation itself in that they were linked to or part of a licensing process.[1375] Other measures concerned the action of importing in a more direct, physical sense.[1376] Some past cases concerned *de jure* measures, while others concerned *de facto* measures, such as the measure considered (but not found to be in violation) in *Argentina – Hides and Leather,* which provided for the presence of representatives of the domestic tanning industry in the process of exportation of hides and leathers.[1377] Finally, in some cases, panels have had to explore whether the measure at issue concerned the action of "importation" itself rather than an already imported product. In *Brazil – Retreaded Tyres*, for example, the panel decided that certain fines (including fines on marketing and transport), because they served the purposes of penalizing the act of importing and thus enforced an import ban, were restrictions on "importation".[1378]

7.992. Turning to the facts of this case, the Panel observes that, based on its understanding that Article XI:1 merely requires the showing of limiting effects on importation, Indonesia has not demonstrated that the measure is applied on or in relation to importation. In fact, the evidence

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[1373] Oxford English Dictionary online, definition of "through" (https://www.oed.com/dictionary/through_prep?tab=meaning_and_use#18684474)(accessed on 21 September 2023).

[1374] See also the GATT panel in *Japan – Semi-Conductors*, which noted that Article XI:

> […] applied to all measures instituted or maintained by a contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures that *take the form* of duties, taxes or other charges. [emphasis added]
>
> (GATT Panel Report, *Japan – Semi-Conductors*, para. 104.)

[1375] For example, in *India – Autos* a trade balancing condition contained in a Memorandum of Understanding that manufacturers of automobiles were required to sign in order to obtain an import licence, directly determined the amount of imports allowed into the country. (Panel Report, *India – Autos*, paras. 2.4-2.5.) Similarly, in *Argentina – Import Measures*, companies were not allowed to import unless they achieved a trade balance or an export surplus through a limited number of specific actions. (Panel Report, *Argentina – Import Measures*, para. 6.121.) Other cases involving similar import licensing measures include *India – Quantitative Restrictions* (import licensing and other measures); *Indonesia – Import Licensing Regimes* (import licensing); *Indonesia – Chicken* (import licensing); *China – Raw Materials* (export licensing); *Colombia – Textiles (Article 21. 5 – Panama)* (specific bond requirement).

[1376] For example, in *Colombia – Ports of Entry* the measures at issue concerned physical access to certain ports of entry. (Panel Report, *Colombia – Ports of Entry*, paras. 7.219-7.223.) Another example is the dispute *EU – Energy Package* where the panel considered certain restrictions on services for gas pipelines to be in the nature of restrictions on importation. The panel argued as follows:

> We consider that due to the fixed nature of pipeline infrastructure and the necessity for natural gas transported by pipeline to flow along predetermined paths and to be imported through a limited number of fixed entry points, an arrangement conditioning access to the transport capacity of such fixed infrastructure with a demonstrable and sufficiently direct link to an entry point for that product into the market of the importing Member may have an effect on the importation of the product in question. *(*Panel Report, *EU – Energy Package*, para. 7.994)

[1377] Panel Report, *Argentina – Hides and Leather*, para. 11.22.

[1378] Panel Report, *Brazil – Retreaded Tyres*, para. 7.372. Other cases that can be said to belong in this category are those concerning state trading enterprises. In *Korea – Various Measures on Beef*, the panel stated that:

> Based on the panel findings in the Canada - Marketing Agencies (1988) case, the Panel considers that to the extent that LPMO fully controls both the importation and distribution of its 30 per cent share of Korean beef quota, the distinction normally made in the GATT between restrictions affecting the importation of products (i.e. border measures) and restrictions affecting imported products (i.e. internal measures) loses much of its significance. (Panel Report, *Korea – Various Measures on Beef*, para. 766.)

before the Panel shows that the high ILUC-risk cap and phase-out is not applied on or in relation to importation, but rather in relation to renewable energy targets that EU member States are required to reach in their consumption, regardless of the origin of the various types of fuel they consume. Indonesia's argument that Article XI:1 must apply in cases where the affected imported goods are not and cannot be domestically produced, is therefore inapposite.[1379] Even in such a factual situation[1380], the measure at issue would still have to be shown to be one that is applied on or in relation to importation, in addition to having trade-limiting effects. The same holds true for Indonesia's argument that the effects on palm oil itself, rather than on biofuel, constitute a separate aspect of the measure that is challengeable under Article XI:1.[1381] In other words, Indonesia would still be required to show that the measure at issue is applied on or in relation to importation, and has a trade-limiting effect. Indonesia has therefore failed to demonstrate that there is a "restriction … on the importation" within the meaning of Article XI:1.

7.993. The Panel recalls that it must first consider whether a measure falls within the scope of both Article XI:1 and Article III:4, before addressing any questions as to the relationship between these two provisions. As Indonesia has not demonstrated that the high ILUC-risk cap and phase-out falls within the scope of Article XI:1, the Panel does not go on to consider the relationship between Article XI:1 and Article III:4.

7.1.5.1.4 Conclusion on Article XI:1

7.994. The Panel concludes that Indonesia has not established that the high ILUC-risk cap and phase-out is inconsistent with the obligation in Article XI:1 of the GATT 1994 to not institute or maintain any prohibitions or restrictions on the importation of any product of the territory of another Member.

7.1.5.2 Article III:4 – National treatment

7.1.5.2.1 Introduction

7.995. The Panel now turns to the claim under Article III:4 of the GATT 1994.

7.996. Indonesia submits[1382] that the European Union violates Article III:4 of the GATT 1994 because the high ILUC-risk cap and phase-out discriminates between palm oil and palm oil-based biofuel originating in Indonesia on the one hand and like products of EU origin on the other hand. More specifically, Indonesia argues that the measure at issue is a law, regulation or a requirement falling within the scope of Article III:4 that caps and ultimately phases-out the eligibility of palm oil-based biofuels for counting towards EU renewable energy targets. Indonesia contends that because there is essentially no market for biofuels that are not eligible to count towards the EU renewable energy targets, the measure limits and eventually eliminates the competitive opportunities for palm oil-based biofuel on the EU market, as compared to rapeseed oil- and soybean oil-based biofuel, which remain eligible. According to Indonesia, this in turn limits and eliminates the demand for palm oil on the EU market for biofuel feedstocks, which is not the case for rapeseed oil or soybean oil.

7.997. The European Union contests[1383] that the high ILUC-risk cap and phase-out falls within the scope of Article III:4 and that it discriminates against palm oil-based biofuel and/or palm oil. More specifically, the European Union disputes the characterization of the measure essentially as a market access condition and submits that Indonesia has failed to discharge the burden of proof that the measure affects the internal sale of a product. According to the European Union, Indonesia has not demonstrated the causal link between the eligibility to count towards the renewable energy targets

[1379] Indonesia's first written submission, para. 1115; second written submission, para. 1051.

[1380] As the European Union rightly points out, the measure at issue applies to biofuels, and therefore, to a good, that is also produced domestically. See European Union's first written submission, paras. 1072-1074.

[1381] Indonesia's second written submission, para. 1071.

[1382] Indonesia's first written submission, paras. 1173-1196; opening statement at the first meeting of the Panel, paras. 38-73; responses to the Panel's first set of questions, paras. 103-135 and 144-159; second written submission, paras. 1148-1175; responses to the Panel's second set of questions, paras. 68-100; and comments on the European Union's responses to the Panel's second set of questions, paras. 299-350.

[1383] European Union's responses to the Panel's first set of questions, paras. 215-282 and 288-319; opening statement at the second meeting of the Panel, paras. 38-48; responses to the Panel's second set of questions, paras. 349-403; and comments on Indonesia's responses to the Panel's second set of questions, paras. 104-122.

and market access for palm oil and palm oil-based biofuel. The European Union further argues that Indonesia has unduly limited the less favourable treatment analysis to a few selected like products and that the measure treats palm oil and palm oil-based biofuel in the same manner irrespective of where it is produced.

7.998. In their arguments, both parties thus raise a number of issues that are the same or similar to those addressed in the section concerning Indonesia's claim under Article 2.1 of the TBT Agreement. More specifically, the parties refer back to or repeat the arguments they make with respect to the like products and national treatment components of the analysis under Article 2.1. Where relevant, the Panel thus relies on and refers back to the findings it has already made with respect to that claim.

7.1.5.2.2 Legal standard

7.999. Article III of the GATT 1994 is entitled "National Treatment on Internal Taxation and Regulation". Article III:4 sets forth the obligation that:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

7.1000. Article III:4 has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.1001. Based on the text of the provision, panels and the Appellate Body have explained the three elements of a violation of Article III:4 as follows[1384]:

a. the imported and domestic products at issue are "like products";

b. the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and

c. the imported products are accorded "less favourable" treatment than that accorded to like domestic products.

7.1002. The Panel will elaborate further on the elements of the legal standard in Article III:4 as necessary in the course of its assessment of the issues in dispute.

7.1003. The Panel notes that Indonesia makes its claim under Article III:4 with respect to the treatment of both palm oil-based biofuel and palm oil used as biofuel feedstock. The Panel will therefore first address the parties' arguments with respect to each of these two types of products in turn.

7.1.5.2.3 Palm oil-, rapeseed oil-, and soybean oil-based biofuels

7.1.5.2.3.1 Like products

7.1004. The Panel recognizes that the scope of the non-discrimination obligation in Article III:4 and in Article 2.1 of the TBT Agreement is different; while the national treatment obligation features in both provisions, the MFN obligation is contained only in the latter. The Panel is also mindful that the very concept of like products is not identical across different provisions of WTO agreements.[1385]

[1384] Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.
[1385] Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 21; and *EC – Seal Products*, para. 5.81.

These differences notwithstanding, panels and the Appellate Body have highlighted important parallels that exist between the non-discrimination obligations contained in Articles 2.1 and III:4.[1386]

7.1005. In particular, the likeness analysis in each of these provisions is "fundamentally, a determination about the nature and extent of a competitive relationship between and among products".[1387] To that end, and similarly to the assessment under Article 2.1, panels and the Appellate Body have regarded the four likeness criteria outlined in the Working Party Report on Border Tax Adjustments as a helpful analytical tool in determining whether products are like for the purposes of Article III.[1388] Therefore, in assessing whether the imported and domestic products are like, the Panel will rely on the general principles set out in the Panel's findings under Article 2.1, unless further considerations follow from the nature of the obligation in Article III:4 or the relevant factual circumstances.

7.1006. With respect to biofuels, Indonesia refers back to the arguments and evidence submitted in support of the claim under Article 2.1 of the TBT Agreement.[1389] The European Union, for its part, reiterates that by failing to properly identify the universe of like products, Indonesia has failed to make the case that the products are like[1390] and otherwise refers back to the arguments concerning the likeness of palm oil-, rapeseed oil- and soybean oil-based biofuel under Article 2.1.[1391]

7.1007. Given the overlap in the arguments the parties make with respect to the likeness of palm oil-, rapeseed oil-, and soybean oil-based biofuel, the Panel does not see anything that would lead it, in the circumstances of this case, to a different conclusion about the likeness of these three products than that reached under Article 2.1 of the TBT Agreement. Therefore, on the basis of the findings made in the context of Article 2.1 above, the Panel concludes that, for the purposes of its analysis under Article III:4, palm oil-, rapeseed oil- and soybean oil-based biofuels are like products.

7.1.5.2.3.2 The scope of application of Article III:4

7.1008. Indonesia submits that the high ILUC-risk cap and phase-out is a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of palm oil-based biofuel.[1392] Indonesia relies on its arguments concerning the impact of the high ILUC-risk cap and phase-out on market opportunities for palm oil-based biofuel and argues that Article III:4 covers not only mandatory measures, but also those that create incentives or disincentives with regard to the sale, offering for sale, purchase and use of a product.[1393]

7.1009. The European Union does not dispute that the measure is a law or a regulation.[1394] However, it contests that the high ILUC-risk cap and phase-out "affects" internal sales, offering for sale of products, as it does not impose market access conditions.[1395]

7.1010. The Panel recalls that the term "affecting" in Article III:4 has been found to express a link between certain types of government actions and "specific transactions, activities and uses relating to products in the marketplace".[1396] It has also been interpreted broadly, extending beyond the meaning of "regulating" or "governing" sales or offering for sale of products.[1397] Accordingly, Article III:4 covers not only laws and regulation which directly govern the conditions of sale or purchase but also those which might adversely modify the conditions of competition between domestic and

[1386] Appellate Body Reports, *EC – Seal Products*, para. 5.82 and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.278.
[1387] Appellate Body Report, *EC – Asbestos*, para. 99.
[1388] Appellate Body Report, *EC – Asbestos*, para. 101.
[1389] Indonesia's first written submission, para. 1178; second written submission, paras. 1156-1157.
[1390] European Union's first written submission, paras. 1163-1167.
[1391] European Union's first written submission, para. 1165. In addition to disputing the scope of like products, the European Union argues that Indonesia ignores the differences between the legal tests in Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement. European Union's first written submission, paras. 1166-1167; and response to Panel question No. 59, paras. 291-293.
[1392] Indonesia's first written submission, paras. 1180-1184; second written submission, paras. 1162-1166.
[1393] Indonesia's first written submission, paras. 1181 and 1184.
[1394] European Union's first written submission, para. 1157.
[1395] European Union's first written submission, para. 1159.
[1396] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 208.
[1397] Appellate Body Report, *EC – Bananas III*, para. 220. (fn omitted)

imported products.[1398] To that end, the effects of a measure on those who sell, purchase, transport, distribute, or use the products are not beyond scrutiny under Article III:4.[1399] Applying these principles, past panels found governmental measures providing incentives to purchase or offer for sale certain products over others to fall within the ambit of Article III:4.[1400]

7.1011. Article 26(2) of RED II does not impose an exact fuel mix on EU member States or fuel producers. However, it specifically limits and gradually excludes from consideration for the purposes of meeting the renewable energy targets those biofuels that are made from high ILUC-risk feedstocks. All EU member States thus must take the high ILUC-risk cap and phase-out into account in designing any domestic "incentives for market players to use certain biofuels", as the European Union itself acknowledges, to meet their national contribution targets. In that sense, the measure affects the competitive opportunities for biofuels. In light of these considerations, the Panel finds that the high ILUC-risk cap and phase-out is a measure "affecting" the sale, offering for sale, purchase, transportation, distribution, or use of palm oil-based biofuel and falls within the scope of Article III:4.

7.1.5.2.3.3 Treatment no less favourable

7.1012. Article III:4 requires WTO Members to accord to the group of imported products treatment no less favourable than that accorded to the group of like domestic products.[1401] This obligation has been interpreted as requiring effective equality of competitive opportunities for imported and domestic products on the internal market.[1402] In order to establish an inconsistency with Article III:4, a complainant must therefore show that the measure modifies the conditions of competition to the detriment of imported products.[1403]

7.1013. The legal standard for demonstrating that a measure fails to accord "treatment no less favourable" under Article III:4 is similar to that which applies under Article 2.1 of the TBT Agreement, insofar as both require a demonstration that the measure modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products. Indeed, as noted above[1404], there are important parallels in the scope and formulation of these two non-discrimination obligations[1405], with the main difference being that Article III:4 does not require a Panel to determine whether any detrimental impact on the imported product "stems exclusively from a legitimate regulatory distinction".[1406]

7.1014. Mindful of these considerations, insofar as the parties rely on the same arguments that they make under Article 2.1 of the TBT Agreement for the purposes of establishing the existence of a "detrimental impact" under Article III:4, the Panel will refer back to the relevant findings made under that provision.

7.1015. The Panel notes that with respect to biofuels, the parties essentially refer to or repeat the arguments they make with regard to the national treatment component of Indonesia's claim under Article 2.1.[1407] Given the overlap in the parties' arguments, the Panel does not see anything that would lead it, in the circumstances of this case, to a different conclusion regarding the "no less favourable treatment" of biofuels than that which it has already reached concerning the existence of a detrimental impact under Article 2.1. Therefore, for the reasons explained in its findings under Article 2.1, the Panel finds that the high ILUC-risk cap and phase-out accords less favourable

[1398] Panel Report, *Canada – Autos*, para. 10.80. See also Panel Report, *Argentina – Financial Services*, para. 7.1019-7.1023.
[1399] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 305.
[1400] See e.g. Panel Reports, *India – Autos*, paras. 7.195-7.198 and 7.307-7.309; and *China – Auto Parts*, para. 195.
[1401] Appellate Body Report, *EC – Asbestos*, para. 100.
[1402] Appellate Body Reports, *Japan – Alcoholic Beverages*, p. 16; and *EC – Seal Products*, para. 5.101.
[1403] Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 128; and *Korea – Various Measures on Beef*, para. 137.
[1404] See para. 7.478 above.
[1405] Appellate Body Reports, *US – Clove Cigarettes*, para. 100; and *EC – Seal Products*, para. 5.122.
[1406] Appellate Body Reports, *EC – Seal Products*, para. 5.125.
[1407] Indonesia's first written submission, paras. 1188-1191; second written submission, paras. 1167-1173.

treatment to palm oil-based biofuel imported from Indonesia, as compared to rapeseed oil- and soybean oil-based biofuel of EU origin.[1408]

7.1.5.2.4 Biofuel feedstocks

7.1016. The Panel understands the essence of Indonesia's position to be that insofar as the high ILUC-risk cap and phase-out has a detrimental impact on palm oil-based biofuel, that detrimental impact necessarily extends to its feedstock (i.e. palm oil). The Panel notes that Indonesia's arguments concerning the alleged less favourable treatment of palm oil rest on the same premises as those relating to the treatment of palm oil-based biofuel. In these circumstances, the Panel must consider the practical value that any such findings would have for implementation, in light of its other findings relating to palm oil-based biofuel.

7.1017. The Panel sees no reason for making separate and additional findings under Article III:4 on whether the same aspects of the same measure that have been found to have a detrimental impact on imports of palm oil-based biofuel also have a detrimental impact on its feedstock (i.e. palm oil). The Panel recalls that, for the purposes of its claim under the national treatment and MFN obligations in Article 2.1 of the TBT Agreement, Indonesia focuses only on palm oil-based biofuels, and the Panel's findings are formulated accordingly. Indonesia has not explained how additional findings of a detrimental impact on the feedstock (i.e. palm oil) would have any practical value from the perspective of a possible appeal, from the perspective of implementation, or otherwise.

7.1018. The Panel notes that, because the alleged detrimental impact on the feedstock allegedly stems from the same aspects of the same measure that give rise to a detrimental impact on palm oil-based biofuels, it necessarily follows that any action taken to implement the findings in respect of discrimination in respect of palm oil-based biofuel would necessarily address any discrimination arising from the same aspects of the same measure in respect of the feedstock (i.e. palm oil). Thus, from the perspective of implementation, separate and additional findings regarding the feedstock (i.e. palm oil) would appear to be entirely redundant.[1409]

7.1019. Therefore, the Panel does not consider it necessary to make additional findings on the treatment of palm oil to secure a positive solution to this dispute or to assist the DSB in making the rulings and recommendations provided for in the covered agreements.

7.1.5.2.5 Conclusion on Article III:4

7.1020. The Panel concludes that the high ILUC-risk cap and phase-out out is inconsistent with Article III:4 of the GATT 1994 because it accords less favourable treatment to palm oil-based biofuel from Indonesia than that accorded to like products of EU origin.

7.1.5.3 Article I:1 – Most-favoured nation treatment

7.1.5.3.1 Introduction

7.1021. The Panel now turns to the claim under Article I:1 of the GATT 1994.

7.1022. Indonesia submits[1410] that the European Union violates Article I:1 because the high ILUC-risk cap and phase-out discriminates between Indonesian palm oil and oil palm crop-based biofuel and like products imported from other WTO Members. More specifically, Indonesia reiterates that palm oil-based biofuel is like rapeseed oil-based biofuel and soybean oil-based biofuel and that palm oil is like rapeseed oil and soybean oil used as biofuel feedstock. Indonesia contends that rapeseed oil-based biofuel and soybean oil-based biofuel, and, by extension, their feedstocks, benefit from

[1408] The European Union acknowledges that it produces domestically both rapeseed oil- and soybean oil-based biofuel. European Union's first written submission, para. 1180.

[1409] Furthermore, the Panel does not consider that such additional findings on feedstocks would prejudge the level of nullification or impairment arising from the high ILUC-risk cap and phase-out beyond any level that would otherwise be found to exist.

[1410] Indonesia's first written submission, paras. 1134-1172; responses to the Panel's first set of questions, paras. 117-135 and 144-159; opening statement at the first meeting of the Panel, paras. 38-73; second written submission, paras. 1146-1185; responses to the Panel's second set of questions, paras. 68-100; and comments on the European Union's responses to the Panel's second set of questions, paras. 299-349.

commercial opportunities flowing from their eligibility to count towards EU renewable energy targets within the 7% maximum share. According to Indonesia, this advantage is not extended to palm oil-based biofuel and palm oil due to the high ILUC-risk cap and phase-out limiting and eventually excluding eligibility of palm oil-based biofuel to count towards the renewable energy consumption targets.

7.1023. The European Union submits[1411] that Indonesia has failed to demonstrate that the high ILUC-risk cap and phase-out is inconsistent with Article I:1. More specifically, the European Union argues that Indonesia has failed to demonstrate its case on like products and contests that the high ILUC-risk cap and phase-out discriminates between palm oil and palm oil-based biofuel and like products, and that an advantage is conferred on the latter. The European Union refers in this regard to its submissions relating to Indonesia's claims under Article 2.1 of the TBT Agreement.

7.1024. In arguing their respective positions under Article I:1, the parties make the same or similar arguments to those made in the context of Indonesia's claims under Articles 2.1 and Article III:4. Therefore, where relevant, the Panel will refer to the findings it makes with respect to those two claims.

7.1.5.3.2 Legal standard

7.1025. Article I is entitled "General Most-Favoured Nation Treatment". Article I:1 sets forth the obligation that:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

7.1026. Article I:1 has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.1027. Panels and the Appellate Body have found based on the text of Article I:1 that establishing a violation of Article I:1 requires showing the following elements[1412]:

a. the measure at issue falls within the scope of application of Article I:1;

b. the imported products at issue are "like" products within the meaning of Article I:1;

c. the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and

d. the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members.

7.1028. If a Member grants an advantage of any nature to any product imported from any country, it must accord such advantage "immediately and unconditionally" to any like imported product.[1413] The terms of the non-discrimination obligation in Article I:1 are formulated differently from Article III:4. Notwithstanding these differences, both provisions are concerned, fundamentally, with

[1411] European Union's first written submission, paras. 1078-1142; responses to the Panel's first set of questions, paras. 239-282 and 288-319; opening statement at the first meeting of the Panel, paras. 26-42; opening statement at the second meeting of the Panel, paras. 38-48; responses to the Panel's second set of questions, paras. 349-403; and comments on Indonesia's responses to the Panel's second set of questions, paras. 104-122.

[1412] Appellate Body Reports, *EC – Seal Products*, para. 5.86.

[1413] Appellate Body Reports, *EC – Seal Products*, para. 5.87; and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.277.

prohibiting discriminatory measures by requiring equality of competitive opportunities for like imported products from all Members (Article I:1) and for imported products and like domestic products (Article III:4).[1414]

7.1029. The Panel will elaborate further on the elements of the legal standard in Article I:1 as necessary in the course of its assessment of the issues in dispute.

7.1.5.3.3 The scope of Article I:1

7.1030. As reflected in the text of the provision, the MFN obligation in Article I:1 applies:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,*

7.1031. Indonesia argues that Article I:1 is applicable in the case at hand, because the high ILUC-risk cap and phase-out falls within the scope of Article III:4.[1415] As such, it is a "matter referred to in paragraphs 2 and 4 of Article III".

7.1032. The Panel does not understand the European Union to be contesting the applicability of Article I:1.

7.1033. The Panel has previously found, in the context of its assessment under Article III:4, that the high ILUC-risk cap and phase-out is a "law, regulation or requirement affecting the sale, offering for sale, purchase, transportation, distribution, or use" of palm oil-based biofuel and palm oil.[1416] The Panel thus makes the consequential finding that the measure is a "matter referred to in paragraphs 2 and 4 of Article III" and as such falls within the ambit of Article I:1.

7.1034. As with Article III:4, Indonesia makes its claim under Article I:1 with respect to the treatment of both palm oil-based biofuel and palm oil used as biofuel feedstock. The Panel will therefore first address the parties' arguments with respect to each of these two types of products in turn.

7.1.5.3.4 Palm oil-, rapeseed oil- and soybean oil-based biofuels

7.1.5.3.4.1 Like products

7.1035. The Panel recognizes that the non-discrimination obligations in Articles I:1, III:4 and 2.1 differ in scope, and that the elements of the legal tests are not identical. The Panel is also mindful that the very concept of "like products" is not identical across different provisions.[1417] These differences notwithstanding, panels and the Appellate Body have highlighted important parallels between these obligations.[1418] In particular, the likeness analysis in each of these provisions is "fundamentally a determination about the nature and extent of a competitive relationship between and among products".[1419] To that end, and similarly to the assessment under Article 2.1 of the TBT Agreement, panels and the Appellate Body have regarded the four likeness criteria outlined in the Working Party Report on Border Tax Adjustments as a helpful analytical tool in determining whether products are like under Article I:1.[1420]

[1414] Appellate Body Reports, *EC – Seal Products*, para. 5.82; and *US – Tuna II (Mexico)*, para. 7.29, also in the context of Article 2.1 of the TBT Agreement; Panel Report, *EU – Energy Package*, para. 7.571.

[1415] Indonesia's first written submission, para. 1138.

[1416] See section on the scope of application of Article III:4 above.

[1417] Appellate Body Reports, *EC – Seal Products*, paras. 5.81-5.82; and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.277.

[1418] Appellate Body Reports, *EC – Seal Products*, para. 5.82; and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.278.

[1419] Appellate Body Report, *EC – Asbestos*, para. 99.

[1420] Appellate Body Report, *EC – Asbestos*, para. 101.

7.1036. The Panel notes that with respect to the likeness of palm oil-, rapeseed oil-, and soybean oil-based biofuel, Indonesia makes essentially the same arguments as those submitted in support of its claims under Article 2.1 and Article III:4.[1421] Given the overlap in the arguments the parties make with respect to the likeness of palm oil-, rapeseed oil-, and soybean oil-based biofuel the Panel does not see anything that would lead it, in the circumstances of this case, to a different conclusion regarding the likeness of these products compared with the conclusions already reached under Articles 2.1 and III:4. In that context, the Panel has found that PME, RME and SBME have similar properties, end-uses, and are considered highly substitutable by the relevant consumers. Therefore, on the basis of those findings, the Panel concludes that for the purposes of its analysis under Article I:1, palm oil-, rapeseed oil- and soybean oil-based biofuels are like products.

7.1.5.3.4.2 Advantage, favour, privilege, or immunity

7.1037. Indonesia contends that rapeseed oil- and soybean oil-based biofuel benefit from an advantage in the form of market access opportunities within the 7% maximum share.[1422] Indonesia also contends that an additional advantage consists in allowing any yield of rapeseed oil- and soybean oil-based biofuel to count towards EU renewable energy targets, as opposed to only additional yield that can be certified as low ILUC risk.

7.1038. The European Union contests that any advantage is conferred on rapeseed oil- and soybean oil-based biofuels. The European Union relies in this regard on its arguments contesting the link between eligibility to count towards EU renewable energy targets and the demand for biofuels.[1423] The European Union further contends that any "advantage" allegedly conferred on other "like" products remains undefined and is not guaranteed.[1424]

7.1039. The Panel notes that the parties' arguments on the existence of an advantage for the purposes of Article I:1 essentially focus on an issue that the Panel has already addressed in several preceding sections, namely the link between eligibility to count towards EU renewable energy targets and the demand for biofuels. According to the European Union, Indonesia has not demonstrated that such a link exists or is sufficiently close to confer an advantage on rapeseed oil- and soybean oil-based biofuels.

7.1040. The Panel observes that the term "advantage" has been interpreted broadly and covers situations creating more favourable competitive opportunities or affecting the commercial relationship between products originating in different countries.[1425] Panels and the Appellate Body have considered as conferring an advantage not only those measures directly regulating access for products to a Member's market, but also those measures that create incentives for economic operators to choose certain imported products over others.[1426]

7.1041. The Panel has found that the demand for biofuels is mostly driven by EU renewable energy consumption targets and blending mandates. The Panel has also found that limiting or excluding a biofuel from eligibility to count towards these targets will reduce or virtually eliminate the demand for that biofuel on the EU market.[1427] Insofar as Article I:1 refers not to some advantage but to *any* advantage, it seeks to protect such competitive opportunities.[1428]

7.1042. The Panel further disagrees with the European Union that because the 7% maximum share does not require EU member States to include specific biofuels in the renewable energy mix, no "advantage" is conferred on rapeseed oil and soybean oil-based biofuels.[1429] It may well be that biofuels made from feedstocks other than rapeseed oil and soybean oil, or bioliquids or other gaseous fuels, will be used to achieve the 14% renewable energy target up to the 7% maximum share. The fact remains, however, that rapeseed oil- and soybean oil-based biofuels can be used to meet these

[1421] Regarding biofuels, see Indonesia's first written submission, paras. 1141.
[1422] Indonesia's first written submission, para. 1153; second written submission, para. 1154.
[1423] European Union's first written submission, para. 1103.
[1424] European Union's first written submission, para. 1122.
[1425] Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.239.
[1426] Panel Report, *EU – Energy Package*, para. 7.1312. See also Panel Reports, *US – Poultry (China)*, para. 7.415; *Colombia – Ports of Entry*, para. 7.341; and *Brazil – Taxation*, para. 7.1041.
[1427] See section addressing the existence of a detrimental impact of the high ILUC-risk cap and phase-out in the context of Indonesia's claim under Article 2.1.
[1428] Appellate Body Report, *Canada – Autos*, para. 79.
[1429] European Union's first written submission, paras. 1119-1126.

renewable energy targets to an extent that palm oil-based biofuel cannot. This is precisely the type of "expectations of equal competitive opportunities" that Article I:1 seeks to protect for like imported products from all Members.[1430]

7.1043. Indonesia is thus not required to show the actual effects of the measure insofar as it has demonstrated that, based on the design and operation of the measure, it creates favourable competitive opportunities for some imported like products. This being said, there is evidence showing that food and feed crop-based biofuels accounted for approximately 60% of the renewable energy consumed in the transport sector in 2019.[1431] This is a sizeable part of the market presenting considerable commercial opportunities. The advantage conferred on rapeseed oil- and soybean oil-based biofuels is thus very real and not merely "hypothetical", as the European Union asserts.

7.1044. However, the Panel is unconvinced that the requirement that only an additional yield can be certified as low ILUC-risk constitutes a separate "advantage" conferred on rapeseed oil- and soybean oil-based biofuel.[1432] In line with the Panel's findings above[1433], any advantage for rapeseed oil- and soybean oil-based biofuels stems from the fact that they are not subject to the high ILUC-risk cap and phase-out. As such, the alleged advantage is simply a corollary of rapeseed oil and soybean oil not being classified in the Delegated Regulation as high ILUC-risk biofuel feedstocks.[1434]

7.1.5.3.4.3 Accorded immediately and unconditionally

7.1045. Indonesia argues that the advantage stemming from the eligibility to count towards the renewable energy targets is not extended to palm oil-based biofuel.[1435] Indonesia refers in this regard to the arguments concerning the design and operation of the high ILUC-risk cap and phase-out and in particular the commercial consequences of the exclusion of palm oil-based biofuel from the renewable energy targets.[1436]

7.1046. The European Union maintains that Article I:1 does not preclude WTO Members from attaching conditions to the conferral of an advantage.[1437] The European Union explains that in the case at hand, the condition attached to the advantage relates to the overall environmental effects associated with the production of biofuel. These, according to the European Union, are different for palm oil-based biofuel on the one hand, and rapeseed oil- and soybean oil-based biofuel on the other hand.[1438]

7.1047. In the preceding sections, the Panel has found that the high ILUC-risk cap and phase-out limits and ultimately eliminates the eligibility of palm oil-based biofuel to count towards the renewable energy consumption targets.[1439] The Panel has further found that there is little to no demand for biofuels that are not eligible to count towards these targets as far as the EU biofuel market is concerned. The Panel has concluded on this basis that the high ILUC-risk cap and phase-out affects the competitive opportunities for palm oil-based biofuel on the EU biofuel market. It follows that, due to being subject to the high ILUC-risk cap and phase-out, palm oil-based biofuel imported from Indonesia cannot enjoy the same market opportunities as rapeseed oil- and soybean oil-based biofuels imported from other countries.

[1430] Panel Report, *Argentina – Hides and Leather*, para. 11.20; Appellate Body Reports, *EC – Seal Products*, para. 5.87.

[1431] Eurostat, Consumption of renewable energy in the transport sector in the EU-27 in 2011-2019, (Exhibit IDN-317).

[1432] Indonesia's first written submission, para. 1156; second written submission, para. 1122.

[1433] See para. 7.508 above.

[1434] The Panel disagrees thus with Indonesia's contention that low ILUC-risk certification has an additional detrimental impact on palm oil-based biofuel, because it applies only to additional yield, while any yield of rapeseed oil- and soybean oil-based biofuels can count towards the renewable energy consumption targets. (Indonesia's first written submission, para. 524.)

[1435] Indonesia's first written submission, para.1167.

[1436] Indonesia's first written submission, paras.1167 and 1170.

[1437] European Union's first written submission, para. 1128.

[1438] European Union's first written submission, para. 1128.

[1439] See sections addressing the existence of a detrimental impact of the high ILUC-risk cap and phase-out in the context of Indonesia's claims under Articles 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

7.1048. It is true, as argued by the European Union, that Article I:1 does not preclude attaching certain conditions to granting an advantage.[1440] However, the Panel notes that Article I:1 "prohibits those conditions that have a detrimental impact on the competitive opportunities for like imported products from any Member".[1441] In the preceding sections, the Panel identified the classification of a biofuel feedstock as high ILUC risk, and the resulting application of the high ILUC-risk cap and phase-out, as the element giving rise to a detrimental impact against palm oil-based biofuel. This is precisely the type of condition that, when attached to an advantage, may have a detrimental impact on the competitive opportunities for like imported products from one or more Members.

