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

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY MALAYSIA

The following communication, dated 15 April 2021, from the delegation of Malaysia to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

My authorities have instructed me to request the establishment of a panel pursuant to Articles 4.7 and 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ('DSU'), Article XXIII of the General Agreement on Tariffs and Trade 1994 ('GATT 1994'), Article 14.1 of the Agreement on Technical Barriers to Trade ('TBT Agreement') and Article 30 of the Agreement on Subsidies and Countervailing Measures ('SCM Agreement') regarding certain measures imposed by the European Union ('EU') and certain EU Member States affecting palm oil and oil palm crop-based biofuel from Malaysia.

On 15 January 2021, Malaysia requested consultations with the EU, as well as France and Lithuania, pursuant to Article 4 of the DSU, Article XXII of the GATT 1994, Article 14.1 of the TBT Agreement and Article 30 of the SCM Agreement. This request was circulated on 19 January 2021 as document WT/DS600/1. The consultations were held on 17 March 2021 with a view to reaching a mutually agreed solution. Regrettably, the consultations failed to settle the dispute.

As a result, Malaysia respectfully requests that a panel be established pursuant to the dispute settlement provisions referred to above to examine the measures at issue, identified in this request, on the basis of the standard terms of reference as set out in Article 7.1 of the DSU.

I. BACKGROUND

1. Malaysia is the world's second largest producer of palm oil. In 2020, Malaysia produced around 19.14 million metric tonnes of crude palm oil, accounting for 26% of world palm oil production (73.79 million tonnes¹) and 34% of world palm oil exports.² In 2020, Malaysia exported around 1.94 million metric tonnes of palm oil to the EU.³ Malaysia's palm oil industry indirectly employs more than 3 million people and about 28% of all oil palm-planted area in Malaysia is owned or farmed by smallholder farmers, who have benefited enormously from oil palm cultivation.⁴ Palm oil production and export have been major factors in Malaysia's ability to reduce poverty from 50% in the 1970s, down to less than 5% today.
2. As one of the major producers and exporters of palm oil and products derived from palm oil, Malaysia recognises that it has an important role to play in fulfilling the growing global need for oils and fats in a sustainable manner. Malaysia is a responsible producer of palm oil and has long taken a global leadership role in instituting a continuous stream of oil palm

¹ Oil World No.6, Vol. 64, page 77.

² Malaysian Palm Oil Board, Production 2019. Available at <http://bepi.mpob.gov.my/index.php/en/production/production-2020/production-of-oil-palm-products-2020.html>.

³ Malaysian Palm Oil Board, Export Of Palm Oil By Destination, 2020. Available at <http://bepi.mpob.gov.my/index.php/en/export/export-2020/export-of-palm-oil-to-major-destinations-2020.html>.

⁴ Malaysian Palm Oil Board, available at <http://bepi.mpob.gov.my/index.php/en/area/area-2020/oil-palm-planted-area-as-at-dec-2020.html>.

cultivation and palm oil process innovations aimed at making palm oil production more sustainable and environmentally friendly. As of 31 December 2020, nearly 90% of Malaysia's total oil palm cultivation had obtained the Malaysian Sustainable Palm Oil ('MSPO') certification. As of that date, 428 of 452 oil palm mills, corresponding to around 95% of Malaysia's palm oil mills, had received the MSPO certification. Noteworthy is the fact that, since 1 January 2020, Malaysia made the MSPO certification mandatory.

3. It is important to recall Malaysia's commitment at the 1992 Rio Earth Summit, where it pledged to maintain at least 50% of the country's landmass under forest and tree cover. On the basis of data from 2018, about 55.3% of Malaysia's land areas are under forest cover, exceeding the country's pledge made at the 1992 Rio Earth Summit.⁵

