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INDONESIA'S WTO CHALLENGE TO THE EUROPEAN UNION'S RENEWABLE ENERGY DIRECTIVE: PALM OIL & INDIRECT LAND-USE CHANGE[*]

ANDREW D. MITCHELL[†] & DEAN MERRIMAN[‡]

The way the World Trade Organization (WTO) dispute settlement system balances WTO Members' obligation to avoid unnecessary obstacles to international trade with their right to enact measures in pursuit of legitimate public policy objectives has drawn much criticism. The contours of this balance are about to be stretched in a forthcoming dispute in which Indonesia will challenge the European Union's recast Renewable Energy Directive. For Indonesia, this measure discriminates against palm oil used in biofuel production; for the European Union (EU), the measure serves a legitimate objective, as it addresses the greenhouse gas emissions caused by "indirect land-use change" (ILUC), in which carbon-rich land is cultivated for palm oil production (or food production displaced to accommodate palm plantations). This dispute will take WTO dispute settlement into several new directions, as the panel will, in novel ways, be required to assess how measures can address such a legitimate objective in the face of a mismatch between future and historical risks, as well as whether WTO Members can address climate-related risks occurring within other WTO Members. In this article, we step through several of the key claims raised by Indonesia in the early stages of this dispute and assess what a WTO panel's assessment of those claims, and the EU's likely invocation of exceptions, might look like. In our view, the EU's measures are inconsistent with its WTO obligations and cannot be justified

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[†] Professor, Faculty of Law, Monash University; PhD (Cantab); LLM (Harv); Dip Int Law (Melb); LLB (Hons) (Melb); BCom (Hons) (Melb). Email: andrew.mitchell[at]monash.edu.
[‡] Lawyer; Senior Manager, Global Trade Advisory, Deloitte Australia; LLM (Barcelona); JD (Melb). Email: deanrossmerriman[at]gmail.com.

under any available exceptions. Perhaps more importantly, it is not clear to us how ILUC can be addressed through trade measures.

TABLE OF CONTENTS

I. INTRODUCTION

In December 2018, the European Union's updated Renewable Energy Directive (RED II) entered into force. It implemented new renewable energy targets (at least 32% by 2030), as well as measures targeted towards bioenergy, to "ensure robust (Green House Gas (GHG)) emission savings and minimize unintended environmental impacts".[1] One element of the RED II is the cap it places on biofuel consumption in the transport sector that an EU Member State can take into account when assessing whether it has achieved its target and, relatedly, its targeting of emissions from so-called indirect land-use change (ILUC).[2]

ILUC occurs where land is diverted to biofuel production, thereby shifting agricultural production to land with high carbon stock, such as forests or wetlands. The RED II is concerned with minimising the consequent release of CO_2 that

[1] Directive 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, 2018 O.J. (L 328/82)[hereinafter RED II].
[2] European Commission Press Release Memo 19/1656, Sustainability Criteria for Biofuels Specified (Mar. 13, 2019).

would occur as a result.[3] The EU has expressed its concern that ILUC-related emissions could negate some or all of the GHG savings through biofuel use.[4] The RED II limits EU Members' ability to factor so-called "high ILUC-risk" fuels into their calculations of renewable energy use in the transport sector to 2019 levels, and seeks to gradually reduce that share to 0% by 2030.[5] In a related press release, the EU noted that the data it had relied on "show that palm oil has been associated with the highest level of deforestation" as "over the period 2008–2015, 45% of the expansion of palm oil took place in high carbon stock areas", which is "not even by far comparable to other feedstock".[6] Once designated a high ILUC-risk fuel, the RED II limits how the use of palm oil can demonstrate renewable energy use in the transport sector.

Indonesia and Malaysia — the top two producers of palm oil[7] — have raised concerns about the RED II in the Committee on Technical Barriers to Trade at the WTO. On December 16, 2019, Indonesia requested dispute settlement consultations with the EU concerning this and other related measures.[8] Malaysia was also expected to request consultations,[9] but has not done so at the time of writing. Consultations are the first stage in the WTO dispute settlement procedure;

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[3] *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*, at 3–4, COM (2019) 142 (Mar. 13, 2019) [hereinafter Production Expansion Report] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0142&from=en.

[4] *Id.*

[5] *Sustainability criteria*, EUROPEAN COMMISSION (July 31, 2014), https://ec.europa.eu/energy/en/topics/renewable-energy/biofuels/sustainability-criteria (last updated Mar. 16, 2020).

[6] European Union, Delegation of the European Union to Indonesia, Press Release, Palm Oil: What is new in the EU Legislation? (Mar. 21, 2019), https://eeas.europa.eu/sites/eeas/files/20190321_press_release_palm_oil_en.pdf [hereinafter Delegation of the EU to Indonesia].

[7] International Trade Centre's Trade Map, List of exporters for the selected product in 2019: Product: 1511 Palm oil and its fractions, whether or not refined (Excluding Chemically Modified), https://www.trademap.org/(X(1)S(opki3t55tddi14boen0vsr45))/Country_SelProduct.aspx?nvpm=1%7c%7c%7c%7c%7c1511%7c%7c%7c4%7c1%7c1%7c2%7c1%7c1%7c2%7c1%7c1 [hereinafter Trade Map Palm Oil Data].

[8] Request for Consultations by Indonesia, *European Union — Certain Measures concerning Palm Oil and Oil Palm Crop-Based Biofuels*, WTO Docs. WT/DS593/1, G/L/1348, G/TBT/D/52, G/SCM/D128/1 (Dec. 16, 2019) [hereinafter Indonesia's Request for Consultations].

[9] Emily Chow, *Malaysia to file WTO complaint on EU's palm oil curb by November*, REUTERS (July 15, 2019), https://www.reuters.com/article/us-malaysia-palmoil-eu/malaysia-to-file-wto-complaint-on-eus-palm-oil-curb-by-november-idUSKCN1UA0QU.

if the parties fail to resolve the dispute in this context, the complaining party(ies) can request that a WTO panel be appointed to hear the dispute. At the meeting of the WTO's Dispute Settlement Body on July 29, 2020, WTO Members agreed to Indonesia's request for the establishment of a panel to hear the dispute.[10] The EU has stated that the RED II complies with its WTO obligations, as it does not single out specific biofuels, and does not limit the market access of imported biofuels to the EU.[11]

As this matter proceeds through WTO dispute settlement, it will be the latest dispute to explore the balance between WTO Members' obligation to avoid unnecessary obstacles to international trade, with their right to enact measures in pursuit of legitimate public policy objectives. Many previous disputes have explored this balance, and the resulting case law has been subject to much analysis (and often, criticism). But the facts of this dispute and the operation of WTO law as it stands suggest that the way WTO dispute settlement balances Members' rights and obligations will be tested, particularly with respect to the treatment of historical risks, as well as the location of those risks. Indeed, it leaves unclear the extent to which ILUC can be addressed by trade measures.

This article provides an overview of what a WTO panel's assessment of the RED II, and its related instruments, might look like. Using Indonesia's Request for Consultations as a guide to the substance of Indonesia's claims,[12] the authors focus on some of the key legal provisions at issue under the General Agreement on Tariffs and Trade (GATT 1994) and the Agreement on Technical Barriers to Trade (TBT Agreement). After introducing the measure that is the subject of our analysis, we first consider the implications of the GATT 1994, before turning to the TBT Agreement, and consider how the panel might appraise Indonesia's claim. This

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[10] *Panels established to review Indian tech tariffs, Japanese export restrictions, EU palm oil measures*, WORLD TRADE ORGANIZATION (July 29, 2020), https://www.wto.org/english/news_e/news20_e/dsb_29jul20_e.htm. Argentina, Brazil, Canada, China, Colombia, Costa Rica, Guatemala, Honduras, India, Japan, Malaysia, Norway, Russian, Singapore, South Korea, Thailand, Turkey, and the United States have all notified their interest as third parties to the dispute. *See DS593: European Union — Certain measures concerning palm oil and oil palm crop-based biofuels*, WORLD TRADE ORGANIZATION (July 29, 2020), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds593_e.htm.

[11] Delegation of the EU to Indonesia, *supra* note 6.

[12] Indonesia's Request for the Establishment of a Panel was published late in the preparation of this article. The legal claims explored in this research have not relevantly changed between the Request for Consultations and the Request for the Establishment of a WTO Panel. *See* Request for the Establishment of a Panel by Indonesia, *European Union — Certain Measures concerning Palm Oil and Oil Palm Crop-Based Biofuels*, WTO Doc. WT/DS593/9 (Mar. 24, 2020).

approach, in which we try to trace the complexities of this dispute in a manner similar to that which might be expected of a WTO panel, demonstrates the novelty of the issues in this case as well as the problematic nature of the measures. The conclusion is, in summary, that if a panel hears the dispute, it will probably find the measures to be inconsistent with the EU's WTO obligations.

II. THE MEASURES AT ISSUE

Indonesia has identified three measures at issue in its Request for Consultations:[13]

1. Directive (EU) 2018/2001 of the European Parliament and of the Council of December 11, 2018, commonly referred to as the Renewable Energy Directive II (hereinafter the RED II);
2. Commission Delegated Regulation (EU) 2019/807 of March 13, 2019, which supplements RED II (hereinafter the ILUC Regulation); and
3. A report from the European Commission to the European Parliament, European Council, the European Economic and Social Committee, and the European Committee of the Regions regarding the status of production expansion of relevant food and feed crops worldwide, dated March 13, 2019 (hereinafter the Production Expansion Report).

The key elements of each measure are identified below. Throughout the remainder of this article, we refer to these measures collectively as the 'Renewable Energy Package'.

A. RED II (Directive 2018/2001)

The RED II was adopted on December 11, 2018 and entered into force on December 24, 2018. Member States are required to transpose its provisions into national law by June 30, 2021.

The first Renewable Energy Directive created a framework to increase the use of renewable energy, and set binding national targets on the share of renewable energy consumed in the transport sector to be achieved by 2020.[14] In 2014, the European Commission proposed (and the Council later adopted) that the EU adopt a 2030 target, for the share of renewable energy consumed in the Union, of

[13] Indonesia's Request for Consultations, *supra* note 8.

[14] Directive 2009/28 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, 2009 O.J. (L 140/16).

at least 27%.[15] In the aftermath of the Paris Agreement, the EU Parliament adopted resolutions which indicated that, in light of that Agreement as well as renewable technology cost reductions, it was desirable to be more ambitious in this area.[16]

The RED II states that promoting renewable forms of energy is one of the goals of the Union's energy policy.[17] It notes that the increased use of energy from renewable sources "constitutes an important part of the package of measures needed to reduce greenhouse gas emissions and comply with the Union's commitment under the 2015 Paris Agreement on Climate Change".[18] The RED II also states that:

> [t]he increased use of energy from renewable sources also has a fundamental part to play in promoting the security of energy supply, sustainable energy at affordable prices, technological development and innovation as well as technological and industrial leadership while providing environmental, social and health benefits as well as major opportunities for employment and regional development, especially in rural and isolated areas, in regions or territories with low population density or undergoing partial deindustrialisation.[19]

The RED II provides for a binding EU target of 32% renewable energy by 2030.[20] Individual EU Member States are to set national contributions to meet the overall binding target.[21] Article 4 of the RED II provides that, to reach or exceed this target (as well as each Member State's individual target) Member States may apply measures to incentivise the "integration of electricity from renewable sources in the electricity market in a market-based and market-responsive way, while avoiding unnecessary distortions of electricity markets".[22]

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[15] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A policy framework for climate and energy in the period from 2020 to 2030*, at 5–6, COM (2014) 15 (Jan. 22, 2014) (EC).
[16] Resolution of 23 June 2016 on the renewable energy progress report, 2016/2041 (INI), 2018 O.J. (C 91/16) 22; *see also* European Parliament Resolution of 5 February 2014 on a 2030 Framework for Climate and Energy Policies, 2013/2135 (INI), 2014 O.J. (C93/79).
[17] RED II, *supra* note 1, at 82.
[18] *Id.* at 82.
[19] *Id.* at 82.
[20] *Id.* art. 3(1).
[21] *Id.*
[22] *Id.* art. 4.