7.1049. The Panel notes that the European Union adds that there is a "legitimate basis" for conferring the advantage on a subset of like products.[1442] Here, the Panel observes that in contrast to Article 2.1, and in line with Article III:4, the legal standard under Article I:1 does not entail any consideration of whether the detrimental impact of a measure on competitive opportunities for like imported products stems from a legitimate regulatory distinction.[1443] Such analysis is more appropriately conducted under Article XX, which the European Union has invoked in this dispute.

7.1.5.3.5 Biofuel feedstocks

7.1050. For the reasons explained above in the context of the claim under Article III:4, the Panel does not consider it necessary to make additional findings on the treatment of palm oil (as distinct from palm oil-based biofuel) to secure a positive solution to this dispute or to assist the DSB in making the rulings and recommendations provided for in the covered agreements.

7.1.5.3.6 Conclusion on Article I:1

7.1051. In light of the above, the Panel concludes that the high ILUC-risk cap and phase-out is inconsistent with Article I:1 of the GATT 1994 because it does not accord an advantage to palm oil-based biofuel from Indonesia that is accorded to like products imported from third countries.

7.1.5.4 Article X:3(a) – Reasonable and impartial administration

7.1.5.4.1 Introduction

7.1052. The Panel now turns to the claim under Article X:3(a) of the GATT 1994.

7.1053. Indonesia submits[1444] that the European Union violates Article X:3(a) because it administers RED II in an unreasonable manner. Indonesia explains that the European sets out low ILUC-risk certification in the Delegated Regulation without providing for the necessary elements that enable certification to be obtained.

7.1054. The European Union submits[1445] that the claim under Article X:3(a) falls outside the scope of Article X:3(a) because the Delegated Regulation does not administer RED II but creates substantive rules. More specifically, the European Union argues that the high ILUC-risk criteria and low ILUC-risk criteria are substantive matters not concerning the administration or putting into practical effect of RED II, and that in any event, the low ILUC-risk criteria in the Delegated Regulation provide sufficient elements for certification, and while implementing regulations are pending[1446] they are not indispensable to carrying out certification.

[1440] Appellate Body Reports, *EC – Seal Products*, para. 5.88.
[1441] Appellate Body Reports, *EC – Seal Products*, para. 5.88.
[1442] European Union's first written submission, para. 1139.
[1443] Appellate Body Reports, *EC – Seal Products*, para. 5.90.
[1444] Indonesia's first written submission, paras. 1197-1227; second written submission, paras. 84-105 and 1177-1198; and responses to the first set of Panel questions, paras. 31-32, and 252-257.
[1445] European Union's first written submission, paras. 1191-1226; second written submission, paras. 428-434.
[1446] The Panel notes that the implementing regulations were adopted in June 2022.

7.1.5.4.2 Legal standard

7.1055. Article X is entitled "Publication and Administration of Trade Regulations". Article X:3(a) sets forth the obligation that:

> Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

7.1056. Article X:3(a) has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases. While the parties' arguments reflect their divergent views on how findings in prior cases are relevant to the facts of this dispute, there appears to be no fundamental disagreement between the parties on the elements of that standard as described below.

7.1057. In establishing a violation of Article X:3(a), a complainant is required to prove that the measure at issue:

a. administers, i.e. put into effect, a legal instrument of the type listed in Article X:1 of the GATT 1994; and

b. in a manner that is not uniform, impartial or reasonable.

7.1058. The Panel will elaborate further on the elements of the legal standard in Article X:3(a) as necessary in the course of its assessment of the issues in dispute.

7.1.5.4.3 Administering or putting into effect a legal instrument of the type listed in Article X:1

7.1059. First, the Panel considers whether the measures at issue administer or put into effect a legal instrument of the type listed in Article X:1. The instruments listed in Article X:1 include

> [l]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use.

7.1060. Indonesia's claim concerns the administration or putting into effect of RED II through the low ILUC-risk criteria and procedure. The Panel has found above that the low ILUC-risk criteria, contained in RED II, are laws which affect the sale or offering for sale, purchase, transportation, distribution, or use of palm oil-based biofuels, and fall within the scope of Article III:4. Consistent with this finding, the Panel considers that the low ILUC-risk criteria fall within the scope of Article X:1. As to the low ILUC-risk certification procedure, the Panel notes that any consignment of high ILUC-risk biofuel made from a yield meeting the low ILUC-risk criteria has to undergo a certification procedure in order to be eligible to count towards the EU renewable energy targets outside of the limitations imposed by the high ILUC-risk cap and phase-out. The design of the certification procedure can thus impact a biofuel's eligibility. This procedure is enshrined in Article 6 of the Delegated Regulation and alleged to administer or put into effect Article 26(2) of RED II. Therefore, and bearing in mind the Panel's findings regarding the link between the eligibility for the targets and opportunities on the EU biofuel market, the Panel considers that the low ILUC-risk certification procedure affects market opportunities for biofuels generally classified as high ILUC risk. The Panel therefore considers that the low ILUC-risk certification procedure is a law which affects e.g. the sale or offering for sale, purchase, transportation, distribution or use of palm oil-based biofuels, falling with the scope of Article X:1. Moreover, the Panel notes that it is not disputed by the parties, that the administration or putting into effect of RED II would fall within the scope of Article X:3(a). Rather, the European Union submits that the Delegated Regulation, which Indonesia challenges, does not administer RED II.

7.1061. Second, the Panel turns to consider whether the measures at issue "administer" or "put into effect" RED II.

7.1062. Indonesia argues that the Delegated Regulation administers RED II through the low ILUC-risk criteria and certification procedure. Indonesia refers to the setting out of criteria for low ILUC-risk certification without providing for the necessary elements that enable certification to be obtained, both as of the date of entry into force of the Delegated Regulation and date for full implementation by EU member States of Article 26 of RED II.[1447] The necessary elements concern "rules for establishing how certification may be obtained" and explanations of the "meaning of the low ILUC-risk criteria".[1448] Indonesia gives specific examples based on Articles 4 to 6 of the Delegated Regulation, namely: detailed rules on the application of the additionality pathways are to be set out in the implementing rules, evidential requirements for the first pathway are not in the Delegated Regulation but will be set out in the implementing regulations, parameters for smallholders will follow in the implementing regulations, details on auditing and verification requirements set out in Article 6 will be provided in the implementing regulations, and further evidentiary requirements will be set out in the implementing regulations.[1449] Indonesia points to certain implementing regulations, which based on the provisions RED II and the Delegated Regulation are to provide such missing details.

7.1063. The European Union argues that the Delegated Regulation, in particular the high ILUC-risk criteria and low ILUC-risk criteria, are substantive matters.[1450] The European Union also argues that the Delegated Regulation explains the criteria and provides sufficient elements for low ILUC-risk certification, and that while the "intended" implementing regulations will provide further information, they are not indispensable to certification and the low ILUC-risk criteria in the Delegated Regulation are sufficiently detailed for Member States (and voluntary schemes) to proceed with certification.[1451]

7.1064. The Panel recalls that Article X:3(a) concerns the *administration* of the laws, regulations, decisions and rulings referred to in Article X:1 and alluded to in the title of Article X. Administration has been understood by the Appellate Body as meaning "putting into practical effect or applying" e.g. a legal instrument, as distinct from the "substantive content" of such laws, regulations, decisions and rulings.[1452] Prior cases offer some useful illustrations of what qualifies as "administration": (i) "a legal instrument that regulates the application or implementation" of another instrument[1453]; (ii) "any definition, guidelines or standards" (e.g. with respect to the term "operation capacity"[1454]); and (iii) "providing guidance on the meaning of specific requirements of a measure".[1455] The issue is therefore whether the relevant elements of the Delegated Regulation constitute administration of RED II or whether they create substantive rules.[1456]

7.1065. With respect to the low ILUC-risk criteria and certification procedure, the Panel notes that Indonesia's claim is not about the substantive provisions in the Delegated Regulation itself. Rather, this claim turns on the fact that low ILUC-risk certification, as set out in Articles 4 to 6 of the Delegated Regulation, lacks detailed rules (which the European Union admits are to follow in certain implementing regulations) that are necessary to put certain elements of the low ILUC-risk certification criteria and procedure into effect. The Panel notes that low ILUC-risk certification, as set out Articles 4 to 6 of the Delegated Regulation, is in turn to put into effect the exemption to the high ILUC-risk cap and phase-out set out in Article 26(2) of RED II.

7.1066. The Panel recalls that while in past cases, legal criteria/requirements themselves seem to have generally been considered to be "substantive" in nature, the absence of definitions or guidance on the meaning or means of satisfying criteria/requirements has been considered to be

[1447] Indonesia's first written submission, paras. 1217 and 1219.
[1448] Indonesia's first written submission, para. 1220.
[1449] Indonesia's response to Panel question No. 11, para. 32 (referring to European Union's first written submission, paras. 135, 136, 138, 757 and 740).
[1450] European Union's first written submission, paras. 1212-1222.
[1451] European Union's first written submission, paras. 1212-1225; second written submission, para. 431.
[1452] Appellate Body Reports, *EC – Bananas III*, para. 200; and *EC – Poultry*, para. 115.
[1453] Appellate Body Report, *EC – Selected Customs Matters*, para. 200.
[1454] Panel Reports, *China – Raw Materials*, paras. 7.745-7.746.
[1455] Panel Reports, *US – COOL*, paras. 7.830, 7.833 and 7.840. In *US – COOL*, the panel found that the USDA "put into practical effect" the COOL measure by providing guidance on the labelling requirements such that the USDA guidelines constituted an act of administering the COOL measure. (ibid.).
[1456] See e.g. Panel Report, *Argentina – Hides and Leather*, paras. 11.71-11.72.

administrative in nature. Insofar as the European Union has failed to take timely steps to operationalize and put into effect the low ILUC-risk criteria and certification procedure, set out in Articles 4 to 6 of the Delegated Regulation, in a way that is necessary for certification to be obtained, that absence of detailed rules (e.g. to be contained in implementing regulations) relates to the allegedly deficient administration of RED II, not the criteria in the Delegated Regulation themselves.

7.1.5.4.4 Manner of administration

7.1067. "Reasonable" has been understood in the context of Article X:3(a) in its ordinary sense, i.e. to mean "in accordance with reason", "not irrational or absurd", "proportionate", "sensible", and "within the limits of reason, not greatly less or more than might be thought likely or appropriate". Whether an act of administration can be considered reasonable within the meaning of Article X:3(a) entails a consideration of factual circumstances specific to each case such as the features of the administrative act at issue in light of its objective, cause or the rationale behind it.[1457]

7.1068. Previous panels have found that the imposition of a legal requirement with which it is impossible to ensure compliance (e.g. because of uncertainty generated by legal requirements) amounts to unreasonable administration, inconsistent with Article X:3(a). In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, the panel found that the imposition on cigarette importers of a VAT notification requirement with which individual traders could not ensure compliance (because they did not have access to daily rates to be notified) amounted to an unreasonable administration of the Thai Revenue Code.[1458] In *China – Raw Materials*, the panel found that the "lack of any definition, guidelines or standards in how the 32 Local Departments in charge of Foreign Trade should apply the potentially critical operation capacity criterion constitutes relevant evidence in establishing unreasonable administration of the operation capacity criterion; the lack of any definition, guidelines or standards pose a very real risk that this criterion will be administered differently depending on which Local Department handles the quota application".[1459] In *US – COOL*, the panel found that a letter sent by the Secretary of Agriculture to industry representatives ("the Vilsack letter") in connection with a new rule governing labelling requirements led to "unreasonable" administration because of an apparent tension between the letter and the rule. That panel stated that the Vilsack letter "created uncertainties for industry regarding how to comply with the specific labelling requirements" contained in the "2009 Final Rule", and on that basis found a violation of the "reasonable" administration requirement.[1460]

7.1069. In this dispute, Indonesia argues that without the Implementing Regulation (adopted only in June 2022), it was impossible to design certification schemes or otherwise begin a low ILUC-risk certification process, as of the date of the entry into force of the Delegated Regulation (10 June 2019) and by the "date on which Member States must have fully implemented Article 26 of RED II" (30 June 2021).[1461] In other words, the Panel understands Indonesia to point to uncertainty surrounding the operation of a certification scheme rendering that scheme inoperable. The absence of certain implementing regulations that are necessary to put certain elements of the Delegated Regulation (i.e. the low ILUC-risk certification criteria and procedure) and, by implication, Article 26(2) of RED II, into effect is a situation that fits squarely within the type of situation found to be in violation of Article X:3(a) in the aforementioned prior disputes.

7.1070. The European Union's main point of rebuttal is that implementing regulations (or further detailed rules) are not "indispensable" to the functioning of low ILUC-risk certification such that there is no violation of Article X:3(a). However, the Panel notes that no certification schemes are in operation at the conclusion of exchanges before the Panel, and the subsequent approval of three voluntary schemes in April 2022, prior to the adoption of the Implementing Regulation in June 2022. Moreover, all such voluntary schemes were approved subject to the caveat that they will be revised. In particular, the European Union has not pointed to any examples of palm oil-based biofuel (the only biofuel currently considered to be made from a high ILUC-risk feedstock) being certified as low

[1457] Panel Reports, *US – COOL*, paras. 7.850-7.851; and *Thailand – Cigarettes (Philippines)*, paras. 7.919 and 7.951.
[1458] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.923.
[1459] Panel Reports, *China – Raw Materials*, para. 7.745.
[1460] Panel Reports, *US – COOL*, paras. 7.833-7.840.
[1461] Indonesia's first written submission, paras. 1219, 1221-1222 and 1224-1225; second written submission, para. 90.

ILUC risk. There is also evidence concerning the instigation and results of pilot projects to (test and ultimately revise) aspects of low ILUC-risk certification.

7.1071. The Panel therefore considers that the existence of voluntary schemes from April 2022 only indicates that some certification may have been possible from April 2022, but would have been subject to revision pending the introduction of further implementing rules. In addition, it is not clear how such schemes could operate, if some of the substantive criteria determining whether a crop is eligible for low ILUC-risk were not complete.

7.1072. On that basis, the Panel finds that by (i) introducing a low ILUC-risk certification requirement (i.e. the criteria and procedure) together with the high ILUC-risk cap and phase-out as of mid-2019, which was to be transposed by all member States by mid-2021 at the latest, and (ii) only publishing the promised detailed rules for operationalizing such a requirement in mid-2022 such that it is impossible to use[1462] due to uncertainty attaching to its criteria and process, there is a violation of Article X:3(a).

7.1.5.4.5 Conclusion on Article X:3(a)

7.1073. The Panel concludes that the European Union has acted inconsistently with Article X:3(a) of the GATT 1994 by administering the high ILUC-risk cap and phase-out in Article 26 of RED II in a manner that is not reasonable, to the extent that deficiencies in the design and implementation of the low ILUC-risk criteria and procedure do not provide for the elements needed for palm oil-based biofuel to be certified as low ILUC risk.

7.1.5.5 Article XX – General exceptions

7.1.5.5.1 Introduction

7.1074. Having found that the high ILUC-risk cap and phase-out is inconsistent with Article III:4 and Article I:1, the Panel now proceeds to address the European Union's invocation of the general exceptions in Article XX.

7.1075. The European Union submits[1463] that the high ILUC-risk cap and phase-out is justified under Article XX(a) ("necessary to protect public morals"), Article XX (b) ("necessary to protect human, animal or plant life or health") and Article XX(g) ("relating to the conservation of exhaustible natural resources").

7.1076. Indonesia submits[1464] that the high ILUC-risk cap and phase-out is not justified under any of these exceptions.

7.1077. The Panel notes at the outset that the arguments presented by the parties under Article XX substantially overlap with the arguments presented by the parties in the context of Article 2.1 and Article 2.2 of the TBT Agreement. As elaborated further below, the Panel draws upon its findings under Article 2.1 and Article 2.2 for the purposes of making its findings under Article XX.

[1462] Indonesia has not presented any arguments on the substantive consistency of those detailed rules with the TBT Agreement or the GATT 1994. In the absence of any such arguments. and taking account that the measure was not in existence at the time of the panel's establishment, none of the Panel's findings in this Report should be taken as implying any view on the substantive consistency of those detailed rules with the European Union's obligations under the TBT Agreement, or with the European Union's obligations under the GATT 1994.

[1463] European Union's first written submission, paras. 1227-1361; opening statement at the first meeting of the Panel, paras. 98-147; responses to the Panel's first set of questions, paras. 349-445; second written submission, paras. 435-475; opening statement at the second meeting of the Panel, paras. 57-135; and responses to the Panel's second set of questions, paras. 657-675.

[1464] Indonesia's responses to the Panel's first set of questions, paras. 185-225; second written submission, paras. 1200-1408; opening statement at the second meeting of the Panel, paras. 17-26, and 59-103; responses to the Panel's second set of questions, paras. 239-244; and comments on the European Union's responses to the Panel's second set of questions, paras. 507-528.

7.1.5.5.2 Legal standard

7.1078. Article XX is entitled "General Exceptions". Article XX(a), (b), and (g), read in conjunction with the introductory clause (or "*chapeau*") read as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> …
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

7.1079. Article XX thus allows Members to justify measures that would otherwise be inconsistent with the GATT 1994. Article XX sets out a two-tier test: (i) the measure must fall under one of the listed exceptions in Article XX such as Article XX(b) (it is then provisionally justified); and (ii) the measure must be applied in a manner that satisfies the requirements of the *chapeau* of Article XX.[1465]

7.1080. Article XX(a), (b) and (g) have each been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standards with reference to prior cases.

7.1081. The Panel will elaborate further on the elements of the applicable legal standards in Article XX(a), (b) and (g) as necessary in the course of its assessment of the issues in dispute.

7.1.5.5.3 Article XX(g) – relating to the conservation of exhaustible natural resources

7.1082. In the context of addressing the consistency of the high ILUC-risk cap and phase-out under Article 2.2, the Panel has concluded that the objective of the high ILUC-risk cap and phase-out is to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels, and found that this is a "legitimate objective" within the meaning of Article 2.2. In reaching that conclusion, the Panel recalled the Appellate Body's view that "objectives recognized in the provisions of other covered agreements may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective under Article 2.2"[1466], and considered, for that purpose, whether the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels fell within the scope of the general exceptions in Article XX(g), (b) and (a).

7.1083. With respect to Article XX(g), the Panel observed that Article XX(g) covers measures directed at the "the preservation of the environment, especially of natural resources"[1467], and in past cases a broad range of policies have been found to fall within the scope of measures relating to the conservation of exhaustible natural resources. The Panel further recalled that the Appellate Body has held that the terms "exhaustible natural resources" must be read "in light of contemporary concerns of the community of nations about the protection and conservation of the environment"[1468] and has concluded that "exhaustible natural resources" covers both living and non-living exhaustible natural resources.[1469] Additionally, the Panel recalled that in past cases, measures taken to conserve

[1465] Appellate Body Reports, *US – Gasoline*, p. 22; and *Brazil – Retreaded Tyres*, para. 139.
[1466] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 313; and *US – COOL*, para. 370.
[1467] Appellate Body Reports, *China – Raw Materials*, para. 355.
[1468] Appellate Body Report, *US – Shrimp*, para. 129.
[1469] Appellate Body Report, *US – Shrimp*, para. 131

clean air[1470], sea turtles[1471], petroleum[1472], and various mineral resources[1473] have been found to be measures relating to the conservation of "exhaustible natural resources" under Article XX(g).

7.1084. Turning to the measures at issue, the Panel recalled that as set out in Recitals 80 and 81 of RED II, the high ILUC-risk cap and phase-out is aimed at limiting the risk of ILUC-related GHG emissions that arise when the cultivation of crops for biofuels displaces traditional production of crops for food and feed purposes, leading to "the extension of agricultural land into areas with high-carbon stock, such as forests, wetlands and peatland, causing additional greenhouse gas emissions".[1474] Thus, the measure seeks to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels, which would arise when the cultivation of crops for biofuels displaces traditional production of crops for food and feed purposes requiring the extension of agricultural land into areas with high-carbon stock, including forests, wetlands and peatland. The Panel concluded that the objective of the high ILUC-risk cap and phase-out therefore *prima facie* relates to the conservation of an "exhaustible natural resource", namely high-carbon stock land (forests, wetlands and peatland).[1475] On that basis, the Panel stated that it is satisfied that the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels *prima facie* falls within the scope of the objective of "the conservation of exhaustible natural resources" within the meaning of Article XX(g).

7.1085. The Panel proceeded to find, in light of its findings under Article 2.4, that the ISO standards referred to by Indonesia do not "exclude ILUC from being taken into account" in the context of measures seeking to regulate GHG emissions. The Panel further found that there exists a reasonable basis for the European Union to conclude that increasing demand for crop-based biofuels increases the risk of ILUC-related GHG emissions and explained that its assessment of that issue was in line with the approach followed under Article XX(b). The Panel further found that there is a sufficient nexus between the regulating Member and the activities being regulated, and based its analysis of that issue on prior cases under Article 2.2 and Article XX.

7.1086. The Panel did not specifically address, in the context of its analysis under Article 2.2, the issues of whether the high ILUC-risk cap and phase-out is a measure "relating to" the conservation of exhaustible natural resources that is "made effective in conjunction with restrictions on domestic production or consumption". The Panel now turns to these issues.

7.1087. In the context of Article XX(g), the Appellate Body has found that "for a measure to 'relate to' conservation in the sense of Article XX(g), there must be 'a close and genuine relationship of ends and means' between that measure and the conservation objective of the Member maintaining the measure."[1476] The Panel notes that a similar standard applies in relation to the assessment of whether a measure makes a "contribution" to its objective under the "necessity" test that applies under Article 2.2 and Article XX(b). In *Brazil – Retreaded Tyres*, the Appellate Body indicated that a "contribution" exists "when there is a genuine relationship of ends and means between the objective pursued and the measure at issue".[1477]

7.1088. In the context of its analysis of the "contribution" under Article 2.2, the Panel found that because the high ILUC-risk cap and phase-out has, by design, a limiting effect on EU demand for and consumption of those crop-based biofuels determined to be high ILUC risk, the measure is apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. In the course of its analysis, the Panel observed that a "contribution" exists "when there is a genuine relationship of ends and means between the objective pursued and the

[1470] Appellate Body Report, US – Gasoline, p. 14.
[1471] Appellate Body Report, *US – Shrimp*, para. 131.
[1472] Appellate Body Report, *US – Shrimp*, para. 128.
[1473] Appellate Body Report, *US – Shrimp*, para. 128; and Panel Reports, *China – Raw Materials*, para. 7.369.
[1474] Recital 80 of RED II.
[1475] Furthermore, in addition to high-carbon stock land being an exhaustible natural resource in and of itself, the Panel considered that measures taken to conserve high-carbon stock land, and thereby avoid the GHG emissions that would be released through their use, are related to the conservation of a wide range of exhaustible natural resources that are threatened by increased GHG emissions and climate change.
[1476] Appellate Body Reports, *China – Raw Materials*, para. 355.
[1477] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145. See also Panel Reports, *Brazil – Taxation*, para. 7.526; *EU – Energy Package*, para. 7.1360; *Colombia – Textiles*, para. 7.315; and *India – Solar Cells*, para. 7.361.

measure at issue"[1478], and stated that that is the case here. Accordingly, the Panel considers that the high ILUC-risk cap and phase-out is a measure "relating to" the conservation of exhaustible natural resources, notably high-carbon stock land (forests, wetlands, and peatland).

7.1089. The Panel considers that the high ILUC-risk cap and phase-out is "made effective in conjunction with restrictions on domestic production or consumption". The measure plainly meets this requirement as it, of itself, aims at and results in restricting EU demand for and consumption of crop-based biofuels classified as high ILUC-risk pursuant to the formula in Article 3 of the Delegated Regulation. By restricting EU demand for and consumption of such crop-based biofuels, the measure is aimed at ensuring that EU demand does not result in increased production of the crops used to produce such biofuels. The formula applies to all crop-based biofuels, with no differentiation between biofuels made from crops produced in the European Union and biofuels made from crops produced elsewhere. In addition, all crop-based biofuels are subject to the 7% maximum share, and this measure also applies to all crop-based biofuels, with no differentiation between biofuels made from crops produced in the European Union and biofuels made from crops produced elsewhere.

7.1090. For these reasons, the Panel concludes that the high ILUC-risk cap and phase-out is provisionally justified as a measure relating to the conservation of exhaustible natural resources that is made effective in conjunction with restrictions on domestic production or consumption within the meaning of Article XX(g).

7.1.5.5.4 Article XX(b) – necessary to protect human, animal or plant life or health

7.1091. In the context of its assessment under Article 2.2, the Panel noted that in past cases a broad range of policies have been found to fall within the scope of measures taken for the protection of human, animal and plant life or health. These include policies relating to the reduction of air pollution as a result of consumption of gasoline[1479], the reduction of risks arising from the accumulation of waste tyres[1480], and even the protection of monkeys in the wild.[1481]

7.1092. The Panel also noted that the objective of protecting human, animal or plant life and health is referred to as a legitimate objective in similar if not identical terms in Article XX(b)[1482], Article 2.2[1483], and the Preamble to the TBT Agreement.[1484] The Panel recalled that previous panels and the Appellate Body have stated that "few interests are more 'vital' and 'important' than protecting human beings from health risks, and protecting the environment is no less important."[1485]

7.1093. The Panel then recalled that as set out in Recitals 80 and 81 of RED II, the high ILUC-risk cap and phase-out has the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. The Panel recalled that in *Brazil – Retreaded Tyres*, the Appellate Body suggested that "measures adopted in order to attenuate global warming and climate change" would fall within the scope of Article XX(b) in the context of providing guidance on how panels should assess certain "complex public health or environmental problems" under the necessity test in Article XX(b).[1486] The Panel further recalled that in *Brazil – Taxation*, the panel found that "the reduction of CO_2 emissions is one of the policies covered by subparagraph (b) of Article XX, given that it can fall within the range of policies that protect human life or health."[1487] The Panel indicated that it sees no reason to disagree, considering that global warming and climate change pose one of the greatest threats to life and health on the planet. On that basis, the Panel stated that the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels therefore *prima facie* relates to the protection of human, animal or plant life or health.

[1478] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 210.
[1479] Panel Report, *US – Gasoline*, para. 6.21.
[1480] Panel Reports, *China – Raw Materials*, para. 7.479 (referring to Panel Reports, *US – Gasoline*, para. 6.21; and *Brazil – Retreaded Tyres*, paras. 7.108 and 7.115).
[1481] Panel Report, *Brazil – Retreaded Tyres*, paras. 7.108 and 7.115.
[1482] Article XX(b) refers to measures necessary "to protect human, animal or plant life or health".
[1483] Article 2.2 refers to the "protection of human health or safety, animal or plant life or health".
[1484] The sixth recital of the Preamble to the TBT Agreement refers to "the protection of human, animal or plant life or health".
[1485] Panel Report, *Brazil – Retreaded Tyres*, para. 7.108. See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 179.
[1486] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[1487] Panel Reports, *Brazil – Taxation*, para. 7.880.

7.1094. The Panel proceeded to find, in light of its findings under Article 2.4, that the ISO standards referred to by Indonesia do not "exclude ILUC from being taken into account" in the context of measures seeking to regulate GHG emissions. The Panel further found that there exists a reasonable basis for the European Union to conclude that increasing demand for crop-based biofuels increases the risk of ILUC-related GHG emissions. In relation to that finding, the Panel specifically linked its approach to the legal standard under Article XX(b), and recalled that when assessing whether a measure is taken to protect human, animal or plant life or health under Article XX(b), prior panels have often commenced their analysis by determining the existence of the risk to human, animal or plant life or health (health risk) that the challenged measure aims to reduce.[1488] The Panel further found that there is a sufficient nexus between the regulating Member and the activities being regulated, and based its analysis of that issue on prior cases under Articles 2.2 and Article XX.

7.1095. In the context of its assessment under Article 2.2, the Panel then proceeded to evaluate the necessity of the high ILUC-risk cap and phase-out on the basis of the legal standard and analytical framework that applies equally under Article XX(b). The Panel preliminarily concluded that the high ILUC-risk cap and phase-out is necessary to fulfil the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels, on the grounds that it is apt to make a material contribution to the achievement of that objective and that this is the appropriate standard to apply having weighed and balanced its trade-restrictiveness and the risks that non-fulfilment of the objective would create. The Panel then found that none of the alternative measures put forward by Indonesia demonstrate that the high ILUC-risk cap and phase-out is more trade-restrictive than necessary to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels. On that basis, the Panel found that Indonesia has failed to establish that the high ILUC-risk cap and phase-out is inconsistent with the obligation in Article 2.2 of the TBT Agreement to ensure that technical regulations are not more trade-restrictive than necessary to fulfil a legitimate objective.

7.1096. The Panel's assessment under Article 2.2 applies *mutatis mutandis* to Article XX(b). Accordingly, the Panel concludes that the high ILUC-risk cap and phase-out is provisionally justified as a measure necessary to protect human, animal or plant life or health within the meaning of Article XX(b).

7.1.5.5.5 Article XX(a) – necessary to protect public morals

7.1097. In the context of its assessment under Article 2.2, the Panel explained that, for reasons already set out in the context of the Panel's identification of the objective of the measures at issue, the Panel is unpersuaded that there is any need to make an additional ruling on whether the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels would fall within the scope of the objective protecting EU "public morals".

7.1098. In this connection, the Panel observes that a finding on whether the high ILUC-risk cap and phase-out is additionally justified under Article XX(a) would have no impact on the outcome of the proceedings. If the Panel were to agree with the European Union that the same measure provisionally justified under Article XX(b) and (g) is also provisionally justified under Article XX(a), this would merely serve to establish an additional basis for the overall conclusion that the measure is provisionally justified under Article XX. Were the Panel to agree with Indonesia that the measure is not justified under Article XX(a), this would not alter the conclusion that the measure is provisionally justified under Article XX(b) and (g).

[1488] Panel Reports, *EC – Asbestos*, para. 8.170; *Brazil – Retreaded Tyres*, para. 7.42; *China – Rare Earths*, para. 7.156; *Brazil – Taxation*, para. 7.859; and *Indonesia – Chicken*, para. 7.209. For instance, in *EC – Asbestos*, the panel determined, as the first step in its analysis, whether chrysotile-asbestos posed a risk to human life or health. (Panel Report, *EC – Asbestos*, paras. 8.170, 8.182, and 8.185-8.194.) In *Brazil – Retreaded Tyres*, the panel assessed whether the accumulation of waste tyres posed risks to human, animal or plant life or health. (Panel Report, *Brazil – Retreaded Tyres*, paras. 7.42, and 7.53-7.93.) In *China – Rare Earths*, the panel found that the mining and production of rare earths, tungsten, and molybdenum have caused grave harm to the environment and to the life and health of humans, animals, and plants in China. (Panel Reports, *China – Rare Earths*, paras. 7.149-7.156.) In some other cases, including those where there was no dispute as to the existence of the risks that the measure allegedly aimed to address, prior panels have addressed this step of the analysis succinctly. (See Panel Reports, *US – Gasoline*, para. 6.21; and *EC – Tariff Preferences*, paras. 7.180 and 7.200.)

7.1099. The Panel sees no reason to follow a different approach in the context of Article XX. The Panel therefore finds that it is unnecessary to rule on whether the high ILUC-risk cap and phase-out is a measure necessary to protect public morals under Article XX(a).

7.1.5.5.6 *Chapeau* – arbitrary or unjustifiable discrimination between countries where the same conditions prevail

7.1100. Having concluded that the high ILUC-risk cap and phase-out is provisionally justified under Article XX(g) and Article XX(b), the Panel now turns to the *chapeau* of Article XX. For the reasons that follow, the Panel considers that, in the particular circumstances of this case, its findings under Article 2.1 of the TBT Agreement in connection with the "legitimate regulatory distinction" step of the analysis are equally relevant, and applicable, to the analysis under the *chapeau* of Article XX.

7.1101. The Appellate Body has observed that "there are important parallels"[1489] between the analyses under Article 2.1 and the *chapeau* of Article XX. In particular, the Appellate Body has noted that the concepts of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and of a "disguised restriction on trade" are found both in the *chapeau* of Article XX of the GATT 1994 and in the sixth Recital of the Preamble of the TBT Agreement, which the Appellate Body has recognized as providing relevant context for Article 2.1[1490]

7.1102. Furthermore, the Appellate Body has explained that "a regulatory distinction that is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination" cannot be considered "legitimate", and that "any detrimental impact stemming from such a distinction" will hence reflect discrimination prohibited under Article 2.1.[1491] In other words, in assessing whether any detrimental impact on imports stems from a "legitimate regulatory distinction" under Article 2.1, a panel may be guided by effectively the same standard that applies under the *chapeau* of Article XX, i.e. whether the measure is designed or applied "in a manner that constitutes a means of arbitrary or unjustifiable discrimination".

7.1103. The Panel understands that the assessment of whether any detrimental impact on imports under Article 2.1 stems exclusively from a "legitimate regulatory distinction" will not necessarily, or automatically, resolve the question of whether the measure at issue is applied consistently with the requirements of the *chapeau* of Article XX. The Panel also appreciates that where a panel seeks to rely on its findings under the "legitimate regulatory distinction" step of the analysis under Article 2.1 as a basis for its findings under the *chapeau* of Article XX, it is incumbent on a panel to provide an adequate explanation of why that is so.[1492]

7.1104. In the present case, the parties' arguments under the "legitimate regulatory distinction" step of the analysis under Article 2.1 are essentially the same as their arguments under the *chapeau* of Article XX, and the Panel's assessment under this step of the analysis in Article 2.1 is expressly formulated in terms of whether the measure is designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination. In these circumstances, the Panel sees nothing to be gained, and indeed significant potential for confusion, by repeating the same analysis that has already been presented in the context of Article 2.1 again in the context of the *chapeau* of Article XX.

7.1105. The Panel's assessment under the "legitimate regulatory distinction" step of the analysis in Article 2.1 thus applies *mutatis mutandis* to the *chapeau* of Article XX. Accordingly, the Panel concludes that the high ILUC-risk cap and phase-out has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail because the European Union failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk, and because there are deficiencies in the design and implementation of the low ILUC-risk criteria and certification procedure.

[1489] Appellate Body Reports, *EC – Seal Products*, para. 5.310.
[1490] Appellate Body Reports, *US – Clove Cigarettes*, para. 173; and *US – Tuna II (Mexico)*, para. 213.
[1491] Appellate Body Reports, *EC – Seal Products,* fn 1543 to para. 5.311, referring to *US - COOL,* para. 271.
[1492] Appellate Body Reports, *EC – Seal Products*, para. 5.310.