II. THE CONTEXT OF THE DISPUTE

4. In the context of addressing the environmental risks posed by the extensive use of fossil fuels, the EU and its Member States have, since 2009, adopted a policy of promoting the use of biofuels by setting national targets for the use of renewable energy in various sectors, including the transport sector. This policy led to a rapid increase in the EU consumption of biofuels, produced mainly from food and feed crops.
5. While, in general, the measures taken by the EU and certain EU Member States under the renewable energy policy pursue the reduction of greenhouse gas ('GHG') emissions and the achievement of commitments under international climate agreements, Malaysia considers that some of these measures are inconsistent with the EU's and certain EU Member States' WTO obligations.
6. In particular, the EU contends that only palm oil production entails a high risk of indirect land-use change ('ILUC'). On that basis, the share of oil palm crop-based biofuel shall not exceed the level of consumption of such fuel in each EU Member State in 2019 and shall gradually decrease to 0% by 2030.⁶ Malaysia submits that, in fact, a number of EU Member States appear to phase out oil palm crop-based biofuels, for purposes of meeting EU renewable energy targets, much earlier than 2030. Unless certified as low ILUC-risk, oil palm crop-based biofuel cannot be counted towards EU renewable energy targets.⁷
7. Generally speaking, the measures adopted by the EU, as well as the related measures so far adopted by certain EU Member States, confer unfair benefits to EU domestic producers of certain biofuel feedstocks, such as rapeseed, sunflower, and soybeans, and to the biofuels produced therefrom, at the expense of, respectively, palm oil and oil palm crop-based biofuel produced in Malaysia. These measures also discriminate against palm oil and oil palm crop-based biofuel from Malaysia in favour of 'like products' from third countries.
8. Malaysia submits that the measures adopted by the EU and certain EU Member States already limit and will increasingly reduce the volume of oil palm crop-based biofuel, and, hence, the amount of palm oil used for its production, that may be counted towards reaching EU renewable energy targets and, consequently, that will be sold in the EU market.

⁵ Malaysian Ministry of Energy and Natural Resources, available at <https://www.ketsa.gov.my/en-my/KetsaCore/Forestry/Pages/Total-Forested-Areas-in-Malaysia.aspx>.

⁶ From 31 December 2023 until 31 December 2030 at the latest, that limit shall gradually decrease to 0%. See Article 26(2) of the RED II.

⁷ See European Commission, Factsheet, Indirect Land Use Change, 17 October 2012, available at https://ec.europa.eu/commission/presscorner/detail/de/MEMO_12_787. See also Recitals 80 and 81 and Article 26.2 of the RED II.

III: THE MEASURES AT ISSUE

A. EU measures

EU renewable energy target

9. 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 sources⁸ ('RED II') (2018) establishes a new binding EU target of a share of at least 32% of renewable energy in the EU gross final consumption of energy by 2030, aiming at '[e]nsur(ing) robust GHG emission savings and minimiz(ing) unintended environmental impacts'.⁹ EU Member States are required to transpose this general renewable energy policy framework by 30 June 2021.¹⁰
10. The RED II also places a limit on biofuel consumption in the transport sector, which an EU Member State may take into account for its calculation of the share of energy from renewable sources and, ultimately, when assessing whether it achieves its renewable energy target. The amount of biofuels that may be derived from food and feed crops is set at 7% (or lower¹¹) of total energy consumption in the transport sector (hereinafter, referred to as the '**7% limit**'). For the transport sector, the RED II sets an overall objective of achieving 14% of its energy consumption from renewable sources by 2030.¹²
11. After 1 January 2021, EU Member States' share of energy from renewable sources may not fall below certain specified thresholds.¹³ The thresholds are based on a calculation of the sum of: (i) the gross final consumption of electricity from renewable sources; (ii) the gross final consumption of energy from renewable sources in the heating and cooling sector; and (in relevant part) (iii) the final consumption of energy from renewable sources in the transport sector.¹⁴
12. In calculating an EU Member State's gross final consumption of energy from renewable sources, the share of biofuels, bioliquids, or biomass fuels associated with a high risk of ILUC (i.e., produced from food and feed crops for which 'a significant expansion of the production area into land with high-carbon stock is observed'), must be below the consumption level of such fuels in that EU Member State in 2019 (unless such fuels are certified to be 'low ILUC-risk' fuels). The share of these 'high ILUC-risk' biofuels, bioliquids, or biomass fuels may not exceed the level of consumption of such fuels in a given EU Member State in 2019 (hereinafter, referred to as the '**high ILUC-risk cap**'), unless they are certified to be 'low ILUC-risk' biofuels, bioliquids or biomass fuels. The RED II provides that '[f]rom 31 December 2023 and until 31 December 2030 at the latest, that limit is to gradually decrease to 0%' (hereinafter, referred to as the '**high ILUC-risk phase out**').¹⁵

ILUC-risk

13. The Commission Delegated Regulation (EU) 2019/807 of 13 March 2019¹⁶ ('Delegated Regulation') supplements the RED II by laying down the criteria for determining the high

⁸ 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 L 328, 21.12.2018, p. 82-209, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.L_.2018.328.01.0082.01.ENG.