Moreover, beyond January 1, 2021, Members' share of energy from renewable sources (measured against final gross consumption of energy) may not fall below certain specified baselines.[23] The calculation of this percentage is based on a calculation of the sum of (i) gross final consumption of electricity from renewable sources; (ii) gross final consumption of energy from renewable sources in the heating and cooling sector; and (relevantly) (iii) final consumption of energy from renewable sources in the transport sector.[24]

With specific respect to the transport sector, Article 25 of the RED II requires that each Member State 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.[25] This is calculated in accordance with Articles 26 and 27 of the RED II. Article 26(1) states that the share of biofuels and bioliquids that are produced from food and feed crops is to be:

> [N]o 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.[26]

Members may set lower percentages for these fuels, taking into account "the best available evidence on indirect land use change".[27]

Furthermore, in calculating a Member State's gross final consumption of energy from renewable sources, the share of biofuels, bioliquids or biomass fuels associated with a high risk of ILUC and "produced from food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed", must be below the consumption level of such fuels in that Member State in 2019 (unless such fuels are certified to be "low ILUC-risk" fuels).[28] That use is mandated to reduce from the end of 2023 to 0% by the end of 2030.[29]

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[23] *Id.* art. 3(4).
[24] *Id.* art. 7(1).
[25] *Id.* art. 25(1).
[26] *Id.* art. 26(1).
[27] *Id.*
[28] *Id.* art. 26(2).
[29] *Id.*

The RED II defines "low [ILUC]-risk biofuels, bioliquids and biomass fuels" to mean:

> [B]iofuels, 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 practises 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 certain sustainability criteria specified in Article 29 of RED II for biofuels, bioliquids and biomass fuels.[30]

Among these, many criteria are the requirements that the greenhouse gas (GHG) emission savings from the use of biofuels, bioliquids and biomass fuels be either 50%, 60% or 65%, depending on the age of the installation in which that fuel is produced.[31] Other such criteria are elaborated elsewhere in this article, as relevant; regardless, all criteria must be met before energy from a biofuel, bioliquid or biomass fuel can be taken as contributing towards the EU's renewable energy target or that of any Member States.[32]

B. The ILUC Regulation (Delegated Regulation 2019/807)

The ILUC Regulation supplements the RED II, and "lays down the criteria for determining the high ILUC-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed, and for certifying low ILUC-risk biofuels, bioliquids and biomass fuels".[33]

The ILUC Regulation sets out the methodology for this purpose. The cumulative criteria are that: (i) the average annual expansion of the global production area of the feedstock since 2008 is higher than 1% and affects more than one hundred thousand hectares; and (ii) the share of such expansion into land with high-carbon stock is higher than 10%, following a specified formula.[34]

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[30] *Id.* art. 2(37).
[31] *Id.* art. 29(10).
[32] *Id.* art. 29(1).
[33] 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, C/2019/2055, art.1, 2019 O.J. (L 133/4)[hereinafter The ILUC Regulation].
[34] *Id.* art. 3. The formula specified in the ILUC Regulation is:

The ILUC Regulation also sets out the criteria for certification of low ILUC-risk biofuels, bioliquids and biomass fuels.[35] These criteria are that such fuels comply with the GHG and sustainability criteria elaborated in Article 29 of the RED II, that they have been produced through the use of "additionality" measures,[36] and that evidence of this can be provided.[37]

C. The Production Expansion Report

The Production Expansion Report sets out background information permitting the identification of high ILUC-risk fuels from food or feed crops with a significant expansion into land with high carbon stock.

Section III of the Production Expansion Report reviews the identification of biofuel, bioliquid and biomass fuel feedstock with high ILUC risk. In its identification of the expansion of feedstock used for the production of these feed crops, the EU relied on a combination of scientific literature, Geographic Information System (GIS) data, and consultation "with experts and

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$$x_{hcs} = \frac{x_f + 2.6x_p}{PF}$$

Where:
x_{hcs} = share of expansion into land with high-carbon stock; x_f = share of expansion into continuously forested areas, and areas with certain designated tree coverage, *see* RED II, *supra* note 1, arts. 29(4)(b) & 29(4)(c); x_p = share of expansion into wetlands, *see* RED II, *supra* note 1, art. 29(4)(a); *PF* = productivity factor, which is designated 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.

[35] The ILUC Regulation, *supra* note 33, art. 4.

[36] Additionality measure is defined as:

> [a]ny 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.

Id. art. 2(5).
Moreover, whether a biofuels can be certified as a low ILUC-risk fuel requires that the additionality measures meet certain criteria. The additionality measures must be taken "no longer than 10 years before the certification of the biofuels, bioliquids and biomass fuels as low indirect land-use change-risk fuels", and require that a financial barrier was overcome, or the land was abandoned or severally degraded, or the crop was cultivated by a small farmer. *See id.* art. 5.

[37] *Id.* art 4.

stakeholders".[38] In its review of the literature, the expansion of a number of crops is considered, including soy bean, palm oil, sugar cane, maize, and other crops.[39] The report concludes that "the best-estimates for the fraction of recent expansion onto high-carbon forested land include 8% for soy and 45% for oil-palm", and that "[t]here was not enough data in the literature to provide robust estimates for other crops".[40] Most relevantly, it found that palm oil had the highest speed of overall land expansion and the highest share of expansion into forestland (at 70%). It also found that palm oil exhibited large levels of expansion into peatland (18%), in contrast to other fuels and feed crops.[41]

Section IV of the Production Expansion Report sets out the criteria for determining whether biofuels, bioliquids and biomass fuels can be certified as being low ILUC-risk fuels. These criteria are premised on the notion that the ILUC impacts of biofuels, bioliquids and biomass fuels otherwise considered as having a high ILUC risk can, under certain circumstances, avoid such an association and "even prove to be beneficial for the relevant production areas".[42] Against this premise, "low ILUC-risk biofuels" are described as fuels "produced from additional feedstock that has been grown on unused land or that is the result of a productivity increase".[43] This description dovetails with the definition of "low indirect land-use change-risk biofuels, bioliquids and biomass fuels" in the RED II, mentioned above. Such produce is said to not be in competition with food and feed production, thereby not displacing crops and leading to land-use change.[44]

D. Indonesia's Claims

In its Request for Consultations, Indonesia has argued that the Renewable Energy Package is inconsistent with several provisions of the GATT 1994 and the TBT Agreement. Indonesia's claim is, at a high level, that the measures discriminate against palm oil and palm oil-derived biofuel, given that the Renewable Energy Package designates it as a high ILUC-risk product (and therefore cannot count towards the achievement of the EU's renewable energy target (or those of individual Members), nor be eligible for the support schemes designed to incentivise the use of renewable energy). These assertions are the subject of the remainder of this article.

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[38] Production Expansion Report, *supra* note 3, at 6.
[39] *Id.* § III.2 at 7–9.
[40] *Id.* § III.2 (Palm oil) at 9.
[41] *Id.* § III.2 at 10.
[42] *Id.* § IV at 16.
[43] *Id.*
[44] *Id.*

It is also noted that Indonesia has challenged certain measures introduced in France, and "any other Member States' measures implementing RED II".[45]

We consider below the merits of Indonesia's claims. Specifically, we focus on Indonesia's assertion that the Renewable Energy Package is inconsistent with Articles I:1, III:4 and XI:1 of the GATT 1994. If the measures were to be found inconsistent with these obligations, the EU would invoke the exceptions in Article XX to demonstrate that the measures are nonetheless not inconsistent with the GATT 1994, and we consider whether such an invocation could be successful.[46] We also examine Indonesia's claims under Articles 2.1 and 2.2 of the TBT Agreement.[47] We have also limited ourselves to a consideration of the Renewable Energy Package on its own, on its face, and have therefore not considered Indonesia's challenge to the French measure implementing the Renewable Energy Package.[48]

III. WHETHER THE RENEWABLE ENERGY PACKAGE IS INCONSISTENT WITH THE GATT 1994

A. Most-Favoured-Nation Treatment – Article I:1

Article I:1 of the GATT 1994 provides that "any advantage, favour, privilege or immunity granted by any [WTO 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 [WTO Members]".[49] Article I:1 thus sets out the most favoured nation (MFN) obligation, which prohibits WTO Members from discriminating *among* their trading partners.[50] This obligation "sets out a fundamental non-discrimination obligation under the GATT 1994", which has been described by the Appellate Body on various

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[45] Indonesia's Request for Consultations, *supra* note 8, at 28.

[46] Indonesia's claim under Article X:3 of the GATT 1994 is not under consideration in this article.

[47] Indonesia's claims under Articles 2.4, 2.5, 2.8, 2.9, 5.1.1, 5.1.2, 5.2, 5.6, 5.8, 12.1 and 12.3 of the TBT Agreement are not the subject of this article.

[48] Indonesia's challenge to the so-called "French fuel tax", which it asserts is inconsistent with Articles I:1 and III:2 of the GATT 1994, as well as Articles 3 and 5 of the *Agreement on Subsidies and Countervailing Measures* is not under consideration in this article.

[49] General Agreement on Tariffs and Trade 1994, art. I:1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1994].

[50] Appellate Body Report, *Canada — Certain Measures Affecting the Automotive Industry*, ¶ 84, WTO Docs. WT/DS139/AB/R, WT/DS142/AB/R (adopted June 19, 2000) [hereinafter *Canada — Autos (ABR)*].

occasions as "pervasive", a "cornerstone of the GATT", and "one of the pillars of the WTO trading system".[51]

To summarise, Indonesia is arguing that the Renewable Energy Package is inconsistent with this provision because the EU does not provide certain advantages to Indonesian palm oil that the EU provides to other WTO Members' like goods.

Based on the text of Article I:1 of the GATT 1994, a complainant must demonstrate the following elements to establish that a measure is inconsistent with the provision:

(i) that the measure at issue falls within the scope of application of Article I:1;
(ii) that the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country;
(iii) that the relevant imported products at issue are "like" products; and
(iv) that the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members.[52]

Thus, if a Member grants any advantage to any product originating in the territory of any other country, such advantage must be accorded "immediately and unconditionally" to like products originating from all other WTO Members.[53]
In its Request for Consultations, Indonesia argues that the Renewable Energy Package is inconsistent with Article I:1 because it:

- limits and phases out the use of oil palm crop-based biofuels for meeting EU renewable energy targets, "in light of the criteria for determining high ILUC-risk feedstock and the criteria for certifying low ILUC-risk biofuels,

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[51] Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.86, WTO Docs. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014) [hereinafter *EC — Seal Products (ABR)*] (quoting Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 101, WTO Doc. WT/DS246/AB/R (adopted Apr. 20, 2004) [hereinafter *EC — Tariff Preferences(ABR)*] (referring to *Canada — Autos (ABR)*, *supra* note 50, ¶ 69); Appellate Body Report, *United States — Section 211 Omnibus Appropriations Act of 1998*, ¶ 297, WTO Doc. WT/DS176/AB/R (adopted Feb. 1, 2002).
[52] *EC — Seal Products (ABR)*, *supra* note 51, ¶ 5.86.
[53] *Id.*

without defining other crops as high ILUC-risk and subjecting other biofuels to the low ILUC-risk criteria";

- imposes the sustainability criteria and the GHG emissions saving criteria.[54]

Indonesia's MFN claim, therefore, consists of two parts. The first is with respect to the limitation placed on biofuels under the RED II, which caps the contribution such fuels can make towards the EU's renewable energy target to 2020 levels, with the possibility to increase them by one percentage point to a maximum of 7%, and ultimately to decrease this to 0% by 2030. The second is the adoption of the sustainability criteria and the GHG emissions saving criteria.

We now assess the elements of Indonesia's MFN claim, in the order likely to be taken by a WTO Panel.

1. Whether the Renewable Energy Package Falls Within the Scope of Application of Article I:1

Article I:1 covers a broad range of measures. The internal measures (as opposed to border measures) to which Article I:1 applies include internal regulations affecting the sale, distribution and use of products.

The Renewable Energy Package, in this case, affects the use of palm oil, insofar as it places conditions on the implications of its use in the context of an assessment of the extent to which an EU Member has met its obligations to achieve its own renewable energy target under the RED II. It is therefore likely to be uncontroversial that the Renewable Energy Package falls within the scope of Article I:1.

2. Whether the Measure at Issue Confers an "Advantage, Favour, Privilege, or Immunity" on Products Originating in the Territory of Any Country

The advantages, favours, privileges and immunities under Article I:1 fall within a broad scope.[55] As the Appellate Body clarified in *Canada — Autos*, Article I:1 applies to "*any* advantage", rather than just "some advantages".[56] Note that Article I:1 covers the non-discriminatory granting of advantages on a *de jure* basis (where failure to accord an advantage is evident from the face of the measure) and a *de*

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[54] Indonesia's Request for Consultations, *supra* note 8, ¶ 34(xv), at 6 ¶ 34(xv).
[55] Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶ 206, WTO Doc. WT/DS27/AB/R (adopted Sept. 25, 1997).
[56] *Canada — Autos (ABR)*, *supra* note 50, ¶ 79.

facto basis (where failure to accord an advantage is evident from the operation of the measure).[57]

In the context of the Renewable Energy Package, the measures create a distinction between biofuels the use of which can, and cannot, be accounted for in assessing whether an EU Member has achieved its renewable energy target. Biofuels that are associated with a high ILUC risk cannot be so accounted for; nor can biofuels that do not meet the GHG and sustainability criteria. Other biofuels, however, can be considered for this purpose. The benefit of being accounted for in an assessment of whether an EU Member has achieved its target with respect to biofuel use is not accorded to all biofuels.[58] Moreover, the practical implications of the limitations are significant — recall that, under Article 4 of the RED II, the EU foresees that "[i]n order to reach or exceed the Union target set in Article 3(1), and each Member State's contribution to that target set at a national level for the deployment of renewable energy, Member States may apply support schemes".[59] Such "support schemes" are those that promote the use of energy from renewable sources, through measures such as investment aid, tax exemptions or reductions, tax refunds, renewable energy obligation support schemes and price support schemes.[60] The practical implication for high ILUC-risk biofuels, or biofuels that do not satisfy the GHG and sustainability criteria, is likely to be that such fuels cannot benefit from such incentives and therefore will not benefit from these "advantages".[61] By extension, the measures confer an advantage on those fuels that can be taken into account because they are low ILUC risk or meet the GHG and sustainability criteria, given that their use will contribute to the extent to which an EU Member has achieved its renewable energy target. The Renewable Energy Package, therefore, confers an advantage on biofuels derived from a feedstock other than palm oil.