7.1106. The Panel notes that certain of these same deficiencies have been found to give rise to a violation of the obligation in Article X:3(a), and the European Union has not argued that the inconsistency with Article X:3(a) is justified under Article XX.

7.1.5.5.7 Conclusion on Article XX

7.1107. The Panel concludes that:

a. the high ILUC-risk cap and phase-out is a measure relating to the conservation of exhaustible natural resources that is made effective in conjunction with restrictions on domestic production or consumption within the meaning of Article XX(g);

b. the high ILUC-risk cap and phase-out is a measure necessary to protect human, animal or plant life or health within the meaning of Article XX(b);

c. it is unnecessary to rule on whether the high ILUC-risk cap and phase-out is a measure necessary to protect public morals under Article XX(a); and

d. the high ILUC-risk cap and phase-out has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail because the European Union failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk, and because there are deficiencies in the design and implementation of the low ILUC-risk criteria and certification procedure.

7.1108. One panelist has reached a different conclusion, as set out in section 7.3 of this Report.

7.2 Claims in respect of the French measure

7.2.1 Preliminary considerations

7.2.1.1 Preliminary considerations relating to the definition of the French TIRIB measure

7.1109. As explained in section 2 of this Report, the specific French measure challenged by Indonesia concerns an annual tax, known as the TIRIB, payable by entities that release fuel for consumption within the territory of France.

7.1110. Indonesia refers in its panel request to this tax as "the French fuel tax".[1493] Indonesia challenges in particular the alleged tax reductions to the fuel tax for certain oil crop-based biofuels and the alleged exclusion of palm oil-based biofuel from the alleged tax reduction.[1494]

7.1111. In its first written submission, Indonesia further describes the "French fuel tax" as consisting of a general tax on fuel released for consumption in France, and a reduction of that tax based on the quantity of qualifying biofuel incorporated therein, which Indonesia refers to as "French biofuel tax reduction".[1495] Indonesia also clarifies in its first written submission that the term "French fuel tax" was used in its panel request to refer to the "French measure", but in its submission it distinguishes between the "French fuel tax" and the "French biofuel tax reduction" for specificity and clarity in its claims.[1496]

7.1112. Thus, based on Indonesia's panel request, and as further elaborated in its subsequent submissions, the Panel understands that Indonesia has specifically focused its claims on what it refers to as the "French biofuel tax reduction".[1497]

[1493] Indonesia's panel request, WT/DS593/9, para. 43.
[1494] Indonesia's panel request, WT/DS593/9, paras. 44-46.
[1495] Indonesia's first written submission, para. 189.
[1496] Indonesia's first written submission, fn 276.
[1497] See, for example, Indonesia's first written submission, paras. 1229-1230.

7.1113. In its submissions, the European Union refers to the "TIRIB" when referring to what Indonesia refers to as the "French Fuel tax", and to the "TIRIB reduction" when referring to what Indonesia refers to as the "French biofuel tax reduction".[1498]

7.1114. For the sake of clarity and consistency, the Panel will refer throughout its analysis to the "French TIRIB" when referring generally to the "TIRIB" or "French fuel tax", and to the "French TIRIB measure" when referring to the specific aspect of the French TIRIB that is at issue in this dispute, i.e. the "French biofuel tax reduction" or "TIRIB reduction".

7.2.1.2 Order of analysis under the SCM Agreement and the GATT 1994

7.1115. Having defined the French measure at issue, the Panel now turns to the order of analysis in respect of the multiple legal claims that Indonesia has raised under the SCM Agreement and the GATT 1994.

7.1116. The Panel will first address the order of analysis between the SCM Agreement and the GATT 1994 and will then address the order of analysis among the multiple claims brought under those agreements. In structuring its order of analysis, the Panel has accorded due weight to the manner in which the parties themselves have presented their claims and defences.[1499]

7.1117. Indonesia has brought claims under Articles I:1 and III:2 of the GATT 1994 and under Articles 3, 5 and 6 of the SCM Agreement. Indonesia has presented its claims under the GATT 1994 first, and then its claims under the SCM Agreement. The European Union does the same in its own submissions.

7.1118. The Panel notes that the disciplines of the SCM Agreement clearly deal with certain types of measures more specifically and in greater detail than certain corresponding provisions of the GATT 1994, such as those provisions of the GATT 1994 relating to countervailing duty investigations (Article VI) and subsidies (Article XVI). However, in this dispute the provisions of the GATT 1994 raised by Indonesia are the non-discrimination obligations in Articles I:1 and III:2. The Panel considers that there is no mandatory order of analysis between the provisions of the GATT 1994 and the provisions of the SCM Agreement which are at issue in this dispute.

7.1119. Therefore, the Panel will address the claims related to the French TIRIB measure in the order presented by Indonesia, and begin with the claims under the GATT 1994. If the Panel finds that any of Indonesia's claims is well founded, the Panel will proceed to address the European Union's defence under Article XX. The Panel will then address Indonesia's claims under the SCM Agreement.

7.1120. With respect to the claims under the GATT 1994, Indonesia has presented its claim under Article I:1 first, and then its claims under Article III:2. However, when conducting its analysis under Article I:1, Indonesia refers to its claims under Article III:2 for the purposes of demonstrating that the challenged measure falls within the scope of Article I:1. For this reason, the Panel considers it more appropriate to analyse Indonesia's claims under Article III:2 first, and then proceed to address Indonesia's claim under Article I:1.

7.1121. In respect of the claims under the SCM Agreement, the Panel begins by addressing whether the French TIRIB measure falls within the definition of a subsidy under Article 1 of the SCM Agreement. The Panel then addresses Indonesia's claim under Articles 3.1(b) and 3.2. The Panel then addresses whether any subsidy found to exist is a specific subsidy within the meaning of Article 2. This is followed by the Panel's assessment of Indonesia's claims of serious prejudice under Articles 5(c), 6.3(a) and 6.3(c).

[1498] See, for example, European Union's first written submission, paras. 1364 and 1391.
[1499] See Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.

7.2.2 Claims under the GATT 1994

7.2.2.1 The European Union's preliminary objection on the basis of Article 6.2 of the DSU with respect to Indonesia's claims under Article III:2

7.2.2.1.1 Introduction

7.1122. The European Union submits[1500] that Indonesia's claims under the first and second sentences of Article III:2 are not properly before the Panel on the basis of Article 6.2 of the DSU, and asks the Panel to rule on this preliminary matter before engaging in the substantive analysis of Indonesia's claims. The European Union accepts that Indonesia's panel request identifies the specific measure at issue, but argues that it does not contain a "brief summary of the legal basis of the complaint sufficient to present the problem clearly". In this connection, the European Union argues that it is impossible to read the panel request and understand anything at all about the manner in which Indonesia considered that the challenged measure was violating Article III:2.[1501] The European Union submits that the panel request could have been interpreted on its face as referring to the first sentence of Article III:2, or to the second sentence, or to both, and that it was only after reading Indonesia's first written submission that it was in a position to discover what the precise legal basis of Indonesia's complaint was.[1502]

7.1123. Indonesia requests the Panel to reject the European Union's objection.[1503] Indonesia maintains that, reading the panel request as a whole and taking into account the nature of Article III:2, the conditions of Article 6.2 of the DSU are met. Indonesia submits that paragraph 45 of its panel request as well as its section addressing the legal basis of the complaint describe the discrimination against palm oil-based biofuel, as compared to the treatment afforded to other oil crop-based biofuels. For Indonesia, when paragraph 45 and the claims section are read together, it is clear that Indonesia identified the problem.[1504]

7.1124. Indonesia maintains that it did not refer in its panel request to "like" or "directly competitive and substitutable" products when describing its claim under Article III:2, and that, by contrast, it expressly referred to like products when describing other claims. For Indonesia, by not qualifying its discrimination claim under Article III:2 by referring to like products, Indonesia put the European Union on notice that the entirety of Article III:2 fell within the Panel's terms of reference. Indonesia adds that, in past disputes involving the first and second sentences of Article III:2, the panel requests either mentioned both sentences or simply identified Article III:2.[1505]

7.2.2.1.2 Legal standard

7.1125. The Panel notes that the panel request governs a panel's terms of reference and delimits the scope of its jurisdiction. In fulfilling this function, it also pursues a due process objective, by providing the respondent and third parties with sufficient notice regarding the nature of the complainant's case, and by enabling them to respond accordingly.[1506]

7.1126. The Panel recalls that Article 6.2 of the DSU states, in relevant part, as follows:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.1127. Article 6.2 sets out two substantive requirements that a complainant must satisfy when preparing its panel request: (a) identify the specific measures at issue, and (b) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The European

[1500] European Union's first written submission, paras. 1401-1415.
[1501] European Union's first written submission, para. 1414.
[1502] European Union's first written submission, paras. 1411-1412.
[1503] Indonesia's opening statement in the first substantive meeting, para. 98; responses to the Panel's first set of questions, paras. 1-13.
[1504] Indonesia's responses to the Panel's first set of questions, paras. 3-6.
[1505] Indonesia's responses to the Panel's first set of questions, paras. 8-12.
[1506] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.8.

Union's preliminary objection concerns the second requirement. The Panel elaborates on the applicable legal standard as necessary in the context of its assessment of Indonesia's panel request.

7.2.2.1.3 Assessment by the Panel

7.1128. Indonesia's panel request presents its claim(s) under Article III:2 as follows:

> [B]y making reductions to the fuel tax available for oil crop-based biofuels but excluding oil palm crop-based biofuels from those reductions, such measures appear to discriminate between imported oil palm crop-based biofuels and other biofuels of domestic origin, in violation of Article III:2 of the GATT 1994 […][1507]

7.1129. The Panel notes that Indonesia's panel request identifies Article III:2 without quoting the provision and without specifying whether its claim is with respect to the first sentence, the second sentence, or both sentences.

7.1130. It is well established that Article 6.2 demands only a summary of the legal basis of the complaint, which may be brief, but must be sufficient to present the problem clearly.[1508] It is also well established that the identification of the treaty provisions claimed to have been violated by the respondent is always necessary, but it may not always be enough such as in cases where the articles listed establish not one single, distinct obligation, but rather multiple obligations.[1509] Thus, a simple reference to Article III:2, without any further indication as to which one of the two distinct obligations therein a claim pertains to, may not meet the requirements of Article 6.2 in some cases.

7.1131. However, Indonesia's panel request does not limit itself to merely identifying the legal provision. The panel request identifies the products to be compared (i.e. imported palm oil-based biofuels and other oil crop-based biofuels of domestic origin) and it also identifies the alleged discrimination causing the alleged violation of Article III:2 (i.e. "making reductions to the fuel tax available for oil crop-based biofuels but excluding oil palm crop-based biofuels from those reductions"). In the Panel's view, although the European Union may not have known whether the products to be compared would be considered by Indonesia as like or directly competitive or substitutable or, indeed, as both, the European Union was clearly put on notice with respect to the products to be compared and with respect to the nature of the alleged tax discrimination.

7.1132. Also, as the Panel will explain later, the first sentence of Article III:2 concerns taxation in excess of like products, and the second sentence concerns "directly competitive and substitutable products" that are not similarly taxed, so as to afford protection to domestic production. Although the scope and legal standard of both sentences differ, the two sentences are closely related[1510], as they both concern discriminatory taxation, and similar considerations are taken into account in the analysis of whether the relevant products are like or directly competitive or substitutable and whether the relevant tax treatment constitutes taxation in excess of or dissimilar taxation.

7.1133. Therefore, in the Panel's view, the fact that Indonesia's panel request did not specify that the claim(s) concerned both sentences of Article III:2 did not affect the ability of the European Union to understand what the case was about and to prepare its defence. For this reason, the Panel finds that Indonesia's panel request provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.2.2.1.4 Conclusion on the preliminary objection

7.1134. Based on the above, the Panel rejects the European Union's preliminary objection and concludes that Indonesia's claims under Article III:2, first and second sentences of the GATT 1994 are within the Panel's terms of reference.

[1507] Indonesia's panel request, WT/DS593/9, para. 48(ii).
[1508] Appellate Body Reports, *Korea – Dairy*, para. 120; and *Korea – Pneumatic Valves (Japan)*, para. 5.6.
[1509] Appellate Body Report, *Korea – Dairy*, para. 124; and *Korea – Pneumatic Valves (Japan)*, para. 5.6.
[1510] Appellate Body Reports, *Canada – Periodicals*, p. 24; and *EC – Asbestos*, para. 79.

7.2.2.2 Article III:2, first sentence

7.2.2.2.1 Introduction

7.1135. The Panel now proceeds to address Indonesia's claim under Article III:2, first sentence of the GATT 1994.

7.1136. Indonesia submits[1511] that the French TIRIB measure is inconsistent with Article III:2, first sentence, because, by excluding palm oil-based biofuel from the tax reduction mechanism, France discriminates against imported palm oil-based biofuel, while favouring other like domestic oil crop-based biofuels. More specifically, Indonesia submits that: (i) the French TIRIB constitutes an internal tax; (ii) imported palm oil-based biofuel is like other domestic oil crop-based biofuels; and (iii) imported palm oil-based biofuel is taxed in excess of like domestic oil crop-based biofuels.

7.1137. The European Union submits[1512] that Indonesia's claim under Article III:2, first sentence is groundless. More specifically, while the European Union does not dispute that the French TIRIB constitutes an internal tax, the European Union contends that Indonesia has not demonstrated that the relevant products are like within the meaning of Article III:2, first sentence. Furthermore, while the European Union does not contest that the exclusion of palm oil-based biofuel from the French TIRIB measure implies that fuels containing such biofuel, whether imported or domestically produced, may be taxed in excess of fuels containing other types of biofuels, whether imported or domestically produced, it contests that this tax differential is related to the origin of the product.

7.2.2.2.2 Legal standard

7.1138. Article III:2, first sentence states as follows:

> The products of the territory of any Member imported into the territory of any other Member shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

7.1139. Article III:2, first sentence has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.1140. Based on its text, a complainant must demonstrate the following elements to establish an inconsistency with Article III:2, first sentence:

a. that the measure is an internal tax or other internal charge applied, directly or indirectly, to products[1513];

b. that imported and domestic products are like products within the meaning of Article III:2, first sentence; and

c. that the imported products are taxed in excess of the domestic products.[1514]

7.1141. The Panel will elaborate further on the elements of the legal standard in Article III:2, first sentence as necessary in the course of its assessment of the issues in dispute.

[1511] Indonesia's first written submission, paras. 1258-1284; second written submission, paras. 1414-1416,1419-1441.

[1512] European Union's first written submission, paras. 1416-1443; second written submission, paras. 496-515.

[1513] Appellate Body Reports, *China – Auto Parts*, para. 181.

[1514] Appellate Body Report, *Canada – Periodicals*, pp. 22-23.

7.2.2.2.3 Internal taxes applied, directly or indirectly, to products

7.1142. The Panel begins its analysis with the issue of whether the French TIRIB constitutes an internal tax applied, directly or indirectly, to products.

7.1143. Indonesia submits that the French TIRIB is an internal tax within the meaning of Article III:2, because it applies to all fuel released for consumption based on the amount of renewable biofuel it contains, and thus, it applies indirectly to biofuel, and it becomes payable when the product is released for consumption in France.[1515]

7.1144. The European Union does not contest that the French TIRIB is an internal tax.[1516]

7.1145. Article III:2 concerns "internal taxes or other internal charges of any kind … applied, directly or indirectly, to … products". The Appellate Body has explained that what is important for determining if a measure is an internal tax or other internal charge is that the obligation to pay must accrue due to an internal event, such as the distribution, sale, use or transportation of the product.[1517] For the purposes of Article III:2, the tax must be "applied, directly or indirectly, to products". In this respect, the panel in *Mexico – Taxes on Soft Drinks* found that non-cane sugar sweeteners were indirectly subject to the soft-drink tax when they were used in the production of soft drinks and syrups.[1518]

7.1146. As explained in section 2 of this Report, the French TIRIB is an annual tax payable by entities that release fuel for consumption within the territory of France; and its applicable rate will vary depending on the incorporation of sources qualifying as renewable energy, which includes certain biofuels, into such fuel. The French TIRIB is therefore a tax that applies to products. It applies directly to fuel and indirectly to the biofuel incorporated into such fuel. The obligation to pay such tax is accrued due to the internal event of releasing the fuel for consumption in France. Thus, the French TIRIB is an internal tax applied, directly or indirectly, to products.

7.1147. The Panel therefore finds that the French TIRIB is an internal tax applied, directly or indirectly, to products, that falls within the scope of Article III:2. Consequently, the French TIRIB measure, as a feature of the French TIRIB, also falls within the scope of Article III:2.

7.2.2.2.4 Like products

7.1148. The Panel now proceeds to address the issue of whether the products at issue are like products within the meaning of Article III:2.

7.1149. Indonesia maintains that it has already demonstrated, in the context of its claims against the high ILUC-risk cap and phase-out, that palm oil-based biofuel and palm oil as a biofuel feedstock are like other oil crop-based biofuels and their respective biofuel feedstocks. For Indonesia, while the concept of likeness under Article III:2, first sentence may need to be interpreted more narrowly, the same considerations apply concerning the products' physical characteristics, end-uses in a given market, consumer tastes and preferences, and tariff classification.[1519]

7.1150. The European Union contends that Indonesia has not demonstrated that the relevant products are like within the meaning of Article III:2, first sentence.[1520]

7.1151. The Panel recalls that Indonesia has confirmed, in the context of its claims under Articles 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 with respect to the high ILUC-risk cap and phase-out, that the focus of its claims is the treatment of palm oil-based biofuel as compared to the treatment of rapeseed oil- and soybean oil-based biofuels. Because, with respect to the French TIRIB measure, Indonesia has explicitly referred to its arguments on like products put forward with respect to the high ILUC-risk cap and phase-out, the Panel will compare the same products. Thus,

[1515] Indonesia's first written submission, para. 1267.
[1516] European Union's first written submission, para. 1399.
[1517] Appellate Body Reports, *China – Auto Parts*, para. 162.
[1518] Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.45.
[1519] Indonesia's first written submission, para. 1270.
[1520] European Union's first written submission, para. 1439.

the Panel will compare palm oil-based FAME biofuel with rapeseed oil- and soybean oil-based FAME biofuels.

7.1152. The Appellate Body has explained that the scope of like products in the first sentence of Article III:2 must be construed narrowly, given the existence of the second sentence providing for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products, namely, directly competitive or substitutable products. The Appellate Body further explained that how narrowly the definition of like products in Article III:2, first sentence should be construed "is a matter that should be determined separately for each tax measure in each case".[1521]

7.1153. Panels and the Appellate Body have consistently explained that whether products are like within the meaning of Article III:2, first sentence must be determined on a case-by-case basis, by examining relevant factors, which include: (i) the products' physical characteristics (which may relate to its physical properties, nature and qualities); (ii) the products' end-uses in a given market; (iii) consumers' tastes and habits[1522]; and (iv) the tariff classification of the products.[1523] As the Appellate Body has cautioned, however, this approach for determining whether products are like will be most helpful if decision makers keep in mind how narrow the range of like products in Article III:2, first sentence is meant to be as opposed to the range of like products contemplated in some other provisions of the GATT 1994 and other covered agreements.[1524]

7.1154. The Panel recalls that the four criteria are neither exhaustive nor mutually exclusive, none of them necessarily has an overarching role, and they are rather analytical tools for organizing and assessing the evidence relevant for the analysis of like products.[1525] Moreover, a panel is to use these criteria to examine the nature and extent of a competitive relationship between and among imported and domestic products, which will depend on the market where these products compete.[1526]

7.1155. In order to conduct its analysis of like products under Article III:2, first sentence with respect to the French TIRIB measure, the Panel will rely on factual aspects of its analysis of like products under Articles 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 with respect to the high ILUC-risk cap and phase-out. The Panel will include in this section considerations with respect to the French market, and will reach a conclusion bearing in mind that the scope of like products under Article III:2, first sentence is narrower than the scope of "like products" under the provisions analysed with respect to the high ILUC-risk cap and phase-out.

7.2.2.2.4.1 Physical properties

7.1156. Regarding physical properties, Indonesia submits that biofuel produced from palm oil, rapeseed oil and soybean oil share the same chemical nature and similar basic physical characteristics, although there are slight differences related to the CFPP of the products that do not have an impact on the competitive relationship between the products.[1527]

7.1157. The European Union argues that biodiesel produced from palm oil, rapeseed oil and soybean oil have different properties, referring to the low-temperature operability expressed through the CFPP, which typically is +13°C for PME, -14°C for RME and -2°C for SBME. For the European Union, these differences are not minor or irrelevant, but are characteristics that define the extent to which SBME, PME and RME can be substituted to each other and hence the degree of competition that exists between them.[1528]

[1521] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20.
[1522] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20.
[1523] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 21-22.
[1524] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20.
[1525] Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 119 and 131.
[1526] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 168. The Appellate Body further stressed that the determination of "likeness" under Article III:2, first sentence is, fundamentally, a determination about the nature and extent of a competitive relationship between and among imported and domestic products. (Appellate Body Reports, *Philippines – Distilled Spirits*, para. 170.)
[1527] Indonesia's first written submission, para. 1275.
[1528] European Union's first written submission, para. 1428; second written submission, para. 503.

7.1158. As the Panel has already found, PME, RME and SBME share the same basic chemical composition of FAME, and a number of physical characteristics, including viscosity, density, and flash point, while not identical, are similar. The Panel recalls that the core differences that are in the focus of the parties' arguments relate to the cold flow properties, in particular the CFPP, as well as the iodine value and cetane number. For the purposes of the French measure, the parties refer mainly to the CFPP, which is relevant to the analysis of the end-uses and consumers' tastes and habits.

7.2.2.2.4.2 End-uses

7.1159. With regard to end-uses, Indonesia maintains that all oil crop-based biofuels, pure or mixed, have the same end-use which is as a transport fuel. Indonesia submits that the EU standards for transport fuels do not differentiate among FAME produced from different feedstock, and PME is typically mixed with biofuel made from other feedstock in order to obtain a lower CFPP of the blend (e.g. FAME0). Indonesia adds that biodiesel consumption data in France shows that, prior to the introduction of the French measure, a significant amount of PME was consumed in France, which indicates that even if PME was not consumed in France during the winter season, it must have been consumed during the summer season. For Indonesia, therefore, PME can be substituted with SBME and RME, and thus, RME, SBME and PME compete with each other in the FAME blending market.[1529]

7.1160. The European Union contends that the different properties of PME, SBME and RME have consequences for their end-uses. The European Union maintains that the CFPP for diesel fuel in France ranges between 0ºC in the summer and -15ºC in the winter, and that PME is often blended only up to 20% in FAME0 blends. For the European Union, the different standards required for diesel mix and biodiesels in France in the summer and the winter season have an effect on the amount of PME that can be used in biodiesel blends in France, which demonstrates that PME has a limited substitutability with other biofuels mixed in blends not only in winter but also during the summer.[1530]

7.1161. As the Panel has already explained, the parties do not dispute that PME, RME and SBME are all primarily used as biofuel mixed with mineral diesel transport fuel, in addition to certain other applications. However, the parties disagree on the extent of substitutability between the three types of biofuel, based on the different CFPP of each type of biofuel. Indeed, as explained, the evidence submitted by the parties confirms that low-temperature operability, and therefore, the CFPP, is an important factor to be considered for the use of biofuel in diesel engines depending on the climate of the relevant geographical region.

7.1162. With respect to the French market, the evidence on the record confirms that France requires a CFPP of -15ºC for the winter season and a CFPP of 0ºC during the summer season[1531], and also that PME is often blended in "FAME0" blends (i.e. blends with a CFPP of 0°C).[1532] Therefore, due to its higher CFPP, PME has to be blended with other biofuels in France during the summer season and is likely less commonly used during the winter season. However, the evidence on the record shows that palm oil has been commonly used in France as feedstock for biofuel production[1533], and also that the cold properties of fuels can be improved through the use of additives such as flow improvers.[1534]

7.1163. The Panel notes that, according to data from the French Government, from the total amount of biofuel produced in France for incorporation into diesel in 2019, 50% was made of rapeseed oil, 23% was made of palm oil and 18% was made of soybean oil; and, of the biofuel produced in France for incorporation into diesel in 2018, 53.53% was made of rapeseed oil, 22.45% was made of palm oil and 14.10% was made of soybean oil. This includes both methyl esters and HVO, which, in 2019,

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[1529] Indonesia's first written submission, paras. 1276-1277; second written submission, paras. 1427 and 1446.

[1530] European Union's first written submission, paras. 1427-1433; second written submission, para. 504.

[1531] Biodiesel Standards in various EU member States (website accessed 25 April 2021), (Exhibit EU-147).

[1532] Commission Implementing Regulation (EU) 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia, OJ 2019 L 212, p. 1, (Exhibit IDN-28), recital 297.

[1533] USDA FAS, "GAIN, Biofuels Annual: European Union", 22 June 2021, (Exhibit IDN-355), p. 27; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit IDN-30), p. 31; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit IDN-195), p. 25.

[1534] Arbeitsgemeinschaft Qualitätsmanagement Biodiesel e.V., "Cold Properties of Biodiesel", (Exhibit IDN-17), p. 3.

comprised, respectively, 83.5% and 16.5% of the biofuel produced in France for incorporation into diesel.[1535] Also, of the vegetable oil methyl ester produced in France in 2019, 64% was made of rapeseed oil, 23% was made of soybean oil and 9% was made of palm oil; and, of the vegetable oil methyl ester produced in France in 2018, 65% was made of rapeseed oil, 17% of soybean oil and 14% of palm oil.[1536] This means that palm oil-based biofuel was the second most-used biofuel in France in 2018 and 2019; and that PME was the third most-used oil crop-based methyl ester in France in 2018 and 2019. Palm oil-based biofuel was also more commonly used as biofuel feedstock than biofuels made from waste and animal fat.[1537]

7.1164. The Panel also refers to its discussion on cetane number and iodine value with respect to SBME, adding that both palm oil and soy have been imported into France in significant quantities for the production of biofuel.[1538] This would not have been the case, had there been no substitution between the PME, RME and SBME in spite of certain differences in their physical properties. Moreover, a 2020 report on biofuels from the French Parliament indicates that the biodiesel sector had been weakened by competition from imported biofuels made from palm oil and soybean oil, and that the use of these oils had made it possible to considerably lower the costs.[1539] This corroborates a significant degree of competition between PME, RME and SBME.

7.1165. These data evidence that, despite certain differences in product characteristics, there is a significant degree of competition between PME, RME and SBME. This is further reinforced by the fact that, in the context of an anti-dumping duty investigation into the imports of biodiesel from Argentina and Indonesia, the European Union rejected the claim that PME was not a like product to RME or SBME due to its higher CFPP, and considered that PME could be used throughout the Union throughout the year, by blending with other biodiesels before use, in the same way as RME and SBME; and that PME was therefore interchangeable with biodiesel made in the European Union.[1540]

7.2.2.2.4.3 Consumer perceptions

7.1166. With respect to consumer perceptions, Indonesia maintains that the relevant consumers, who can be operators who purchase imported palm oil to convert to biofuel, operators who purchase biofuel to mix with other biofuel to create FAME X, or operators who purchase FAME X to mix it with mineral diesel base their choices on the price of the product, its CFPP value and the eligibility to count towards meeting the EU renewable energy targets.[1541]

7.1167. The European Union submits that the direct consumers of biofuels are the economic operators, who mix those fuels with fossil fuels to release them for consumption on the market. For the European Union, since they have to produce a blend which complies with certain requirements (for instance in terms of CFPP), and since different biofuels have different CFPP values, they necessarily have to be concerned about what biofuels they are blending and in which proportions.[1542] The European Union adds that the final consumers are not aware of whether palm oil biodiesel is contained in the product they are purchasing, but that, given the widespread public concern in the European Union associating palm oil production with deforestation, loss of biodiversity and climate change, it is clear that consumers' awareness about the presence of palm oil-based biofuels in the

[1535] DGEC, "Panorama 2019 - Biofuels incorporated in France", (Exhibit IDN-302), p. 6; French Parliament Report n. 2609, (Exhibit EU-43), p. 16.
[1536] DGEC, "Panorama 2019 - Biofuels incorporated in France", (Exhibit IDN-302), p. 7.
[1537] DGEC, "Panorama 2019 - Biofuels incorporated in France", (Exhibit IDN-302), pp. 5-10.
[1538] According to a report on biofuels from the French Parliament, in 2018, the volume released for consumption of biofuels produced from palm oil in France represented 838 million litres, and the volume of biofuels produced from soy represented 472 million litres, being respectively 18% and 9.6% of the total volume of biofuels incorporated in France. Of the palm oil used in France for the production of biofuels incorporated into fuels in 2018, 71% originated from Indonesia and 22% from Malaysia. Also, 56.4% of the soy used was imported from Argentina, 21.5% from Brazil and 16.4% from Paraguay. (French Parliament Report n. 2609, (Exhibit EU-43), p. 62.)
[1539] The report mentions in this respect that European rapeseed biodiesel was worth 956 dollars per tonne, while Argentinian soy biodiesel was worth 708 dollars per tonne and Malaysian palm oil biodiesel was 678 dollars per tonne. (French Parliament Report n. 2609, (Exhibit EU-43), p. 75.)
[1540] Council Implementing Regulation (EU) 1194/2013, (Exhibit IDN-25), Recitals 18-19.
[1541] Indonesia's first written submission, para. 1278-1279.
[1542] European Union's first written submission, para. 1437; second written submission, para. 505.

fuel mix is entirely capable of influencing their purchasing decisions, and their preferences and tastes necessarily influence what oil companies produce and what biofuels they blend.[1543]

7.1168. The Panel recalls its findings above that the evidence related to the trade defence measures indicates that final consumers are not aware of or concerned by the composition of the biofuel blend, if the product meets the required CFPP; and that economic operators involved in blending of biofuels will mix PME, RME and SBME with a view to obtaining a blend conforming with the CFPP specifications required by the customer. If the specification requires a particularly low CFPP, the amount of PME will admittedly be lower compared to fuel destined for warmer climates. Within the specification, however, PME competes with RME and SBME.

7.1169. The Panel also refers to its findings above regarding the European Union's assertion that final consumers' awareness about the presence of palm oil-based biofuels in the fuel mix is capable of influencing what biofuel oil companies will blend. The Panel recalls in particular that, the decision by Total France to switch from production of palm oil-based biofuel to biofuel made from other feedstocks, appears to have been driven by the exclusion of PME from the scope of renewable energy sources for the purposes of the French TIRIB.[1544]

7.2.2.2.4.4 Tariff classification

7.1170. Finally, on tariff classification, Indonesia maintains that PME, RME and SBME also have the same tariff classification.[1545]

7.1171. The Panel has already found that the customs classification of PME, RME and SBME is consistent with the indication that they all belong to the category of biodiesel and corroborates the finding that they share important product characteristics and have the same application.

7.2.2.2.4.5 Conclusion on like products

7.1172. The Appellate Body has found that products that have very similar physical characteristics may not be like within the meaning of Article III:2 if their competitiveness or substitutability is low, while products that present certain physical differences may still be considered like if such physical differences have a limited impact on the competitive relationship between and among the products.[1546] The Appellate Body considered that, as long as the differences among the products, including difference in the raw material base, leave fundamentally unchanged the competitive relationship among the final products, the existence of these differences would not prevent a finding of likeness if, by considering all factors, the panel is able to come to the conclusion that the competitive relationship among the products is such as to justify a finding of likeness under Article III:2.[1547] The Appellate Body has also explained that not only products that are perfectly substitutable can fall within the scope of Article III:2, first sentence, as this would be too narrow an interpretation and would reduce the scope of the first sentence essentially to identical products. Rather, products that are close to being perfectly substitutable can be like products, whereas products that compete to a lesser degree would fall within the scope of the second sentence.[1548]

7.1173. The Panel considers that the evidence on the record demonstrates that, despite certain differences in product characteristics, there is a significant degree of competition between PME, RME and SBME in the French market. In the Panel's view, the competitive relationship among the products at issue in the French market is sufficient to justify a finding that, as regards FAME, even under the narrower scope of like products of Article III:2, first sentence, biofuels made from rapeseed oil and soybean oil are like palm oil-based biofuel.

7.1174. The Panel therefore finds that, as regards FAME, biofuels made from rapeseed oil and soybean oil are like palm oil-based biofuel within the meaning of Article III:2, first sentence.

[1543] European Union's first written submission, para. 1438; second written submission, para. 505.
[1544] Press article, 11 January 2019, (Exhibit EU-140).
[1545] Indonesia's first written submission, para. 1280.
[1546] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 120
[1547] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 125.
[1548] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 149.

7.2.2.2.5 Taxation in excess of

7.1175. The Panel now proceeds to address the issue of whether imported palm oil-based biofuel is indirectly taxed in excess of like domestic oil crop-based biofuels.

7.1176. Indonesia submits that imported palm oil-based biofuel is taxed in excess of like domestic oil crop-based biofuels.[1549] Indonesia maintains that in the case of palm oil-based biofuel, the entire amount of the tax is due; whereas biofuel which contains a certain share of sustainable renewable energy, which includes biofuel of domestic origin, is eligible to be included in the calculation for the reduction of the rate of the French TIRIB, resulting in a lower tax rate.[1550]

7.1177. The European Union does not contest that the exclusion of palm oil-based biofuel from the French TIRIB measure implies that fuels containing such biofuel, whether imported or domestically produced, may be taxed in excess of fuels containing other types of biofuels, whether imported or domestically produced. The European Union contests, however, that this tax differential is related to the origin of the product.[1551] For the European Union, the French TIRIB measure is an origin neutral measure, because it is not the incorporation of domestic *vis-à-vis* imported biofuels that triggers the French TIRIB measure, but rather the type of biofuel that is incorporated regardless of its origin.[1552]

7.1178. The Panel notes that, with respect to taxation in excess of, the Appellate Body has stated that even the smallest amount of "excess" is "too much".[1553] Furthermore, a determination of whether an infringement of Article III:2, first sentence exists must be made on the basis of an overall assessment of the actual tax burdens imposed on imported products, on the one hand, and like domestic products, on the other hand.[1554]

7.1179. As explained in section 2 of this Report, entities that release fuel for consumption within the territory of France are liable to pay the French TIRIB as an additional tax that varies in relation to the extent to which the fuel released achieves established incorporation targets for renewable energy sources. While biofuels, including rapeseed oil- and soybean oil-based biofuels, are considered as renewable energy sources for the purposes of the French TIRIB, palm oil-based products are excluded from being considered as renewable energy sources for the purposes of the French TIRIB. The French TIRIB is determined according to a formula whose application results in a tax rate that varies in direct proportion to the difference between the targeted incorporation of renewable energy sources and the actual incorporation of such sources into the fuel released for consumption.