⁹ Article 3(1) of and recital 8 in the preamble to the RED II.

¹⁰ Article 36(1) of the RED II.

¹¹ Article 26(1) of the RED II allows EU Member States to set lower limits and, in so doing, to distinguish between biofuels, bioliquids and biomass fuels produced from food and feed crops and specifically from oil crops.

¹² Article 25(1) of the RED II.

¹³ Article 3(4) of the RED II.

¹⁴ Article 7(1) of the RED II.

¹⁵ Article 26(2) of the RED II.

¹⁶ 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. 1-7, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.L_.2019.133.01.0001.01.ENG.

ILUC-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed, as well as for certifying low ILUC-risk¹⁷ biofuels, bioliquids and biomass fuels. The alleged 'scientific basis' for these criteria is provided in the Report from the Commission on the status of production expansion of relevant food and feed crops worldwide ('Status Report').¹⁸

14. Under Article 3 of the Delegated Regulation, for purposes of determining high ILUC-risk feedstock for which a significant expansion of the production area into land with high-carbon stock is observed, two cumulative criteria are applied: (1) the average annual expansion of the global production area of the feedstock since 2008 must be higher than 1% and affect more than 100,000 hectares; and (2) the share of such expansion into land with high-carbon stock must be higher than 10%, in accordance with a particular mathematical formula, which consists of the share of expansion into land with high-carbon stock, the share of expansion into land referred to in Article 29(4)(b) and (c) of the RED II, and the share of expansion into land referred to in Article 29(4)(a) of the RED II. The Delegated Regulation, however, does not provide any explanation or guidance as to the scientific rationale of the factors and values taken into account for these criteria. The selected reference period, as well as the benchmark for annual expansion, appear to have been skilfully set so that only palm oil would be negatively affected by the measure.
15. The criteria for determining the high ILUC-risk feedstock and low ILUC-risk biofuels, bioliquids or biomass fuels are based on the alleged overall expansion with respect to each particular feedstock, and not on a transparent methodology based on the circumstances in a particular country or the particular circumstances of production, including the management of land, in that country. The mechanism does not, *inter alia*, take into account features unique to tropical regions, which have a considerably larger forest cover than other WTO Members, such as the EU.
16. Contrary to its intended purpose, the Status Report does not offer sound, accurate, and comprehensive scientific evidence to support the conclusions reached with respect to the respective commodities. As the Status Report itself admits, the available data has oftentimes either been selectively chosen or has been 'assumed', because the actual data was often unavailable or not found.¹⁹
17. The certification as low ILUC-risk (hereinafter, referred to as the '**low ILUC-risk certification**'), as provided by Article 4 of the Delegated Regulation, is possible for biofuels, bioliquids, and biomass fuels that are produced under circumstances that avoid ILUC effects, if all relevant criteria are met, namely that: (1) such products comply with the sustainability and GHG emissions saving criteria set out in Article 29 of the RED II; (2) such products have been produced from additional feedstock obtained through additionality measures that meet the specific criteria set out in Article 5 of the Delegated Regulation; and (3) the evidence needed to identify the additional feedstock and to substantiate claims regarding the production of additional feedstock is duly collected and thoroughly documented by the relevant economic operators).²⁰
18. Although the RED II does not single out any particular fuels as carrying high-ILUC risk, it follows from the Delegated Regulation that only oil palm crop-based biofuel must be certified

¹⁷ Low ILUC-risk biofuels, bioliquids and biomass are defined in Article 2(37) of RED II as 'biofuels, bioliquids and biomass fuels, the feedstock of which was produced within schemes which avoid displacement effects of food and feed-crop based biofuels, bioliquids and biomass fuels through improved agricultural practices as well as through the cultivation of crops on areas which were previously not used for cultivation of crops, and which were produced in accordance with the sustainability criteria for biofuels, bioliquids and biomass fuels laid down in Article 29'.

¹⁸ 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).