3. Whether the Relevant Imported Products at Issue Are "Like" Products

The majority of jurisprudence dealing with the interpretation and application of the "likeness" requirement in the GATT 1994 has been undertaken by panels and the

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[57] *Id.* ¶ 78.
[58] *Id.* ¶ 85.
[59] RED II, *supra* note 1, art 4(1).
[60] *Id.* art 2(5).
[61] Indeed, Indonesia has challenged certain tax measures adopted in France that Indonesia argues incentive the consumption of those biofuels that will enable it to meet the renewable energy targets imposed under RED II. *See* Indonesia's Request for Consultations, *supra* note 8, at 18. As mentioned above, this element of Indonesia's challenge is not the subject of this research.

Appellate Body in the context of Article III of the GATT 1994 (as well as elsewhere in the covered agreements), rather than Article I. However, a series of panel reports support the notion that a "likeness" analysis under Article I:1 is similar to, and at the very least informed by the same factors as under, Article III of the GATT 1994.[62]

Under WTO law, there are four factors for establishing likeness: (1) the properties, nature and quality of the goods; (2) their end uses; (3) consumers' perceptions and behaviour in respect to those goods; and (4) their tariff classification.[63] At its core, an assessment of the "likeness" of two products is "fundamentally … about the nature and extent of a competitive relationship between and among [those] products".[64]

To demonstrate that the Renewable Energy Package is inconsistent with Article I:1 of the GATT 1994, Indonesia must (based on the formulation of its Request for Consultations) demonstrate that:

- High ILUC-risk biofuel (i.e. palm oil-derived biofuel, based on the EU's methodology) is "like" low ILUC-risk biofuel (i.e. biofuel that which derived from non-palm oil feed crops); and
- Biofuels that do meet the GHG and sustainability criteria are "like" biofuels that do not meet the GHG and sustainability criteria.[65]

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[62] *See, e.g.*, Panel Report, *European Union and its Member States — Certain Measures Relating to the Energy Sector*, ¶ 7.837, WTO Doc. WT/DS476/R (Aug. 10, 2018, appealed) [hereinafter *EU — Energy Package*]; Panel Report, *United States — Certain Measures Affecting Imports of Poultry from China*, ¶¶ 7.424–7.425, WTO Doc. WT/DS392/R (adopted Oct. 25, 2010) [hereinafter *US — Poultry (China)*]; 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*, ¶ 7.409, WTO Doc. WT/DS381/RW (adopted Dec. 3, 2015) [hereinafter *US — Tuna II (Mexico) (Article 21.5–Mexico)*].

[63] Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 100, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter *EC — Asbestos (ABR)*].

[64] *Id.* ¶ 95.

[65] Indonesia formulates its claim as follows:

> [B]y limiting and phasing out the use of oil palm crop-based biofuels for meeting EU renewable energy targets, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for certifying low ILUC-risk biofuels, without defining other crops as high ILUC-risk and subjecting other biofuels to the low ILUC-risk criteria, and by imposing the sustainability criteria and the GHG emissions saving criteria, the measures at issue appear to discriminate among like crops and biofuels

As a result, the panel, in this case, will have to conduct its likeness analysis in respect of *each* comparison.

a. High ILUC-Risk Products v. Low ILUC-Risk Products

Though the distinction in the Renewable Energy Package is between high and low ILUC-risk biofuels, the EU has set out in the Production Expansion Report that the only feed crop that yields a high ILUC-risk biofuel is palm oil.[66] Because of this factual determination by the EU, when the comparison is made between high and low ILUC-risk biofuels, the comparison is in effect between palm oil-derived biofuels and non-palm oil-derived biofuels.

It is not the purpose of this paper to provide a scientific analysis of the likeness of these products; however, a WTO panel will need to step through the factors identified above to make this determination, based on the evidence before it. It may suffice to point out that palm oil is used in biodiesel, which is typically used in transportation fuels as part of different blend (for example, of 5%, or "B5" up to 20%, or "B20").[67] It has been noted that, although the primary determinants of the feedstock used in particular biodiesel is availability and cost depending on the location of manufacture and consumption,[68] the choice of feedstock will also have an effect on the overall qualities of the finished product. The differences in the qualities of biofuels derived from different feed crops include their respective performance at low temperatures, their storage stability, and the conversion of the constituent fatty acid methyl esters.[69] Indeed, changes in the feedstock used has flow-on effects on the physical, chemical and fuel properties of the biodiesel.[70] As such, biodiesel derived from certain feedstocks will not be used under particular circumstances — for example, the "pour point" (lowest temperature at which

originating in third countries, in violation of Article I:1 of the GATT 1994[.]

See Indonesia's Request for Consultations, *supra* note 8, ¶ 34(xv).

[66] Production Expansion Report, *supra* note 3, at 8.

[67] N.N.A.N. Yusuf et al., *Overview on the current trends in biodiesel production*, 52(7) ENERGY CONVERSION & MGMT. 2741, 2742 (2011).

[68] Khairul Azly Zahan & Manabu Kano, *Biodiesel Production from Palm Oil, Its By-Products, and Mill Effluent: A Review*, 11(8):2132 ENERGIES 7 (2018); József Popp et al., *Biofuels and their co-products as livestock feed: Global economic and environmental implications,* 21(3):285 MOLECULES 13 (2016); Asia Pacific Economic Cooperation [APEC], *Establishment of the Guidelines for the Development of Biodiesel Standards in the APEC Region*, at 9, APEC 21ST CENTURY RENEWABLE ENERGY DEV. INITIATIVE (COLLABORATIVE IX) (Apr. 2009).

[69] Zahan & Kano, *supra* note 68, at 7–10; *see generally* Yusuf et al., *supra* note 67.

[70] Bryan R. Moser, *Influence of Blending Canola, Palm, Soybean, and Sunflower Oil Methyl Esters on Fuel Properties of Biodiesel*, 22(6) ENERGY & FUELS 4301, 4301 (2008).

there is movement of the fuel when the container is tipped) of palm oil-derived biofuel makes it inappropriate for colder climates (though this can be overcome through the use of certain additives).[71] However, the shortcomings associated with a biofuel derived from a single feed crop can be overcome by the use of biofuel derived from multiple feed crops blended together.[72] It is, for example, possible to meet the EU biodiesel standard by using a mix of rapeseed, soybean and palm oil, thereby overcoming weaknesses associated with soybean (which does not comply with the iodine value prescribed by the standard) and palm oil (which is not sufficiently stable in winter climates for the Northern European market).[73]

Fitting these elements within the Appellate Body's framework for understanding "likeness" in the context of the present dispute, the physical characteristics of palm oil-derived biofuel and other biofuels appear to feature differences between their physical, chemical and fuel properties. These distinctions cause differences concerning performance in different temperatures, flash point, and so forth. The end use of the fuel does not appear to differ depending on the feed crop from which the fuel is derived; certainly, to the extent that a biodiesel contains several feed crops, the end uses would appear indistinguishable. Consumers' tastes and preferences might be influenced by how the physical characteristics of palm oil-derived and non-palm oil-derived biofuel manifest in the finished product — for instance, if palm oil-derived biofuel is not suitable for use in a given climate, consumers in that climate may be dissuaded from using it. This may not, however, be relevant — in *US — Clove Cigarettes*, the Appellate Body noted that it is not necessary to demonstrate that the relevant products are substitutable for all consumers, or that they actually compete in the entire market.[74] The Appellate Body noted that likeness is based on the competitive relationship between and among different products, and that this analysis should not focus on *some* instances of competition, but *all* instances of competition.[75] The Panel's conclusion in that dispute was that young and potential young smokers viewed clove and menthol-flavoured cigarettes as similar for the purpose of starting to smoke; the Appellate Body viewed this consideration of consumer preferences as being too limited, because it should also have taken into account adult smokers and their perception

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[71] BOB FLACH ET AL., U.S.D.A., EU BIOFUELS ANNUAL 2019, 30 (Global Agricultural Information Network Report Number NL9022) (July 15, 2019); Zahan & Kano, *supra* note 68, at 7–10.

[72] Moser, *supra* note 70, at 4303–4306.

[73] Flach et al., *supra* note 71, at 30.

[74] Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 142, WTO Doc. WT/DS406/AB/R (adopted Apr. 24, 2012) [hereinafter *US — Clove Cigarettes (ABR)*].

[75] *Id.* ¶¶ 142–143.

of the degree of substitutability of those products.[76] Applying this reasoning to the present matter, though the differences in physical characteristics between palm oil-derived and non-palm oil-derived biofuels may affect consumer preferences in *some* parts of the EU market, to the point that they are not substitutable, that alone would appear insufficient to justify a conclusion that biofuels derived from palm oil and that derived from other feed crops are not like products, given they would still compete in *other* segments of the market, for example, elsewhere within the EU.

Also, in respect of consumers' tastes and preferences, it is conceivable that consumers would prefer to purchase biofuel that does not have a high ILUC risk, compared with biofuel that does. This assumes that consumers are aware of the feed crop from which their biodiesel is derived; it is not clear, however, whether this is the case. In any event, to the extent that feed crops might be combined to overcome the shortcomings associated with any single feed crop,[77] this distinction would, in any event, be irrelevant, given that the consumer is not shopping for fuels derived from any particular feed crops.

In respect of the tariff classification of imported biofuels, this would depend at least in part on the form in which they were imported. For example, pure unmixed biodiesel (B100, which might be blended post importation) is likely to be classified under heading 3826.00,[78] whereas biodiesel mixtures (such as B5 or B20, as mentioned above) are likely to be classified under tariff classification 2710.20. Regardless, there is no basis for classifying biofuels differently based on whether they are high ILUC risk or low ILUC risk.

Based on the above, it is likely that a WTO panel in this dispute will find that palm-oil derived biofuels are "like" biofuels derived from other feed crops.

b. Products that Fulfil the Sustainability and GHG Emissions Saving Criteria versus Products that Do Not Fulfil the Sustainability and GHG Emissions Saving Criteria

[76] *Id.* ¶¶ 142–145. This finding was not, however, sufficient to overturn the Panel's finding that the clove and menthol-flavoured cigarettes were like.

[77] Moser, *supra* note 70, at 4303–4306.

[78] *See* The Tariff Classification of B100 Biodiesel from Canada, Cust. B. & Dec, NY N226639, CLA-2-38:OT:RR:NC:N2:239 (Aug. 15, 2012), https://rulings.cbp.gov/search?term=n226639&collection=ALL&sortBy=RELEVANCE&pageSize=30&page=1[hereinafter Customs and Border Protection Ruling].

We now turn to the other argument implicit in Indonesia's claim under Article I:1; namely, that biofuels, bioliquids and biomass fuels that *do* fulfil the sustainability and GHG emissions saving criteria are like biofuels, bioliquids and biomass fuels that *do not* fulfil those sustainability and GHG emissions saving criteria.