7.1180. The Panel recalls the examples provided in section 2 of this Report to illustrate the operation of the TIRIB formula using the 2020 incorporation target for diesel (8%) and the established 2020 rate (EUR 101 per hectolitre). Based on these examples, the Panel observes that:

a. If the diesel released for consumption contains 8% (or more) of renewable energy sources, including rapeseed oil- and soybean oil-based biofuels, the TIRIB rate would be EUR zero per hectolitre.

b. If the diesel released for consumption contains 8% (or more) of renewable energy sources, including rapeseed oil- and soybean oil-based biofuels, and any amount of palm oil-based biofuel, the TIRIB rate would still be EUR zero per hectolitre.

c. If the diesel released for consumption contains 6% of renewable energy sources, including rapeseed oil- and soybean oil-based biofuels, and 2% (or more) of palm oil-based biofuel, the TIRIB rate would be EUR 2.02 per hectolitre.

[1549] Indonesia's first written submission, para. 1284.
[1550] Indonesia's first written submission, para. 1284; second written submission, para. 1429.
[1551] European Union's first written submission, paras. 1440-1441.
[1552] European Union's first written submission, para. 1442; second written submission, para. 506.
[1553] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23.
[1554] Appellate Body Reports, *Brazil – Taxation*, para. 5.35.

d. If the diesel released for consumption contains 2% of renewable energy sources, including rapeseed oil- and soybean oil-based biofuels, and 6% (or more) of palm oil-based biofuel, the TIRIB rate would be EUR 6.06 per hectolitre.

e. If the diesel released for consumption does not contain any renewable energy source, including rapeseed oil- and soybean oil-based biofuels, but contains 8% (or more) of palm oil-based biofuel, the TIRIB rate would be EUR 8.08 per hectolitre.

7.1181. These examples show that, if palm oil-based biofuel is incorporated into diesel to satisfy any portion of the 8% incorporation target, replacing renewable energy sources, the tax burden on such diesel will increase in proportion to the amount of palm oil-based biofuel incorporated. In contrast, if rapeseed oil- and/or soybean oil-based biofuels are incorporated into diesel to satisfy any portion of the 8% incorporation target, the tax burden on such diesel will decrease in proportion to the amount of rapeseed oil- and/or soybean oil-based biofuels incorporated, with the possibility of achieving a tax rate of EUR zero per hectolitre if the 8% incorporation target is fully satisfied.

7.1182. In other words, as a consequence of the exclusion of palm oil-based products from being considered as renewable energy sources for the purposes of the French TIRIB, or more specifically, as a result of the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure, fuel containing palm oil-based biofuel for the purpose of satisfying any portion of the incorporation target will always be taxed in excess of fuel containing rapeseed oil- and soybean oil-based biofuels for the purpose of satisfying any portion of the incorporation target. This means, in turn, that the palm oil-based biofuel that is incorporated into fuel to satisfy any portion of the incorporation target will always be indirectly taxed in excess of the like products rapeseed oil- and soybean oil-based biofuels when incorporated into fuel to satisfy the incorporation targets.

7.1183. The European Union does not dispute this. However, it argues that the French TIRIB measure is an origin neutral measure because it is not the incorporation of domestic *vis-à-vis* imported biofuels that triggers the reduction, but rather the type of biofuel that is incorporated regardless of its origin. The European Union submits that the incorporation of imported soybean oil, rapeseed oil, sunflower oil biofuels, and biofuels produced from waste material and animal fat as well as second generation biofuels triggers the same reduction as when these biofuels are domestic; and, conversely, the incorporation of domestic palm oil-based biofuel does not produce any reduction. The European Union adds that palm oil-based biofuel is also produced in the European Union, including in France.[1555]

7.1184. Indonesia submits that the relevant comparison is between like products, i.e. between imported palm oil-based biofuel and, for example, domestic rapeseed oil-based biofuel, and not between identical domestic palm oil-based biofuel and imported palm oil-based biofuel. Indonesia adds that, while it exports to France only palm oil-based biofuel, there is no evidence that France produces more than a negligible amount of palm oil-based biofuel, since France uses palm oil to produce HVO, which is not a like product. Indonesia maintains that, while a small percentage of domestic products may be eligible to be taxed, up to 80% of them will not be subject to the tax, whereas all of the imported palm oil-based biofuel will be subject to the tax.[1556]

7.1185. The Panel notes that Article III:2, first sentence provides for equality of competitive conditions of all products found to be like. If palm oil-based biofuel has been found to be like rapeseed oil- and soybean oil-based biofuel, the comparison to be made with respect to taxation in excess of is not between imported palm oil-based biofuel and domestic palm oil-based biofuel, but between imported palm oil-based biofuel and the like domestic products rapeseed oil- and soybean oil-based biofuel.[1557]

[1555] European Union's first written submission, para. 1441-1442; second written submission, para. 506.

[1556] Indonesia's second written submission, paras. 1432-1438; Indonesia's response to Panel question No. 107, para. 321.

[1557] The situation at issue is similar to that in *Japan – Alcoholic Beverages II*. As the panel in *Indonesia – Autos* described it, *in Japan – Alcoholic Beverages II* "the internal tax imposed on domestic shochu was the same as that imposed on imported shochu; the higher tax imposed on imported vodka was also imposed on domestic vodka. Identical products (not considering brand differences) were taxed identically. The issue was

7.1186. Under this comparison, it is clear that fuel containing imported palm oil-based biofuel is taxed in excess of fuel containing the like domestic products rapeseed oil- and soybean oil-based biofuels. Consequently, imported palm oil-based biofuel is indirectly taxed in excess of the like domestic products rapeseed oil- and soybean oil-based biofuels.[1558]

7.1187. In any event, and without ruling on whether the following additional findings are necessary in order for Indonesia to establish its claim under Article III:2, first sentence, the Panel notes that Indonesia is one of the two world's largest producers of palm oil, which produces and exports palm oil as feedstock for biofuel production and palm oil-based biofuel[1559], including to the European Union.[1560]

7.1188. The European Union is the largest biodiesel producer in the world[1561] and France has been one of the major producers and consumers of biodiesel in the European Union.[1562] Rapeseed oil, palm oil and soybean oil have been the most-used feedstocks for biodiesel production in France.[1563] Thus, France produces rapeseed oil-based biofuel, soybean oil-based biofuel and palm oil-based biofuel. Rapeseed oil has been the major feedstock source for biodiesel production in the European Union[1564] and in France[1565], so most of the oil crop-based biofuel produced in France is rapeseed oil-based biofuel. France also produces soybean oil-based biofuel and palm oil-based biofuel, but to a lesser extent.[1566] Counted together, rapeseed oil- and soybean oil-based biofuels comprise most of the biodiesel produced in France.

7.1189. This means that, in effect, palm oil-based biofuel imported from Indonesia, which is all the biofuel imported from such Member, is indirectly taxed in excess of the like rapeseed oil and soybean oil-based biofuels produced in France, which comprise most of the biofuels produced in France.

7.1190. The Panel therefore finds, without ruling on whether these additional findings are necessary in order for Indonesia to establish its claim under Article III:2, that the situation where, as a result of the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure, palm oil-based biofuel is indirectly taxed in excess of rapeseed oil- and soybean oil-based biofuels is, in effect, one where imported products are subject to taxes in excess of those applied to like domestic products.

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whether the differences between the two products shochu and vodka, as defined for tax purposes, were so minor that shochu and vodka should be considered to be like products and therefore subject to the requirement of Article III:2, first sentence, that one should not be taxed in excess of the other." (Panel Report, *Indonesia – Autos*, para. 14.112.)

[1558] In line with the Panel's explanation in *Indonesia – Autos* regarding the situation *Japan – Alcoholic Beverages II*, this finding is not affected by the fact that the European Union also produces palm oil-based biofuel, and thus, that domestic palm oil-based biofuel is indirectly taxed identically to imported palm oil-based biofuel.

[1559] UFOP Global Market Supply 2020/2021, (Exhibit EU-135), p. 27; UFOP Global Market Supply 2019/2020, (Exhibit IDN-11), p. 25.

[1560] USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit IDN-355), p. 29; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit IDN-30), p. 32; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit IDN-195), p. 27.

[1561] UFOP Global Market Supply 2020/2021, (Exhibit EU-135), p. 27; UFOP Global Market Supply 2019/2020, (Exhibit IDN-11), p. 25.

[1562] UFOP Global Market Supply 2020/2021, (Exhibit EU-135), p. 28; UFOP Global Market Supply 2019/2020, (Exhibit IDN-11), p. 24; USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit IDN-355), pp. 25-26; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit IDN-30), pp. 28-29; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit IDN-195), pp. 22-27.

[1563] DGEC, "Panorama 2019 - Biofuels incorporated in France", (Exhibit IDN-302), p. 6; French Parliament Report n. 2609, (Exhibit EU-43), p. 16.

[1564] UFOP Global Market Supply 2020/2021, (Exhibit EU-135), p. 30; UFOP Global Market Supply 2019/2020, (Exhibit IDN-11), p. 28; USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit IDN-355), p. 27; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit IDN-30), p. 30; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit IDN-195), p. 25.

[1565] UFOP Global Market Supply 2020/2021, (Exhibit EU-135), p. 30; UFOP Global Market Supply 2019/2020, (Exhibit IDN-11), p. 28; DGEC, "Panorama 2019 - Biofuels incorporated in France", (Exhibit IDN-302), p.6; French Parliament Report n. 2609, (Exhibit EU-43), p. 16.

[1566] DGEC, "Panorama 2019 - Biofuels incorporated in France", (Exhibit IDN-302), p.6; French Parliament Report n. 2609, (Exhibit EU-43), p. 16.

7.2.2.2.6 Conclusion on Article III:2, first sentence

7.1191. For the reasons stated above, the Panel concludes that, by excluding palm oil-based biofuel from the group of qualifying biofuels, the French TIRIB measure is inconsistent with Article III:2, first sentence of the GATT 1994, because it results in the application of internal taxes to imported palm oil-based biofuel in excess of those applied to the like domestic rapeseed and soybean oil-based biofuels.

7.2.2.3 Article III:2, second sentence

7.2.2.3.1 Introduction

7.1192. The Panel now turns to Indonesia's claim under Article III:2, second sentence.

7.1193. Indonesia submits[1567] that, should the Panel find that palm oil-based biofuel is not like domestic oil crop-based biofuel, the French TIRIB measure is inconsistent with Article III:2, second sentence. Indonesia submits that: (i) imported palm oil-based biofuel and other domestic oil crop-based biofuels are directly competitive or substitutable products; (ii) imported palm oil-based biofuel is not similarly taxed to domestic oil crop-based biofuel; and (iii) the dissimilar taxation of these directly competitive or substitutable products is applied so as to afford protection to domestic production.

7.1194. The European Union submits[1568] that Indonesia has not demonstrated that the French TIRIB measure constitutes a violation of Article III:2, second sentence. More specifically, the European Union contends that Indonesia has not demonstrated that the relevant products are directly competitive or substitutable within the meaning of Article III:2, second sentence. Furthermore, while the European Union does not contest that the exclusion of palm oil-based biofuel from the French TIRIB measure implies that fuels containing such biofuel, whether imported or domestically produced, may be taxed differently to fuels containing other types of biofuels, whether imported or domestically produced, it contests that this tax differential is related to the origin of the product, that this tax differential exceeds the *de minimis* threshold to be considered as dissimilar taxation, and that it is applied so as to afford protection to domestic production.

7.1195. The Panel notes that Indonesia has stated that its claim under Article III:2, second sentence is made in the alternative to its claim under the first sentence. The Panel has already found a violation of Article III:2, first sentence, finding that the products at issue are like within the narrow meaning of such sentence. Therefore, the Panel could stop its analysis here.

7.1196. However, the Panel notes that the likeness of the products at issue under the first sentence of Article III:2 is an issue that remains disputed and is admittedly less clear than the likeness of the products under the broader scope that applies with respect to Article 2.1 of the TBT Agreement and Articles III:4 and III:2, second sentence. Furthermore, given that the like products within the meaning of the first sentence have been considered as a subset of the directly competitive or substitutable products within the meaning of the second sentence[1569], the Panel's factual findings in the context of its assessment of the first sentence necessarily imply a view on whether the same products are directly competitive or substitutable for the purposes of the second sentence. In light of this, and for the sake of completeness, the Panel considers it appropriate to address Indonesia's claim with respect to Article III:2, second sentence.[1570]

7.2.2.3.2 Legal standard

7.1197. Article III:2, second sentence provides as follows:

[1567] Indonesia's first written submission, paras. 1285-1318; second written submission, paras. 1417-1418, 1442-1466.

[1568] European Union's first written submission, paras. 1444-1470; second written submission, paras. 516-519.

[1569] Appellate Body Report, *Korea – Alcoholic Beverages*, para. 118. See also Appellate Body Report, *Canada – Periodicals*, p. 19.

[1570] The Panel observes that it is not necessarily bound by the fact that a claim is formulated as a claim made in the alternative. (See e.g. Appellate Body Report, *US – Continued Zeroing*, paras. 274-279.)

> Moreover, no Member shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

7.1198. Article III:2, second sentence must be read together with the Note *Ad* Article III:2, which states as follows:

> A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

7.1199. Article III:1, referred to in Article III:2, second sentence, states that Members:

> recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

7.1200. Article III:2, second sentence has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.1201. Based on the text of Article III:2, second sentence, read together with its *Ad* Note, a complainant must demonstrate the following four elements to establish an inconsistency with this provision:

a. that the measure is an internal tax or other internal charge applied, directly or indirectly, to products;

b. that the imported and domestic products at issue are "directly competitive or substitutable" with respect to each other;

c. that these directly competitive or substitutable products are "not similarly taxed"; and

d. that the dissimilar taxation of these directly competitive or substitutable products is "applied… so as to afford protection to domestic production".[1571]

7.1202. With respect to the first element, the Panel has already found that the French TIRIB measure falls within the scope of Article III:2.

7.1203. The Panel will elaborate further on the elements of the legal standard in Article III:2, second sentence as necessary in the course of its assessment of the issues in dispute.

7.2.2.3.3 Directly competitive or substitutable products

7.1204. The Panel begins with the issue of whether the products at issue are directly competitive or substitutable within the meaning of Article III:2.

7.1205. Indonesia submits that if the Panel finds that palm oil-based biofuel is not like other oil crop-based biofuels, the same arguments and evidence lead to a conclusion that these products are directly competitive or substitutable within the meaning of Article III:2, second sentence.[1572]

7.1206. The European Union submits that Indonesia has not discharged its burden of demonstrating that palm oil-based biofuel and other crop-based biofuels are directly competitive or

[1571] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 24.
[1572] Indonesia's first written submission, paras. 1292 and 1296; second written submission, para. 1446.

substitutable.[1573] The European Union maintains that Indonesia has merely demonstrated that palm oil, soybean and rapeseed oil biofuels appear to be in some competitive relationship, but it has not investigated how intensive this competitive relationship is. For the European Union, Indonesia has not described in any way the extent of the competitive relationship between those products on the French market, which is characterized by the fact that France requires a CFPP of -15ºC for the winter season, which greatly affects the extent to which PME can substitute other biodiesels.[1574]

7.1207. The Panel recalls that both the analysis of like products under Article III:2, first sentence, and the analysis of direct competitiveness and substitutability under Article III:2, second sentence, require consideration of the competitive relationship between imported and domestic products, but like products is a narrower category than directly competitive and substitutable products, so the degree of competition and substitutability required under the first sentence is higher than that under the second sentence.[1575] The Panel further recalls that products that are close to being perfectly substitutable can be like products, whereas products that compete to a lesser degree would fall within the scope of Article III:2, second sentence.[1576]

7.1208. The Panel has already found the competitive relationship among the products at issue in the French market to be sufficient to justify a finding that, as regards FAME, even under the narrower scope of like products of Article III:2, first sentence, biofuels made from rapeseed oil and soybean oil are like palm oil-based biofuel. The factual findings made by the Panel in the context of finding that the competitive relationship among the products at issue suffices to make them like within the narrow scope of Article III:2, first sentence mean that, for the same reasons, and *a fortiori*, the products are directly competitive or substitutable within the wider scope of the second sentence of Article III:2.

7.1209. The Panel therefore finds that, as regards FAME, rapeseed oil- and soybean oil- based biofuels and palm oil-based biofuel are directly competitive and substitutable within the meaning of Article III:2, second sentence.

7.2.2.3.4 Dissimilar taxation

7.1210. The Panel now proceeds to address the issue of whether imported palm oil-based biofuel and domestic oil crop-based biofuel are not similarly taxed.

7.1211. Indonesia maintains that imported palm oil-based biofuel is not similarly taxed to domestic oil crop-based biofuel.[1577]Indonesia submits that, while products containing oil crop-based biofuels other than palm oil are eligible for the reduction of the rate of the French TIRIB, products containing palm oil-based biofuel do not benefit from such reduction. For Indonesia, as a consequence, the addition of imported palm oil-based biofuel results in a higher tax rate, as compared to the tax levied on biofuel containing EU produced oil crop feedstock, which is always a feedstock other than palm oil.[1578]

7.1212. The European Union submits that the incorporation of imported soybean oil, rapeseed oil, sunflower oil biofuels, and biofuels produced from waste material and animal fat as well as second generation biofuels triggers the same reduction as when these biofuels are domestic; and, conversely, the incorporation of domestic palm oil-based biofuel does not produce any reduction. For the European Union, it is not the incorporation of domestic *vis-à-vis* imported biofuels that triggers the reduction, but rather the type of biofuel that is incorporated regardless of its origin.[1579] The European Union adds that palm oil-based biofuels are produced in France and in the European Union, while other oil-based biofuels are imported into France and the European Union. For the European Union, Indonesia has not correctly assessed whether imported and domestic products are

[1573] European Union's first written submission, para. 1454; second written submission, para. 517.
[1574] European Union's first written submission, para. 1455; second written submission, para. 517.
[1575] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 148.
[1576] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 149.
[1577] Indonesia's first written submission, para. 1302.
[1578] Indonesia's first written submission, para. 1302.
[1579] European Union's first written submission, paras. 1457-1458.

dissimilarly taxed by considering the whole group of directly competitive or substitutable products, but only by looking at a subset of those products.[1580]

7.1213. The Panel has already found that imported palm oil-based biofuel is indirectly taxed "in excess of" the like domestic rapeseed oil- and soybean oil-based biofuels. Thus, there is a tax differential between the products at issue.

7.1214. The Appellate Body has clarified that to be "not similarly taxed" within the meaning of Article III:2, second sentence, the tax burden on imported products must be heavier than on directly competitive or substitutable domestic products, and more than *de minimis*. A determination of whether the tax burden is more than *de minimis* can only be made on a case-by-case basis.[1581] Panels must look at the market in question, and the products themselves, and assess whether the difference in taxation has an impact on the market.[1582]

7.1215. In this respect, Indonesia presents an example of an economic operator releasing for consumption a volume of 185,000 hectolitres diesel in 2020. According to Indonesia:

a. If the economic operator includes a share of renewable energy that can be taken into account for that biofuel of 7.91% (produced from EU produced rapeseed oil and other eligible products, for example), with the remaining 0.09% of the 8% cap being produced from palm oil, which is not eligible to be counted, the amount of the TIRIB for 2020 would be: 185,000 hL * EUR 101 / hL * 0.09% = EUR 16,816.5.[1583]

b. If the economic operator instead includes 3.09% of palm oil-based biofuel, blended with the remaining 4.91% of EU produced rapeseed oil-based biofuel, the amount of the TIRIB for 2020 would be: 185,000 hL * EUR 101 / hL * 3.09% = EUR 577,366.5.[1584]

c. If the economic operator did not include any biofuel, or only palm oil-based biofuel, the amount of the TIRIB would be: 185,000 hL * EUR 101 / hL * 8.00% = EUR 1 494 985.0.[1585]

7.1216. Indonesia submits that the difference in taxation is more than *de minimis*. That is because, if the share of renewable energy is greater than or equal to the national target percentage for using renewable energy in the transport sector (8% in 2020), the tax would be zero, which provides the opportunity for a vast difference in taxation between the two categories of like products.[1586]

7.1217. As previously explained, based on the examples provided in section 2 of this Report to illustrate the operation of the TIRIB formula, if the diesel released for consumption contains 8% (or more) of renewable energy sources, including rapeseed oil- and soybean oil-based biofuel, the TIRIB rate would be EUR zero per hectolitre. If this is compared to the full amount of the TIRIB rate of EUR 8.08 per hectolitre if the diesel released for consumption does not contain any renewable energy source, including rapeseed oil and soybean oil-based biofuel, but contains 8% (or more) of palm oil-based biofuel, the difference in taxation would be EUR 8.08 per hectolitre.

7.1218. The Panel considers that the mere possibility of achieving a tax rate of EUR zero per hectolitre by fully satisfying the incorporation target is sufficient to have a significant impact on the market, incentivizing the use of qualifying biofuels for the purposes of the French TIRIB measure, including rapeseed oil- and soybean oil-based biofuels, allowing such biofuels to compete for a share of the fuel market, and excluding palm oil-based biofuel from competing for such share of the fuel market.

7.1219. This impact on the market can be illustrated by the decision by Total France to switch from production of palm oil-based biofuel to biofuel made from other feedstocks, which appears to have been driven by the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the

[1580] European Union's second written submission, para. 518.
[1581] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 27.
[1582] Panel Report, *Chile – Alcoholic Beverages*, paras. 7.90-7.91.
[1583] Indonesia's first written submission, para. 1299.
[1584] Indonesia's first written submission, para. 1300.
[1585] Indonesia's first written submission, para. 1301.
[1586] Indonesia's first written submission, para. 1303.

purposes of the French TIRIB measure.[1587] In addition, this is further reinforced by the European Union's characterization of the tax as being "about changing the tax payers behaviours so that they do not pay the tax at all but contribute to an environmental objective."[1588]

7.1220. In light of the above, in the Panel's view, the tax burden on imported palm oil-based biofuel resulting from the difference in taxation is heavier than on directly competitive or substitutable domestic products, and more than *de minimis*. Consequently, the difference in taxation amounts to dissimilar taxation within the meaning of Article III:2, second sentence.

7.1221. Indonesia also refers to a mandate change whereby the share of rapeseed oil-based biofuel was counted at its actual value plus 20%. Indonesia submits that from 1 August 2020 until 31 December 2020, any share of renewable energy whose CFPP is at the most -10°C, was counted at 20% over its actual value for the purposes of the French TIRIB measure. Indonesia maintains that only rapeseed oil-based biofuel, with a CFPP value of -14°C, benefited from the accounting change to the calculation of the reduction of the French TIRIB. According to Indonesia, palm oil-based biofuel was excluded from benefitting from this increased counting because its CFPP value is higher than -10°C. For Indonesia, this had already affected the conditions of competition to the detriment of palm oil-based biofuel, as trade in rapeseed oil-based biofuel increased significantly in the wake of the publication of the amendment in August 2020.[1589]

7.1222. The European Union contends that Indonesia's panel request nowhere identifies or mentions a French measure whereby the share of biofuel with a CFPP of at most -10°C is counted at its actual value plus 20% for the purpose of the French TIRIB measure, so it is the exclusion of palm oil from the French TIRIB measure which according to Indonesia, would violate WTO provisions and not the rules for counting the share of biofuel with a given CFPP for the purpose of the French TIRIB measure.[1590]

7.1223. The Panel has already found dissimilar taxation within the meaning of Article III:2, second sentence. This is regardless of the existence of the accounting change related to the CFPP of rapeseed oil-based biofuel, which was valid from 1 August 2020 until 31 December 2020. Therefore, it is not necessary for the Panel to rule on whether the increased counting is within its terms of reference, as it could only reinforce the conclusion on dissimilar taxation that it has already reached.

7.1224. The Panel therefore finds that, as a result of the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure, imported palm oil-based biofuel and the like domestic products rapeseed oil- and soybean oil-based biofuels are not similarly taxed.

7.2.2.3.5 So as to afford protection to domestic production

7.1225. The Panel now turns to the issue of whether the dissimilar taxation of these directly competitive or substitutable imported and domestic products is applied so as to afford protection to domestic production.

7.1226. Indonesia argues that the French TIRIB measure is applied so as to afford protection to domestic oil crop-based biofuels and their feedstocks, because it is designed in such a way as to encourage the use of domestic oil crop-based biofuels and their feedstocks, such as rapeseed oil-based biofuel and its feedstock, to the detriment of imported palm oil and palm oil-based biofuel.[1591] Indonesia submits that the design and structure of the French TIRIB measure demonstrate its protective application, because it excludes from the tax reduction palm oil-based biofuel which is made using a wholly imported product or is itself imported, whereas domestic oil crop-based biofuels benefit from the tax reduction. Indonesia adds that the increased counting for biofuel with a CFPP

[1587] Press article, 11 January 2019, (Exhibit EU-140).
[1588] European Union's first written submission, para. 1536.
[1589] Indonesia's first written submission, paras. 1304-1306.
[1590] European Union's first written submission, para. 1452.
[1591] Indonesia's first written submission, paras. 1309, 1314; second written submission, para. 1465.

of at most -10°C for the purposes of quantifying the tax reduction only benefited domestically produced rapeseed oil-based biofuel.[1592]

7.1227. The European Union disputes that its legal framework for renewable energy as well as the exclusion of palm oil-based biofuel from the French TIRIB measure is designed to afford protection to domestic products. The European Union argues that palm oil-based biofuel is not excluded from the French TIRIB measure because it is imported, as also domestic palm oil-based biofuel is subject to the same exclusion, which had serious consequences on investment and employment in France. The European Union maintains that, despite those consequences, the French legislator rejected the French Government's proposal to relax that exclusion, referring to the environmental and climate change impact of palm oil cultivation and the associated moral concerns, in line with the very objective and revealing structure of the French TIRIB.[1593]

7.1228. The Appellate Body has explained that the question of whether dissimilar taxation "affords protection" for the purposes of Article III:2, second sentence is not one of intent, but rather the structure of the measure in question and its application on domestic as compared to imported products.[1594] The Appellate Body also stated that, although the aim of a measure may not be easily ascertained, its protective application can most often be discerned from the "design, the architecture, and the revealing structure of a measure".[1595] The protective application of dissimilar taxation can only be determined "on a case-by-case basis, taking account of all relevant facts".[1596] In certain cases, the magnitude of the dissimilar taxation may be evidence of such a protective application.[1597]

7.1229. The Panel's analysis of its structure and application reveals that the French TIRIB is a tax that varies in relation to the extent to which the fuel released achieves established incorporation targets for renewable energy sources. While biofuels, including rapeseed oil- and soybean oil-based biofuels, are considered as renewable energy sources for the purposes of the French TIRIB, palm oil-based products are excluded from being considered as renewable energy sources.

7.1230. As already explained, as a consequence of the exclusion of palm oil-based products from being considered as renewable energy sources for the purposes of the French TIRIB, or more specifically, as a result of the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure, if palm oil-based biofuel is incorporated into diesel to satisfy any portion of the incorporation target, replacing renewable energy sources, the tax burden on such diesel will increase in proportion to the amount of palm oil-based biofuel incorporated. In contrast, if rapeseed oil- and/or soybean oil-based biofuels are incorporated into diesel to satisfy any portion of the incorporation target, the tax burden on such diesel will decrease in proportion to the amount of rapeseed oil- and/or soybean oil-based biofuels incorporated, with the possibility of achieving a tax rate of EUR zero per hectolitre if the incorporation target is fully satisfied. The Panel has already found that the mere possibility of achieving a tax rate of EUR zero per hectolitre by fully satisfying the incorporation target is sufficient to incentivize the use of qualifying biofuels for the purposes of the French TIRIB measure, including rapeseed oil- and soybean oil-based biofuels, allowing such biofuels to compete for a share of the fuel market, and excluding palm oil-based biofuel from competing for such share of the fuel market.

7.1231. The Panel also recalls that Indonesia is one of the two world's largest producers of palm oil, which produces and exports palm oil as feedstock for biofuel production and palm oil-based biofuel[1598], including to the European Union.[1599] In turn, France has been one of the major producers

[1592] Indonesia's first written submission, paras. 1310-1317; second written submission, paras. 1463-1465.

[1593] European Union's first written submission, paras. 1461-1462.

[1594] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29.

[1595] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29.

[1596] Appellate Body Report, *Korea – Alcoholic Beverages*, para. 137.

[1597] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29.

[1598] UFOP Global Market Supply 2020/2021, (Exhibit EU-135), p. 27; UFOP Global Market Supply 2019/2020, (Exhibit IDN-11), p. 25.

[1599] USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit IDN-355), p. 29; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit IDN-30), p. 32; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit IDN-195), p. 27.

and consumers of biodiesel in the European Union[1600], producing rapeseed oil-based biofuel, soybean oil-based biofuel and palm oil-based biofuel.[1601] While most of the oil crop-based biofuel produced in France is rapeseed oil-based biofuel[1602], France also produces soybean oil-based biofuel and palm oil-based biofuel, but to a lesser extent.[1603] Counted together, rapeseed oil- and soybean oil-based biofuels comprise most of the biodiesel produced in France.

7.1232. This means that the exclusion of palm oil-based biofuels from the group of qualifying biofuels for the purposes of the French TIRIB measure has the effect of incentivizing the use of rapeseed oil-based biofuel, which is the oil crop-based biofuel that France produces the most, and soybean oil-based biofuels, which is also produced in France but to a smaller extent, to the advantage of the French domestic producers of such biofuels, and to the detriment of imports of palm oil-based biofuels from Indonesia. Therefore, by excluding palm oil-based biofuels from the group of qualifying biofuels, the French TIRIB measure has the effect of affording protection to French producers of rapeseed oil- and soybean oil-based biofuels.

7.1233. Indonesia also maintains that Members of the French legislature have explicitly confirmed that the measures are designed to protect the domestic biofuel industry, and that this protectionist intent is in line with the application of RED I and RED II. Indonesia refers to a proposal for the early version of the TIRIB which included an explanation that "[t]he exclusion of biofuels made from sustainable palm oil from the list of biofuels eligible for the reduction of [what would become the TIRIB] could also be considered as *discriminatory internal taxation* and therefore contrary to European Union and constitutional law", and submits that members of the French parliament, during parliamentary debate focused on the competition between palm oil- and rapeseed oil-based biofuel.[1604] Indonesia submits that the European Parliament specifically targeted palm oil-based biofuel and palm oil with the intention of excluding them from the EU market and protecting the EU biofuel and oil crop feedstock industry.[1605]

7.1234. The European Union contends that the statements by Members of the French legislature in parliamentary debates demonstrate that the French TIRIB measure is driven primarily by environmental concerns.[1606] The European Union submits that the fact that the other oil crops biofuels do not fall within the same exclusion from the French TIRIB measure is objectively explained both by the EU analysis with regard to high ILUC-risk crop and their share of expansion in land with high-carbon stock, as well as by information elaborated by the French authorities, which concluded, for instance, that the large increase in rapeseed production in France between 2005 and 2008 had a limited effect on deforestation.[1607] For the European Union, it is coherent with the climate change and environmental objective of the French TIRIB that this type of biofuel is not treated the same way as palm oil-based biofuel for the purpose of the French TIRIB measure, and the fact that the incorporation of imported biofuel in the fuel released for consumption in France contributes to the

[1600] UFOP Global Market Supply 2020/2021, (Exhibit EU-135), p. 28; UFOP Global Market Supply 2019/2020, (Exhibit IDN-11), p. 24; USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit IDN-355), pp. 25-26; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit IDN-30), pp. 28-29; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit IDN-195), pp. 22-27.

[1601] DGEC, "Panorama 2019 - Biofuels incorporated in France", (Exhibit IDN-302), p. 6; French Parliament Report n. 2609, (Exhibit EU-43), p. 16.

[1602] UFOP Global Market Supply 2020/2021, (Exhibit EU-135), p. 30; UFOP Global Market Supply 2019/2020, (Exhibit IDN-11), p. 28; DGEC, "Panorama 2019 - Biofuels incorporated in France", (Exhibit IDN-302), p.6; French Parliament Report n. 2609, (Exhibit EU-43), p. 16.

[1603] DGEC, "Panorama 2019 - Biofuels incorporated in France", (Exhibit IDN-302), p.6; French Parliament Report n. 2609, (Exhibit EU-43), p. 16.

[1604] Indonesia's first written submission, para. 1315; and second written submission, para. 1458 (referring to Amendment nr. II-320 rect. ter. of 5 December 2018 to the French Finance Law of 2019, (Exhibit IDN-122), final paragraph; and Minutes of the third session of 18 December 2018 of the National Assembly XV Legislature, Ordinary session of 2018-2019, (Exhibit IDN-364), p. 105)).

[1605] Indonesia's first written submission, paras. 1315-1316; second written submission, paras. 1457-1459.

[1606] European Union's first written submission, paras. 1465-1467. The European Union adds that it is unclear how a specific quote within parliamentary debates over an earlier version of the TIRIB is relevant, and that the parliamentary discussions over the TIRIB dealt with potential impacts of the TIRIB on a number of issues including the environment, security of supply, and loss of jobs, and thus selecting a single sentence by a small group of people during the negotiations that have involved over 348 senators and 577 Members of the National Assembly is misleading.

[1607] European Union's first written submission, para. 1463.

French TIRIB measure confirms that the structure, design and application of the measure is not to afford protection to domestic products.[1608]

7.1235. The Panel has focused its analysis on the structure and application of the measure itself, and has found, on that basis, that the French TIRIB measure has the effect of affording protection to French producers of rapeseed oil- and soybean oil-based biofuels. Under these circumstances, the Panel considers it unnecessary, for the purposes of the evaluation of the claim under Article III:2, second sentence, to delve further into objectives expressed by individual legislators or the public policy concerns that may lay behind the measure.

7.1236. The Panel therefore finds that the French TIRIB measure has the effect of affording protection to French producers of rapeseed oil- and soybean oil-based biofuels, which is sufficient under the circumstances of this dispute to conclude that the dissimilar taxation is applied "so as to afford protection to domestic production" within the meaning of Article III:2, second sentence.