¹⁹ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the status of production expansion of relevant food and feed crops worldwide, COM(2019) 142 final (13 March 2019), pp. 8, 13, 14.

²⁰ Articles 4 and 5 of the Delegated Regulation 2019/807, identify the cumulative criteria that must be met in order to certify biofuels, bioliquids and biomass fuels as low ILUC-risk. These criteria include the sustainability and GHG emissions saving criteria and the need to comply with additionality requirements.

as low ILUC-risk to be taken into account in order to meet the EU renewable energy targets and to benefit from EU Member States' support schemes. It appears that the conditions set out in Articles 4 and 5 of the Delegated Regulation are designed in a manner so as to effectively preclude oil palm crop-based biofuel from meeting these conditions.

19. EU Member States will still theoretically allow the importation of high ILUC-risk feedstocks or biofuels, bioliquids, and biomass fuels produced therewith. Between 31 December 2023 and 31 December 2030, however, the share of fuels produced from feedstocks considered by the EU as high ILUC-risk feedstocks is to gradually decrease to 0% for the calculation of an EU Member State's gross final consumption of energy from renewable sources referred to in Article 7 of the RED II and the minimum share referred to in the first sub-paragraph of Article 25(1) of the RED II.²¹ As a result, the demand for biofuels will inevitably turn to fuels that may be taken into account in order to meet the EU renewable energy targets and that benefit from EU Member States' support measures.

The sustainability and GHG emission savings criteria

20. Energy from biofuels, bioliquids, and biomass fuels must also satisfy the sustainability and GHG emission savings criteria in order to be taken into account for the purpose of contributing towards the EU's renewable energy targets and being eligible under the relevant support schemes put in place by EU Member States.²²
21. The GHG emission savings criteria provide that the greenhouse gas emission savings from the use of biofuels, bioliquids and biomass fuels shall be either 50%, 60%, or 65% of total emissions from the use of the biofuel, depending on the age of the installation in which that fuel is produced.²³
22. The European Commission may decide on the eligibility of the voluntary national or international schemes setting standards for the production of biofuels, bioliquids or biomass fuels, or other fuels. To this end, the European Commission may adopt implementing legislation laying down rules regarding, *inter alia*, adequate standards of reliability, transparency and independent auditing that must be satisfied by all voluntary schemes.²⁴ However, the same opportunity is not provided as regards mandatory systems of sustainability standards, such as the government-imposed MSPO standard, which, arguably, should be recognised by the EU and reflected in the measures at issue.

Relevant legal and other instruments

23. Malaysia understands that the measures at issue are set up and implemented through the RED II, and in particular, but not exclusively, Article 26 thereof, and the Delegated Regulation, both referred to above, as well as, *inter alia*, the following legal and other instruments, considered alone and in combination:
 - 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 ('RED I'), as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources, OJ 2015 L 239, p. 1;
 - ii. 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

²¹ Article 26(2) of the RED II.

²² Article 29(1) of the RED II.

²³ Article 31 of the RED II and Annex V thereto lay down rules for calculating the GHG impact of biofuels, bioliquids and their fossil fuel comparators.

²⁴ Article 30(8) of the RED II.

Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, OJ 2018 L 328, p. 1 ('Regulation 2018/1999');

- iii. European Parliament Resolution of 4 April 2017 on palm oil and deforestation of rainforests (2016/2222(INI)), OJ 2018 C 298, p. 2 ('Resolution of 4 April 2017');
- iv. 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) ('Status Report'); and
- v. Any annexes thereto, amendments, supplements, replacements, renewals, extensions, implementing measures or any other related measures, and any exemptions applied.

B. EU Member States' measures

24. The RED II envisages that the renewable energy targets be reached by adopting at the EU Member States' level various support schemes, including tax refunds, reductions, or exemptions.²⁵ Two EU Member States, namely France and Lithuania, have already adopted measures that transpose the RED II into national legislation.