Recall that energy from biofuels, bioliquids and biomass fuels must satisfy the sustainability and GHG emissions saving criteria to be taken into account for the purpose of contributing towards the EU's renewable energy target and that of the respective Member States; measuring compliance with renewable energy obligations; and to be eligible for financial support for the consumption of biofuels, bioliquids and biomass fuels.[79] In this context, it is worth elaborating on the sustainability and GHG emissions saving criteria in the RED II. These criteria include that:

- Biofuels, bioliquids and biomass fuels produced from waste and residues derived from agricultural land (excluding forestry) shall be taken into account only where operators or national authorities have monitoring or management plans in place regarding soil quality and soil carbon.[80]
- Biofuels, bioliquids and biomass fuels produced from agricultural biomass cannot be taken into account where made from raw material obtained from land with a high biodiversity value (based on its status in January 2008, regardless of whether the land continues to have that status).[81]
- Biofuels, bioliquids and biomass fuels produced from agricultural biomass cannot be taken into account where made from raw material obtained from land with high-carbon stock, i.e. land that in January 2008 (but not presently) was (*inter alia*) wetland or a continuously forested area (as defined)[82]; or which is made from raw material obtained from land that was peatland in January 2008.[83]
- Biofuels, bioliquids and biomass fuels produced from agricultural biomass cannot be taken into account unless they meet land-use, land-use change and forestry criteria. These are that the country or regional economic integration organisation of origin of the forest biomass: (i) is a Party to the Paris Agreement; and (ii) has submitted a nationally determined contribution (NDC) to the United Nations Framework Convention on

[79] RED II, *supra* note 1, art. 29(1).
[80] *Id.* art. 29(2).
[81] *Id.*
[82] *Id.* art. 29(4).
[83] *Id.* art. 29(5). An exception exists where evidence is provided that the cultivation and harvesting of that raw material does not involve drainage of previously undrained soil.

Climate Change (UNFCCC),[84] covering emissions and removals from agriculture, forestry and land use; or (iii) has national or sub-national laws in place to conserve and enhance carbon stocks and sinks.[85]

- Biofuels or biogas consumed in the transport sector must provide a GHG emissions saving of either 50%, 60% or 65%, depending on the date that the installation in which it was produced came into operation.[86]

A WTO panel, in this case, will be required to determine whether biofuels, bioliquids and biomass fuels that *do* fulfil these criteria are "like" biofuels, bioliquids and biomass fuels that *do not* fulfil them. Given Indonesia's primary interest in this dispute — its palm oil exports — it is likely that this question will in the course of argument be narrowed to biofuels alone.

The criteria for determining likeness, set out above, will again be applied. Again, our purpose is not to provide a scientific assessment. However, at least on the face of the measures, the sustainability and GHG criteria do not appear to distinguish between products based on factors that may have a bearing on their properties, nature and/or qualities. Moreover, the distinction does not appear to relate to the end use of the products and, indeed, the criteria appear to assume that the products will be used in a similar fashion. With respect to consumers' perceptions and behaviour, it may again be the case that consumers exhibit a preference for biofuels produced in a sustainable fashion; however, it would be a factual matter to determine whether such a preference exists. Perhaps more importantly, it would be a factual matter to determine whether consumers act on those preferences or indeed have sufficient information about the products to determine that one is more 'sustainable' than the other. Finally, as noted, biofuel mixes should be classified under tariff heading 2710.20 of the HS Code, though unblended inputs should be classified under heading 3826.00,[87] and the HS Code does not distinguish between fuels or their feed crops based on whether they satisfy the GHG or sustainability criteria.[88]

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[84] NDCs are the instruments in which parties to the Paris Agreement set out their own efforts to reduce their national CO2 emissions and adapt to the impact of climate change as part of the broader emission-reduction aims of the Paris Agreement. *See* Paris Agreement to the United Nations Framework Convention on Climate Change, art. 4, Apr. 22, 2016, U.N. Doc. FCCC/CP/2015/10/Add 1.

[85] *Id.* art. 29(7).

[86] *Id.* art 29(10). The saving is calculated under Article 31.

[87] Customs and Border Protection Ruling, *supra* note 78.

[88] *See* Annex to the International Convention on the Harmonized Commodity Description and Coding System, ch. 138, June 14, 1983, 1503 U.N.T.S. 3.

Finally, in respect of each of these comparisons — that is, between high ILUC-risk products and low ILUC-risk products, and between products that do and do not fulfil the sustainability and GHG emissions saving criteria — we note, for completeness, the distinction between product-related process and production methods (PR-PPMs), and non-product related process and production methods (NPR-PPMs). The issue of whether the latter are relevant in distinguishing between products to determine their 'likeness' has been the subject of considerable academic debate.[89] It is not our purpose here to contribute to this debate; we do however make the point that the weight of WTO case law is in favour of taking PPMs into consideration only insofar as they may have implications for the standard 'likeness' assessment using the criteria articulated above (that is, of the properties and end uses of the goods, consumer tastes with respect to those goods, and their tariff classification). In the context of Article I:1 of the GATT 1994, this position is supported by, most recently, the decisions of the various panels and the Appellate Body in *US — Tuna II (Mexico)* (where tuna products were "like" regardless of whether they were fished in a dolphin-friendly or dolphin-unfriendly manner),[90] and the Panel in *EC — Seal Products* (which found that seal products that differed only based on the identity of the hunter of the seals, or the purpose of the hunt in which the seal was killed were like products).[91] In the context of Indonesia's claim against the EU, the distinctions drawn between products ultimately relate to phenomena that occur during, or in relation to, or because of, the production of different feed crops. We have noted that the consequences of using a fuel derived from a high ILUC-risk feedstock, or that does not meet the GHG or sustainability criteria, may have an influence on consumer preferences, but it is unclear how this manifests in different consumer choices or affects the competitive relationship between the products. We therefore think it is highly unlikely that a panel in these disputes would distinguish between goods in a 'likeness' analysis based on their ILUC risk or whether they meet GHG or sustainability criteria, as such distinctions are not related to the products themselves.

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[89] *See, e.g.*, Steve Charnovitz, *The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT'L L. 59 (2002); Robert Howse & Donald Regan, *The Product/Process Distinction–An Illusory Basis for Disciplining "Unilateralism" in Trade Policy*, 11(2) EUR. J.INT'L L. 249 (2000).

[90] *See, e.g.*, Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 7.242–7.251, WTO Doc. WT/DS381/R (adopted June 13, 2012) [hereinafter *US — Tuna II (Mexico)*].

[91] Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 7.138–7.139, WTO Docs. WT/DS400/R, WT/DS401/R (adopted June 18, 2014) [hereinafter *EC — Seal Products*].

In summary, it appears that there is little to indicate that products that do and do not, respectively, meet the sustainability and GHG emissions criteria, are not like products.

4. Whether the Advantage Accorded is Extended "Immediately" and "Unconditionally" to Imports Originating in the Territory of All Members

The term "immediately" is likely to have its ordinary meaning — i.e., without delay.[92] Regarding the requirement that advantages be extended "unconditionally" to imported products, the Appellate Body has noted that Article I:1 does not necessarily prohibit a Member from attaching any conditions to the granting of an "advantage" under Article I:1, but instead that a Member may not attach a condition to the enjoyment of an advantage that has a detrimental impact on the competitive opportunities enjoyed by (like) imported products from any Member.[93] Regulatory distinctions between like imported products are permitted under Article I:1, but they must not result in a detrimental impact on the competitive opportunities for like imported products from a particular WTO Member.[94]

In this dispute, the advantage accorded to biofuels that can be counted in an assessment of the extent to which an EU Member State has achieved its renewable energy target is conditioned on whether that product satisfies the EU's requirements concerning the association between the relevant feed crop and ILUC, as well as whether the biofuel satisfies the GHG and sustainability criteria. To the extent that a competitive relationship exists between high and low ILUC-risk feed crops, and biofuels that do and do not meet the GHG and sustainability criteria — as appears to be the case, as discussed above — then the conditional enjoyment of that advantage would have a detrimental impact on the competitive opportunities of biofuels rendered to those biofuels that do not meet these requirements. By extension, any incentives made available at the EU Member State level for such fuels, under Article 4 of the RED II, would similarly not be available to biofuels not meeting the criteria. Indonesia, as the world's primary producer and exporter of palm oil,[95] will suffer the impact of the measures disproportionately; the advantages will not be accorded immediately and unconditionally to its exports of biofuels because its biofuel exports are composed of palm oil-derived biofuels. This is in contrast to the biofuel exports of those other WTO Members whose biofuel exports do not include those derived from palm oil.

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[92] PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 329 (3d ed., 2013).
[93] *EC — Seal Products(ABR), supra* note 51, ¶ 5.88.
[94] *Id.*
[95] Trade Map Palm Oil Data, *supra* note 7.

5. Conclusion Regarding Article I:1 of the GATT 1994

Based on the foregoing, it appears that Indonesia will be able to make out all the elements under Article I:1 of the GATT 1994 to demonstrate that the Renewable Energy Package is inconsistent with the provision. This is because the measures create an advantage for certain biofuels (i.e. those that are low ILUC risk, and those that meet the GHG and sustainability criteria) that is not accorded immediately and unconditionally to like biofuels. Indonesia's biofuel exports — which contain palm oil-derived biofuel — will not enjoy the advantages accorded to the biofuel imports of other WTO Members whose biofuel exports do not include palm oil. In our view, a WTO panel is therefore likely to find that the Renewable Energy Package is inconsistent with Article I:1 of the GATT 1994.

B. National Treatment – Article III:4

Article III:4 provides, in relevant part, that:

> [t]he products of the territory of any contracting party imported into the territory of any other contracting party 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.[96]

Indonesia's description of its claim under Article III:4 indicates that, like under Article I:1, it relates to two different elements of the Renewable Energy Package: first, the limiting and phasing out the use of oil palm crop-based biofuels for meeting EU renewable energy targets (based on the EU's ILUC criteria); and second, the imposition of the sustainability criteria and the GHG emissions saving criteria.[97]

As the Appellate Body has elaborated, there are three elements that must be established to show a violation of Article III:4: (i) that the measure at issue is a "law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use" of the products at issue; (ii) that the imported and domestic products are "like products"; and (iii) that the treatment

[96] GATT 1994, *supra* note 49, art. III:4.
[97] Indonesia's Request for Consultations, *supra* note 8, ¶ 34(xvi).

accorded to imported products is "less favourable" than that accorded to like domestic products.[98]

We consider each of these elements in turn.

1. Whether the Measure at Issue is a "Law, Regulation, or Requirement Affecting the Internal Sale, Offering for Sale, Purchase, Transportation, Distribution, or Use" of the Products at Issue

This requirement in Article III:4 has been interpreted very broadly, to apply to a range of different measures. In our view, the notion that the Renewable Energy Package would amount to a "law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use" is not a particularly controversial one.

We note, however, that the EU might argue that this measure does not fall within the scope of Article III:4 on the basis that decisions regarding whether to use high ILUC-risk biofuels are for private participants in the market, which cannot be said to be "law[s], regulation[s], or requirement[s]" within the meaning of Article III:4. Put differently, as there is no prohibition on the importation or sale or use of high ILUC-risk products, the decision of whether to use such fuels is a private matter. It bears noting that several panels have addressed such arguments — in *Canada — Autos*, for example, the Panel considered an argument that commitments by Canadian auto manufacturers to increase value-added in Canada did not amount to a "requirement" under Article III:4. The Panel concluded that such private actions could be "requirements" within the meaning of Article III:4 if there was a "nexus" between the act of the private party and an act of the government — in such cases, the government is to be held accountable for the private action in question.[99] The Panel found that the conditioning of a particular advantage on a private action satisfies this requirement.[100]

In the context of the Renewable Energy Package in this dispute, a limit has been placed on the extent to which high ILUC-risk biofuels may be counted in the

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[98] Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 133, WTO Doc. WT/DS161/AB/R (adopted Jan. 10, 2001) [hereinafter *Korea — Beef (ABR)*].

[99] Panel Report, *Canada — Certain Measures Affecting the Automotive Industry*, ¶ 10.107, WTO Docs. WT/DS139/R, WT/DS142/R (adopted June 19, 2000) [hereinafter *Canada — Autos*]. *See also* Panel Report, *Canada — Certain Measures Concerning Periodicals*, ¶¶ 5.33–5.36, WTO Doc. WT/DS31/R (adopted July 30, 1997).

[100] *Canada — Autos, supra* note 99, ¶ 10.106.

context of measuring renewable energy use. Private actors are free to use such high ILUC-risk fuels and, the argument might go, their decision to forego the use of such fuels is a private commercial matter. However, EU Member States will be bound by their renewable energy targets and will, as envisaged by Article 4 of the RED II, incentivise the use of biofuels that can be taken into account in an assessment of their achievement of their renewable energy target. This type of "nexus" — between the incentive to use particular biofuels and not others — will, it is expected, be sufficient to bring the measure within the scope of Article III:4.

2. Whether the Imported and Domestic Products Are "Like Products"

In our discussion under Article I:1 in Part III.A.3, we discussed, as a general matter, whether palm oil-derived biofuel is "like" non-palm oil-derived biofuel, for the purpose of the distinction in the Renewable Energy Package between high ILUC-risk and low ILUC-risk products. We also considered whether products that do, and do not, meet the sustainability and GHG emissions criteria in the Renewable Energy Package are 'like' for the purpose of that part of Indonesia's claim. This was to understand whether the Renewable Energy Package accords an advantage to some products *of any origin* that is not accorded immediately and unconditionally to other like products *of any other origin*. Under Article III:4, the assessment is not of whether an advantage is accorded to goods of *certain* origins, but whether the Renewable Energy Package treats less favourably *imported* goods vis-à-vis like *domestic* goods.