7.2.2.3.6 Conclusion on Article III:2, second sentence

7.1237. The Panel concludes that, by excluding palm oil-based biofuel from the group of qualifying biofuels, the French TIRIB measure is inconsistent with Article III:2, second sentence of the GATT 1994, because it results in dissimilar taxation between imported palm oil-based biofuel and the directly competitive or substitutable domestic rapeseed oil and soybean oil-based biofuels, and this dissimilar taxation is applied so as to afford protection to domestic production.[1609]

7.2.2.4 Article I:1

7.2.2.4.1 Introduction

7.1238. Having addressed the claims relating to the national treatment obligations in the first and second sentences of Article III:2, the Panel now proceeds to address whether the French TIRIB measure is inconsistent with the MFN obligation in Article I:1.

7.1239. Indonesia submits[1610] that the French TIRIB measure is inconsistent with Article I:1, because by excluding palm oil-based biofuel from the tax reduction mechanism, it discriminates against Indonesian palm oil-based biofuel, while favouring other like imported oil crop-based biofuels. More specifically, Indonesia submits that: (i) the French TIRIB measure falls within the scope of application of Article I:1; (ii) imported palm oil-based biofuel is like other imported oil crop-based biofuels; (iii) the French TIRIB measure constitutes an advantage to other like imported oil crop-based biofuels; and (iv) that advantage is not extended immediately and unconditionally to palm oil-based biofuel.

7.1240. The European Union submits[1611] that Indonesia's claim under Article I:1 should be rejected. More specifically, the European Union does not dispute that the French TIRIB measure is a matter which is capable of falling within Article III:2, and therefore also within Article I:1. However, the European Union contends that Indonesia has not demonstrated that the relevant products are like within the meaning of Article I:1, first sentence. Furthermore, while the European Union does not contest that the French TIRIB measure grants an advantage, it contests that such advantage is not accorded immediately and unconditionally to the like product originating in all the other WTO Members.

7.2.2.4.2 Legal standard

7.1241. Article I:1 states:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments

[1608] European Union's first written submission, para. 1464; second written submission, para. 519.
[1609] Indonesia's first written submission, para. 1284.
[1610] Indonesia's first written submission, para. 1234-1257; second written submission, paras. 1472-1480.
[1611] European Union's first written submission, para. 1476-1499; second written submission, paras. 520-537.

> for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

7.1242. As already noted in the context of the Panel's assessment of the claim under Article I:1 against the high ILUC-risk cap and phase-out, a complainant must demonstrate the following elements to establish an inconsistency with Article I:1:

a. that the measure at issue falls within the scope of application of Article I:1;

b. that the imported products at issue are like products within the meaning of Article I:1;

c. that the measure at issue grants an advantage, favour, privilege, or immunity on a product originating in the territory of any country; and

d. that the advantage so accorded is not accorded immediately and unconditionally to like products originating in the territory of all Members.[1612]

7.1243. The Panel will elaborate further on the elements of the legal standard in Article I:1 as necessary in the course of its assessment of the issues in dispute.

7.2.2.4.3 Scope of application of Article I:1

7.1244. The Panel begins with the issue of whether the French TIRIB measure falls within the scope of application of Article I:1.

7.1245. Indonesia maintains that, by demonstrating that the French TIRIB measure is a matter referred to in Article III:2, it has established that it falls within the scope of Article I:1.[1613] Indonesia also contends that the likeness of the products is not relevant in determining whether a measure is a matter referred to in Article III:2.[1614]

7.1246. The European Union submits that the French TIRIB is an internal tax, and France is a WTO Member, so the French TIRIB is a matter which is capable of falling within Article III:2, and therefore also within Article I:1.[1615] The European Union submits, however, that the exclusion of palm oil-based biofuel from the French TIRIB measure creates a tax differential between products which Indonesia has not demonstrated to be like or directly competitive or substitutable, so the Panel should conclude that the exclusion from the French TIRIB measure is not a matter falling within Article III:2 and, as a consequence, under Article I:1.[1616]

7.1247. The Panel observes that Article I:1 covers a wide range of measures, including all matters referred to in paragraphs 2 and 4 of Article III. Thus, internal matters subject to the national treatment obligation under Articles III:2 and III:4 are also within the scope of the MFN obligation under Article I:1.[1617] This includes internal taxes applied, directly or indirectly, to products, referred to in Article III:2.

7.1248. The Panel has already found that the French TIRIB is an internal tax applied, directly or indirectly, to products, which falls within the scope of Article III:2, and that, consequently, the French TIRIB measure, as a feature of the French TIRIB, also falls within the scope of Article III:2. Because the French TIRIB measure falls within the scope of Article III:2, it is a matter referred to in Article III:2 and it thus falls within the scope of Article I:1.

[1612] Appellate Body Reports, *EC – Seal Products*, para. 5.86.
[1613] Indonesia's first written submission, paras. 1237-1238.
[1614] Indonesia's second written submission, para. 1475.
[1615] European Union's first written submission, para. 1477.
[1616] European Union's first written submission, paras. 1478-1479.
[1617] Appellate Body Reports, *EC – Seal Products*, para. 5.80.

7.1249. As Indonesia contends, and contrary to the European Union's argument, whether the products concerned are like is irrelevant in the determination of whether the French TIRIB measure falls within the scope of Article I:1. Even if the products concerned were found not to be like, the French TIRIB would still be an internal tax applied to products, subject to the MFN obligation contained in Article I:1, and the French TIRIB measure, as a feature of the French TIRIB, would still fall under the scope of application of Article I:1 of the GATT 1994.

7.1250. The Panel therefore finds that the French TIRIB measure falls within the scope of application of Article I:1.

7.2.2.4.4 Like products

7.1251. The Panel now turns to the issue of whether the products at issue are like products within the meaning of Article I:1.

7.1252. Indonesia maintains that palm oil-based biofuel is like other oil crop-based biofuels for the purposes of Article I:1. Indonesia refers to its arguments in the context of its claims against the high ILUC-risk cap and phase-out.[1618]

7.1253. The European Union submits that it has already explained with regard to Article III:2 that Indonesia has neither demonstrated that palm oil-based biofuel is like all the other biodiesels or just RME, and SBME, nor has it shown that these products are directly competitive or substitutable, and notably in the French market. For the European Union, it follows that the exclusion of palm oil-based biofuel from the French TIRIB measure creates a tax differential between products which Indonesia has not demonstrated to be like or directly competitive or substitutable.[1619]

7.1254. The Panel recalls that it has already found that, as regards FAME, rapeseed oil- and soybean oil-based biofuels are like palm oil-based biofuel within the narrow scope of Article III:2, first sentence. The factual findings made by the Panel in the context of finding that the competitive relationship among the products at issue suffices to make them like within the narrow scope of Article III:2, first sentence mean that, for the same reasons, and *a fortiori*, these products are like under the wider scope of Article I:1.

7.1255. The Panel therefore finds that, as regards FAME, rapeseed oil and soybean oil-based biofuels are like palm oil-based biofuel within the meaning of Article I:1.

7.2.2.4.5 Advantage granted to a product originating in the territory of any other country

7.1256. The Panel will now proceed to address whether the French TIRIB measure grants an advantage to other like imported oil crop-based biofuels.

7.1257. Indonesia submits that the French TIRIB measure constitutes an advantage granted to imported oil crop-based biofuels other than palm oil-based biofuel.[1620] Indonesia maintains that a tax reduction is available to imported oil crop-based biofuel qualifying as renewable energy biofuels, but excludes palm oil-based biofuel.[1621] Indonesia argues that the economic operators will favour oil crop-based biofuels other than palm oil-based biofuel, whose incorporation into fuel can trigger either a lower or zero tax rate.[1622] For Indonesia, thus, the advantage of qualifying for a lower tax rate, and, as a result, better competitive opportunities, is granted to other imported oil crop-based biofuels, but not to palm oil-based biofuel.[1623]

7.1258. The European Union does not contest that the French TIRIB measure grants an "advantage" for the purpose of Article I:1.[1624]

[1618] Indonesia's first written submission, para. 1239.
[1619] European Union's first written submission, para. 1478.
[1620] Indonesia's first written submission, para. 1240.
[1621] Indonesia's first written submission, paras. 1244-1246.
[1622] Indonesia's first written submission, para. 1247.
[1623] Indonesia's first written submission, paras. 1248 and 1251.
[1624] European Union's first written submission, para. 1481.

7.1259. Previous panels have considered advantages within the meaning of Article I:1 to be those that create more favourable competitive opportunities or affect the commercial relationship between products of different origins.[1625] They have also found that an advantage exists when a measure modifies the conditions of competition for certain imported products relative to other like imported products.[1626] The focus of the analysis under Article I:1 should be on the impact of a given measure on the equality of competitive opportunities for the like imported products rather than the actual trade effects of a measure.[1627]

7.1260. The Panel recalls that the French TIRIB is a tax that varies in relation to the extent to which the fuel released achieves established incorporation targets for renewable energy sources. While biofuels, including rapeseed oil- and soybean oil-based biofuels, are considered as renewable energy sources for the purposes of the French TIRIB, palm oil-based products are excluded from being considered as renewable energy sources. As explained, if rapeseed oil- and soybean oil-based biofuels are incorporated into diesel to satisfy any portion of the incorporation target, the tax burden on such diesel will decrease in proportion to the amount of rapeseed oil- and/or soybean oil-based biofuels incorporated, with the possibility of achieving a tax rate of EUR zero per hectolitre if the incorporation target is fully satisfied.

7.1261. The Panel considers that a lower tax rate that can be as low as zero undoubtedly creates more favourable competitive opportunities for the products qualifying to receive such advantage. Indeed, when incorporated into fuel to satisfy the incorporation targets, rapeseed oil- and soybean oil-based biofuels originating in the territory of any country qualify to receive an advantage in the form of a lower tax rate that can be as low as zero, and this advantage allows such biofuels to compete for a share of the fuel market.

7.1262. Indonesia also submits that the planned progressive elimination of the tax advantage by 2031 is in practice of no effect, given that the tax advantage will only be eliminated for high ILUC-risk raw materials, and palm oil is the only high ILUC-risk raw material and is not even subject to the tax reduction scheme. For Indonesia, this means that imported oil crop-based biofuel other than palm oil-based biofuel are granted not only the advantage of a reduced tax rate, but also the advantage of being able to benefit from an exception to the progressive elimination, and thus, will continue to enjoy the benefit of the reduced tax rate without being subject to any system of progressive elimination by 2031.[1628]

7.1263. The European Union contends that the planned progressive elimination is not the measure that Indonesia has identified in its panel request, and therefore requests the Panel to find as a preliminary matter that it falls outside its terms of reference.[1629]

7.1264. The Panel observes that, pursuant to the Circular of 18 August 2020, a planned progressive elimination of the tax advantage for high-ILUC risk raw materials by 2031 entered into force on 1 January 2020, applying only to palm oil-based products, as only palm oil-based products were considered to pose a high ILUC risk.[1630] However, as the Circular explains, because palm oil-based products were no longer considered to be biofuels, and thus, were excluded from the TIRIB measure, the planned progressive elimination of the tax advantage became, in practice, inoperative. The Panel has already found that an advantage in the form of a lower tax rate exists, regardless of the progressive elimination of the tax reduction for high ILUC-risk raw materials. Therefore, it is not necessary for the Panel to rule on whether the planned progressive elimination is within its terms of reference, or whether not being subject to the planned progressive elimination will confer an additional advantage within the meaning of Article I:1.

7.1265. The Panel therefore finds that the French TIRIB measure grants an advantage to rapeseed oil- and soybean oil-based biofuels originating in the territory of any country.

[1625] Panel Reports, *US – Poultry (China)*, para. 7.415, and *Colombia – Ports of Entry*, para. 7.341.
[1626] Panel Reports, *Brazil – Taxation*, para. 7.1041.
[1627] Appellate Body Reports, *EC – Seal Products*, para. 5.87 and fn 1019.
[1628] Indonesia's first written submission, paras. 1249-1250 and 1256.
[1629] European Union's first written submission, para. 1498.
[1630] French Government Circular of 18 August 2020, (Exhibit IDN-108), p. 19.

7.2.2.4.6 Not accorded immediately and unconditionally to like products originating in the territory of all Members

7.1266. The Panel now turns to the issue of whether the advantage granted to rapeseed oil- and soybean oil-based biofuels originating in the territory of any country is accorded immediately and unconditionally to imported palm oil-based biofuel.

7.1267. Indonesia maintains that the advantage granted to other like imported oil crop-based biofuels is not accorded immediately and unconditionally to imported palm oil-based biofuel.[1631] Indonesia submits that, by subjecting the French TIRIB measure to the classification of biofuels as renewable, and excluding palm oil-based biofuel from such classification, and thus, from the scope of products eligible to receive the tax reduction, a condition to the granting of an advantage has been introduced, which has a detrimental impact on the competitive opportunities of, and thus discriminates against imported palm oil-based biofuel from Indonesia.[1632]

7.1268. The European Union maintains that the French TIRIB measure grants an advantage to imported or domestic oil crop-based biofuel other than imported or domestic palm oil-based biofuel. For the European Union, therefore, the French TIRIB measure does not grant an advantage to any product originating in any country, which is not accorded immediately and unconditionally to the like product originating in all the other WTO Members.[1633]

7.1269. The Panel notes that palm oil-based products are excluded from being considered as renewable energy sources for the purposes of the French TIRIB, or more specifically, palm oil-based biofuel is excluded from the group of qualifying biofuels for the purposes of the French TIRIB measure. This means that the advantage that is granted through the French TIRIB measure to rapeseed oil- and soybean oil-based biofuels is not conferred immediately and unconditionally to palm oil-based biofuel.

7.1270. The European Union submits that the French TIRIB measure is an origin neutral measure, which creates a tax differential in the group of like products identified by Indonesia as all oil crop-based biofuels, but the tax differential created does not target any imports let alone imports from any WTO Member.[1634] The European Union adds that, in order to understand if the measure discriminates between like products from one Member *vis-à-vis* the products of other Members, it is necessary to consider the whole group of products that are like, domestic and imported.[1635] For the European Union, Indonesia should have assessed the impact of the regulatory distinction introduced by the French TIRIB measure on the whole group of like products, as they are produced by the different WTO Members, but it concentrates on rapeseed oil- and soybean oil-based biofuels, a partial subset.[1636]

7.1271. For the European Union, the simple fact that Indonesia does not produce soybeans or rapeseed oil does not say much about whether Indonesia is discriminated against *vis-à-vis* other Members when all the products that should be included in the comparison are considered.[1637]

7.1272. The Panel notes that Article I:1 requires that any advantage granted to "any product", and not to some products, originating in any other country, and not some other countries, is accorded immediately and unconditionally to the like product originating in all other Members, and not in some other Members.[1638] A complainant does not need to demonstrate the trade effects of the measure at issue, so the focus of the analysis should be on the impact of a given measure on the equality of competitive opportunities for the like imported products.[1639]

7.1273. If palm oil-based biofuel has been found to be like rapeseed oil- and soybean oil-based biofuels, the comparison to be made for the purposes of the MFN obligation is not between palm oil-

[1631] Indonesia's first written submission, para. 1257.
[1632] Indonesia's first written submission, para. 1252-1256; second written submission, para. 1479.
[1633] European Union's first written submission, paras. 1482-1483.
[1634] European Union's first written submission, para. 1486.
[1635] European Union's first written submission, para. 1487.
[1636] European Union's first written submission, para. 1494, 1497.
[1637] European Union's first written submission, paras. 1495-1497.
[1638] Appellate Body Reports, *EC – Seal Products*, para. 5.87; and *Canada – Autos*, para. 79.
[1639] Appellate Body Reports, *EC – Seal Products*, para. 5.87 and fn 1019.

based biofuel imported from Indonesia and palm oil-based biofuel imported from any other country, but between palm oil-based biofuel imported from Indonesia and the like products rapeseed oil- and soybean oil-based biofuels imported from any other country. Under this comparison, it is clear that the advantage that is granted to rapeseed oil- and soybean oil-based biofuels originating in the territory of any country is not accorded immediately and unconditionally to like palm oil-based biofuel originating in the territory of Indonesia. In the Panel's view, this is sufficient to find that this element of the analysis has been established.

7.1274. In any event, and to illustrate this further, the Panel notes that Indonesia is an important producer of palm oil-based biofuel[1640], which exports palm oil-based biofuel to the European Union[1641], and such biofuel does not qualify to receive the advantage of the French TIRIB measure; and France, one of the major consumers of biodiesel in the European Union[1642], imports biodiesel from the European Union[1643], which is mostly rapeseed oil-based biofuel[1644], and such biofuel qualifies to receive the advantage of the French TIRIB measure.

7.1275. The Panel therefore finds that the advantage granted to rapeseed oil- and soybean oil-based biofuels originating in the territory of any country is not accorded immediately and unconditionally to like palm oil-based biofuel originating in the territory of Indonesia.

7.2.2.4.7 Conclusion on Article I:1

7.1276. The Panel concludes that, by excluding palm oil-based biofuel from the group of qualifying biofuels, the French TIRIB measure is inconsistent with Article I:1 of the GATT 1994, because it grants an advantage to imported rapeseed oil- and soybean oil-based biofuels that is not immediately and unconditionally accorded to like palm oil-based biofuel imported from Indonesia.

7.2.2.5 Article XX – General exceptions

7.2.2.5.1 Introduction

7.1277. Having found that, by excluding palm oil-based biofuel from the group of qualifying biofuels, the French TIRIB measure is inconsistent with Article III:2 and Article I:1, the Panel now proceeds to address the European Union's invocation of the general exceptions in Article XX.

7.1278. The European Union submits[1645] that the exclusion of palm oil-based biofuel from the French TIRIB measure is justified under Article XX(a) ("necessary to protect public morals"), Article XX (b) ("necessary to protect human, animal or plant life or health") and Article XX(g) ("relating to the conservation of exhaustible natural resources"). The European Union maintains that the arguments contained in its defence with respect to the high ILUC-risk cap and phase-out apply *mutatis mutandis* to the exclusion of palm oil-based biofuel from the French TIRIB measure and must be considered as an integral part of the European Union's response to Indonesia's GATT claims concerning the French TIRIB measure.[1646]

7.1279. Indonesia rejects[1647] the European Union's defence under Article XX with respect to the French TIRIB measure, and submits that its arguments and evidence rebutting the European Union's defence under Article XX of the high ILUC-risk cap and phase-out apply *mutatis mutandis* to the exclusion of palm oil-based biofuels from the French TIRIB measure.[1648]

[1640] UFOP Global Market Supply 2020/2021, (Exhibit EU-135), p. 27; UFOP Global Market Supply 2019/2020, (Exhibit IDN-11), p. 25.
[1641] USDA FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit IDN-355), p. 29; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit IDN-30), p. 32; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit IDN-195), p. 27.
[1642] FAS, "GAIN Biofuels Annual: European Union", 22 June 2021, (Exhibit IDN-355), pp. 25-26; USDA FAS, "GAIN Biofuels Annual: EU-28", 15 July 2019, (Exhibit IDN-30), pp. 28-29; USDA FAS, "GAIN Report, Biofuels Annual: EU-28", 15 July 2015, (Exhibit IDN-195), pp. 22-27.
[1643] French Parliament Report n. 2609, (Exhibit EU-43), p. 62.
[1644] UFOP Global Market Supply 2020/2021, (Exhibit EU-135), p. 30.
[1645] European Union's first written submission, paras. 1500-1507.
[1646] European Union's first written submission, para. 1502.
[1647] Indonesia's second written submission, paras. 1481-1486.
[1648] Indonesia's second written submission, para. 1482.

7.1280. The Panel notes at the outset that, as the Appellate Body has explained, the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994.[1649] The Panel has concluded that the French TIRIB measure is inconsistent with the GATT as a result of the exclusion of palm oil-based biofuel from the group of qualifying biofuels. Therefore, the Panel will focus its analysis on the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure, as this is the aspect of the measure that gave rise to the finding of inconsistency.

7.1281. The Panel also notes that, given the parties' reliance on their arguments with respect to the high ILUC-risk cap and phase-out, the Panel will mostly refer to its analysis of the European Union's defence under Article XX with respect to the high ILUC-risk cap and phase-out. The Panel notes, however, that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is not identical in every aspect to the high ILUC-risk cap and phase-out. The Panel will therefore include in this section, as necessary, additional explanations on how its findings with respect to the high ILUC-risk cap and phase-out apply to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure.

7.2.2.5.2 Legal standard

7.1282. The European Union invokes the same exceptions under Article XX in respect of the French TIRIB measure that it invokes in respect of the high ILUC-risk cap and phase-out. For ease of reference, the Panel recalls that Article XX (General Exceptions) provides in relevant part as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> …
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

7.2.2.5.3 The Panel's assessment

7.2.2.5.3.1 Article XX(b) – necessary to protect human, animal or plant life or health

7.1283. The European Union submits that the exclusion of palm oil-based biofuel from the French TIRIB measure is consistent with the European Union's objectives of avoiding that demand for renewable energy contribute to increased greenhouse gas emissions and that they exacerbate biodiversity loss.[1650] For the European Union, the preservation of biodiversity and of the environment falls within the range of policies designed to protect human, animal or plant life or health.[1651]

7.1284. Indonesia rejects the European Union's contention.[1652]

[1649] Appellate Body Reports, *EC – Seal Products*, para. 5.185. Additionally, in *Thailand – Cigarettes (Philippines)*, the Appellate Body observed that: "[W]hen Article XX(d) is invoked to justify an inconsistency with Article III:4, what must be shown to be "necessary" is the treatment giving rise to the finding of less favourable treatment. Thus, when less favourable treatment is found based on differences in the regulation of imports and of like domestic products, the analysis of an Article XX(d) defence should focus on whether those regulatory differences are 'necessary'". (Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177.)

[1650] European Union's first written submission, paras. 1501 and 1503.

[1651] European Union's first written submission, para. 1505.

[1652] Indonesia's second written submission, para. 1483.

7.1285. In the context of its analysis of Article XX(b) with respect to high ILUC-risk cap and phase-out, the Panel considered that this measure is aimed at limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.1286. With respect to the French TIRIB measure, the Panel notes that the Circular of 18 August 2020 explains in its introduction that this measure contributes to achieving the objective of the European Union of having a 10% of final consumption of energy produced from renewable sources in all forms of transport in 2020, as provided for in RED I, as amended; and that this objective is part of a broader binding objective of a share of at least 20% of energy produced from renewable sources in the gross final energy consumption of the European Union by 2020.[1653]

7.1287. With respect to the tax treatment of palm oil-based products more specifically, Article 46 of the Circular of 18 August 2020 explains that since 1 January 2020, pursuant to Article 266 *quindecies* of the French Customs Code, products made from palm oil are no longer considered to be biofuels, and that therefore biofuels produced from palm oil are no longer taken into account for the purposes of the French TIRIB measure.[1654] Articles 48 and 49 explain, with respect to the progressive elimination of the French TIRIB measure for certain feedstocks that present a high-ILUC risk, that it follows from the Delegated Regulation, adopted on the basis of Article 26(2) of RED II, that only palm oil products pose a high ILUC risk, and that the French national legislator did not intend to use a different definition of high ILUC-risk from that established pursuant to Article 26(2) of RED II.[1655] Moreover, the 2020 report on biofuels from the French Parliament explains that, as palm oil-based biofuels are now considered at the European level as posing a high-ILUC risk, Article 266 *quindecies*, as worded in the 2019 Finance Law, provides that palm oil-based products are not considered to be biofuels.[1656] Also, the French Constitutional Court has confirmed that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure responds to concerns about the risk of ILUC-related GHG emissions associated with crop-based biofuels, and the high ILUC-risk posed by oil palm cultivation.[1657]

7.1288. The Panel considers that the reference to the objectives of RED I, the reliance on RED II and on the Delegated Regulation for considering that palm oil products pose a high ILUC risk, and the explanations of the French Parliament Report and the French Constitutional Court demonstrate that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure pursues the same objectives as the high ILUC-risk cap and phase-out. Therefore, in the Panel's view, its reasoning regarding the identification of the objective of the measure with respect to the high ILUC-risk cap and phase-out applies *mutatis mutandis* to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure. For those same reasons already set out by the Panel with respect to assessment of the high ILUC-risk cap and phase-out under Article 2.2 of the TBT Agreement and Article XX(b) of the GATT, the Panel finds that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB has the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels, that this objective relates to the protection of human, animal or plant life or health, and that there is a sufficient nexus between the regulating Member and the activities being regulated.

7.1289. With respect to the necessity test, the European Union submits that the measure fulfils the required level of connection with the objectives sought, considering that it makes a genuine contribution to the protection of certain key values that are of the highest consideration in France

[1653] French Government Circular of 18 August 2020, (Exhibit IDN-108), p. 6.
[1654] French Government Circular of 18 August 2020, (Exhibit IDN-108), p. 19.
[1655] French Government Circular of 18 August 2020, (Exhibit IDN-108), p. 19.
[1656] French Parliament Report n. 2609, (Exhibit EU-43), p. 49.
[1657] The 2019 Decision of the French Constitutional Court, concerning a challenge against the French TIRIB measure, explains that French legislator sought to reduce both the direct GHG emissions and the indirect GHG emissions caused by the displacement of agricultural crops for food with crops used to produce biofuels, leading to the cultivation, for food purposes, of non-agricultural land with a high carbon stock, such as forests or peatland. The Constitutional Court also explains that the legislator had relied on the observation that palm oil stands out for its strong growth and the significant expansion in the global area surface devoted to its production, in particular on carbon-rich land, resulting in deforestation and the drying out of peatland. The Constitutional Court adds that the legislator thus took into account the fact that oil palm cultivation poses a high risk, higher than that posed by the cultivation of other oilseed crops, of indirectly causing an increase in GHG emissions. (French Parliament Report n. 2609, (Exhibit EU-43), pp. 50-51; French Constitutional Court decision 2019-808 of 11 October 2019, (Exhibit EU-46), p.4.)

while entailing a minimum degree of trade-restrictiveness, and that there are no reasonably available alternatives that would make an equally effective contribution to the objectives pursued.[1658]

7.1290. Indonesia rejects the European Union's contentions.[1659]

7.1291. In the context of its analysis of Article XX(b) with respect to the high ILUC-risk cap and phase-out, the Panel considered its analysis under Article 2.2 of the TBT agreement to apply *mutatis mutandis* to its analysis under Article XX(b). In particular, the Panel referred to its findings that the high ILUC-risk cap and phase-out is necessary to fulfil its objective, on the grounds that it is apt to make a material contribution to the achievement of that objective, and that this is the appropriate standard to apply having weighed and balanced its trade-restrictiveness and the risks that non-fulfilment of the objective would create. The Panel then found that none of the alternative measures put forward by Indonesia demonstrate that the high ILUC-risk cap and phase-out is more trade-restrictive than necessary to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.1292. With respect to trade-restrictiveness, the Panel considered that the high ILUC-risk cap and phase-out is trade-restrictive because it establishes a limitation on the total quantity of crop-based biofuels that are eligible to count towards the 14% target in the European Union, with the entirety of EU conventional biofuel demand being essentially defined by the RED regime. The Panel considered that the measure thereby has, by design, a "limiting effect on trade" insofar as crop-based biofuels are imported into the European Union.[1660] The Panel recalls that the fact that the European Union has created the market in question does not modify this assessment. In the Panel's view, very similar reasoning applies to its analysis with respect to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure. This exclusion is trade-restrictive because it establishes a limitation for palm oil-based biofuel to be included within the group of qualifying biofuels for the purposes of the French TIRIB measure, and thus, to count towards the incorporation targets set by France, with the entirety of French conventional biofuel demand being essentially defined by those incorporation targets.

7.1293. With respect to contribution to the objective, the Panel considered that, while it is not possible to quantify the extent to which the high ILUC-risk cap and phase-out contributes to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels, the measure is apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. As the Panel explained, the conclusion follows from the fact that the high ILUC-risk cap and phase-out has, by design, a limiting effect on EU demand for and consumption of those crop-based biofuels determined to be high ILUC risk. In the Panel's view, very similar reasoning applies to its analysis with respect to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure. The exclusion is apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels, because it has, by design, a limiting effect on French demand for and consumption of palm oil-based biofuel, which has been determined to be high ILUC risk.

7.1294. The Panel's reasoning concerning the identification of the objective, the trade-restrictiveness and the contribution to the objective with respect to the high ILUC-risk cap and phase-out applies very similarly to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure. In the Panel's view, its weighing and balancing analysis of those elements with respect to the high ILUC-risk cap and phase-out applies *mutatis mutandis* to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure. Therefore, for those same reasons already set out by the Panel with respect to assessment of the high ILUC-risk cap and phase-out under Article 2.2 of the TBT Agreement and Article XX(b) of the GATT, the Panel preliminary concludes that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of

[1658] European Union's first written submission, para. 1506.
[1659] Indonesia's second written submission, para. 1484.
[1660] The Panel recalls that, where the design and structure of the measure is sufficient to establish that it will have a limiting effect on trade, it is not necessary to make findings on the actual trade effects, or the anticipated effects, of the challenged measure. (See e.g. Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.392.)

the French TIRIB measure is necessary to fulfil the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.1295. The Panel has already found that none of the alternative measures put forward by Indonesia demonstrate that the high ILUC-risk cap and phase-out is more trade-restrictive than necessary to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels. Given that Indonesia does not refer to any alternative measures other than those put forward, and already assessed by the Panel, with respect to the high-ILUC risk cap and phase-out, the same reasoning applies with respect to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure.

7.1296. For these reasons, the Panel concludes that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is provisionally justified as a measure necessary to protect human, animal or plant life or health within the meaning of Article XX(b).

7.2.2.5.3.2 Article XX(g) – relating to the conservation of exhaustible natural resources

7.1297. The European Union submits that the exclusion of palm oil-based biofuel from the French TIRIB measure falls within the policies related to the conservation of living and non-living exhaustible natural resources, and it is even-handed inasmuch as such exclusion applies to the relevant biofuels irrespective of whether they are of domestic or imported origin.[1661]

7.1298. In the context of its analysis of Article XX(g) with respect to high ILUC-risk cap and phase-out, the Panel considered that because the high ILUC-risk cap and phase-out has, by design, a limiting effect on EU demand for and consumption of those crop-based biofuels determined to be high ILUC risk, the measure is apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. For this reason, the Panel considered that the high ILUC-risk cap and phase-out is a measure "relating to" the conservation of exhaustible natural resources, notably high-carbon stock land (forests, wetlands, and peatland).[1662]

7.1299. In the Panel's view, the same reasoning applies to its analysis with respect to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure. For those same reasons already set out by the Panel with respect to the high ILUC-risk cap and phase-out under Article 2.2 of the TBT Agreement and Article XX(g) of the GATT, the Panel finds that, because the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure has, by design, a limiting effect on French demand for and consumption of those crop-based biofuels determined to be high ILUC risk, the measure is apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. For this reason, the Panel finds that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure "relating to" the conservation of exhaustible natural resources, notably high-carbon stock land (forests, wetlands, and peatland).

7.1300. The Panel also considered, in the context of its analysis of Article XX(g) with respect to high ILUC-risk cap and phase-out, that this measure meets the requirement to be made effective in conjunction with restrictions on domestic production or consumption, because this measure, of itself, aims at and results in restricting EU demand for and consumption of crop-based biofuels determined to be high ILUC-risk pursuant to the formula in Article 3 of the Delegated Regulation. In the Panel's view, the same reasoning applies to its analysis with respect to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for purposes the French TIRIB measure. For the same reasons already set out with respect to the high ILUC-risk cap and phase-out in the context of the Panel's earlier assessment under Article 2.2 and Article XX(g), the Panel finds that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB

[1661] European Union's first written submission, para. 1504.

[1662] Furthermore, in addition to high-carbon stock land being an exhaustible natural resource in and of itself, the Panel considered that measures taken to conserve high-carbon stock land, and thereby avoid the GHG emissions that would be released through their use, are related to the conservation of a wide range of exhaustible natural resources that are threatened by increased GHG emissions and climate change.

measure, of itself, aims at and results in restricting French demand for and consumption of crop-based biofuels determined to be high ILUC risk.

7.1301. For these reasons, the Panel concludes that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is provisionally justified as measure relating to the conservation of exhaustible natural resources that is made effective in conjunction with restrictions on domestic production or consumption within the meaning of Article XX(g).

7.2.2.5.3.3 Article XX(a) – necessary to protect public morals

7.1302. The European Union submits that the exclusion of palm oil-based biofuel from the French TIRIB measure is designed to contribute to the same objectives of the EU renewable energy legal framework, and that the French civil society and the French legislator consider the environmental impact of oil palm cultivation in terms of climate change and loss of biodiversity to be an issue of moral concern.[1663] For the European Union, the exclusion of palm oil-based biofuel from the French TIRIB measure addresses moral concerns in France related to climate change, environmental degradation and biodiversity loss.[1664]

7.1303. Indonesia rejects the European Union's contention.[1665]

7.1304. In the context of its analysis of Article XX(a) with respect to high ILUC-risk cap and phase-out, the Panel considered that a finding on whether the high ILUC-risk cap and phase-out is additionally justified under Article XX(a) would have no impact on the outcome of the proceedings. In the Panel's view, the same reasoning applies to its analysis with respect to the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure. For those same reasons already set out with respect to the high ILUC-risk cap and phase-out in the context of the Panel's earlier assessment under Article 2.2 and Article XX(a), the Panel finds that it is unnecessary to rule on whether the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure necessary to protect public morals under Article XX(a).

7.2.2.5.3.4 *Chapeau* – arbitrary or unjustifiable discrimination between countries where the same conditions prevail

7.1305. Regarding the *chapeau*, the European Union submits that the exclusion of palm oil-based biofuel from the French TIRIB measure is applied without any arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[1666]

7.1306. Indonesia rejects the European Union's contention.[1667]

7.1307. In the context of its analysis of the *chapeau* with respect to high ILUC-risk cap and phase-out, the Panel concluded that the high ILUC-risk cap and phase-out has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail because the European Union failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk, and because there are deficiencies in the design and implementation of the low ILUC-risk criteria and certification procedure. As explained by the Panel in that context, those findings were based on the Panel's assessment of the high ILUC-risk cap and phase-out under Article 2.1 of the TBT Agreement. More specifically, the Panel's assessment of whether that measure's detrimental impact on palm oil-based biofuel stems exclusively from a "legitimate regulatory distinction", for the purposes of Article 2.1, appears to the Panel to involve the application of a legal standard that is very similar to the legal standard set out in the *chapeau* of Article XX. It was for that reason that the Panel considered that its findings under Article 2.1 extended *mutatis mutandis* to the Panel's assessment of the high ILUC-risk cap and phase-out under the *chapeau* of Article XX.