The exclusion of oil palm crop-based biofuel from the tax reduction, as well as the fuel tax reduction itself, under the French 'General Tax on Polluting Activities'

25. In view of the provisions of the EU's renewable energy framework, including the RED I and the RED II, France has introduced a General Tax on Polluting Activities, which includes a tax on the consumption of petrol and diesel (the '**French fuel tax regulation**'). The French fuel tax provides incentives for the consumption of petrol and diesel that contain certain oil crop-based biofuels in order to meet EU renewable energy targets. More specifically, the tax rate for petrol and diesel is reduced depending on the volume of biofuels included (hereinafter, referred to as the '**French fuel tax reduction**').²⁶
26. The French Code des douanes expressly states that palm oil-based products are not considered as biofuels.²⁷ The practical implication of this provision is that petrol and diesel that contain oil palm crop-based biofuel cannot benefit from the lower tax rate for petrol and diesel that contain certain oil crop-based biofuels (hereinafter, referred to as the '**exclusion from the French fuel tax reduction**'). Oil palm crop-based biofuel is, therefore, at a competitive disadvantage vis-à-vis competing 'like products'.
27. Malaysia understands that the French fuel tax is set up and implemented through the following legal instruments:
 - i. Article 266 quinquies of the French Code des douanes, as modified by the Loi n°2018-1317 du 28 décembre 2018, Loi n° 2019-1479 du 28 décembre 2019, and the Loi n°2020-1721 du 29 décembre 2020;
 - ii. Articles L. 661-1 to 661-9 of the French Code de l'énergie;

²⁵ Article 2(5) of the RED II.

²⁶ Article 266 quinquies of the French Code des douanes, as modified by Article 192 of Loi n° 2018-1317 du 28 décembre 2018 de finances pour 2019. See also Décret no 2019-570 du 7 juin 2019 portant sur la taxe incitative relative à l'incorporation de biocarburants, JORF no 0133 of 9 June 2019, no. 13; Ministère de l'Action et des Comptes publics, Circulaire du 12 juin 2019 – Taxe incitative relative à l'incorporation de biocarburants (TIRIB), available at https://www.douane.gouv.fr/sites/default/files/bod/src/dana/da/Energie-environnement-loi%20de%20finances_19-023.pdf and Annexes, available at https://www.douane.gouv.fr/sites/default/files/bod/src/dana/da_annexes/Energie-environnement-loi%20de%20finances_19-023_1.pdf.

²⁷ Article 266 quinquies V B 2. (3°) of the French Code des douanes, as modified by Article 192 of Loi n° 2018-1317 du 28 décembre 2018 de finances pour 2019.

- iii. Décret n° 2019-570 du 7 juin 2019 portant sur la taxe incitative relative à l'incorporation des biocarburants;
 - iv. 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;
 - v. Arrêté du 2 mai 2012 relatif aux contenus énergétiques des biocarburants et des carburants;
 - vi. Circulaire du 12 juin 2019 Tax incitative relative à l'incorporation de biocarburants (TIRIB); and
 - vii. Any annexes thereto, amendments, supplements, replacements, renewals, extensions, implementing measures or any other related measures, and any exemptions applied.
28. In particular, but not exclusively, Malaysia is concerned with the French fuel tax reduction under Article 266 quinquies of the French Code des douanes and the exclusion from the French fuel tax reduction under Article 266 quinquies V B 2. 3° of the French Code des douanes.

Lithuania's Law No XI-1375 on renewable energy

29. In view of the provisions of the RED II and the Delegated Regulation, Lithuania has amended its law on renewable energy to reflect the revised EU rules on ILUC.
30. Lithuania, like any other EU Member State, will still theoretically allow the importation of high ILUC-risk feedstocks or biofuels, bioliquids, and biomass fuels produced therewith. By 2030, however, the share of fuels produced from feedstocks considered by the EU as high ILUC-risk feedstocks are to gradually decrease to 0% for the calculation of Lithuania's gross final consumption of energy from renewable sources referred to in Article 7 of the RED II and the minimum share referred to in the first subparagraph of Article 25(1) of the RED II.
31. Malaysia understands that Lithuania's measure is set up and implemented through the following legal instruments:
- i. Lithuania's Law No XI-1375 on renewable energy, as amended by Law No XIII-2869 amending Articles 1, 2, 3, 4, 5, 6, 11, 13, 14, 16, 17, 20, 20(1), 22, 25, 28, 29, 35, 37, 38, 39, 46, 48, 49, 55, 58, 59, 60, 61, 62, 63, 63, 64 and the Annex of Law No XI-1375 on renewable energy, repealing Article 11(1) and adding Article 20(2) of 28 April 2020;²⁸ and
 - ii. Any annexes thereto, amendments, supplements, replacements, renewals, extensions, implementing measures or any other related measures, and any exemptions applied.