Notwithstanding this distinction, our analysis of likeness remains the same, irrespective of whether we are comparing biofuels of *different origins*, or whether we are comparing biofuels of *Indonesian* (or another) origin with biofuels *of EU origin*. This is because, as discussed above, though the bulk of case law considering likeness has been carried out under Article III of the GATT 1994, there is no evident reason why the analysis under Article I:1 and Article III is not based, at least, on similar criteria and would yield the same result concerning likeness.[101]

Finally, as discussed in Part III.A.3 above, the issue of PPMs may be raised in the context of the likeness analysis under Article III:4. In this respect, it was in the context of Article III:4 that the GATT Panel in *US — Tuna* drew a clear distinction between PR-PPMs and NPR-PPMs, for the purpose of determining likeness. In that case, the Panel determined that the fishing of tuna in a dolphin-

[101] As noted above, a series of panel reports support the notion that a "likeness" analysis under Article I:1 is similar to, and at the very least informed by the same factors as under Article III of the GATT 1994. *See EU — Energy Package*, *supra* note 62; *US — Poultry (China)*, *supra* note 62; *US — Tuna II (Mexico) (Article 21.5–Mexico)*, *supra* note 62.

unfriendly manner was of no relevance in determining whether such tuna were "like" tuna caught in a dolphin-friendly manner. That decision, though unadopted by the GATT Contracting Parties, has effectively stood for the notion that NPR-PPMs are relevant only insofar as they might affect the factors that otherwise determine likeness and, perhaps most relevantly, consumers' tastes and habits.[102] As noted in Part III.A.3 above, we consider this unlikely in the context of biofuels and the Renewable Energy Package.

In summary, palm oil-derived biofuels (being a high ILUC-risk biofuel under the EU's methodology) and biofuels derived from other feed crops (which are low ILUC-risk under the EU's methodology) are likely to be found to be "like" products.[103] Moreover, there is little, if anything, on the face of the measures regarding the sustainability and GHG criteria that sets out reasons why biofuels that do, and do not, meet those criteria are not "like". Indeed, this would appear true based not only on a comparison of biofuels originating in various countries and imported into the EU (under Article I:1 of the GATT 1994), but also based on a comparison of biofuels originating from outside the EU and biofuels originating within the EU (under Article III:4).

3. Whether the Treatment Accorded to Imported Products is "Less Favourable" than that Accorded to Like Domestic Products

The final requirement under Article III:4 is that the Renewable Energy Package accords "less favourable treatment" to imported products vis-à-vis like domestic products.

The Appellate Body has articulated the relevant legal standard for assessing "less favourable treatment" under Article III:4, most notably in *Korea — Beef*. In that dispute, it noted that:

> A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated "less favourably" than like domestic products should be assessed instead by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.[104]

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[102] *See* Report of the Panel, *United States — Restrictions on Imports of* Tuna, ¶ 5.15, GATT Doc. DS21/R (Sept. 3, 1991), GATT BISD34S/155 (unadopted) [hereinafter *US — Tuna*].
[103] *See* Part III.A.3 of this article.
[104] *Korea — Beef (ABR)*, *supra* note 98, ¶ 137.

The Appellate Body subsequently explained, in *EC — Asbestos*, how the application of this legal test is to occur, taking into account the comparison being made (that is, between imported products and like domestic products):

> If there is "less favourable treatment" of the group of "like" imported products, there is, conversely, "protection" of the group of "like" domestic products. However, a Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of "like" imported products "less favourable treatment" than that accorded to the group of "like" domestic products.[105]

This elaboration of the standard for less favourable treatment is important because it identifies that the relevant comparison when assessing less favourable treatment is between the *group* of imported products and the *group* of "like" domestic products.[106] A measure that does not accord less favourable treatment to *some* products in the group of imported products may still be found to accord less favourable treatment to the *group* of imported products as a whole.[107]

It can be observed, as the EU has pointed out,[108] that the RED II is origin-neutral on its face — it applies to all goods, regardless of origin. As Indonesia will argue, and as is well-settled in WTO law, this observation is of marginal relevance to an assessment of less-favourable treatment under Article III:4. This is because, as the quotes above indicate, the less favourable treatment obligation applies *de facto*, rather than exclusively *de jure*, such that the consistency of origin-neutral measures with the national treatment obligation can be assessed by determining whether those measures have a detrimental impact on the competitive opportunities enjoyed by imported products vis-à-vis those enjoyed by domestic products.

This means that the panel must compare:

- in respect of ILUC risk, the treatment accorded to the group of imported biofuels (which includes biofuels that are low ILUC risk and high ILUC risk) with the group of like domestic biofuels (which includes only low

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[105] *EC — Asbestos (ABR)*, *supra* note 63, ¶ 100.
[106] *See* Lothar Ehring, *De Facto Discrimination in World Trade Law: National and Most-Favoured-Nation Treatment–or Equal Treatment?*, 36(5) WORLD TRADE J. 921, 942–946 (2002).
[107] *Id.*; *see also* BOSSCHE & ZDOUC, *supra* note 92, at 397.
[108] Delegation of the EU to Indonesia, *supra* note 6.

ILUC-risk biofuels, based on the EU's methodology, as the EU does not produce palm oil); and

- in respect of the sustainability and GHG criteria, the treatment accorded to the group of imported biofuels (which may include biofuels that do, and do not, meet the criteria) with the group of like domestic biofuels (which may, or may not, include biofuels that do, and do not, meet the criteria).

In respect of the former comparison, Indonesia's and Malaysia's predominance in terms of global palm oil exports,[109] and the evident absence of palm oil production in the EU, indicate that it is only the group of imported products that suffers the detrimental impact of not being eligible to be taken into account in respect of the contribution to the EU's renewable energy target (and thus eligible for related incentives). As such, the measures treat imported goods less favourably than the group of like domestic goods insofar as the ILUC requirements are concerned.

In respect of the comparison between goods that do and do not meet the GHG and sustainability criteria, a more fact-intensive examination of which products meet and fail these requirements is required. Indonesia does not explicitly assert that palm oil-derived biofuel does not meet the GHG and sustainability criteria and as such is less favourably treated. There would have to be some evidence of this to substantiate Indonesia's claim (at least if it limits itself to its own exports, as opposed to those of another WTO Member). Regardless, Indonesia must demonstrate whether this amounts to less favourable treatment for the *group* of imported biofuel products vis-à-vis the *group* of like domestic biofuel products. In this respect, recall that the GHG savings criteria are that the GHG emission savings from the use of biofuels, bioliquids and biomass fuels be either 50%, 60% or 65%, depending on the age of the installation in which that fuel is produced.[110] It is interesting to note that doubts have been raised concerning rapeseed-derived biofuel's ability to meet the GHG emission criteria. Specifically, the biodiesel derived from rapeseed — primarily grown in Europe and Canada — has been identified as potentially being unable to meet a 60% GHG reduction target.[111] If this were the case, then there would be both imported *and* domestic like products that did not meet the criteria. It would, therefore, become a factual matter for the

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[109] Trade Map Palm Oil Data, *supra* note 7.

[110] RED II, *supra* note 1, art. 29(10).

[111] Terry Macalister, *Biofuels fail EU sustainability test, researchers say*, EURACTIV, (Aug. 21, 2012), https://www.euractiv.com/section/agriculture-food/news/biofuels-fail-eu-sustainability-test-researchers-say/; *see also* T. Thamsiriroj & J. D. Murphy, *Can Rape Seed Biodiesel Meet the European Union Sustainability Criteria for Biofuels?*, 24(3) ENERGY & FUELS 1720 (2010).

parties to substantiate whether the composition of the groups of like imported and domestic products respectively is such that the adverse impact[112] of the GHG and sustainability criteria falls on imported goods. Perversely, this would require the EU to make arguments *against* the sustainability of an indigenous crop, and Indonesia to make arguments *against* the sustainability of palm oil. It may be for this reason that Indonesia may not pursue its claims regarding the alleged discriminatory effect of the GHG and sustainability criteria, and limit itself to arguments regarding the distinctions in the Renewable Energy Package relating to ILUC risk.

4. Conclusion Regarding Article III:4

Based on this analysis, our view is that the Renewable Energy Package is likely to be found inconsistent with Article III:4 of the GATT 1994, at least insofar as the ILUC requirements are concerned. The inconsistency of the GHG and sustainability criteria in the RED II with Article III:4 is less clear.

C. Quantitative Restrictions – Article XI:1

Indonesia argues that:

> [B]y limiting and phasing out the use of oil palm crop-based biofuels for meeting EU renewable energy targets, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for certifying low ILUC-risk biofuels, and by imposing the sustainability criteria and the GHG emissions saving criteria, the Renewable Energy Package appears to restrict importation of palm oil and oil palm crop-based biofuels, in violation of Article XI:1 of the GATT 1994.[113]

Article XI of the GATT 1994 is entitled "General Elimination of Quantitative Restrictions". Paragraph 1 of GATT 1994 provides that:[114]

> 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

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[112] Appellate Body Report, *Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines*, ¶ 134, WTO Doc. WT/DS371/AB/R (adopted July 15, 2011) [hereinafter *Thailand — Cigarettes (Philippines)(ABR)*].

[113] Indonesia's Request for Consultations, *supra* note 8, ¶ 34(xiv).

[114] GATT 1994, *supra* note 49, art. XI.

> contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

In its interpretation of Article XI, the Appellate Body has noted that the term "restriction" refers to something that has a limiting effect; when understood in the context of the word "quantitative" in the title of Article XI, the Appellate Body noted that the coverage of Article XI "includes those prohibitions and restrictions that limit the quantity or amount of a product being imported or exported".[115] The terms "on the importation … or on the exportation or sale for export" indicate that not every condition or burden placed on importation or exportation is inconsistent with Article XI — the provision prohibits only those measures that limit the importation or exportation of products.[116] The scope of Article XI:1 also covers measures through which a prohibition or restriction is produced or becomes operative; namely, where an import or export prohibition or restriction is "made effective through quotas, import or export licences or other measures".[117]

In our view, it is unclear whether the Renewable Energy Package amounts to a prohibition on importation, or a restriction on importation, within the meaning of Article XI:1 of the GATT 1994. Specifically, it is not clear how the measures apply to *the importation* of palm oil products. The measures do not prohibit the importation of palm oil, palm oil-derived biofuels, or otherwise; nor do they restrict the *importation* of such products.

The key interpretative issue raised under this claim is that of the relationship between Article III and Article XI of the GATT 1994, and whether an internal measure (such as the one in this case) should nonetheless be considered under Article XI. The inverse of this question — whether a border measure is to be considered under Article III — is addressed by *Ad* Article III of the GATT, which provides that internal measures (as defined in Article III:1 of the GATT 1994) that

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[115] Appellate Body Report, *Argentina — Measures Affecting the Importation of Goods*, ¶ 5.217, WTO Docs. WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (adopted Jan. 26, 2015) [hereinafter *Argentina — Import Measures (ABR)*] (referring to Appellate Body Report, *China — Measures Related to the Exportation of Various Raw Materials*, ¶ 320, WTO Docs. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted Feb. 22, 2012) [hereinafter *China — Raw Materials (ABR)*]).

[116] *Argentina — Import Measures (ABR)*, *supra* note 115, ¶ 5.217; Appellate Body Report, *Indonesia — Importation of Horticultural Products, Animals and Animal Products*, ¶ 5.72, WTO Docs. WT/DS477/AB/R, WT/DS478/AB/R (adopted Nov. 22, 2017) [hereinafter *Indonesia — Import Licensing Regime (ABR)*].

[117] *Argentina — Import Measures (ABR), supra* note 115, ¶ 5.218.

are applied to like domestic and imported products *at the point of importation* are nonetheless subject to Article III.[118] However, *Ad* Article III does not address the situation that arises in this dispute; namely, whether a measure that affects (as here) the internal use of a product can be subject to Article XI.

In addressing this, the relationship between these provisions in the context of the present dispute, several factors are likely to be relevant. First, several previous cases have identified that the focus of Article XI is on measures limiting importation of goods. For example, the Panel in *India — Autos* (referring to the Panel in *India — Quantitative Restrictions*) stated:

> On a plain reading, it is clear that a "restriction" need not be a blanket prohibition or a precise numerical limit. Indeed, the term "restriction" cannot mean merely "prohibitions" on importation, since Article XI:1 expressly covers both "prohibition or restriction". Furthermore, the Panel considers that the expression "limiting condition" used by the *India – Quantitative Restrictions* panel to define the term "restriction" and which this Panel endorses, is helpful in identifying the scope of the notion in the context of the facts before it. That phrase suggests the need to identify not merely a condition placed on importation, but a condition that is limiting, i.e. that has a limiting effect. *In the context of Article XI, that limiting effect must be on importation itself.*[119] (emphasis added)

The Panel in *Dominican Republic — Import and Sale of Cigarettes* interpreted the above quote and concluded that the expression "entering the market":

> was used by that panel as an expression equivalent to "importation itself". However, there are barriers to entry in a specific market that do not affect only imports but also domestic supply. In the Panel's

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[118] The full text of the relevant part of *Ad* Article III provides:

> Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

GATT 1994, *supra* note 49, *Ad* art. III.