[1663] European Union's first written submission, para. 1501.
[1664] European Union's first written submission, para. 1505.
[1665] Indonesia's second written submission, para. 1484.
[1666] European Union's first written submission, para. 1507.
[1667] Indonesia's second written submission, para. 1485.

7.1308. The Panel notes that the European Union has not argued, or pointed to, the existence of any provisions or flexibilities for palm oil-based biofuels to be certified as low ILUC-risk for the purposes of the French TIRIB measure. If the existence of deficiencies in the design and implementation of the low ILUC-risk criteria and certification procedure with respect to the high ILUC-risk cap and phase-out is sufficient to conclude that such measure has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, then *a fortiori* the European Union's failure to demonstrate the existence of *any* provisions or flexibilities for palm oil-based biofuels to be certified as low ILUC-risk requires the Panel to conclude that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail. Also, as the Panel explained earlier, France has relied on RED II and on the Delegated Regulation for considering that palm oil products pose a high ILUC risk, and the Panel has found that the European Union has failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk.

7.1309. The Panel therefore concludes that the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail. This is because the European Union has failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk[1668], and has failed to demonstrate the existence of any provisions or flexibilities for palm oil-based biofuels to be certified as low ILUC risk.

7.2.2.5.4 Conclusion on Article XX

7.1310. The Panel concludes that:

a. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure relating to the conservation of exhaustible natural resources that is made effective in conjunction with restrictions on domestic production or consumption within the meaning of Article XX(g);

b. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure necessary to protect human, animal or plant life or health within the meaning of Article XX(b);

c. it is unnecessary to rule on whether the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure is a measure necessary to protect public morals under Article XX(a); and

d. the exclusion of palm oil-based biofuel from the group of qualifying biofuels for the purposes of the French TIRIB measure has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail because the European Union has failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk, and has failed to demonstrate the existence of any provisions or flexibilities for palm oil-based biofuels to be certified as low ILUC risk.

7.1311. One panelist has reached a different conclusion, as set out in section 7.3 of this Report.

[1668] For greater clarity, the Panel is not suggesting that in parallel with the review that is to be undertaken by the European Union, France should have also been expected to conduct a separate, independent review of the data used to determine which biofuels are high ILUC risk. Instead, the Panel considers that because the French TIRIB measure relies on the European Union's determination that palm oil products pose a high ILUC risk, the Panel's finding that the European Union's failure to review the data used to make that determination leads to arbitrary or unjustifiable discrimination necessarily extends to the French TIRIB measure, as well.

7.2.3 Claims under the SCM Agreement

7.2.3.1 Article 1 - Existence of a subsidy

7.2.3.1.1 Introduction

7.1312. Having addressed the claims under the GATT 1994 with respect to the French TIRIB measure, the Panel now turns to the claims under the SCM Agreement. For Indonesia's claims to prevail, it must demonstrate that the challenged measure is a subsidy within the meaning of Article 1 of the SCM Agreement.

7.1313. Indonesia alleges inconsistency[1669] with provisions of the SCM Agreement on the basis of the French TIRIB measure. Indonesia asserts that the French TIRIB measure creates a financial contribution in the form of government revenue that is otherwise due that is foregone or not collected within the meaning of Article 1.1(a)(1)(ii). Indonesia further submits that the alleged subsidy confers a benefit.

7.1314. The European Union submits[1670] that because the challenged tax treatment constitutes the same treatment as the appropriate normative benchmark, the French Government is not foregoing any revenue that is otherwise due. More specifically, the European Union argues that the tax treatment applied to all similarly situated taxpayers is identical because taxpayers are similarly situated under the principles of French TIRIB measure to the extent that they similarly contribute to the satisfaction of the qualifying biofuel incorporation targets. The European Union further submits that because the French TIRIB measure provides no financial contribution it cannot confer a benefit.

7.2.3.1.2 Legal standard

7.1315. Article 1 is entitled "Definition of a Subsidy", and reads as follows:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)[1671];
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be

[1669] Indonesia's first written submission, paras. 1319-1430; responses to the Panel's first set of questions, paras. 333-359; second written submission, paras. 1487-1567; responses to the Panel's second set of questions, paras. 245-293; and comments on EU responses to the Panel's second set of questions, paras. 529-565.

[1670] European Union's first written submission, paras. 1508-1682; responses to the Panel's first set of questions, paras. 509-535; second written submission, paras. 538-648; responses to the Panel's second set of questions, paras. 676-784; and comments on Indonesia's responses to the Panel's second set of questions, paras. 176-214.

[1671] The footnote to the text of Article 1.1(a)(1)(ii) states: "In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy."

vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

7.1316. The definition of a "subsidy" in Article 1, including the notion of a financial contribution in the form of government revenue that is otherwise due is foregone or not collected and benefit have been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.1317. The parties agree that the determination of what is otherwise due involves a comparison between the circumstances presented and the circumstances that would pertain otherwise, the latter being referred to as a "defined, normative benchmark".[1672] The parties further agree that because Members "have the sovereign authority to determine their own rules of taxation, the comparison under Article 1.1(a)(1)(ii) of the SCM Agreement must necessarily be between the rules of taxation contained in the contested measure and other rules of taxation of the Member in question".[1673]

7.1318. The parties agree upon the analytical approach to be applied in examining this question. In particular, the parties agree that Article 1.1(a)(1)(ii) requires a panel to:

a. identify the tax treatment that applies to the alleged subsidy recipients;

b. identify a benchmark for comparison (e.g. a general rule of taxation); and

c. compare the challenged treatment and its reasons with the benchmark tax treatment.[1674]

7.1319. The comparison of the challenged tax treatment with the defined normative benchmark will determine the difference between the revenue actually raised and the revenue that would have been raised "otherwise".[1675]

7.1320. The Panel will elaborate further on the elements of the legal standard in Article 1, and in particular the notion of a financial contribution in the form of "government revenue that is otherwise due is foregone or not collected", and "benefit" as necessary in the course of its assessment of the issues in dispute. Each of these elements will be assessed in turn.

7.2.3.1.3 Financial contribution

7.1321. Indonesia contends that the challenged tax treatment confers a financial contribution in the form of "government revenue, otherwise due, that is foregone or not collected" under Article 1.1(a)(1)(ii).[1676] The European Union disputes this contention.[1677] With regard to financial contribution, there is no dispute between the parties regarding whether the French TIRIB is attributable to the French Government and operates within its territory.

[1672] Appellate Body Reports, *US – FSC*, para. 90; and *US – FSC (Article 21.5 – EC)*, paras. 87-89.
[1673] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 89.
[1674] Appellate Body Reports, *Brazil – Taxation*, para. 5.162.
[1675] Appellate Body Report, *US – FSC*, para. 90.
[1676] Indonesia's first written submission, para. 1319.
[1677] European Union's first written submission, para. 1513.

7.1322. Indonesia emphasizes the exclusion of palm oil-based biofuel from the qualifying biofuels as central to its claims and frames its arguments accordingly. In other words, Indonesia submits that the French TIRIB measure affords favourable treatment to fuel containing qualifying biofuels, but palm oil-based biofuel is treated as equivalent to fossil fuel for tax purposes because it is not included among the qualifying biofuels.

7.1323. The Panel understands that in Indonesia's view qualifying biofuels and palm oil-based biofuel should be considered as similarly situated by the tax regime and should, therefore, receive similar tax treatment. Accordingly, the favourable treatment of qualifying biofuels as compared to palm oil-based biofuel should be considered as a financial contribution within the meaning of Article 1.1(a)(1)(ii). The Panel considers, however, that products that are similar (or like or even identical) from the perspective of product characteristics, uses, substitutability, production methods, tariff classifications, etc., are not necessarily similarly situated from the perspective of a Member's tax regime and tax principles. At this stage of the analysis, the Panel must focus on whether the allegedly subsidized taxpayer receives from the government the functional equivalent of a direct transfer of funds in the form of an amount of taxes that were due otherwise but was not required to be paid. Accordingly, the question for the Panel is not whether similar products are taxed similarly, but rather whether the challenged tax treatment constitutes the kind of departure from that tax regime and tax principles such that government revenue that was otherwise due was foregone or not collected.

7.1324. The Panel turns, therefore, to the three-step analysis of whether it has been established that "government revenue that is otherwise due is foregone or not collected" under Article 1.1(a)(1)(ii). In particular, the Panel will: (i) identify the tax treatment that applies to the alleged subsidy recipients; (ii) identify a benchmark for comparison (e.g. a general rule of taxation); and (iii) compare the challenged treatment and its reasons with the benchmark tax treatment. If the challenged treatment arises by reason of the application of the tax regime and its principles to the circumstances of the allegedly subsidized taxpayer, then government revenue otherwise due is not foregone or not collected.

7.2.3.1.3.1 The tax treatment applicable to the alleged subsidy recipients

7.1325. As explained in section 2 of this Report, entities that release fuel for consumption within the territory of France are liable to pay the TIRIB as an additional tax that varies in relation to the extent to which the energy content of the fuel released achieves established incorporation targets for qualifying energy sources. The Panel recalls that the TIRIB is applied in addition to the value added tax (VAT) and the internal consumption tax on energy products (TICPE). The amount of the TIRIB is determined according to the TIRIB formula.

7.1326. The TIRIB formula results in a tax rate that varies in direct proportion to the factor (IT% - AI%), which is the difference between the targeted energy incorporation of qualifying biofuel and the actual incorporation of qualifying biofuel.

7.1327. The parties concur on the essential operation of the French TIRIB. The challenged tax treatment consists of the treatment of taxpayer entities that partially or fully satisfy the incorporation target of qualifying biofuel. In other words, the treatment of those entities that release fuel for consumption in France with an AI% that is greater than zero, yielding a (IT% - AI%) factor that is less than IT%.

7.2.3.1.3.2 Preliminary assessment of possible normative benchmarks

7.1328. The Panel now turns to a preliminary assessment of the appropriate normative benchmark. An examination of the record suggests consideration of four different normative benchmarks for comparison with the challenged tax treatment.

The General Tax on Polluting Activities

7.1329. The Panel first considers the appropriateness of the General Tax on Polluting Activities as a normative benchmark. While neither party advanced the General Tax on Polluting Activities as a normative benchmark in their arguments, Malaysia did propose it as a possible normative benchmark in its third-party arguments, and the Panel considers it appropriate to examine this proposal for a

thorough consideration of all options available on the record.[1678] The General Tax on Polluting Activities appears to provide for a variety of tax treatments that are particular to certain polluting activities individually calibrated to a variety of measures of the pollutants associated with those activities.[1679] Under a different name and under a prior iteration of the relevant legislation, the TIRIB was categorized as a tax under the umbrella of the General Tax on Polluting Activities.[1680]

7.1330. Malaysia considers the General Tax on Polluting Activities to be a general rule of taxation, and the challenged tax treatment to be an exception thereto.[1681]

7.1331. The Panel takes note of the conceptual and historical link between the General Tax on Polluting Activities and the French TIRIB. However, the Panel does not consider that the assorted tax treatments calibrated to various measures of diverse polluting activities can be assembled in a coherent way to be used as a normative benchmark comparable to the challenged tax treatment under the French TIRIB. Nor has the French TIRIB been established to apply in lieu of the General Tax on Polluting Activities to the extent that taxpayers subject to the French TIRIB also engage in polluting activities associated with those taxes.

7.1332. The Panel finds that the tax treatments associated with the General Tax on Polluting Activities do not correspond to an amount of revenue "otherwise due" in relation to the challenged tax treatment. Rather, the French TIRIB is an additional tax paid by entities in connection with the particular activity of releasing fuel for consumption within the territory of France as an additional tax that varies in relation to the extent to which the energy content of the fuel released achieves established incorporation targets for qualifying energy sources.

7.1333. For the above reasons, the Panel finds that the General Tax on Polluting Activities is not an appropriate normative benchmark in this case.

The tax treatment associated with the release of fuel fully satisfying the incorporation targets

7.1334. The second possible normative benchmark tax treatment, as proposed by the European Union, is the tax treatment associated with the release of fuel for consumption in France that fully satisfies the incorporation targets for qualifying biofuels.

7.1335. The European Union submits in this regard that the collection of no amount of tax pursuant to the French TIRIB is the intended and expected outcome from the application of the TIRIB formula and should, therefore, be considered as the normative benchmark treatment.[1682] The European Union argues that this demonstrates that payment of the tax is truly exceptional and the general rule is satisfaction of the incorporation targets.[1683] While the achievement of such an outcome is not mandated by the scheme, the European Union argues that collection of no tax is the intended and expected result of application of the French TIRIB and it is so designed to achieve that objective. On the basis of the above-described design and operation of the French TIRIB, the European Union submits that any tax paid functions as a fine or penalty imposed upon non-compliance with the incorporation objectives and should not be considered as an amount of tax that is "otherwise due". In this regard, the European Union submits that the French TIRIB is a behavioural tax with an environmental purpose and is not designed to raise any revenue.[1684]

7.1336. The Panel understands that all potential taxpayers operate under a scheme under which no amount of tax is due if the fuel they release satisfies the incorporation targets. Access to the zero tax treatment is otherwise uninhibited for these taxpayers. While it is established that some amount of tax was collected pursuant to the French TIRIB during the time periods for which the Panel has information, the extent of any failure of fuels released for consumption in France to satisfy the incorporation targets is extremely small. Nevertheless, the Panel considers that under Article 1.1(a)(1)(ii), the issue is not whether the French TIRIB is a behavioural tax or has an environmental

[1678] Malaysia's third-party submission, para. 152.
[1679] European Union's response to Panel question No. 116, paras. 523-524.
[1680] European Union's response to Panel question No. 116, paras. 523-524.
[1681] Malaysia's third party submission, para. 152.
[1682] European Union's first written submission, paras. 1525-1528.
[1683] European Union's first written submission, para. 1528.
[1684] European Union's first written submission, para. 1525.

purpose or was intended to raise revenue. The extent to which these features constitute elements of the challenged tax treatment and/or elements of the tax regime and tax principles that will define the normative benchmark does not require the Panel to assess the legitimacy of these features as elements of a Member's tax rules.

7.1337. The Panel considers that the key concept guiding the selection of an appropriate normative benchmark derives from the term "otherwise due" in the text of Article 1.1(a)(1)(ii). In particular, the appropriate normative benchmark represents the treatment associated with the tax liability otherwise due in accordance with the structure of the domestic tax regime and its organising principles as adopted by the Member pursuant to its own authority in comparison to the challenged tax treatment. The Panel is not persuaded that the collection of no amount of tax pursuant to the French TIRIB constitutes the appropriate normative benchmark treatment. Under certain circumstances under the French TIRIB an amount of tax liability is imposed on the taxpayer and, when paid, this amount represents government revenue that is due. The Panel does not consider that it would be appropriate to find under such a scheme that the structure of the domestic tax regime and its organising principles imposes no tax liability as a normative benchmark regardless of the frequency or the infrequency with which the circumstances associated with no tax liability arise. Instead, the appropriate normative benchmark should take into account those circumstances in which a tax liability arises in accordance with the structure of the domestic tax regime and its organising principles.

7.1338. The Panel understands that the European Union analogizes the French TIRIB with a scheme of fines or penalties, but without asserting that the French TIRIB is not, in fact, a tax scheme. Accordingly, the Panel does not consider it necessary to determine the circumstances under which forms of payments, other than taxes, owing to the government would or would not constitute government revenue foregone or not collected within the meaning of Article 1.1(a)(1)(ii).

7.1339. For the above reasons, the Panel finds that the collection of no amount of tax pursuant to the French TIRIB is not an appropriate normative benchmark in this case.

The tax treatment associated with the release of fuel that does not satisfy any part of the incorporation targets

7.1340. Indonesia submits that another possible benchmark that should be considered as the normative benchmark, for the purposes of comparison with the challenged tax treatment, is the maximum amount of tax potentially payable pursuant to the TIRIB formula, i.e. the amount of tax that would be payable if *no* portion of qualifying biofuel was incorporated into the fuel released for consumption. Indonesia argues that the French Government has established rules of taxation on fuel released for consumption in France such that revenue which is otherwise due is not collected from operators incorporating qualifying biofuels, which do not include palm oil-based biofuel, into fuel released for consumption in France.[1685]

7.1341. The Panel understands that this possible benchmark is premised on the notion that through the TIRIB formula, the French Government establishes the elements (rate, IT%) and permits the taxpayer to choose through their actions the amount of tax to pay by selecting the actual incorporation element (AI%). The variable amount of tax that a taxpayer would pay to the extent that they do not fully satisfy the incorporation target is what provides the motivation for them to incur whatever additional cost is associated with incorporating the qualifying biofuels. To the extent that the taxpayer opts to take on those additional costs, they do it to obtain the benefit of the lower tax liability and avoid the payment of the tax that would have otherwise been due if they had failed to incorporate qualifying biofuels. The taxpayer is aware of the amount of tax that they would have to pay if they do not incorporate qualifying biofuel into their fuel mix because the amount of TIRIB they pay will depend exclusively on their own choice about how much qualifying biofuel to include in the fuel mix they release for consumption in France.

7.1342. The above preliminary considerations suggest that the maximum amount of tax potentially payable pursuant to the TIRIB formula highlights the conditionality of accessing the favourable tax treatment which is a feature of a normative benchmark that might be relevant to the Panel's

[1685] Indonesia's first written submission, para. 1332.

determination of whether the French TIRIB involves a financial contribution in the form of government revenue foregone or not collected.

The tax payable according to the TIRIB formula

7.1343. The fourth potential normative benchmark, as argued by the European Union, posits that the challenged treatment and the normative benchmark are, in fact, the same tax treatment.

7.1344. The European Union has argued, in effect, that the elements of the formula set by the government (rate, IT%) are established at a level designed, intended and expected to achieve the incorporation target.[1686] The European Union has argued that taxpayers that do not fulfil the incorporation targets are not considered as similarly situated under the TIRIB tax regime.[1687] The European Union has emphasized that the elements of the TIRIB formula are inseparable because the tax would be without incentivizing effect unless it applies the variable rate in connection with the extent to which the released fuel satisfies the incorporation targets.[1688]

7.1345. The Panel understands that this possible benchmark is premised on the notion that the TIRIB formula establishes an amount of tax that is due on the basis of the formula elements, and no element or elements of the formula considered in isolation from the rest of the formula represent an amount of tax that is due or that is "otherwise due". The Panel recalls that while the rate element of the formula is expressed as euros per hectolitre, the French TIRIB is exclusively concerned with a relatively small portion of the energy content of the fuel, i.e. that portion which the regime has targeted for incorporation of qualifying biofuels. The maximum tax due under the French TIRIB does not reflect the application of the defined tax rate per hectolitre of fuel released because the factor (IT% - AI%) will have a maximum value of IT%, which in 2020 was 8%.

7.1346. The Panel further recalls that an essential feature of the TIRIB regime is that the application of the formula results in a tax rate that varies in direct proportion to the factor (IT% - AI%), which is the difference between the targeted energy incorporation of qualifying biofuel and the actual incorporation of qualifying biofuel. Because the tax varies directly in proportion to this factor, it is possible to characterize the TIRIB as a tax, not on the action of releasing hectolitres of fuel for consumption in France, but rather a tax on the extent to which the targeted level of qualifying biofuels has not been incorporated into the fuel released. Viewed in this light, the amount of tax can be seen as starting at zero when the targeted portion of qualifying biofuels have been incorporated, and increasing to its maximum amount in direct proportion to the missing percentages of qualifying biofuel.

7.1347. The above preliminary considerations suggest that the tax payable according to the TIRIB formula highlights the design and intended operation of the French TIRIB as a whole which is a feature of a normative benchmark that might be relevant to the Panel's determination of whether the French TIRIB involves a financial contribution in the form of government revenue foregone or not collected.

7.2.3.1.3.3 Final assessment of the appropriate normative benchmark

7.1348. Having preliminarily examined the four possible normative benchmarks suggested in this dispute, and having found two of those benchmarks exhibit certain features which could potentially make them appropriate normative benchmarks for comparison with the challenged tax treatment, the Panel now turns to a further assessment of those two benchmarks.

7.1349. The Panel recalls that the purpose of selecting a normative benchmark is to determine, through a comparison with the challenged tax treatment, whether "government revenue that is otherwise due is foregone or not collected" within the meaning of Article 1.1(a)(1)(ii). The Panel notes as well that the first category of financial contributions provided for under Article 1.1(a)(1)(i) includes various direct transfers of funds or potential direct transfers of funds. This provides some context for understanding the inclusion of the second category, which is the one relevant in this case. The Panel considers that where government revenue is otherwise due and the government foregoes or does not collect the amount otherwise due, this is the functional equivalent of a direct

[1686] European Union's first written submission, paras. 1525-1528.
[1687] European Union's first written submission, paras. 1537-1540.
[1688] European Union's first written submission, paras. 1376, 1534.

transfer of funds from the government. It is useful to recall that this stage of the analysis focuses solely on whether a financial contribution exists, rather than on any alleged effects of the challenged measure.

7.1350. The Panel takes note of prior reports that offer guidance on considerations for selecting an appropriate benchmark. The benchmark will not exist in the abstract, but rather in the rules of taxation established by the Member in question.[1689] This also flows from the notion that Members, in principle, have the sovereign authority to determine their own rules of taxation as they see fit.[1690] The analysis must, therefore, be sufficiently flexible to adjust to the complexities of a Member's domestic rules of taxation.[1691] The benchmarks to be applied are the economy-wide tax treatments from which the exemptions, reductions and suspensions are taken.[1692] However, given the variety and complexity of domestic tax systems, it will usually be very difficult to isolate a 'general' rule of taxation and 'exceptions' to that 'general' rule.[1693] In ascertaining a proper benchmark, the Appellate Body in *Brazil – Taxation* went further, stating that a panel would be expected to "examine the structure of the domestic tax regime and its organising principles" to determine what is "the tax treatment of comparable income of comparably situated taxpayers".[1694] The Panel agrees with that approach.

7.1351. In this context, the Panel considers that "comparability" and "similarly situated" are not determined in the abstract, nor on the basis of what is considered legitimate, appropriate or fair. Rather, "comparability" and "similarly situated" are determined in relation to the "structure of the domestic tax regime and its organising principles." The concern of the Appellate Body in *Brazil – Taxation* was over-reliance on the fact that the challenged measure took the form of an exception to a general rule. When a general rule appears to be broadly applicable and subject to various exceptions, it may be necessary to look further to examine the extent to which the general rule, in light of the other exceptions, constitutes an inadequate benchmark because it insufficiently represents the structure of the tax regime and its organizing principles. This can be understood by considering, as the Appellate Body did in *Brazil – Taxation*, an example of a generally applicable tax with numerous and various exceptions. Thus, a corporate tax rate that is in principle applicable to all commercial entities, but with numerous and overlapping adjustments for various categories, sizes and circumstances of the entities taxed could not serve as an adequate benchmark for any one of the exceptions because it could be that few if any entities actually pay the tax at the generally applicable rate. This means that the tax regime and its organizing principles that determine the normative benchmark may be found in rules that take the form of exceptions to a general rule as much as in the form of the general rules themselves.

7.1352. This notion may be further illuminated with an example of a tax regime where the tax rate depends on the size of the company. If the tax rate increased according to the size, then small companies might appear to pay less than is otherwise due. If the tax rate decreases according to size, then large companies might appear to pay less than is otherwise due. If, however, company size is understood to be the organizing principle of the tax regime, then small, medium and large companies would not be considered as similarly situated and the amounts paid by companies of other sizes would not be relevant to determining what amount of tax is otherwise due. It might be observed that all sizes are not available to all companies and this might justify additional scrutiny of the breakdown of size categories and differences in tax rates, etc., possibly concluding nevertheless that company size is indeed an organizing principle of the tax regime. With this analytical approach in mind, the Panel turns to an examination of certain relevant aspects of the French TIRIB and then proceeds to further assess the third and fourth possible normative benchmarks as described above.

7.1353. The Panel recalls that the French TIRIB is not a broadly applicable, economy-wide tax. Rather, it applies exclusively to a particular activity, and it applies in addition to all other applicable taxes payable by these taxpayers. In relation to other taxes, the Panel therefore finds that the French TIRIB operates to increase the amount of tax that is otherwise due from these taxpayers

[1689] Appellate Body Report, *US – FSC*, para. 90.
[1690] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 89.
[1691] Appellate Body Reports, *Brazil – Taxation*, para. 5.162 (quoting Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 91).
[1692] Appellate Body Reports, *Brazil – Taxation*, para. 5.181 (quoting Panel Reports, *Brazil – Taxation*, para. 7.414.)
[1693] Appellate Body Reports, *Brazil – Taxation*, para. 5.162 (quoting Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 91).
[1694] Appellate Body Reports, *Brazil – Taxation*, para. 5.167.

because it has not been established that the French TIRIB applies in lieu of any broadly applicable tax or any other tax. Moreover, on the basis of the evidence presented, the Panel finds that it has not been established that any taxpayers are *ex ante* ineligible or otherwise incapable of incorporating qualifying biofuels. In other words, it appears that the full range of tax treatments provided for under the French TIRIB are available to all taxpayers without exception.

7.1354. Under the third possible normative benchmark, the Panel considers that the French TIRIB and its principles must be understood to reside in *certain elements of the TIRIB formula*, namely the elements established by the government (i.e. rate, IT%), but not in others, namely actual incorporation percentage (AI%). Thus, the French TIRIB would be characterized as establishing an amount of tax that would be due for each hectolitre of fuel released for consumption in France and every taxpayer will pay this amount of tax unless they choose to take actions (selecting the value for AI%) that will allow them to avoid payment of the tax.

7.1355. Under the fourth possible normative benchmark, the Panel understands that the French TIRIB and its principles are considered to reside in *the entire TIRIB formula*. With this understanding, taxpayers with different values of the factor (IT% - AI%) are not similarly situated with respect to the French TIRIB and its organizing principles. In other words, there would be nothing exceptional about the tax treatment of any particular taxpayer regardless of their particular value of AI% because all taxpayers with the same AI% are treated the same, the TIRIB formula does not identify any single rate of taxation as a default rate or as the general tax rate, nor as an exceptional tax rate. Instead, the tax due varies in direct proportion to the factor (IT% - AI%).

7.1356. In weighing the appropriateness of these two possible normative benchmarks, the Panel considers that the design and operation of the French TIRIB, as well as how it is situated in relationship to the broader tax regime, reveal that the fact that the amount of tax due varies in direct proportion to the factor (IT% - AI%) is a central and essential organizing principle of the French TIRIB. Thus, the Panel considers that this element is not an element of the TIRIB formula amenable to be disregarded as a principle of taxation under this scheme. As such, the Panel finds that the elements of the TIRIB formula go hand in hand and do not exist in isolation, and are accurately described as being inseparably linked as integral parts of the TIRIB formula.[1695] In establishing a formula to determine the rate of tax that is proportional to the factor (IT% - AI%), the design of the French TIRIB establishes a range of tax rates each of which is applicable to similarly situated taxpayers. The Panel considers that for all taxpayers to which the TIRIB formula applies, the amount of tax that is due is determined by the formula and no other amount of tax is due. In sum, whatever tax liability is imposed by the French TIRIB it represents an additional tax on operators releasing fuel for consumption in France that are similarly situated to the extent that the targeted portion of the fuel released does not incorporate qualifying biofuels. Accordingly, the Panel finds that the TIRIB formula represents the most appropriate normative benchmark for comparison with the challenged tax treatment.

7.1357. While the third possible normative benchmark identifies a relationship between a lower tax due and the satisfaction of certain conditions that can be perceived as functioning in a manner similar to a tax credit, the Panel finds that this approach places inordinate emphasis on form rather than substance. In particular, breaking the TIRIB formula into its elements and treating one part of the formula, i.e. the maximum amount of tax per hectolitre (rate * IT%), as a general rule of taxation, fails to accurately reflect the French TIRIB and its organizing principles. Thus, on balance, the Panel finds that the maximum amount of tax potentially payable pursuant to the TIRIB formula fails to represent an appropriate benchmark tax treatment for the challenged tax treatment. Despite the conditionality attached to the lower tax rates, as highlighted by Indonesia, the Panel finds that the maximum amount of tax potentially payable pursuant to the TIRIB formula does not represent government revenue otherwise due within the meaning of Article 1.1(a)(1)(ii). Accordingly, the Panel finds that that the maximum amount of tax potentially payable pursuant to the TIRIB formula does not represent the most appropriate normative benchmark for comparison with the challenged tax treatment.

[1695] Indonesia's response to Panel question No. 94, para. 358; European Union's first written submission, para. 1535.

7.2.3.1.3.4 Conclusion on financial contribution

7.1358. The Panel finds that the challenged tax treatment consists of the treatment of taxpayer entities releasing fuel for consumption in France that partially or fully satisfies the incorporation target for qualifying biofuel. The Panel finds that the TIRIB formula represents the most appropriate normative benchmark for comparison with the challenged tax treatment. Because the challenged tax treatment is part of and incorporated into the benchmark tax treatment, both of which flow from the application of the TIRIB formula, the challenged tax treatment and the benchmark tax treatment are the same.

7.1359. Accordingly, the Panel concludes that there is no difference between the challenged tax treatment and the benchmark tax treatment, and therefore, no government revenue has been foregone or not collected and no financial contribution exists within the meaning of Article 1.1(a)(1)(ii).

7.2.3.1.4 Benefit

7.1360. The Panel recalls that it has found that Indonesia has failed to establish the existence of a financial contribution with respect to the French TIRIB. In the absence of establishing the alleged financial contribution no benefit can be conferred thereby, and Indonesia's claims that a subsidy exists under Article 1 cannot prevail.

7.2.3.1.5 Conclusion on the existence of a financial contribution

7.1361. For the above reasons, the Panel concludes that Indonesia has failed to establish that government revenue has been foregone or not collected and, therefore, no financial contribution exists within the meaning of Article 1.1(a)(1)(ii). In the absence of establishing the alleged financial contribution, Indonesia has failed to demonstrate that the French TIRIB measure is a subsidy within the meaning of Article 1.

7.1362. Accordingly, the Panel concludes that Indonesia has failed to establish that the French TIRIB measure provides a subsidy that constitutes a prohibited subsidy within the meaning of Article 3.1 and 3.2 of the SCM Agreement, or, in the alternative, a specific subsidy that causes adverse effects in the form of serious prejudice under Articles 5.3(c), 6.3(a) and 6.3(c) of the SCM Agreement.

7.2.3.2 Further assessment assuming *arguendo* the existence of a financial contribution

7.1363. In the prior section, the Panel found that Indonesia has failed to establish that government revenue has been foregone or not collected and, therefore, no financial contribution exists within the meaning of Article 1.1(a)(1)(ii). Notwithstanding this conclusion, in the subsections that follow, the Panel proceeds to evaluate the merits of Indonesia's complaints against the European Union's alleged subsidization under the French TIRIB.

7.1364. Although the Panel did not find the maximum amount of tax potentially payable pursuant to the TIRIB formula to be the most appropriate normative benchmark, the Panel considers that this option exhibits certain features, which, at first view, suggested that it could have served as an appropriate benchmark. In these circumstances, and in light of the extensive argumentation that the parties have devoted to these issues, the Panel considers it appropriate to engage in a further analysis of the merits of Indonesia's claims on the basis of this normative benchmark.

7.1365. Accordingly, the Panel will proceed in the subsections below to conduct a further analysis of benefit, prohibited subsidy claims, specificity, and adverse effects. The basis for this further analysis is the *arguendo* assumption that the maximum amount of tax potentially payable pursuant to the TIRIB formula could be considered as an appropriate normative benchmark. It is clear that the comparison of this benchmark with the challenged tax treatment would lead to the conclusion that the challenged tax treatment represents a tax liability lower than the benchmark tax liability to the extent that the taxpayer has incorporated qualifying biofuel. This difference in tax liability would, therefore, represent a financial contribution in the form of government revenue foregone or not collected within the meaning of Article 1.1(a)(1)(ii).

7.2.3.2.1 Benefit

7.1366. The Panel now proceeds to consider, on the *arguendo* assumption that a financial contribution exists within the meaning of Article 1.1(a)(1)(ii), whether Indonesia has established that a benefit was thereby conferred within the meaning of Article 1.1(b).

7.1367. The Panel notes the financial contribution at issue is in the form of government revenue foregone or not collected, and this financial contribution would exist with respect to the difference between (i) the challenged tax treatment of operators releasing fuel for consumption in France that incorporates some portion of qualifying biofuels and (ii) the normative benchmark treatment of the maximum amount of tax potentially payable pursuant to the TIRIB formula, which would be paid by operators releasing fuel for consumption in France that incorporates no qualifying biofuels.

7.1368. The Panel considers that where a government purchases goods or services, sells goods, loans money, infuses equity and so on, there can be an important distinction between the question of a financial contribution being made and a benefit being conferred because the government could take the above actions at market prices or market rates. In such cases, the recipient of the financial contribution would be no better off than if they engaged in the same transaction with a private commercial entity on commercial terms.[1696] In the case of government revenue otherwise due that is foregone or not collected, it has been considered that such financial contributions are not available in the market. A recipient of a financial contribution in the form of government revenue foregone or not collected receives a benefit equal to the amount of tax otherwise due that was foregone or not collected.[1697] This has been considered to be so even where the taxpayer is induced to undertake some actions and incur associated expenses to qualify for the tax break. In this case the taxpayers do incur additional production costs to incorporate qualifying biofuels into the fuel mix and they are induced to do so to take advantage of the tax reduction. Because they choose to incorporate the costlier biofuels into their fuel mix to take advantage of the tax reductions, it can be reasoned that a benefit has been conferred on them by doing so.

7.1369. The Panel considers that the above rationale cannot be applied to assume that a benefit conferred in the form of a lower tax liability on the taxpayers, who are operators releasing fuel for consumption in France under the French TIRIB, will necessarily automatically confer a benefit upon the upstream suppliers of qualifying biofuels or on the producers of qualifying biofuels. The Panel considers that Indonesia has not provided sufficient additional information and argument to establish that under the circumstances of this case the conferral of a benefit should be considered to extend beyond the group of taxpayers.

7.1370. For the above reasons, the Panel considers that, on the *arguendo* assumption that a financial contribution exists as described above, a benefit would thereby be conferred on the operators that release fuel for consumption in France incorporating some portion of qualifying biofuels. The Panel considers that Indonesia has not established that the conferral of a benefit should be considered to extend beyond this group of taxpayers.