IV. LEGAL BASIS FOR THE COMPLAINT IN RESPECT OF THE EU MEASURES

32. With regard to the EU measures at issue, as embodied and developed in the respective legal and other instruments as specified above in paragraph 23 and as applied by the relevant authorities, Malaysia considers that these measures are inconsistent with the EU's obligations under the TBT Agreement and the GATT 1994. In particular, the measures at issue are inconsistent with:

²⁸ Lietuvos Respublikos atsinaujinančių išteklių energetikos įstatymo Nr. XI-1375 1, 2, 3, 4, 5, 6, 11, 13, 14, 16, 17, 20, 20(1), 22, 25, 28, 29, 35, 37, 38, 39, 46, 48, 49, 55, 58, 59, 60, 61, 62, 63, 63(1), 64 straipsnių ir priedo pakeitimo, 11(1) straipsnio pripažinimo netekusiu galios ir įstatymo papildymo 20(2) straipsniu įstatymas Nr. XIII-2869, available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/76ecca608acd11eaa51db668f0092944>.

TBT Agreement

- i. Article 2.1 of the TBT Agreement, because the measures at issue, notably the high ILUC-risk cap and the high ILUC-risk phase out, are technical regulations within the meaning of Annex 1.1 of the TBT Agreement, which accord to Malaysia's oil palm crop-based biofuel imported into the EU treatment less favourable than that accorded to 'like products' imported into the EU from other countries and to 'like' domestic products;
- ii. Article 2.2 of the TBT Agreement, because the measures at issue, notably the 7% limit, the high ILUC-risk cap and the high ILUC-risk phase out, are technical regulations within the meaning of Annex 1.1 of the TBT Agreement, which are more trade-restrictive than necessary to achieve the objectives pursued by the measures;
- iii. Article 2.4 of the TBT Agreement, because the measures at issue, notably the high ILUC-risk cap and the high ILUC-risk phase out, are technical regulations within the meaning of Annex 1.1 of the TBT Agreement, which are not based on the relevant international standards;
- iv. Article 2.5 of the TBT Agreement, because the EU, in preparing, adopting or applying the measures at issue, notably the 7% limit, the high ILUC-risk cap and the high ILUC-risk phase out, which are technical regulations within the meaning of Annex 1.1 of the TBT Agreement, has failed, upon the request of Malaysia, to explain the justification for those measures in terms of Articles 2.2 to 2.4 of the TBT Agreement;
- v. Article 2.8 of the TBT Agreement, because the measures at issue, notably the high ILUC-risk cap and the high ILUC-risk phase out, are technical regulations within the meaning of Annex 1.1 of the TBT Agreement, which are based on an abstract and unsubstantiated high-ILUC risk concept instead of the performance of such biofuels;
- vi. Article 2.9 of the TBT Agreement, because the measures at issue, notably the 7% limit, the high ILUC-risk cap and the high ILUC-risk phase out, are technical regulations within the meaning of Annex 1.1 of the TBT Agreement, which were adopted without the required timely publication and notification of these measures and organising an adequate process for commenting;
- vii. Article 5.1.1 of the TBT Agreement, because the EU, by preparing, adopting or applying the measure at issue, namely the low ILUC-risk certification, is a conformity assessment procedure within the meaning of Annex 1.3 of the TBT Agreement, under which suppliers of oil palm crop-based biofuel from Malaysia are treated less favourably than domestic suppliers of 'like' biofuels or suppliers from other WTO Members in a comparable situation;
- viii. Article 5.1.2 of the TBT Agreement, because the EU, by preparing, adopting or applying the measure at issue, namely the low ILUC-risk certification, which is a conformity assessment procedure within the meaning of Annex 1.3 of the TBT Agreement, creates unnecessary obstacles to international trade;
- ix. Article 5.2 of the TBT Agreement, because the EU failed to make available the detailed implementing rules for the low ILUC-risk certification;
- x. Article 5.6 of the TBT Agreement, because the EU, with regard to the measure at issue, namely the low ILUC-risk certification, neither notified nor entered into meaningful consultations, or allowed for comments on this conformity assessment procedure;
- xi. Article 5.8 of the TBT Agreement, because the EU neither promptly published nor otherwise made available the measure at issue, namely the low ILUC-risk certification, which is a conformity assessment procedure within the meaning of Annex 1.3 of the TBT Agreement; and

- xii. Articles 12.1 and 12.3 of the TBT Agreement, because the EU, in the preparation and application of the measures at issue, notably the 7% limit, the high ILUC-risk cap, the high ILUC-risk phase out, and the low ILUC-risk certification, failed to take into account the circumstances specific to developing countries, in particular Malaysia, where palm oil and oil palm crop-based biofuel are produced.