[119] Panel Report, *India — Measures Affecting the Automotive Sector*, ¶ 7.270, WTO Doc. WT/DS146/R, WT/DS175/R (adopted Apr. 5, 2002) (emphasis added).

> view, not every measure affecting the opportunities for entering the market would be covered by Article XI, but only those measures that constitute a prohibition or restriction on the importation of products, i.e. those measures which affect the opportunities for importation itself … Article XI:1 of the GATT does not prohibit all barriers to entry into a market, but only those that constitute prohibitions or restrictions imposed on the importation or on the exportation of products.[120]

Given this case law, it bears noting that the Renewable Energy Package does not affect the importation of palm oil or palm oil-derived products. Such products are not prohibited under the measures; nor is the importation of the products restricted by the Renewable Energy Package. It is true that the imposition of the measures may have the effect of reducing *demand* for palm oil-derived biofuels, and that such an effect might amount to a restriction on the *international trade* in those products.[121] However, this is not equivalent to the measures restricting the *importation* of palm oil products.

It is therefore likely that the panel in this dispute will find that the Renewable Energy Package is not inconsistent with Article XI:1 of the GATT 1994.

D. General Exceptions – Article XX

Article XX of the GATT 1994 sets out "general exceptions" clauses.[122] Its effect is that the measures that may be inconsistent with another provision of the GATT 1994 may nonetheless be consistent with the GATT 1994 because they satisfy the requirements of this provision. The structure of Article XX is important for its interpretation and operation. It states, in relevant part (based on the provisions that the EU might be expected to invoke in this dispute):

> 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: …

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[120] Panel Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶¶ 7.261–7.262, WTO Doc. WT/DS302/R (adopted May 19, 2005) [hereinafter *Dominican Republic — Cigarettes*].

[121] *See* discussion *infra* Part III.D.1.b.

[122] GATT 1994, *supra* note 49, art. XX.

> (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 […].

The Appellate Body has stated that the structure of Article XX is such that a Member must show (i) that the measure is provisionally justified under one of the subparagraphs of Article XX, and (ii) that the measure satisfies the requirements set out in the *chapeau* of Article XX.[123] It is for the responding Member — the EU in this case — to demonstrate that the measure is *prima facie* justified under Article XX.[124]

It is also relevant to note what a panel must analyse under Article XX of the GATT 1994. The Appellate Body has explained that 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".[125] In the preceding analysis, we identified that the panel is likely to find the Renewable Energy Package to be inconsistent with Articles I:1 and III:4 of the GATT 1994, specifically because of the distinctions between goods drawn by the ILUC risk criteria, and the sustainability and GHG criteria. As it is these aspects of the measure that would give rise to the GATT inconsistency, it is these aspects of the Renewable Energy Package that must be considered under Article XX.

Based on the above order of analysis, we turn first to provisional justification under Article XX(b) or Article XX(g).

1. Necessary to Protect Human, Animal or Plant Life or Health – Article XX(b)

Article XX(b) of the GATT 1994 provides that WTO Members are not, by virtue of the other provisions of the GATT 1994, prevented from adopting or enforcing measures "necessary to protect human, animal or plant life or health".[126]

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[123] Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, ¶ 22, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) [hereinafter *US — Gasoline (ABR)*]; Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 117–120, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *US — Shrimp (ABR)*].
[124] *Indonesia — Import Licensing Regimes (ABR), supra* note 116, ¶ 5.51.
[125] *EC — Seal Products(ABR)*, *supra* note 51, ¶ 5.88.
[126] GATT 1994, *supra* note 49, art. XX.

As the Appellate Body has explained on numerous occasions, the "necessity" test under Article XX of the GATT 1994 involves the "weighing and balancing" of a number of factors. This process involves identifying the relative importance of the interests or values that are pursued or furthered by the measure at issue, and that the measure is adopted or enforced in pursuit of that end.[127] Once this is identified, the assessment turns to other factors that must be weighed and balanced, "which will in most cases include" (i) the contribution made by the measure at issue to the objective pursued and (ii) the trade-restrictiveness of that measure.[128] Once a panel has assessed the factors to be weighed and balanced[129] and this "yields a preliminary conclusion"[130] that the measure is necessary, the result of this analysis "must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective".[131]

a. The Objective of the Measure and its Importance

Considering the objective of the Renewable Energy Package first, the EU can be expected to formulate the objective it pursues in a manner that is favourable to its arguments. The objective is significant not only in and of itself, but also because it will frame the panel's analysis regarding the nature and extent of the contribution made by the Renewable Energy Package to that objective, as part of the overall weighing and balancing of factors under the necessity analysis. However, a WTO panel is not bound by the responding Member's characterisation of its objective. It

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[127] *Korea — Beef (ABR), supra* note 98, ¶ 162; *EC — Seal Products (ABR), supra* note 51, ¶ 5.169.

[128] Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 240–242, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010) [hereinafter *China — Publications and Audiovisual Products(ABR)*] (discussing Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 306–308, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005) [hereinafter *US — Gambling (ABR)*]; Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, ¶ 178, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007) [hereinafter *Brazil — Retreaded Tyres (ABR)*]; *Korea — Beef (ABR), supra* note 98, ¶ 166).

[129] *US — Gambling (ABR), supra* note 128, ¶¶ 306–308.

[130] *China — Publications and Audiovisual Products (ABR), supra* note 128, ¶ 242 (citing *Brazil — Retreaded Tyres (ABR), supra* note 128, ¶ 178).

[131] *China — Publications and Audiovisual Products (ABR), supra* note 128, ¶ 242 (quoting *Brazil — Retreaded Tyres (ABR), supra* note 128, ¶ 178).

may also be guided by the structure and operation of the measure, as well as evidence proffered by the complainant.[132]

The RED II is a measure that addresses, on its face, a variety of objectives, including the reduction of GHG emissions, but also improving energy security, reinforcing technological leadership in the renewable energy field, and creating jobs and growth.[133] Concerning GHG emissions and ILUC, the EU will need to emphasise the connection between the Renewable Energy Package and the imperative of GHG reduction. It will then need to link this to the protection of human, animal or plant life or health.[134] Indonesia, as complainant, might argue that the true objective of the Renewable Energy Package is to support the EU feed crop producers. It may argue that the RED II limits a major source of foreign competition in the market for energy feed crops and thereby increases demand for other feed crops, including those from the EU. If Indonesia can successfully make such an argument, a panel is unlikely to give much weight to the importance of the EU's objective. However, based on the measures on their face, it is likely that a panel will accept that the measures are directed at the reduction of GHG emissions caused by ILUC and, furthermore, accept the link between such reduction and the protection of human, animal or plant life or health. In previous cases involving the protection of human, animal or plant life or health, the Appellate Body has noted that this is "both vital and important in the highest degree",[135] although this was in the context of a dispute where the connection between the trade restriction (a ban on asbestos and asbestos products) was arguably more directly linked to the human health consequences of the measures. How the panel assesses the importance of the objective will be significant — indeed, more important the value pursued by the measure (and the more the measure contributes to that objective), the more likely it is to be "necessary".[136]

The EU may also refer to the implications of ILUC for the preservation of biodiversity in the affected areas. Though the link between ILUC and loss of biodiversity appears to have been well documented,[137] the focus of the measures at issue appears to be more on the GHG emissions implications of ILUC, and

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[132] *US — Gambling (ABR), supra* note 128, ¶ 304.
[133] RED II, *supra* note 1, Preamble ¶ 2–3; Production Expansion Report, *supra* note 3, at 2.
[134] Panel Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, ¶ 7.46, WTO Doc. WT/DS332/R (adopted Dec. 17, 2007).
[135] *EC — Asbestos (ABR)*, *supra* note 63, ¶ 172.
[136] *Id.*
[137] *See, e.g.*, Claudia Dislich et al., *A review of the ecosystem functions in oil palm plantations, using forests as a reference system*, 92(3) BIOLOGICAL REV. CAMBRIDGE PHIL. SOC'Y 1539, 1543–1544 (2017) (and studies cited therein).

specifically whether the magnitude of such emissions would be sufficient to overwhelm any GHG emissions saved through the use of high ILUC-risk feed crops.[138] It is therefore unclear to us the extent to which the biodiversity implications of ILUC will play a role in this dispute.

Having identified the objective of the measures and its importance, the panel will then need to weigh and balance the trade restrictiveness of the measures and their contribution to this objective.

b. Trade Restrictiveness of the Measure

With respect to trade restrictiveness, the EU is likely to emphasise the fact that neither the ILUC criteria, nor the sustainability and GHG emission criteria, amount to a prohibition on the importation, sale, marketing or use of palm oil. By extension, the measures do not have a highly trade-restrictive effect.[139] Indonesia will argue that the measures' trade restrictiveness is high, given that the measures create a disincentive to use palm oil (which increases over time). This disincentive will become more concrete as more EU Member States put in place the support schemes foreseen in Article 4 of the RED II. Indeed, Indonesia's most reliable argument in this context may be to rely on the less favourable treatment of imports (under Article III:4) and/or the advantages afforded under Article I:1 that are not afforded immediately to like products of all other countries (if these are, indeed, the panel's findings, as we discuss above). This is because, albeit in a different context, the Appellate Body concluded that certain measures that were discriminatory within the meaning of Article 2.1 of the TBT Agreement exhibited a "considerably" trade-restrictive effect based on their limiting effect on the competitive opportunities for imported goods compared with the situation before the measures were enacted.[140]

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[138] Production Expansion Report, *supra* note 3, at 3.

[139] *See* Appellate Body Report, *Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear*, ¶ 5.111, WTO Doc. WT/DS461/AB/R (adopted June 22, 2016) [hereinafter *Colombia — Textiles (ABR)*].

[140] *See* Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements–Recourse to Article 21.5 of the DSU by Canada and Mexico*, ¶ 5.208, WTO Docs. WT/DS384/AB/RW, WT/DS386/AB/RW, n.643 (adopted May 29, 2015) [hereinafter *US — COOL (Article 21.5–Canada and Mexico) (ABR)*] (referring to Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, ¶ 477, WTO Docs. WT/DS384/AB/R, WT/DS386/AB/R (adopted July 23, 2012) [hereinafter *US — COOL (ABR)*] (citing Panel Report, *US — Certain Country of Origin Labelling (COOL) Requirements*, ¶¶ 7.356, 7.376–7.380, WTO Docs. WT/DS384/R, WT/DS386/R (adopted July 23, 2012) [hereinafter *US — COOL*]).

The panel must not only identify whether there is a trade-restrictive effect as a result of the Renewable Energy Package, but also assess the *degree* of the measures' trade restrictiveness. This is because the "necessity" test examines whether there are *less* trade-restrictive alternatives to the challenged measure (here the Renewable Energy Package).[141] Previous panels have struggled with this task,[142] even though the degree of trade-restrictiveness can be identified quantitatively or qualitatively.[143] Measures such as import prohibitions — which these measures are not — are more straightforward in this respect given their more blunt nature; behind the border measures are more difficult and will be a key challenge for this panel. Notwithstanding this, it may be the case that the effect of the measures on competitive opportunities for imported products (identified under Article III:4), or the advantage afforded to certain imports (identified under Article I:1), may mean that the measures have a "considerable degree" of trade restrictiveness in comparison with the situation before the enactment of the Renewable Energy Package. Indeed, this is how the Appellate Body interpreted the Panel's comments in *US — COOL*.[144]

c. Contribution of the Measure to the Objective

The panel will then need to assess the degree of contribution made by the Renewable Energy Package to the EU's objective. It is worth noting that the EU does not need to demonstrate that the Renewable Energy Package *is actually making* a contribution to its objective. Indeed, the RED II requires that its terms be transposed into the law of EU Member States by June 30, 2021. The Appellate Body held in *Brazil — Retreaded Tyres* that where the effect of a measure is not certain, a responding Member may nonetheless be able to demonstrate that it is "apt to produce a material contribution to the achievement of its objective", and thus that the measure is still necessary.[145] Such arguments may be based on "quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence".[146] As a result, the

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[141] *Colombia — Textiles (ABR)*, *supra* note 139, ¶¶ 5.73, 5.104.
[142] *Id.* ¶ 5.111.
[143] *US — COOL (Article 21.5–Canada and Mexico)(ABR), supra* note 140, ¶ 5.208.
[144] *US — COOL (ABR), supra* note 140, ¶ 477; *see also* Panel Report, *Brazil — Certain Measures Concerning Taxation and Charges*, ¶ 7.607, WTO Doc. WT/DS472/R (adopted Jan. 11, 2019).
[145] *Brazil — Retreaded Tyres (ABR), supra* note 128, ¶ 151.
[146] *Id.* The report of the Panels in *Australia — Tobacco Plain Packaging* provides an example of where a WTO panel has considered the limitations of available empirical evidence but nonetheless endorsed the contribution made by a measure to its objective based on projections regarding the expected future effect of that measure. Panel Report, *Australia — Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging*

fact that the Renewable Energy Package has not yet been implemented in all EU Member States, or that the precise contribution that the measures might make to their objective is unclear, does not foreclose the possibility of the EU being able to make out that the measures make a contribution and are therefore necessary.