7.2.3.2.2 Articles 3.1(b) and 3.2 – Prohibited subsidy claims

7.2.3.2.2.1 Introduction

7.1371. Having proceeded on the *arguendo* assumption that the French TIRIB provides a financial contribution, and that a subsidy within the meaning of Article 1 would exist because a benefit is thereby conferred on those operators releasing fuel for consumption in France to the extent that the fuel released incorporates qualifying biofuel, the Panel now turns to the claims under Articles 3.1(b) and 3.2. The parties address these provisions together in their submissions, and the relationship between these provisions is such that the Panel considers it appropriate to do the same.

[1696] See Panel Report, *Canada – Aircraft*, para. 9.112; see also Appellate Body Report, *Canada – Aircraft*, paras. 154, 157; and Panel Report, *Brazil – Aircraft*, para. 7.24.

[1697] See Panel Reports, *US – FSC*, paras. 7.41-7.103; *US – FSC (Article 21.5 – EC)*, paras. 8.3-8.48; *US – Large Civil Aircraft (2nd complain)*, paras. 7.115-7.171; *US – Tax Incentives*, para. 7.161; and Appellate Body Report, *US – FSC*, para. 140.

7.1372. Indonesia submits[1698] that the French TIRIB measure violates Articles 3.1(b) and 3.2 because it provides a subsidy that is *de facto* contingent upon the use of domestic oil crop-based biofuel over imported palm oil-based biofuel, and is, therefore, a prohibited subsidy within the meaning of Article 3.1(b).[1699] Indonesia submits that the requirement to use domestic inputs over imports does not need to be unambiguous[1700], but can instead be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy.[1701] Indonesia argues that "factual circumstances, where relevant, may form part of the context for understanding the measure's design, structure, and modalities of operation in a particular market, all of which may assist in discerning whether or not a *de facto* contingency exists".[1702]

7.1373. The European Union submits[1703] that Indonesia's arguments are "based on a wrong reading of the Article 3.1(b) of the SCM Agreement as well as unsupported in fact".[1704] The European Union argues that Indonesia's claim erroneously seeks to show that the French TIRIB measure may foster the use of domestic inputs by creating a preference for those inputs rather than showing that a conditional relationship between the granting of the subsidy and the use of domestic over imported goods is objectively observable from the facts and circumstances.[1705]

7.2.3.2.2.2 Legal standard

7.1374. Article 3 is entitled "Prohibition", and sets forth the following obligations:

> 3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> > (a) subsidies contingent, in law or in fact[[1706]], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[[1707]];
> >
> > (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.
>
> 3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

7.1375. The obligation in Article 3.1(b) has been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.1376. Article 3.1(b) prohibits subsidies, within the meaning of Article 1, that are "contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods." The term "contingent" is understood to mean "conditional" or "dependent for its existence upon".[1708]

[1698] Indonesia's first written submission, paras. 1352-1359; responses to the Panel's first set of questions, paras. 350-353; second written submission, paras. 1522-1529; responses to the Panel's second set of questions, paras. 279-283; and comments on EU responses to the Panel's second set of questions, para. 543.

[1699] Indonesia's first written submission, para. 1352.

[1700] Indonesia's second written submission, para. 1525.

[1701] Indonesia's second written submission, para. 1527 (referring to, *inter alia*, Appellate Body Report, *US – Tax Incentives*, para. 5.50).

[1702] Indonesia's response to Panel question No. 114 (referring to Appellate Body Report, *US – Tax Incentives*, para. 5.50).

[1703] European Union's first written submission, paras. 1570-1591; second written submission, paras. 616-628; responses to the Panel's second set of questions, paras. 726-736; and comments on Indonesia's responses to the Panel's second set of questions, paras. 212-214.

[1704] European Union's first written submission, para. 1574; second written submission, para. 623.

[1705] European Union's first written submission, para. 1584.

[1706] The first footnote to the text of Article 3.1(a) reads: "This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision."

[1707] The second footnote to the text of Article 3.1(a) reads: "Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement."

[1708] Appellate Body Reports, *Canada – Autos*, para. 123; and *US – Tax Incentives*, para. 5.7.

Such that "a subsidy would be 'contingent' upon the use of domestic over imported goods if the use of those goods were a condition, in the sense of a requirement, for receiving the subsidy." The text of Article 3.1(b) is not conclusive as to whether it applies to subsidies contingent "in law or in fact" as neither form of contingency is specifically mentioned as included or excluded from the application of this provision.[1709] In *Canada – Autos*, the Appellate Body reasoned that the ordinary meaning of this provision does not exclude the *de facto* form of contingency, while the relevant context of Article III:4 of the GATT 1994 and the object and purpose of the SCM Agreement offer support for including the *de facto* form of contingency within the ambit of the provision because excluding the *de facto* form of contingency would facilitate circumventing the prohibition.[1710] The Panel agrees with that conclusion. Thus, Article 3.1(b) applies to subsidies contingent, in law or in fact, upon the use of domestic over imported goods.[1711]

7.1377. Determining that a subsidy is *de facto* contingent upon the use of domestic over imported products requires an assessment of the total configuration of the facts constituting and surrounding the granting of the subsidy, including the design and structure of the measure granting the subsidy, the modalities of operation set out in such a measure, and the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation.[1712] If the subsidy is found to be prohibited under Article 3.1(b), then the subsidy is deemed to be specific and the granting or maintenance of such a subsidy by France would be inconsistent with its obligation under Article 3.2.

7.1378. The Panel will elaborate further on the elements of the legal standard in Article 3.1(b) as necessary in the course of its assessment of the issues in dispute.

7.2.3.2.2.3 *De facto* contingency

7.1379. Indonesia argues that for the tax reduction to be granted, there is a strict requirement that imported palm oil-based biofuel cannot be used.[1713] Indonesia submits that the French TIRIB measure discriminates on the basis of whether the biofuel is imported (or made from imported feedstock).[1714] Moreover, Indonesia argues that the measure is designed so that the financial contribution can only be accessed upon the exclusion of imported biofuel.[1715] Indonesia makes the following factual claims in support of its argument[1716]:

a. The European Union grows all major oilseed crops used for production of biofuel, except for palm oil.

b. European Union production of rapeseed oil is primarily for domestic use, and the major share of which is used in the biofuel sector.

c. The European Union produces soybean oil, from domestic and imported soybean.

d. The European Union produces biofuel from imported palm oil.

e. Indonesia is the main exporter of palm oil-based biofuel to the European Union.

f. All palm oil and the predominant share of palm oil-based biofuel were imported into the European Union in 2019.

g. The majority of oil crop feedstock for biofuel production in the form of rapeseed oil, and other crop-based biofuel are produced domestically.

[1709] Apellate Body Report, *Canada – Autos*, paras. 138, 141.
[1710] Appellate Body Report, *Canada – Autos*, paras. 140-142.
[1711] Appellate Body Report, *Canada – Autos*, paras. 140, 143.
[1712] Appellate Body Reports, *US – Tax Incentives*, paras. 5.12-5.13; *EC and certain member States – Large Civil Aircraft*, para. 1046; and Panel report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.778.
[1713] Indonesia's first written submission, para. 1358.
[1714] Indonesia's first written submission, para. 1358.
[1715] Indonesia's first written submission, para. 1358.
[1716] Indonesia's first written submission, para. 1357.

7.1380. Indonesia concludes that the measure discriminates on the basis of whether the biofuel is imported or not, and Indonesia asserts that the total configuration of facts and the context in which the measure operates, points to a "condition, in the sense of a requirement" for the use of domestic over imported goods.[1717]

7.1381. The European Union submits that Indonesia's arguments aim to demonstrate that there exists a *de facto* preference for domestic over imported inputs linked to the French TIRIB measure rather than aiming to satisfy the necessary legal standard of Article 3.1(b), which is to show the existence of a condition requiring the use of domestic over imported inputs.[1718] According to the European Union, the entities engaged in releasing fuel for consumption in the French market incorporate imported qualifying biofuels and they do receive the lower tax liability under French TIRIB the same as domestically produced qualifying biofuel.[1719] Thus, the European Union argues that the measure is clearly not designed "so that the financial contribution can only be accessed upon the exclusion of imported biofuel" contrary to Indonesia's contention.[1720]

7.1382. On the basis of the evidence on the record, the Panel finds that Indonesia has not established that, as a matter of fact, the use of imported biofuels precludes access to the subsidy under the French TIRIB. In particular, the facts presented do not establish that imported qualifying biofuels, other than palm oil-based biofuel, are *de facto* precluded from qualifying for the favourable tax treatment under the French TIRIB. Thus, the Panel finds that Indonesia has not established that the financial contribution can only be *de facto* accessed upon the exclusion of imported biofuel.

7.1383. With respect to domestic biofuel, the European Union argues that palm oil-based biofuel is produced in France and such biofuel is a "domestic" input, and this domestic input is treated identically as imported palm oil-based biofuel from Indonesia, i.e. it does not contribute to eligibility for the favourable tax treatment.[1721] Indonesia objects to treating any palm oil-based biofuel produced in France as "domestic" because it would necessarily be produced from imported oil palm feedstock.

7.1384. The Panel is not persuaded that biofuel produced in France from imported oil palm feedstock and then supplied to an operator for incorporation into fuel released for consumption in France is properly treated as the use of imported goods for the purposes of an analysis under Article 3.1(b). The Panel, however, finds that in light of the factual findings it has made above, it is not necessary for the Panel to decide this question in order to resolve Indonesia's claim.

7.1385. The Panel notes that under the French TIRIB imported qualifying biofuels do have *de jure* access to the subsidy, and the use of domestic qualifying biofuels is not *de jure* required. The Panel considers that while the contingency element of Article 3.1(b) may be found either on a *de jure* or *de facto* basis, the required strictness of the contingency is the same. In both cases, contingent means "conditional" or "dependent for its existence upon", and in both cases a subsidy would be contingent upon the use of domestic over imported goods if the use of those goods were a condition, in the sense of a requirement, for receiving the subsidy. A finding of contingency on a *de facto* basis, therefore, requires a configuration of facts such that use of imported goods *de facto* precludes access to the subsidy, and use of domestic goods is *de facto* required to access the subsidy.

7.1386. The Panel finds that the total configuration of facts supports the conclusion that access to the subsidy is contingent on the use of certain qualifying biofuels (*whether imported or domestic*) over palm oil-based biofuel (which is predominantly or exclusively imported). The fact remains that imported qualifying biofuels do have *de facto* access to the subsidy, and the use of domestic biofuels is not *de facto* required to access the subsidy. The circumstances presented, therefore, do not establish that the alleged subsidy is *de facto* contingent within the meaning of Article 3.1(b).

[1717] Indonesia's responses to Panel questions Nos. 114, 230, 241.
[1718] European Union's second written submission, para. 618.
[1719] European Union's first written submission, para. 1587.
[1720] European Union's first written submission, para. 1587 (quoting Indonesia's first written submission, para. 1358).
[1721] European Union's first written submission, para. 1589; second written submission, para. 624.

7.2.3.2.2.4 Conclusion on Articles 3.1(b) and 3.2

7.1387. For the above reasons, the Panel concludes that, assuming *arguendo* that the French TIRIB measure provides a subsidy within the meaning of Article 1, it does not provide a subsidy that is "contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods". Accordingly, The Panel finds that the French TIRIB measure does not provide a prohibited import substitution subsidy within the meaning of Articles 3.1(b) and 3.2.

7.2.3.2.3 Article 2 - Specificity

7.2.3.2.3.1 Introduction

7.1388. Having proceeded on the *arguendo* assumption that the French TIRIB measure provides a financial contribution that would confer a benefit, and found that such a subsidy would not be a prohibited import substitution subsidy under Article 3.1(b) the Panel now turns to consider whether such a subsidy would be specific within the meaning of Article 2.[1722]

7.1389. Indonesia submits that the subsidy at issue is specific pursuant to Article 2.1(a) because access to the subsidy is limited to the "biofuel industry"[1723], and industries which do not "produce or blend biofuel are not able to access the benefit from the biofuel tax reduction".[1724] Indonesia explains that "enterprises that form the biofuel industry, including importers of biofuel, approved warehouse-keepers which store biofuel, registered recipients, and biofuel producers, are the only enterprises capable of receiving the tax reduction and thus the subsidy is specific to that industry."[1725] For Indonesia, Article 2.1(b) cannot be relied upon by the European Union to argue that the subsidy is non-specific because the "French biofuel tax reduction is not based on 'objective criteria or conditions' as defined in footnote 2 to the SCM Agreement".[1726] Finally, if the Panel finds that the subsidy is not specific under Article 2.1(a), Indonesia submits that it is nonetheless *de facto* specific under Article 2.1(c).[1727]

7.1390. The European Union responds that, to the extent that the French TIRIB measure is considered a subsidy, access to it is "obviously limited to the enterprises that are capable of receiving it, i.e. French taxpayers which are importers, approved warehouse keepers, registered recipients or occasional registered recipients when they release fuel for consumption in France containing 'renewable' biofuel". The European Union submits that "[o]il crop-based biofuel producers other than palm oil-crop based producers are not among that group of enterprises, whether they are based in France, in the European Union or elsewhere, simply because they are not necessarily releasing fuel for consumption in France containing 'renewable' biofuel."[1728] Moreover, the European Union submits that specificity does not exist by virtue of Article 2.1(b) because access to the subsidy is based on "objective criteria or conditions governing the eligibility for, and the amount of, the alleged subsidy" that "are clearly spelled out in law, regulation, or other official document, so that they are capable

[1722] Indonesia claims that, in the event that the Panel finds that the TIRIB is a prohibited subsidy under Article 3.1(b) of the SCM Agreement, the TIRIB would also be specific by virtue of Article 2.3 of the SCM Agreement. (Indonesia's first written submission, paras. 1341-1342.) However, in light of the Panel's earlier finding that the TIRIB does not constitute a prohibited subsidy, the subsidy at issue cannot be *deemed* to be specific pursuant to Article 2.3 and the Panel must examine whether specificity exists in light of the parties arguments under Article 2.1 of the SCM Agreement.

[1723] Indonesia's first written submission, paras. 1345 and 1347 (referring to Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.228). See also Indonesia's first written submission, para. 1320.

[1724] Indonesia's first written submission, paras. 1350. See also Indonesia's response to Panel question No. 112, para. 335.

[1725] Indonesia's response to Panel question No. 112, para. 335.

[1726] Indonesia's response to Panel question No. 113, para. 349. See also Indonesia's response to Panel question No. 238, para. 270 (noting that the "measure would fall under Article 2.1(b) of the SCM Agreement were it provided without favouring the French biofuel industry over foreign competitors, and were it based on truly objective economic criteria such as, for example, the size of the industry or number of employees. This is not the case. The European Union has explained, in fact, that the subsidy is granted not on objective criteria, but based on the inputs used and their supposed 'impact … on climate change and biodiversity'").

[1727] Indonesia's first written submission, para. 1320.

[1728] European Union's second written submission, para. 566; first written submission, para. 1558.

of verification, and that eligibility is automatic".[1729] Finally, according to the European Union, Indonesia refers "in very general terms" to *de facto* specificity under Article 2.1(c), but, "in reality" it makes no argument "specifically aimed at demonstrating *de facto* specificity."[1730]

7.2.3.2.3.2 Legal standard

7.1391. Article 2 is entitled "Specificity". Article 2.1 consists of three subparagraphs, which read as follows:

> 2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
>
> > (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
> >
> > (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[2] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
> >
> > (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy[3]. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.
>
> ---
>
> [2] Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.
>
> [3] In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

[1729] European Union's first written submission, para. 1561. See also European Union's first written submission, para. 1568 (noting that "given that Indonesia has made a litigation choice in this dispute not to address the application of Article 2.1(b) to the TIRIB reduction, Indonesia should bear the consequence of its choice and the Panel should not give Indonesia the opportunity to develop a completely new line of argument seeking to show that the TIRIB criteria determining eligibility and amount of subsidy do not conform to the requirement of that provision.")

[1730] European Union's second written submission, 594.

7.1392. The provisions of Article 2 have been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.1393. The purpose of Article 2 is to ascertain whether the subsidy that is found to exist pursuant to Article 1.1 is specific. To this end, Article 2.1 sets out certain "principles" for determining whether *access* to a subsidy is limited to a particular class of recipients and the subsidy is, for that reason, specific. Article 2.1(a) states that a subsidy shall be specific if the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to that subsidy to certain enterprises or industries. Article 2.1(b) sets out that specificity "shall not exist" if the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, the subsidy, provided that eligibility is automatic, that such criteria or conditions are strictly adhered to, and that they are clearly spelled out in an official document so as to be capable of verification.

7.1394. In determining whether a subsidy is specific, both subparagraphs (a) and (b) thus focus on the same subject-matter, i.e. "the granting authority, or the legislation pursuant to which the granting authority operates".[1731] Article 2.1(a) talks of *explicit limits* on access to a subsidy. Article 2.1(b) enumerates the situations when a subsidy shall be regarded as non-specific, based on an analysis of the *conditions and criteria* for eligibility and amount of the subsidy as *clearly spelled out in law, regulation, or other official document*. The provisions thus envisage taking into account all relevant *de jure* features of a subsidy established through legislation and other instruments for the determination of specificity. The common aim and subject-matter of the two subparagraphs also suggests to the Panel that they apply concurrently.[1732]

7.1395. The Panel will elaborate further on the elements of the legal standard in Article 2 as necessary in the course of its assessment of the issues in dispute.

7.2.3.2.3.3 Assessment by the Panel

7.1396. In determining whether *de jure* specificity exists, Articles 2.1(a) directs the Panel to focus on explicit limits on access to the subsidy placed by the granting authority or the legislation pursuant to which it operates. Article 2.1(b) further requires the Panel to take into account the conditions and criteria for eligibility and amount of the subsidy as reflected in law, regulation, or another official document. In the present case, the Panel notes that the relevant *de jure* features of the subsidy at issue are set out in several instruments. The operators liable to pay the TIRIB are set out in the Circular of 18 August 2020 as follows:

> The persons liable to pay the TIRIB are the persons liable to pay the TICPE for the release for consumption of these fuels as a result of import, as a result of intra-Community circulation under a tax suspensive procedure, or on leaving establishments placed under a tax suspensive procedure (factories under customs control ["usines exercées"], tax warehouses for storage and, for ED95 and B100, tax warehouses for energy products). They are importers, approved warehouse keepers, registered recipients or occasional registered recipients.[1733]

7.1397. The text of this instrument expressly limits the payment of the TIRIB to those entities "that *release for consumption* these fuels as a result of import, as a result of intra-Community circulation under a tax suspensive procedure, or on leaving establishments placed under a tax suspensive procedure", i.e. "importers, approved warehouse keepers, registered recipients or occasional registered recipients". It follows that access to any reduction in the TIRIB is also limited to the same operators that are liable to pay the TIRIB, i.e. entities that release for consumption fuels in France, i.e. "importers, approved warehouse keepers, registered recipients or occasional registered recipients".

7.1398. Furthermore, Article 266 *quindecies* of the Customs Code provides that, for the purposes of the TIRIB, qualifying sources of energy in the fuel mix for achieving the incorporation target are renewable energy sources, and that energy from biofuels is renewable if it meets the sustainability

[1731] Panel Report, *US – Ripe Olives from Spain*, para. 7.27.
[1732] Panel Report, *US – Ripe Olives from Spain*, para. 7.28.
[1733] French Government Circular of 18 August 2020, (Exhibit IDN-108), Article 8.

and reduction of greenhouse gas emissions criteria that are in line with RED II and the Delegated Regulation.[1734] In this manner, the Circular and the Customs Code set out a scheme for the payment of – and exemption from – the TIRIB for entities that release for consumption (i.e. importers, approved warehouse keepers, registered recipients or occasional registered recipients) fuels containing qualifying sources of energy.

7.1399. Article 266 *quindecies* of the French Customs Code also provides that "palm oil-based products are not considered to be biofuels" starting from 1 January 2020.[1735] The Circular of 18 August 2020 states that palm oil-based products are "excluded, from 2020, from the full benefit of the tax advantage regardless of their mode of production."[1736] The Circular of 12 June 2019, which preceded and was replaced by the Circular of 18 August 2020, stated that this was "to exclude products based on palm oil not only from the scope of biofuels but also from that of renewable energy".[1737]

7.1400. Working together, these instruments indicate to the Panel that only those economic operators that incorporate and release for consumption fuels incorporating qualifying sources of energy have access to a reduction in the TIRIB, whereas operators that do not incorporate qualifying sources of energy do not have access to the reduction, and, to the extent that operators do not incorporate sufficient qualifying biofuels to meet the target, they have proportionally less access to the reduction in the TIRIB. Moreover, palm oil-based products do not constitute qualifying sources of energy for the purposes of accessing the French TIRIB measure.

7.1401. Under Article 2.1(a), "a limitation on access to a subsidy may be established 'in many different ways', including, for example, 'by virtue of the type of activities conducted by the recipients'".[1738] Based on the text of the underlying instruments discussed above, the Panel finds that the subsidy assumed *arguendo* to exist pursuant to Article 1.1 – i.e. the lower tax liability associated with incorporating qualifying biofuels – is specific within the meaning of Article 2.1(a) because access to such subsidy is limited to those economic operators that release for consumption fuels incorporating qualifying biofuels.

7.1402. Indonesia argues that access to the subsidy at issue is limited to the "biofuel industry", which includes "importers of biofuel, approved warehouse-keepers which store biofuel, registered recipients, and biofuel producers".[1739] Specifically, Indonesia explains that "entities which produce biofuel … form part of the biofuel industry" and these entities have access to the TIRIB reduction because they are "*in practice* … often the same entities that blend, store and release biofuel for consumption …."[1740]

7.1403. The Panel notes that the first three of the entities identified in Indonesia's definition of the "biofuel industry" are also listed as persons liable to pay the TIRIB – and hence have access to any reduction thereof – in the Circular of 18 August 2020. Indonesia thus appears to correctly identify these entities as those having access to a reduction in the TIRIB. By contrast, "biofuel producers" are not included in the list of persons liable to pay the TIRIB in the Circular of 18 August 2020.

7.1404. Given that the taxable activity under the Circular of 18 August 2020 is the "release for consumption" of fuels, the mere "production" of biofuel, does not, in and of itself, render an entity engaging in such production liable to pay the TIRIB or to receive any reductions thereof. In other words, the payment of, and exemption from, the TIRIB are not limited to biofuel producers *per se*, but only to entities that blend and release fuel for consumption (which may or may not be biofuel producers). While it may be – as argued by Indonesia – that "biofuel producers" receive the subsidy because, *in practice,* they often also blend, store, and release biofuel for consumption, this fact alone is insufficient to establish that *access* to the subsidy is explicitly limited by the underlying legal instruments to biofuel producers. This is because, as discussed above, Article 2.1(a) focuses on

[1734] Article 266 quindecies of the French Customs Code, (Exhibit IDN-102).
[1735] Article 266 quindecies of the French Customs Code, (Exhibit IDN-102).
[1736] French Government Circular of 18 August 2020, (Exhibit IDN-108), Article 8.
[1737] Indonesia's first written submission, para. 214 (quoting Circular of 12 June 2019 – the incentive tax relating to the incorporation of biofuels (TIRIB), NOR: CPAD1917078C (Circulaire du 12 juin 2019 Tax incitative relative à l'incorporation de biocarburants (TIRIB)), pp. 1, 2, 19, (Exhibit IDN-109)).
[1738] Panel Report, *US – Softwood Lumber VII*, para. 7.722 (quoting, *inter alia*, Appellate Body Report, *US – Washing Machines*, para. 5.223).
[1739] Indonesia's response to Panel question No. 112, para. 335. (emphasis added)
[1740] Indonesia's response to Panel question No. 245, para. 286.

explicit limits on access to a subsidy and not on whether certain enterprises, in fact, receive the subsidy.[1741] For these reasons, the Panel agrees with the European Union that the "simple fact of being a biodiesel producer does not qualify neither for the application of the TIRIB nor for any exemption or reduction therefrom".[1742]

7.1405. The European Union also asserts that specificity does not exist by virtue of Article 2.1(b) because the subsidy at issue is based on "objective criteria or conditions governing the eligibility for, and the amount of, the alleged subsidy" that "are clearly spelled out in law, regulation, or other official document, so that they are capable of verification, and that eligibility is automatic".[1743] The European Union's arguments under Article 2.1(b) have a procedural and a substantive aspect.

7.1406. Procedurally, the European Union argues that by failing to address Article 2.1(b) in its first written submission, Indonesia failed to make a *prima facie* case of specificity under Article 2.1, and that concerns relating to due process and the Panel's Working Procedures prevent Indonesia from remedying this misstep in its subsequent submissions to the Panel.[1744] Substantively, the European Union submits that the TIRIB exemption applies on the basis of criteria that: (i) are "*external to the mind*" and relate to the impact of biofuels on climate change and biodiversity; (ii) apply in a uniform and neutral way to any operator which releases fuel for consumption and meets the renewable energy incorporation requirements; (iii) are not designed, nor intended to give an advantage to certain enterprises but to induce all those operators that release fuel for consumption to contribute to the objectives of the French legislator; (iv) concern the development of the use of renewable energy in the transport sector and therefore are "economic" in nature in that they regulate material resources in France.[1745]

7.1407. Indonesia, for its part, sees "no obligation or rule which requires a complainant to present arguments under both subparagraphs (a) and (b)" of Article 2.1.[1746] Pointing out that it presented arguments as to why the subsidy is specific under Article 2.1(a) in its first written submission and subsequently responded to the European Union's allegation that the subsidy is not specific in respect of Article 2.1(b) as part of its response to questioning by the Panel at the first substantive meeting, Indonesia submits that "it is for the Panel to decide whether it is necessary to examine arguments made at any point during the proceeding".[1747] As to the substance, Indonesia submits that the "French biofuel tax reduction is not based on 'objective criteria or conditions' as defined in footnote 2 to the SCM Agreement" because the "establishing criteria or conditions for the tax are not neutral, in that they favour certain enterprises over others, and are not economic in nature because they relate to the type of biofuel included in the final fuel mix rather than, for example, the size of the enterprise".[1748]

7.1408. As discussed above, a proper determination of specificity requires the concurrent application of Articles 2.1(a) and 2.1(b) to all the relevant *de jure* features of a subsidy. In the Panel's view, this serves to caution that a separate or compartmentalized analysis under the two provisions – such that a complainant must always first establish a *prima facie* case by reference to *both* provisions in *all* circumstances – may not always be warranted or desirable. Certainly, it would not appear to be necessary when a complainant's arguments under one subparagraph are also relevant for the inquiry under the other provision, for example, by showing that a piece of legislation explicitly limits access to a subsidy, a complainant at the same time could also possibly demonstrate that the legislation pursuant to which that subsidy is granted does not establish objective eligibility

[1741] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 368.
[1742] European Union's second written submission, paras. 576-577.
[1743] European Union's first written submission, para. 1561.
[1744] European Union's first written submission, paras. 1560-1569; second written submission, paras. 581-582.
[1745] European Union's second written submission, para. 590.
[1746] Indonesia's response to Panel question No. 237, para. 269.
[1747] Indonesia's response to Panel question No. 237, para. 268.
[1748] Indonesia's response to Panel question No. 113, para. 349. See also Indonesia's response to Panel question No. 238, para. 270 (noting that the "measure would fall under Article 2.1(b) of the SCM Agreement were it provided without favouring the French biofuel industry over foreign competitors, and were it based on truly objective economic criteria such as, for example, the size of the industry or number of employees. This is not the case. The European Union has explained, in fact, that the subsidy is granted not on objective criteria, but based on the inputs used and their supposed 'impact … on climate change and biodiversity'").

criteria. Thus, the mere fact that Indonesia – the complainant – did not first raise and address Article 2.1(b) does not prevent the Panel from examining the parties' arguments under that provision.

7.1409. Contrary to the European Union's position[1749], the Panel also does not find anything in paragraph 3.1 of its Working Procedures – the provision relied upon by the European Union[1750] – that imposes any temporal limitation on Indonesia to establish its *prima facie* case.[1751] Concerning the DSU, the European Union does not refer to any specific provision in support of its position, but appears to raise certain due process concerns relating to the ability to comment on Indonesia's arguments.[1752] In this regard, the Panel agrees with prior panels and the Appellate Body that "[t]here is nothing in the DSU" requiring all arguments "to be set out in a complaining party's first written submission".[1753] Rather, a *prima facie* case ought to be made in the course of the written and oral submissions to the Panel and arguments may be progressively refined throughout the course of the proceedings, with each party being afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party.[1754] In this regard, the Panel notes that although Indonesia did not present arguments concerning Article 2.1(b) in its first written submission, it subsequently engaged with the European Union on this issue in its responses to the Panel's questions, as well as in its second written submission. The European Union, for its part, also addressed the substance of Article 2.1(b) and engaged with Indonesia's arguments in its second written submission and in its responses to Panel's questions.[1755]

7.1410. Having found nothing in its Working Procedures or the DSU that would prevent it from addressing the parties' arguments on Article 2.1(b), the Panel now turns to the substance of Article 2.1(b). The provision stipulates that specificity "shall not exist" "[w]here the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy … provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to." Footnote 2 to Article 2.1(b) defines "objective criteria or conditions" as those "which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise".

7.1411. As discussed in the context of the Article 2.1(a) analysis above, the text of the underlying instruments establishes that only those operators that incorporate and release for consumption fuels incorporating qualifying sources of energy have access to a reduction in the TIRIB. This also implies that, for the purposes of Article 2.1(b), the criteria or conditions for eligibility for the French TIRIB measure are not "objective" insofar as they "favour certain enterprises over others", i.e. those operators that incorporate and release for consumption fuels incorporating qualifying sources of energy over those operators that incorporate and release for consumption fuels incorporating palm oil-based biofuel.[1756]

[1749] European Union's first written submission, paras. 1564, 1565, and 1568 (noting that by "ignor[ing] altogether" Article 2.1(b), "Indonesia has failed to make a prima facie case that the TIRIB reduction is de jure specific". Now, "the Panel should not give Indonesia the opportunity to develop a completely new line of argument seeking to show that the TIRIB criteria determining eligibility and amount of subsidy do not conform to the requirement of that provision.")

[1750] European Union's first written submission, para. 1567.

[1751] Instead, that provision concerns the timing and filing of the first written submission by the parties in this dispute.

[1752] European Union's second written submission, para. 582 (noting that, "[w]ith this litigation technique, Indonesia has indeed not only violated the rules of procedure established by the Panel but also deprived third parties of the possibility to make any comment about Indonesia's interpretation of Article 2.1(b).")

[1753] Appellate Body Report, *EC – Bananas III*, para. 145; see also Panel Report, *Australia – Apples*, para. 1277 (According to the Appellate Body, "[t]here is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first submission to the panel." Likewise, the panel in Japan – Apples found that "it is well established that a complainant is not prevented, as a matter of principle, from developing in its second submission arguments relating to a claim that is within the terms of reference of the panel, even if it did not do so in its first written submission.")

[1754] See e.g. Appellate Body Reports, *US – Gambling*, para. 141; and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177.

[1755] See e.g. European Union's second written submission, para. 587.

[1756] See e.g. Panel Report, *US – Softwood Lumber VII*, para. 7.727.

7.2.3.2.3.4 Conclusion on Article 2

7.1412. The instruments setting out the eligibility conditions for the subsidy establish that only those economic operators that release for consumption fuels incorporating qualifying biofuels have access to a favourable tax treatment under the French TIRIB measure, whereas operators that do not incorporate qualifying biofuels do not have access to the favourable tax treatment, and, to the extent that operators do not incorporate sufficient qualifying biofuels to meet the target, they have proportionally less access to the favourable tax treatment.

7.1413. The Panel thus finds that the subsidy assumed to exist for the purposes of the Panel's *arguendo* analysis is specific within the meaning of Article 2.1(a) because access to such subsidy is limited to those economic operators that release for consumption fuels incorporating qualifying biofuels. For the purposes of Article 2.1(b), this also means that the criteria or conditions for eligibility for the favourable tax treatment are not "objective" insofar as they "favour certain enterprises over others", i.e. those operators that release for consumption fuels incorporating qualifying biofuels over those operators that incorporate and release for consumption fuels not incorporating qualifying biofuel.

7.1414. Having found that the subsidy at issue would be specific pursuant to Article 2.1(a), the Panel is not called upon to address and rule upon Indonesia's claim in the alternative that the subsidy is *de facto* specific under Article 2.1(c).

7.2.3.2.4 Articles 5(c), 6.3(a) and 6.3(c) – Adverse effects and serious prejudice

7.2.3.2.4.1 Introduction

7.1415. The Panel proceeded on the *arguendo* assumption that the French TIRIB provides a financial contribution, that a subsidy within the meaning of Article 1 would exist because a benefit would thereby be conferred, that such subsidy is not prohibited within the meaning of Articles 3.1(b) and 3.2, and that such subsidy would be specific within the meaning of Article 2. The Panel now turns to the alternative claims under Article 5(c), 6.3(a) and 6.3(c) of the SCM Agreement.

7.1416. Indonesia submits[1757], in the alternative to its claims under Articles 3.1(b) and 3.2, that the French TIRIB measure is inconsistent with Article 5(c) because the favourable tax treatment it provides to operators releasing fuel for consumption in France incorporating qualifying biofuels constitutes an actionable subsidy which causes adverse effects to the interests of Indonesia, in the form of serious prejudice to its interests within the meaning of Articles 6.3(a) and 6.3(c), or a threat thereof.

7.1417. The European Union submits[1758] that Indonesia has not demonstrated that adverse effects have been caused by the French TIRIB measure. In particular, the European Union submits that causation has not been substantiated because*, inter alia*, the posited counterfactual scenario to show causation does not hold. According to the European Union, in the absence of the alleged subsidy under the French TIRIB, there would be no TIRIB at all because the alleged subsidy is inextricably linked to and is the *raison d'être* of the TIRIB such that one cannot exist without the other.[1759] The European Union argues that, in the absence of the alleged subsidy, there would be no incentive deriving from the TIRIB to incorporate any biofuel at all, nor would there be any economic interest for operators releasing fuel for consumption in France to incorporate biofuel because of the higher price of biofuels compared to fossil fuels.[1760] Therefore, according to the European Union, in the absence of the alleged subsidy the correct counterfactual scenario is the elimination of consumption of all crop-based biofuels in the transport fuel market.[1761]

[1757] Indonesia's first written submission, paras. 1360-1430; second written submission, paras. 1530-1567; and comments on EU responses to the Panel's second set of questions, paras. 544-565.
[1758] European Union's first written submission, paras. 1592-1682; second written submission, paras. 631-648; and responses to the Panel's second set of questions, paras. 737-784.
[1759] European Union's comment on Indonesia's response to Question No. 233.
[1760] European Union's comment on Indonesia's response to Question No. 233.
[1761] European Union's comment on Indonesia's response to Question No. 233.