GATT 1994

- xiii. Article I:1 of the GATT 1994, because the measures at issue, notably the high ILUC-risk cap, the high ILUC-risk phase out, and the low ILUC-risk certification, discriminate among 'like' feedstocks and derived biofuels originating in third countries;
- xiv. Article III:4 of the GATT 1994, because the measures at issue, notably the 7% limit, the high ILUC-risk cap, the high ILUC-risk phase out, and the low ILUC-risk certification, accord less favourable treatment to imported palm oil and oil palm crop-based biofuel than they do to 'like' domestic feedstocks and derived biofuels;
- xv. Article X:3(a) of the GATT 1994, because the measures at issue, notably the high ILUC-risk cap, the high ILUC-risk phase out, and the low ILUC-risk certification, are administered in a manner that is not uniform, impartial and/or reasonable; and
- xvi. Article XI:1 of the GATT 1994, because the measures at issue, notably the high ILUC-risk cap, the high ILUC-risk phase out, and the low ILUC-risk certification restrict the importation of palm oil and oil palm crop-based biofuel.

V. LEGAL BASIS FOR THE COMPLAINT IN RESPECT OF THE EU MEMBER STATES' MEASURES

A. France

33. The measures at issue, as embodied and developed in the French fuel tax regulation and specified above in paragraphs 25 to 28, and as applied by the relevant authorities, are inconsistent with the obligations of France under the GATT 1994 and the SCM Agreement, and in particular with:
- i. Article I:1 of the GATT 1994, because the measure at issue, namely the exclusion from the French fuel tax reduction, discriminates among 'like' biofuels by granting an advantage, in the form of a tax reduction to petrol and diesel containing biofuels of some countries, that is not granted to all WTO Members, and in particular not to Malaysia;
- ii. Article III:2, first sentence, of the GATT 1994, because the measure at issue, namely the exclusion from the French fuel tax reduction, results, in effect, in the application of a tax on imported oil palm crop-based biofuel in excess to the tax that applies to 'like' domestic biofuels; or, in the alternative, Article III:2, second sentence, of the GATT 1994, because the exclusion from the French fuel tax reduction results, in effect, in dissimilar taxation of imported oil palm crop-based biofuel vis-à-vis directly competitive or substitutable domestic biofuels, applied so as to afford protection to domestic production; and
- iii. Articles 3 and 5 of the SCM Agreement, because the measures at issue, under which the French Government reduces the tax on petrol and diesel containing crop-based biofuel other than oil palm crop-based biofuels and excludes petrol and diesel containing oil palm crop-based biofuels from this tax reduction, amount to a subsidy within the meaning of Article 1 of the SCM Agreement, which is: (1) a prohibited import substitution subsidy within the meaning of Article 3.1(b); and/or (2) an actionable subsidy causing an adverse effect on the interests of Malaysia within the meaning of Article 5(c) of the SCM Agreement.

B. Lithuania

34. As noted above, Malaysia contends that the measures set out particularly, but not exclusively, in Article 26 of the RED II and the Delegated Regulation are inconsistent with the EU's obligations under the TBT Agreement and the GATT 1994. Hence, any implementation by Lithuania of these measures in its domestic law would also be inconsistent with the same obligations under the TBT Agreement and the GATT 1994.

VI. CONCLUSIONS

35. Malaysia considers that the measures at issue, as identified above, nullify or impair the benefits accruing to it directly or indirectly under the cited WTO covered agreements.
36. Malaysia requests that a panel be established to examine the measures at issue, as identified above, on the basis of the standard terms of reference as set out in Article 7.1 of the DSU.
37. Malaysia respectfully asks that this request be placed on the agenda for the next meeting of the Dispute Settlement Body.
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