The panel's assessment in this respect can again be expected to be a highly factual one. The EU will point to the association between (i) palm oil production and ILUC; (ii) ILUC and GHG emissions, and (iii) the Renewable Energy Package and reductions in palm oil consumption. The EU has already identified certain connections between palm oil and ILUC, most notably in the Production Expansion Report.[147] It has also sought to draw the link between ILUC and GHG emissions,[148] which has been widely discussed elsewhere[149] (though the quantification of these emissions appears more difficult,[150] as the EU appears to accept).[151] The EU can be expected to rely on this and other similar material to illustrate this point and substantiate arguments surrounding the contribution made by the Renewable Energy Package.

Indonesia can be expected to challenge each of these connections. For example, Indonesia might contest the notion that all palm oil production is linked to ILUC. Indonesia might rely on the fact that the basis for this connection, as set out in the Production Expansion Report, relies on data from 1989 to 2013 (which indicates 45% expansions into land that was forest in 1989). This may demonstrate a historical link between palm oil and ILUC; however, Indonesia may challenge the extent to which this reflects *current* rates of ILUC. Moreover, based on the language of Article 3 of the ILUC Regulation, the relevant expansion for the purpose of determining high ILUC risk is "the global production area",[152] and the Production

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Requirements applicable to Tobacco Products and Packaging, ¶¶ 7.423–7.1045, WTO Docs. WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (adopted Aug. 27, 2018) [hereinafter *Australia — Tobacco Plain Packaging*].

147 Production Expansion Report, *supra* note 3, at 8.

148 *Id.* at 3–4.

149 *See, e.g.*, UNEP, Rep. Int'l Panel Sustainable Res. Mgmt., *Towards sustainable production and use of resources: Assessing Biofuels*, 21–23, U.N. Doc. DT/1213/PA (2009); Richard J. Plevin & Daniel M. Kammen, *Indirect Land Use and Greenhouse Gas Impacts of Biofuels, in* ENCYCLOPAEDIA OF BIODIVERSITY, 293–297 (S.A. Levin 2d ed., 2013).

150 *See* Serina Ahlgren & Lorenzo Di Lucia, *Indirect Land Use Changes of Biofuel Production–A review of modelling efforts and policy developments in the European Union*, 7(1) BIOTECHNOLOGY FOR BIOFUELS 1 (2014); Richard J. Plevin et al., *Carbon Accounting and Economic Model Uncertainty of Emissions from Biofuels-Induced Land Use Change*, 49 ENVTL. SCI. & TECH. 2656–2664 (2015).

151 Production Expansion Report, *supra* note 3, at 4.

152 The ILUC Regulation, *supra* note 33, art. 4.

Expansion Report's conclusion of 45% expansion is assessed "globally".[153]As such, Indonesia might argue (at least at an in-principle level) that even if the historical link between ILUC and palm oil is relevant currently, this is not dispositive of such a link existing *in Indonesia*. On this basis, Indonesia might contend that the expected contribution of the measures is overestimated, either as a general matter or in respect only of the palm oil produced in Indonesia (though in the latter context, this may be a more difficult argument given Indonesia's predominance — together with Malaysia — in palm oil production). Regarding the connection between ILUC and GHG emissions, Indonesia might argue (as it has in its Request for Consultations) that "ILUC cannot be observed or measured", and that "ILUC emissions cannot be measured with the level of precision required to be included in the EU GHG emission calculation methodology".[154] Indonesia might rely on this to argue, notwithstanding the seemingly common view that ILUC is linked to GHG emissions as a general matter, that there is not a sufficient basis for concluding that such a link exists or, for enacting the measures. In terms of the connection between the Renewable Energy Package and reductions in palm oil consumption, Indonesia will rely on its arguments regarding the discriminatory impact on palm oil-derived biofuel and the consequent effect on consumption to make such a point. Finally, Indonesia may also make arguments concerning the high productivity of palm oil crops, especially when compared with other vegetable oils.[155] Indonesia's argument in this respect would be that the measures will shift demand away from palm oil to other feed crops and, because of the extra land these crops require to produce an equivalent amount of oil, the measures will only drive further ILUC.

We expect that the panel will find that the measures do, or are apt to, contribute to their objective. Specifically, given the broad basis on which high ILUC risk is associated with palm oil under the EU's methodology, the Renewable Energy Package will capture those instances where palm oil production is indeed associated with high ILUC risk and prevent such fuel from being counted towards renewable energy use. If the EU can demonstrate that the historical association between palm oil and ILUC is relevant *currently*, the measure will be found to make a contribution to its objective. Note, however, that the panel will need to reach a conclusion not only concerning whether the measures do, or will, contribute to the EU's objective, but also the *degree* to which they will contribute to that objective.

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[153] Production Expansion Report, *supra* note 3, at 8.

[154] Indonesia's Request for Consultations, *supra* note 8, at 4.

[155] *See* Statement by Indonesia to the Committee on Technical Barriers to Trade, *EU — Amendments to the Directive 2009/28/EC, Renewable Energy Directive*, ¶ 8, WTO Doc. G/TBT/W/641 (July 2, 2019); Yusuf et al., *supra* note 67, at 2742; Popp et al., *supra* note 68, at 9, 15–18.

Such a conclusion is required to facilitate a comparison between the contribution made by the measures to the relevant objective, and the contribution made by any reasonably available alternative measure.[156] If the EU can substantiate its position with respect to the current association between current palm oil production and ILUC, that contribution will be strong. If Indonesia can successfully argue that such a historical association is no longer relevant, or that shifts in the composition of the market brought about by the Renewable Energy Package will be detrimental in terms of ILUC, the degree of contribution will be low. This will ultimately be a factual determination for the panel; however, as we discuss below, this use of historical information as a basis for a measure which presumes specific and current risks is likely to be subject to criticism by a WTO panel, and we expect this to play out in the context of alternative measures.

d. Possible Alternative Measures

Indonesia can be expected to propose a number of alternative measures. Indeed, the EU considered a variety of measures when devising its approach to combating deforestation, such as supply-side measures,[157] demand-side measures,[158] and investment and finance mechanisms.[159] Notwithstanding these potential alternatives, it appears to us that Indonesia's strongest alternative will be one that actually addresses the connection between a specific consignment of (palm oil-derived) biofuel and the risk of ILUC. In our view, the Renewable Energy Package

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[156] *Colombia — Textiles (ABR), supra* note 139, ¶ 5.77.

[157] These included promoting production on existing land and improving efficiency, therefore reducing expansion into forest land, including through engagement with the private sector; supporting jurisdictions to strengthen sustainable forest management; or bilateral agreements relating to forest risk commodities, including palm oil. *See* Ecofys, Milieu, COWI & EC, *A potential EU initiative on deforestation: Possible interventions*, *Feasibility Study on Options to Step Up EU Action Against Deforestation*, pt. II, at 71–87 (Jan. 2018).

[158] These included requirements that public procurement be based on the sustainability of the relevant products; international cooperation to arrive at zero-deforestation and sustainability definitions and standards; and the development of sustainable commodity trading platforms (the purpose of which would be to assist certified goods to compete by insulating them from, for example, sudden price fluctuations), encouraging private sector initiatives to cultivate sustainable production, and increasing transparency and consumer information. For completeness, it is noted that the EU also considered conditioning market access on the sustainability of products including palm oil, as well as lowering import duty for goods that comply with sustainable production criteria. It is unlikely that Indonesia would propose such a measure in favour of the measure actually adopted in the EU, given the potentially high trade restrictiveness of these measures. *See id.* at 88–127.

[159] *Id.* at 128–133.

does not do this, and this is one of the main difficulties with the measures for the purpose of this WTO dispute.

In this context, the EU's main argument is expected to relate to the fact that the Renewable Energy Package already addresses specific ILUC risk by making allowances for low ILUC-risk biofuels. In understanding this issue, the Panel will need to first fully understand the current criteria that exist with respect to a determination that a biofuel is associated with a low risk of ILUC.

A close inspection of the relevant provisions indicates that low ILUC-risk fuels must meet the accompanying definition articulated in the RED II,[160] and the "[g]eneral criteria for certification of low [ILUC]-risk biofuels, bioliquids and biomass fuels" in Article 4 of the ILUC Regulation. Reading these provisions together, a low ILUC-risk biofuel must therefore:

- Satisfy the GHG and sustainability criteria in Article 29 of the RED II;[161]
- Avoid displacement of food or feed crop production through improved agricultural practices "as well as" through cultivation on areas not previously used for cultivation of crops;[162]
- Be produced from "additional feedstock" obtained through "additionality measures", according to which the crops became financially attractive, or overcame some other barrier to implementation, by virtue of the prospect of being designated as a low ILUC-risk fuel *or* be produced on abandoned or degraded land *or* be produced by a small landholder.[163]

The difficulties with these requirements may be broadly understood as follows. First, given the requirements for improved agricultural practices and additionality, it is unclear how a palm oil plantation running on a business-as-usual basis can meet these criteria, even though palm production on the concession in question involves no land use change whatever. If the yield from that concession were constant, and the production were at such a scale that (for example) no barriers to production, financial or otherwise, need be overcome, it appears to us that such feed crop would not be eligible for low ILUC-risk status, regardless of the fact that there was no land use change associated with that crop. Second, and relatedly, the GHG and sustainability criteria also appear to set out requirements that are not in and of themselves associated with ILUC risk. For example, biofuels cannot "be

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[160] RED II, *supra* note 1, art. 2(37).
[161] *Id.*; The ILUC Regulation, *supra* note 33, art. 4(1)(a).
[162] RED II, *supra* note 1, art. 2(37).
[163] *See* The ILUC Regulation, *supra* note 33, art. 5(1)(A)(i), 5(1)(A)(ii) & 5(1)(A)(iii) (respectively).

made from raw material obtained from land with a high biodiversity value", which means land that was, "in or after January 2008, whether or not the land continues to have that status" designated as primary forest, highly biodiverse forest, or other designations.[164] Moreover, biofuels cannot be made from raw material "obtained from land with high-carbon stock", which means land that was "in January 2008", but which "no longer has th[e] status" of, wetlands, continuously forested areas, and other areas.[165] For Indonesia, the argument would be that using 2008 as a benchmark excludes a considerable amount of feed crop from eligibility to be counted towards renewable energy use, without having a bearing on whether the area from which it was harvested represented a carbon-rich or high biodiversity area *at the time the affected feed crop was produced*. These elements of the measures indicate an over-inclusiveness that transcends the association between a *given* consignment of biofuel and the ILUC risk against which the measure protects. Therefore, trade in palm oil-derived biofuel is restricted, even though such restriction would serve no environmental purpose if the land from which the crop was derived had already lost its value as a store of carbon or a store of biodiversity (even assuming the latter is relevant to the legal analysis under Article XX in this dispute). Therefore, though the requirement that "low ILUC-risk fuels" satisfy the various elements of that definition, it is not clear that such an "exception" has the effect of targeting the measures towards those feed crops that are high ILUC-risk in fact.

Put plainly, the EU's reliance on a historical generalisation of ILUC risk, and its development of an exception to that generalisation which does not in itself address the same risk, has led to the introduction of an overly inclusive measure. Viewed from this perspective, there are strong arguments that there are less trade-restrictive alternatives to the Renewable Energy Package, and that the measures are therefore not "necessary" within the meaning of Article XX(b).

One such alternative would be a tracing or verification mechanism to track more closely the association between a given consignment and ILUC risk. This would, at least in principle, avoid the overly inclusive approach in the Renewable Energy Package described above. Indonesia might also suggest alterations to the measures as currently written. For example, Indonesia might propose that the EU loosen the GHG and sustainability criteria to, for example, avoid assessments of sustainability being based on the status of land in 2008 to the extent that this has no bearing on ILUC-risk status. This latter alternative may not, however, be sufficient on its own to overcome any disjuncture between the designated ILUC risk and a given

[164] RED II, *supra* note 1, art. 29(3).
[165] *Id.* art. 29(4).

consignment of biofuel and would likely need to be applied in conjunction with a tracing-type or verification-type measure.