7.2.3.2.4.2 Legal standard

7.1418. Article 5 is entitled "Adverse Effects". Article 5(c) read in conjunction with the introductory clause in Article 5 states:

> No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:
>
> …
>
> (c) serious prejudice to the interests of another Member.[1762]

7.1419. Article 6 of the SCM Agreement is entitled "Serious Prejudice". Article 6.3(a) and (c) provide that:

> 6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:
>
> (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;
>
> …
>
> (c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;

7.1420. Articles 5(c), 6.3(a) and 6.3(c) have been interpreted and applied in a number of prior cases, and both parties present their respective understandings of the applicable legal standard with reference to prior cases.

7.1421. The Panel will elaborate on the relevant elements of the legal standards in Articles 5(c), 6.3(a) and 6.3(c) as necessary in the course of its assessment of the issues in dispute.

7.2.3.2.4.3 General approach to the assessment of adverse effects and serious prejudice

7.1422. Indonesia utilized a two-step approach in presenting its arguments regarding adverse effects and serious prejudice. For each of the alleged effects of the alleged subsidy (displacement, impedance and lost sales), Indonesia sought to demonstrate the existence of the alleged effect, and then argued in a second step that the subsidy was a genuine and substantial cause of the effects.[1763]

7.1423. The Panel observes that analysis of adverse effects and serious prejudice has been undertaken using either a unitary or two-step approach.[1764] Under a unitary approach, the analysis of the particular market phenomena identified in the subparagraphs of Article 6.3 is not conducted separately from the analysis of whether there is a causal relationship between those market phenomena and the challenged subsidies. By contrast, under a two-step approach the analysis first seeks to identify the market phenomena, and then, as a second step, examines whether there is a causal relationship between the observed situation on the market and the subsidy. The Panel notes that the Appellate Body has observed that a unitary approach "has a sound conceptual foundation" and that it may be difficult to ascertain the existence of some of the market phenomena in Article

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[1762] The footnote to the text of Article 5(c) states: "The term "serious prejudice to the interests of another Member" is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice."

[1763] Indonesia's first written submission, paras. 1383-1429.

[1764] Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1107; *US – Upland Cotton*, para. 431; and *US – Upland Cotton (Article 21.5 – Brazil)*, para. 354.

6.3 without considering the effect of the subsidy at issue.[1765] The Panel agrees with this line of thinking as elaborated in the following Appellate Body statement[1766]:

> [A] unitary approach that uses a counterfactual will generally be the more appropriate approach to undertaking the assessment required under Article 6.3 of the SCM Agreement. … [I]t is difficult to understand the market phenomena described in the various subparagraphs of Article 6.3 in isolation from the challenged subsidies. Rather, consideration of the effects of the challenged subsidies is intrinsic to the identification of those market phenomena. Any attempt to identify one of the market phenomena in Article 6.3 without considering the subsidies at issue can only be preliminary in nature since Article 6.3 requires that the market phenomenon be the effect of the challenged subsidy. This also means that a two-step approach simply defers the core of the analysis to the second step. In other cases, the problem might be the opposite. By artificially leaving aside the question of whether the market phenomenon is the effect of the subsidy, one could overlook market phenomena that are in fact occurring.
>
> The use of a counterfactual analysis provides an adjudicator with a useful analytical framework to isolate and properly identify the effects of the challenged subsidies. In general terms, the counterfactual analysis entails comparing the actual market situation that is before the adjudicator with the market situation that would have existed in the absence of the challenged subsidies. This requires the adjudicator to undertake a modelling exercise as to what the market would look like in the absence of the subsidies. Such an exercise is a necessary part of the counterfactual approach. As with other factual assessments, panels clearly have a margin of discretion in conducting the counterfactual analysis.

7.1424. Although Indonesia opted to follow the two-step approach, the Panel considers that it is within its discretion to determine the approach it considers most appropriate under the circumstances. The Panel considers certain aspects of the parties' submissions to have relevance in this respect. The parties agree that in the absence of government measures incentivizing the use of biofuels, there would be no commercial reason for operators releasing fuel for consumption in France to incorporate biofuels into their fuel mix. This is because biofuels cannot compete on a commercial basis with fossil fuels.[1767] Moreover, there are substantial questions regarding whether, in the absence of the challenged subsidy, any opportunities for palm oil-based biofuel to compete for a share of the fuel mix would arise.[1768]

7.1425. The Panel's resolution of these latter questions will be key to establishing the appropriate counterfactual for the causation analysis. Were the Panel to conclude that there would be a counterfactual biofuel market that did *not* offer competitive opportunities to palm oil-based biofuel, then the alleged adverse effects would not have been caused by the subsidy. Alternatively, were the Panel to take the opposite view, the nature of the competitive opportunities for palm oil-based biofuel existing in the counterfactual would necessarily inform the subsequent analysis of the market effects. This suggests that a unitary analysis of the adverse effects would be the most efficient way for the Panel to proceed. In this respect, the Panel finds that in the circumstances of this dispute, and as the Appellate Body has observed, "a two-step approach simply defers the core of the analysis to the second step". Accordingly, the Panel determines to take a unitary approach and to turn next to the issue of the appropriate counterfactual analysis.

7.2.3.2.4.4 The appropriate counterfactual analysis

7.1426. To prevail on a claim of serious prejudice, the complainant must demonstrate that the subsidies at issue have caused one or more of a range of prescribed effects in the relevant market.

[1765] Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1107; and *US – Upland Cotton*, para. 354.

[1766] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1109-1110 (fns omitted).

[1767] Indonesia's first written submission, paras. 496, 568, 1123, 1130.

[1768] Indonesia's first written submission, paras. 1418, 1420, 1427; and responses to Panel questions Nos. 232, 233, paras. 254-259; European Union's comments on Indonesia's response to Panel question No. 233, paras. 186-198.

The causal link between a subsidy and its effects that is required to make this showing has been consistently described as "a genuine and substantial relationship of cause and effect", although a panel need not determine it to be the sole cause of that effect, or even that it is the only substantial cause of that effect.[1769]

7.1427. A number of factors have been considered as relevant for an assessment of whether a challenged subsidy causes the effects that constitute serious prejudice, such as the nature of the subsidy; the way in which the subsidy operates; the extent to which the subsidy is provided in respect of a particular product or products; conditions in the market; and the conceptual distance between the activities of the subsidy recipient and the products in respect of which the market phenomena are alleged.[1770] As mentioned above, a counterfactual analysis has been considered as critical in considering these factors to determine whether the alleged market phenomena are the effect of the challenged subsidies.[1771]

7.1428. In an examination of alleged lost sales, for example, this would involve a comparison of the sales actually made by the competing firm(s) of the complaining Member with a counterfactual scenario in which the subsidized firm(s) would not have received the challenged subsidies. There would be lost sales where a counterfactual scenario shows that sales made by the subsidized firm(s) would have been made instead by the competing firm(s) of the complaining Member, thus revealing the effect of the challenged subsidies.

7.1429. In some circumstances, factors other than the subsidy at issue may have caused or contributed to a particular market effect. Effects of those other causal factors should not be attributed to the subsidies at issue, and the extent to which the other causal factors dilute the causal link between those subsidies and the alleged adverse effects should be taken into account when determining whether there is a genuine and substantial relationship of cause and effect between the subsidies and the alleged market phenomenon.[1772] This examination is referred to as the non-attribution analysis.

7.1430. The selection of an appropriate counterfactual will, as a threshold matter, shape any analysis of adverse effects and serious prejudice in the relevant markets, causation thereof, and non-attribution.

7.1431. The parties acknowledge that the appropriate counterfactual scenario is one that would exist in the absence of the challenged subsidy.[1773] The Panel recalls that it has found, premised on the *arguendo* assumption that the French TIRIB provides a financial contribution in the form of government revenue foregone, a benefit is conferred on the taxpayers whose tax liability is reduced, and such subsidy is specific within the meaning of Article 2. Accordingly, the counterfactual scenario would be one where the French TIRIB no longer lowers the tax liability of taxpayers incorporating qualifying biofuels.

7.1432. The parties agree that in the absence of an incentive to incorporate biofuels into the fuel mix, there is no commercial reason for operators releasing fuel for consumption in France to incorporate such biofuels because biofuels cannot compete on a commercial basis with fossil fuels.[1774] It follows that in the absence of the incentive created by the French TIRIB there is no market for biofuel to be incorporated in the fuel mix consumed in France. The commercial non-viability of biofuels for incorporation in the fuel mix *vis-à-vis* fossil fuels supports the conclusion that in the absence of the incentive created by the French TIRIB all crop-based biofuels would disappear from the transport fuel market in France.

7.1433. In other words, while the absence of the subsidy would eliminate the incentive to incorporate the qualifying biofuels into the mix of fuel released for consumption in France, it would

[1769] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 913.
[1770] See Panel Report, *Korea – Commercial Vessels*, para. 7.560.
[1771] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1109-1110.
[1772] Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, para. 914. See also Appellate Body Report, *US – Upland Cotton*, para. 437; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 375; and *EC and certain member States – Large Civil Aircraft*, paras. 1232 and 1376.
[1773] Indonesia's first written submission, paras. 1410, 1415-1416; European Union's first written submission, paras. 1654-1655.
[1774] Indonesia's first written submission, paras. 496, 568, 1123, 1130; European Union's comments on Indonesia's responses to Panel question No. 233, paras. 196-197.

not restore palm oil-based biofuel to the market position where it competed with other oil crop-based biofuels. According to this reasoning, the counterfactual analysis shows that "the market situation that would have existed in the absence of the challenged subsidies" is not one where the alleged adverse effects to Indonesia's interests are mitigated. If the subsidy were the cause of the adverse effects then its absence should result in the mitigation of those adverse effects. This not being the case, the challenged subsidies are shown not to have caused the alleged adverse effects. Put simply, the absence of the challenged subsidy would not result in better market results for palm oil-based biofuel in the face of commercial non-viability of any oil crop-based biofuels *vis-à-vis* fossil fuels.

7.1434. Indonesia contends that the counterfactual should additionally account for the continued applicability of EU renewable energy targets such that oil crop-based biofuel would still need to be used in France to meet those targets and the potential competitive relationship that could exist between palm oil-based biofuel and other crop-based biofuels under the right circumstances.[1775] Indonesia views the EU renewable energy targets as mandates that France must take some action to fulfil.[1776]

7.1435. The European Union counters that EU members have flexibility in implementing the targets according to their own preferences.[1777]

7.1436. The Panel recalls that while the EU renewable energy targets permit palm oil-based biofuel to fulfil some portion of the targets during the phase-out period, incorporation of palm oil-based biofuel is not required by the targets. The Panel notes Indonesia's emphasis on considerations that could favour an implementation that results in market opportunities for palm oil-based biofuel, whereas the European Union has highlighted the policy motivations for alternative outcomes that would not entail market opportunities for palm oil-based biofuel.[1778] In this regard, the Panel recalls that the counterfactual approach "requires the adjudicator to undertake a modelling exercise as to what the market would look like in the absence of the subsidies".[1779] The differences in views of the parties on the role of EU renewable energy targets, however, raises questions about whether, in addition to modelling how market conditions would have responded in the absence of the subsidies, the Panel should also speculate whether and how the subsidizing Member might adopt (or might have adopted) alternative interventions to respond to its various priorities in the absence of the challenged subsidy.

7.1437. The Panel recalls that the purpose of undertaking the counterfactual analysis under Article 5(c) is to ascertain whether the subsidy causes the alleged adverse effects rather than to explore a range of alternative policy options. On the basis of reliable evidence and an understanding of market dynamics, the Panel considers that it is relatively feasible to undertake a modelling exercise that supports a reasoned conclusion that in the absence of the subsidy it is probable that market conditions would respond, or would have responded, in a particular way that shows whether the adverse effects would have been mitigated in the absence of the subsidy.

7.1438. The Panel recognizes that the existence of the EU renewable energy targets suggests that it is possible that France would adopt, or would have adopted, some other implementation in the absence of the subsidy. However, the Panel considers a counterfactual analysis regarding alternative government interventions that could be, or could have been, adopted in the absence of the subsidy to implement the EU renewable energy targets to be considerably more speculative than a market modelling exercise. To the extent that any such speculation would be warranted, the Panel considers that the evidence suggests the French Government would continue to pursue the policy goal of excluding palm oil-based biofuels sooner than the deadline under the EU directive. Crucially, the Panel finds insufficient evidence on the record to conclude that in the absence of the subsidy an alternative government intervention would necessarily establish a competitive relationship between palm oil-based biofuel and other oil crop-based biofuels for a share of the fuel mix in France.

[1775] Indonesia's response to Panel question No. 232, paras. 254-257.
[1776] Indonesia's response to Panel question No. 233, paras. 258-259.
[1777] European Union's comments on Indonesia's response to Panel question No. 233, paras. 187-192.
[1778] Indonesia's first written submission, para. 1421; European Union's first written submission, paras. 1386-1388.
[1779] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1110.

7.1439. As mentioned, the usefulness of applying a counterfactual analysis is "to isolate and properly identify the effects of the challenged subsidies".[1780] The Panel is, therefore, mindful that the appropriate counterfactual analysis should isolate the effects of the challenged subsidy as compared to other aspects of the French TIRIB that do not constitute the subsidy *per se.* Indonesia has focused its causation arguments on alleged effects arising in the 2019-2020 period when palm oil-based biofuel was excluded from the group of qualifying biofuels as compared to prior years when palm oil-based biofuel was a qualifying biofuel, was eligible for the favourable tax treatment, and was on that basis competing with other biofuels for incorporation in the fuel mix.[1781] Indonesia points to the correspondence in time of the effects of the challenged subsidy that arose from 2019 to 2020.[1782] There is not, however, a correspondence in time between the adoption of the challenged subsidy and the alleged adverse effects. Rather, the alleged adverse effects correspond in time with the proposed and implemented *exclusion* of palm oil-based biofuel from the group of qualifying biofuels. The correspondence in time of the adoption of the *exclusion* as opposed to the pre-existing tax reduction suggests to the Panel that the alleged adverse effects were the effect of the *exclusion* rather than the challenged subsidy. The Panel notes in this regard that Indonesia has claimed that, by excluding palm oil-based biofuel from the tax reduction mechanism, the French TIRIB measure is inconsistent with Articles I:1 and III:2 of the GATT 1994, and the Panel has made affirmative findings in relation to those claims.

7.1440. The Panel recalls, however, that the subsidy in question is the favourable tax treatment afforded to the taxpayers incorporating qualifying biofuels such that less tax is paid than would have been due otherwise. The Panel is, therefore, constrained to examine the effects of the specific subsidy found to exist (on an *arguendo* basis), and not other aspects of the French TIRIB that do not constitute the subsidy. In the Panel's view, the subsidy has the effect of creating demand for qualifying biofuel to be incorporated into fuel released for consumption in France. The subsidy thus permits the qualifying biofuels to overcome a competitive disadvantage *vis-à-vis* fossil fuel. The marketing opportunities for palm oil-based biofuel existed when it was treated as a qualifying biofuel, and such opportunities could exist again only as a consequence of some other intervention to create similar opportunities. Accordingly, the Panel finds that the counterfactual analysis supports the conclusion that the alleged adverse effects and any alleged threat thereof are not caused by the subsidy at issue here (which enables some biofuels to compete with fossil fuels), but are rather caused by the exclusion of palm oil-based biofuel from the group of qualifying biofuels. As such, the Panel finds that Indonesia has not established that the alleged adverse effects are caused by the subsidy within the meaning of Articles 5(c), 6.3(a) and 6.3(c).

7.2.3.2.4.5 Conclusion on adverse effects and serious prejudice

7.1441. For the above reasons, assuming *arguendo* that the French TIRIB provides a financial contribution within the meaning of Article 1.1(a)(1)(ii) such that a subsidy within the meaning of Article 1 exists because a benefit is thereby conferred, and that such subsidy is specific within the meaning of Article 2, the Panel finds that Indonesia has not established that such subsidy causes the alleged adverse effects within the meaning of Articles 5(c), 6.3(a) and 6.3(c).

7.2.3.3 Overall conclusion on the claims under the SCM Agreement

7.1442. The Panel concludes that Indonesia has failed to establish that the French TIRIB measure provides a subsidy that constitutes a prohibited subsidy within the meaning of Article 3.1 and 3.2, or, in the alternative, a specific subsidy that causes adverse effects in the form of serious prejudice or a threat thereof under Articles 5(c), 6.3(a) and 6.3(c) of the SCM Agreement.

7.3 Separate opinion by one panelist

7.1443. The Panel majority has undertaken a long and careful evaluation of the parties' arguments concerning the high ILUC-risk cap and phase-out. The Panel majority has found that the high ILUC-risk cap and phase-out is consistent with the requirements of Article 2.2 of the TBT Agreement. The Panel majority has further found that while this measure is inconsistent with the requirements of Article 2.1 of the TBT Agreement and Article XX of the GATT 1994, such inconsistencies are limited

[1780] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1100.
[1781] Indonesia's first written submission, paras. 1390, 1395, 1406, 1408, 1412, 1422, 1429.
[1782] Indonesia's first written submission, paras. 1390, 1395, 1406, 1408, 1412, 1422, 1429; and second written submission, paras. 1537-1538, 1551.

to certain aspects of how the high ILUC-risk cap and phase-out is administered. While I agree with parts of the Panel majority's analysis, I respectfully disagree with certain key aspects of its reasoning that lead to the conclusions that (i) the measure is consistent with Article 2.2, and (ii) the inconsistencies under Article 2.1 and Article XX are limited to certain aspects of how the high ILUC-risk cap and phase-out is administered.

7.1444. Indonesia has challenged two sets of measures.

7.1445. First, Indonesia challenges the 7% maximum share under RED II that applies equally and without discrimination to all crop-based biofuels. I agree with the Panel majority that the 7% maximum share, which applies without differentiation to all crop-based biofuels, has not been shown to be inconsistent with the TBT Agreement. It may be noted in this respect that Indonesia did not pursue any claims under Article 2.1 of the TBT Agreement or Article I:1 and III:4 of the GATT 1994 in respect of the 7% maximum share.

7.1446. Second, Indonesia challenges the EU and French measures that single out one particular type of crop-based biofuels – i.e. palm oil-based biofuel – and with a view to eliminating that one type of biofuel from the EU renewable energy market. I also agree with the Panel majority that the high ILUC-risk cap and phase-out has been applied in a manner that is inconsistent with Article 2.1 of the TBT Agreement and the *chapeau* of Article XX of the GATT 1994, for the reasons stated by the majority; and I further agree that this extends *mutatis mutandis* to the French TIRIB measure.

7.1447. However, I do not consider the inconsistencies with the TBT Agreement and the GATT 1994 to be limited to these issues, which relate exclusively to certain deficiencies in the manner in which it has been administered. In my view Indonesia has provided sufficient evidence to meet its burden of demonstrating that the objective of the measure includes an element of protectionism; and this conclusion is reinforced by the evidence showing there is an element of arbitrariness in singling out palm oil-based biofuel for the high ILUC-risk cap and phase-out when other types of oils, notably soybean, appear to pose the same alleged risk.

7.1448. The difference in view underlying this separate opinion is essentially a matter of how much weight to give to certain evidence before the Panel. I will not exhaustively identify and analyse all of the evidence that could be referred to in connection with the issues raised, or repeat all of the arguments and counterarguments of the parties that have a bearing on these issues. Instead, what follows sets forth the basic rationale behind the conclusions I reach by identifying some of the evidence that I give more weight to than the Panel majority.

7.1449. Beginning with the objective of the high ILUC-risk cap and phase-out, and the related issue of protectionism, there is evidence before the Panel that is difficult to reconcile with the conclusion that the exclusive objective of the measure is to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels. What follows briefly identifies and discusses some of this evidence.

7.1450. First, I give more weight than the Panel majority to the explicitly protectionist recommendation contained in the 4 April 2017 resolution of the European Parliament that called for a phase-out of palm oil as a biofuel component preferably by 2020. In this 15-page resolution, the European Parliament conducts an analysis of the climate change, environmental, deforestation and social implications of palm oil production (and to some extent that of other vegetable crops and agriculture in general). While this resolution does refer to ILUC-related concerns, it explicitly calls for the promotion of "more sustainable alternatives for biofuel use, such as … oils produced from *domestically cultivated* rape and sunflower seeds".[1783] Thus, by its own terms, the resolution recommends a ban or phase-out of consumption of palm oil-based biofuel in the European Union while calling for biofuels to be produced from "domestically cultivated" rape and sunflower seeds.

7.1451. Second, I give more weight than the Panel majority to the evidence provided by Indonesia showing that the European Union has a long history of enacting trade barriers to limit imports of palm oil-based biofuel to protect the EU biofuel industry.[1784] Indonesia has referred to, as evidence, various EU anti-dumping and countervailing duty determinations on imports of biodiesel and several

[1783] European Parliament Resolution of 4 April 2017, (Exhibit IDN-89), para. 83. (emphasis added)
[1784] Indonesia's first written submission, paras. 545 and 585.

WTO panel decisions on challenges that were brought against these measures.[1785] The trade defence measures on imported biofuels taken by the European Union over an extended period of time can be viewed as evidence that domestic EU producers have at various points sought and received protection from imports of biofuels, including (but not limited to) palm oil-based biofuel, in the form of trade measures.

7.1452. Third, I give more weight than the Panel majority to the anticipated effect of the high ILUC-risk cap and phase-out on EU production of competing vegetable oils and biofuels when assessing the objective of the measure. The measures at issue in this dispute have been the subject of academic analyses and commentary by various institutions, and some of these studies have been placed on the record. According to Delzeit et al[1786]:

> The palm oil restriction leads to an increased input of all other vegetable oils into biodiesel production, while rapeseed oil is the main beneficiary of the restriction with an increased input share of 9 percentage points. This finding already indicates a preferential treatment of EU-domestically produced vegetable oil over imports, given that the EU is the largest global producer of rapeseed.[1787]
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> …
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> [T]he increasing demand for biofuels is to a large extent satisfied by rapeseed based biodiesel, which is especially driven by the phase-out of palm oil-based biodiesel that causes imports of palm oil and palm oil-based biodiesel to the EU to decline. This is compensated for by higher production quantities of EU-based rapeseed and rapeseed oil, and to a certain degree by an increase of imported soybean oil. EU farmers can be considered to be beneficiaries of this policy since they generate additional revenues due to expanding the production of rapeseed while simultaneously obtaining higher prices.[1788]

7.1453. This evidence must be assessed holistically, rather than examining each of these statements in isolation from the others. When it is assessed in this manner, I conclude that the objective of the high ILUC-risk cap and phase-out is not simply to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels. Rather, the objective of the measure appears to also include an element of protectionism.

7.1454. The conclusion that the measure appears to include an element of protectionism is reinforced by other evidence before the Panel that strongly implies a degree of arbitrariness in singling out palm oil-based biofuel from the perspective of the stated objective of limiting ILUC-related GHG emissions associated with the production of crop-based biofuels. The fundamental issue here is that certain other types of crop-based biofuels, in particular soybean-based biofuels, appear to pose a similar risk of ILUC-related GHG emissions. What follows briefly identifies and discusses some of this evidence.

7.1455. First, the 4 April 2017 resolution of the European Parliament that called for a phase-out of palm oil as a biofuel component preferably by 2020 (already referred to above) actually acknowledges that soybean- and other plant-based oils may have a much higher environmental footprint than palm oil-based biofuels. In this resolution, the European Parliament:

> Observes that other plant-based oils produced from soybeans, rapeseed and other crops have a much higher environmental footprint and require much more extensive land use than palm oil; notes that other oil crops typically entail a more intensive use of pesticides and fertiliser[.][1789]

[1785] The relevant determinations and exhibits are referenced at Indonesia's first written submission, paras. 545 and 586-591.
[1786] See Delzeit et al, Kiel Working Paper No. 2203, (Exhibit IDN-371).
[1787] See Delzeit et al, Kiel Working Paper No. 2203, (Exhibit IDN-371), p. 10.
[1788] See Delzeit et al, Kiel Working Paper No. 2203, (Exhibit IDN-371), p. 17.
[1789] European Parliament Resolution of 4 April 2017, (Exhibit IDN-89), para. 6.

7.1456. Second, in a literature review summarized in the Study Report (2017), in seven out of the nine studies which were examined and estimated ILUC emissions for all types of oil crop, *soybean and rapeseed* were found to have higher estimated ILUC emissions than oil palm.[1790]

7.1457. Third, an internal legal opinion prepared by the European Commission in 2018 constitutes further evidence of the same conclusion, and I gave appropriate weight to this piece of evidence. To recall, on 17 January 2018, the European Parliament called for the phasing out, by 2021, of palm oil-based biofuel for calculating EU renewable energy targets. The proposed amendment would have singled out palm oil as the only biofuel feedstock to be excluded from counting towards the EU renewable energy consumption targets. The European Parliament's proposed amendment raised substantive concerns in the European Commission about the compatibility of those amendments with the European Union's WTO obligations. Indonesia refers, in this connection, to internal legal advice regarding the consistency of the proposed amendment with EU and WTO law.[1791] That opinion concludes that:

> Such discriminatory treatment does not seem to be justifiable under the GATT general exceptions, *not least because of a lack of sound scientific evidence warranting the suggested differential treatment* to safeguard certain legitimate societal values, notably life or health (Art. XX(b)) or the conservation of exhaustible natural resources (Art. XX(g)).[1792]

7.1458. The conclusion that there is "a lack of sound scientific evidence warranting the suggested differential treatment" appears to have been based on the assessment that other types of crops could have higher ILUC-related GHG emissions than palm oil. The opinion states:

> While there is some evidence that palm oil creates, on average, more carbon emissions than other oil crops, certain sources of palm oil may have associated emissions below that average. *Other types of crops also vary in terms of emissions* and, depending on circumstances, *could have higher associated emissions than certain sources of palm oil.* The Parliament position does not take this issue into account. This is something that could clearly undermine any EU argument under subparagraph (g).[1793]

7.1459. Such concerns are also reflected in the independent academic analysis conducted by Delzeit et al:

> The motivation by the EU for the phase-out is the protection of high carbon stock (hcs) land by reducing the expansion of palm fruit production. Nevertheless, besides an expansion in rapeseed production, our results show an expansion of soybean production in Brazil. There is a considerable probability that a share of this expansion might actually take place in hcs land, but now in South America instead of South-East Asia.
>
> Therefore, a key factor for accessing the effectiveness of the policy is the biofuel productivity of oilseed crops in terms of land use. As shown above, our model results indicate that due to the palm oil phase-out, more than three times of the area saved by reduced palm fruit cultivation is needed for additional soybean and rapeseed production to meet the demand for biofuels. These findings lie in between the range of results of other studies. Debenath (2019) states that the biofuel yield for palm fruit is 4.45 mt/ha while it is 1 mt/ha for rapeseed and 0.36 mt/ha for soybean. In contrast, in their report

[1790] Indonesia's first written submission, para. 266. In 2017, a Study Report on the Reporting Requirements on Biofuels and Bioliquids stemming from the Directive (EU) 2015/1513 was published, authored by Woltjer et al. (Study Report (2017), (Exhibit IDN-87)). Study Report (2017) found 30 studies which reported on land use change and ILUC factors of different biofuel. These studies were based on a number of models and methods, reporting (I)LUC per mass unit. Out of the 30 studies selected by the Study Report (2017), nine made a comparison possible between so-called ILUC GHG emissions of different types of biodiesel, as relevant to this dispute. Seven of those studies produced results that provided higher GHG emissions estimates for soybean-based biofuel than oil palm crop-based biofuel.

[1791] Indonesia's first written submission, para. 146, referring to Letter of DG Trade to DG Energy, (Exhibit IDN-91).

[1792] See Letter of DG Trade to DG Energy, (Exhibit IDN-91), p. 2. (emphasis added)

[1793] See Letter of DG Trade to DG Energy, (Exhibit IDN-91), Annex - Revision of the EU RED (RED II): Compatibility of Amendment 307 of the European Parliament with WTO law – Key elements of legal analysis, at p. 2. (emphasis added)

> for the European Commission, Valin et al. (2015) assume 1.7 times higher biofuel yield per ha for palm fruit compared to rapeseed, and 5 times higher yield compared to soybean. For the RED II calculation of land expansion into hcs-land, as described in the introduction, the European Commission chooses a productivity factor of 2.5 for palm fruit and 1 for rapeseed and soybean (European Union 2019). Compared to the scientific studies, especially the productivity factor for soybean is selected very generously. Moreover, given the absolute historic expansion of soybean production areas into hcs land in South America, like the Amazon Forest but also the Cerrado or the Chaco Forest, it is questionable whether the shift in biodiesel production from palm oil to soybean oil substantially reduces global emissions from land use change. The relatively lower share of expansion into hcs land of soybean compared to palm fruit production might be overcompensated by the higher amount of land required for producing the same amount of biodiesel. Consequently, it raises concerns if it is justified to have a palm oil biodiesel phase-out, but not a soybean oil biodiesel phase-out.[1794]

7.1460. The formula developed by the European Union in the context of the Delegated Regulation raises a number of highly technical issues. However, the singling out of palm oil-based biofuel, notwithstanding the seemingly similar risk of ILUC-related GHG emissions associated with soybean, seems to stem from how the formula seeks to measure ILUC-related GHG emissions on the basis of relative expansion of land, and the relative share of that expansion into high-carbon stock land. As Delzeit et al explain when discussing this central feature of the formula:

> The resulting share of expansion into land with high-carbon stock is much higher for palm fruit (42%) than for soybean (8%). However, the absolute annual expansion of production areas since 2008 is 4.5 times higher for soybean compared to palm fruit (ibid.). As a consequence, when multiplying the absolute annual expansion area with Xhcs, the resulting absolute expansion into land with high-carbon stock of palm fruit and soybean are quite close in size.[1795]

7.1461. On this issue, I give more weight to the expert opinion of Professor Finkbeiner than the Panel majority. In his expert opinion, Professor Finkbeiner states:

> [F]or climate change and the real world impact, it is not the relative effect that matters, it is the absolute effect as the absolute amount of land use change correlates with the associated GHG emissions (see section 2.2.1). As an example, based on the data in the Delegated Regulation, soybean leads to an annual increase in land use of 3183,5 kha and 3,0%, whereas palm oil leads to an annual increase in land use of 702,5 kha and 4,0%. This means that for soybean about 3,5 times more land expansion happened, but the relative growth for palm oil is larger. However, it is the absolute amount of land use that matters and contributes to GHG emissions, not the relative one.[1796]

7.1462. This evidence relating to the arbitrariness of singling out palm oil must be assessed holistically, rather than examining each of these statements in isolation from the others and must also be viewed together with the evidence suggesting that the measure appears to also include an element of protectionism. My weighing of the evidence leads me to the conclusions that Indonesia has substantiated its assertion that there is an element of protectionism behind the decision to single out palm oil-based biofuel, and that the different treatment of soybean and palm oil is arbitrary from the perspective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels.

7.1463. 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

[1794] See Delzeit et al, Kiel Working Paper No. 2203, (Exhibit IDN-371), pp. 17-18.
[1795] See Delzeit et al, Kiel Working Paper No. 2203, (Exhibit IDN-371), p. 5.
[1796] See Finkbeiner Expert Opinion, (Exhibit IDN-126), p. 18.

trade" within the meaning of the *chapeau* of Article XX of the GATT 1994. This analysis extends *mutatis mutandis* to the assessment of the French TIRIB measure under Article XX of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATION

8.1. With regard to the EU measures at issue, the Panel finds that[1797]:

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. Indonesia 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 2.4 of the TBT Agreement to use relevant international standards as a basis for technical regulations;

c. Indonesia 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. Indonesia 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 high ILUC-risk cap and phase-out in terms of Articles 2.2 to 2.4 of the TBT Agreement;

f. Indonesia has failed to establish 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;

i. Indonesia 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

[1797] 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.

implementation of the low ILUC-risk procedure have created unnecessary obstacles to international trade;

k. Indonesia 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 Indonesia 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. it is unnecessary to rule on Indonesia's alternative claim that the European Union acted inconsistently with the obligation in Article 5.8 of the TBT Agreement to ensure that conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them;

n. Indonesia has failed to establish that the European Union has acted inconsistently with Articles 12.3 or 12.1 of the TBT Agreement;

o. Indonesia has not established that the high ILUC-risk cap and phase-out 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 Indonesia 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 Indonesia that is accorded to like products imported from third countries;

r. 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;

s. with respect to Article XX of the GATT 1994:

   i. the high ILUC-risk cap and phase-out is a measure relating to the conservation of exhaustible natural resources that is made effective in conjunction with restrictions on domestic production or consumption within the meaning of Article XX(g);

   ii. the high ILUC-risk cap and phase-out is a measure necessary to protect human, animal or plant life or health within the meaning of Article XX(b);

iii. it is unnecessary to rule on whether the high ILUC-risk cap and phase-out is a measure necessary to protect public morals under Article XX(a); and

iv. the high ILUC-risk cap and phase-out has been administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, because the European Union failed to conduct a timely review of the data used to determine which biofuels are high ILUC risk, and because there are deficiencies in the design and implementation of the low ILUC-risk criteria and certification procedure;

8.2. With regard to the French TIRIB measure, the Panel finds that[1798]:

a. by excluding palm oil-based biofuel from the group of qualifying biofuels, 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. by excluding palm oil-based biofuel from the group of qualifying biofuels, 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. by excluding palm oil-based biofuel from the group of qualifying biofuels, 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 Indonesia;

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

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. Indonesia has failed to establish that the French TIRIB measure provides a prohibited subsidy within the meaning of Articles 3.1 and 3.2 of the SCM Agreement, or in the alternative a specific subsidy that causes adverse effects in the form of serious prejudice or a threat thereof under Articles 5(c), 6.3(a) and 6.3(c) of the SCM Agreement.

[1798] 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.

8.3. 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 Indonesia under those agreements.

8.4. 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.