There are several potential issues with this alternative. The first is that it would itself have a trade restrictive effect. In *US — COOL*, a trace-back mechanism for determining the origin of meat products was raised as an alternative measure. The Appellate Body declined to make findings in respect of the trade restrictiveness of that alternative due to the absence of relevant factual findings by the Panel; however, it is notable that the parties put forward differing views with respect to the trade restrictiveness of the costs associated with compliance with such a scheme.[166] Indeed, case law suggests that the imposition of compliance costs may in principle be trade restrictive,[167] though the question of whether specific costs are trade restrictive is a factual matter to be assessed by the panel based on arguments by the parties.[168] On one view, any trade-restrictive effect of this alternative would reasonably be expected to be less than that of the measure at issue, because more palm oil (i.e. that not associated with high ILUC risk) could be included in EU Member States' calculations of whether they have achieved their renewable energy targets. However, the tracing and verification scheme would need to be applied to *all feed crops*, lest the alternative still only target palm oil and thus continue to discriminate against it (inconsistently with Article I:1 and Article III:4 of the GATT 1994). Thus, the trade-restrictive effect of complying with this scheme would be spread across *all* feed crop producers. The panel would therefore face difficulty in assessing the degree of trade restrictiveness of such an imposition, and comparing it with the degree of trade restrictiveness of the Renewable Energy Package. Indonesia, as the proponent of the alternative, will need to suggest such an alternative in a manner that would allow the panel to easily determine that any trade restrictive effect associated with it will be less than that caused by the Renewable Energy Package.

The second difficulty with this alternative relates to whether it is "reasonably available". Complaining Members must, in proposing alternative measures, demonstrate that such an alternative is one "which the Member concerned could 'reasonably be expected to employ'".[169] This requires an assessment of whether the alternative measure "is merely theoretical in nature", such as where the responding Member "is not capable of taking it, or where the measure imposes an undue

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[166] *US — COOL (ABR), supra* note 140, ¶¶ 489–490.
[167] Panel Report, *Argentina — Measures Affecting the Importation of Goods*, ¶ 6.261, WTO Docs. WT/DS438/AB/R, WT/DS444/R, WT/DS445/R (adopted Jan. 26, 2015).
[168] *See Australia — Tobacco Plain Packaging, supra* note 146, ¶¶ 7.122–7.1246; *Dominican Republic — Cigarettes, supra* note 120, ¶ 7.263.
[169] *Korea —Beef (ABR), supra* note 98, ¶ 166.

burden on that Member, such as prohibitive costs or substantial technical difficulties".[170] It is clear that the expense and technical feasibility of a mechanism capable of tracing the association between a consignment of biofuel and ILUC would be a subject of argument in this context as well. For example, if a biofuel producer were to consolidate palm oil-derived biofuels from various production facilities for export, it is unclear how a producer could respect the distinction (if any) between high and low ILUC-risk biofuel within that consignment. Again, Indonesia will need to develop its submissions in this respect in such a way as to demonstrate the reasonable availability of this alternative.

We therefore believe that a tracing or verification measure is an alternative measure that would make an equivalent contribution to the EU's objective. However, we consider that there are important questions around whether such a measure is less trade-restrictive than the Renewable Energy Package, and whether it is reasonably available to the EU. As we discuss below, this brings into focus the question of whether an issue such as ILUC can even be addressed by trade measures.

In summary, much of the analysis under Article XX(b) will turn on the factual arguments made by the parties. As such, it is difficult to predict with confidence the conclusion the panel will reach. However, based on our high-level survey, it appears that Indonesia would have a strong basis upon which to make out the various steps of this analysis and thus demonstrate that the measures do not satisfy Article XX(b) of the GATT 1994.

2. Relating to the Conservation of Exhaustible Natural Resources– ArticleXX(g)

Article XX(g) of the GATT 1994 provides an exception for measures which are inconsistent with a substantive obligation in the GATT 1994, but which "relat[e] to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

To make out a defence under Article XX(g), a responding Member must satisfy all the requirements of that provision. Though the "text of Article XX(g) does not prescribe a specific analytical framework for assessing whether a measure satisfies the component requirements of that provision", the Appellate Body has nonetheless emphasised "the importance of the design and structure of the challenged measure to a proper assessment of whether a measure satisfies the

[170] *US — Gambling (ABR), supra* note 128, ¶ 308.

requirements of Article XX(g)".[171] The Appellate Body has summarised such an analysis as entailing consideration of whether the measure at issue has "'a close and genuine relationship of ends and means' to the conservation of exhaustible natural resources, when such trade measures are brought into operation, adopted, or applied and 'work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource"'.[172]

a. Characterisation of the Objective

Turning first to the characterisation of reductions in GHG emissions, the Appellate Body's comments in *EC — Tariff Preferences* are relevant:

> As the Appellate Body observed in *US — Shrimp*, WTO Members retained Article XX(g) from the General Agreement on Tariffs and Trade 1947 (the "GATT 1947") without alteration after the conclusion of the Uruguay Round, being "fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy". … Thus, by authorizing in Article XX(g) measures for environmental conservation, an important objective referred to in the Preamble to the WTO Agreement, Members implicitly recognized that the implementation of such measures would not be discouraged simply because Article XX(g) constitutes a defence to otherwise WTO-inconsistent measures.[173]

From this reasoning, it is clear that in the Appellate Body's view, measures with the goal of environmental protection fall within the scope of Article XX(g). It is uncontroversial that a measure that is ostensibly directed towards reducing GHG emissions (through ILUC or otherwise) falls within this characterisation.[174] The Appellate Body has nonetheless stressed the importance of assessing the design and structure of the challenged measure, which "helps to determine whether or not a measure does what it purports to do".[175] The panel in this dispute will need to conduct such an analysis.

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[171] Appellate Body Report, *China — Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, ¶ 5.96, WTO Docs. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (adopted Aug. 29, 2014) [hereinafter *China — Rare Earths (ABR)*].

[172] *Id.* ¶ 5.94.

[173] *EC — Tariff Preferences (ABR)*, *supra* note 51, ¶ 95.

[174] Similarly, the objective of the Gasoline Rule in *US — Gasoline* was "stabilizing and preventing further deterioration of the level of air pollution in 1990", which the Appellate Body was satisfied fell within the scope of Article XX(g). *See US — Gasoline (ABR), supra* note 123, ¶ 19.

[175] *China — Rare Earths (ABR)*, *supra* note 171, ¶ 5.96.

b. Whether the Measure is "related to" this Objective

Regarding whether the Renewable Energy Package is "related to" this objective, the Appellate Body has, as noted, interpreted this as requiring an analysis of whether there is "a close and genuine relationship of ends and means" between that measure and the conservation objective in question.[176] If the measure at issue is "merely incidentally or inadvertently aimed at a conservation objective", it will not satisfy the standard captured in the phrase "relating to" in Article XX(g).[177] Moreover, "where the design and structure of a challenged measure clearly illustrate the absence of a nexus between that measure and the conservation objective, it would be difficult to attribute the evidence of positive effects on conservation to that measure".[178] Finally, though the Appellate Body has clearly articulated the analytical differences between the requirements that a measure "relate" to the conservation of an exhaustible natural resource under Article XX(g) and the "necessity" standard under (*inter alia*) Article XX(b) (discussed above),[179] it is noteworthy that evidence of the "contribution" a measure makes to its objective in a "necessity" analysis could be useful in assessing whether a "close and genuine relationship of ends and means" exists between that measure and the conservation objective for the purposes of Article XX(g).[180]

In this respect, the reasoning of the Appellate Body in *US — Shrimp* may be particularly relevant to the panel's analysis. The Appellate Body examined the relationship between the "general structure and design" of the measure and its objective of conserving sea turtles. It noted first that Section 609(b)(1) of Public Law 101–162 (the measure at issue) imposed an import ban on shrimp that had been harvested with technology that was not equipped with so-called turtle excluder devices (TEDs), which may thus adversely affect sea turtles.[181] The Appellate Body noted that the provision was designed to "influence countries to adopt national regulatory programs requiring the use of TEDs by their shrimp fishermen".[182] It further noted two exemptions from the import ban. First, Section 609 and its accompanying guidelines excluded shrimp harvested "under conditions

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[176] *Id.* ¶ 5.90 (citing *US — Shrimp (ABR)*, *supra* note 123, ¶ 136; *China — Raw Materials (ABR), supra* note 115, ¶ 355).
[177] *China — Rare Earths (ABR)*, *supra* note 171, ¶ 5.90 (citing *US — Gasoline (ABR), supra* note 123, ¶ 18).
[178] *China — Rare Earths (ABR)*, *supra* note 171, ¶ 5.112.
[179] *US — Gasoline (ABR)*, *supra* note 123, ¶ 17.
[180] *China — Rare Earths (ABR)*, *supra* note 171, ¶¶ 5.116–5.117.
[181] *US — Shrimp (ABR)*, *supra* note 123, ¶ 138.
[182] *Id.*

that do not adversely affect sea turtles" from the import ban. Second, under Section 609(b)(2), the measures exempted shrimp caught in waters subject to the jurisdiction of certain certified countries. Certification was available for countries that had a fishing environment that posed no, or a negligible, threat to sea turtles; or those that adopted regulations requiring the use of TEDs on commercial shrimp trawling vessels where those vessels operated in areas where they were likely to encounter sea turtles.[183] The Appellate Body accepted the connection between the prohibition and the exceptions, and the US objective of conserving sea turtles. The Appellate Body noted that:

> In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake, it appears to us that Section 609, cum implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends.[184]

This reasoning is notable in the context of the Renewable Energy Package in this dispute. Specifically, the Renewable Energy Package is similarly composed of a limiting element (that biofuels derived from high ILUC-risk feed crops may not be taken into account in assessing whether an EU Member State has achieved its renewable energy target), and exceptions (for low ILUC-risk biofuels). The measures do not, in the words of the Appellate Body, amount to a "simple, blanket prohibition" on the counting of palm oil-derived biofuel — where it is high risk, it cannot be counted; where it is low risk, it can. However, if a panel in this dispute were to give particular weight to the Appellate Body's reflections on whether a measure is "disproportionately wide in its scope and reach in relation to the policy objective",[185] the EU may again be forced to defend the criteria for low ILUC-risk designation. Specifically, as discussed above in the context of Article XX(b), the requirements for improved agricultural practices and additionality suggest that business-as-usual palm oil production could not satisfy the ILUC-risk criteria, regardless of whether the production in question was related to ILUC. Constant yields and scale production may indicate that there are no barriers to production that must be overcome for viability, and as such the crop would not be eligible for low ILUC-risk status, even though no ILUC occurred. As also noted, the

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[183] *Id.* ¶¶ 139–140.
[184] *Id.* ¶ 141.
[185] *Id.*

sustainability criteria may exclude biofuel derived from feed crop that was cultivated *after* any ILUC-related emissions occurred. It is possible that all these factors indicate that the Renewable Energy Package is "disproportionately wide", as described by the Appellate Body.

However, notwithstanding the comments in *US — Shrimp*, a panel may be reluctant to engage in such an analysis; we consider the adoption of such reasoning to be unlikely. Specifically, the panel will, we expect, be reticent about being understood to conflate the legal standard in Article XX(g) ("relating to") with the legal standard in Article XX(b) ("necessary", which entails an assessment of whether there are less trade-restrictive alternative measures that would make an equivalent contribution to the objective), contrary to Appellate Body jurisprudence.[186] Indeed, the Appellate Body's articulations of the standard under Article XX(g) being one of whether the Renewable Energy Package is "primarily aimed at",[187] or bears "a close and genuine relationship of ends and means"[188] to, the conservation of an exhaustible natural resource are likely to dissuade a panel from adopting this approach.

c. Whether the Measure is Made Effective in Conjunction with Restrictions on Domestic Production or Consumption

The final element of the analysis under Article XX(g) of the GATT 1994 relates to whether the Renewable Energy Package is "made effective in conjunction with restrictions on domestic production or consumption". The Appellate Body has interpreted this requirement as denoting "a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources".[189] This may be evidenced by whether the trade restriction "works together" with domestic production or consumption.[190]

The Renewable Energy Package functions such that biofuels that are derived from feed crops that have a high ILUC risk under the EU's methodology are limited in the extent to which they can be accounted for in a calculation of renewable energy consumption in an EU Member State.[191] This limitation applies irrespective of whether a high ILUC feedstock is domestically produced or imported. Indeed, this

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[186] *US — Gasoline (ABR), supra* note 123, ¶ 17.
[187] *Id.* ¶ 19; *US — Shrimp (ABR), supra* note 123, ¶¶ 141–142.
[188] *See China — Rare Earths (ABR), supra* note 171, ¶ 5.90.
[189] *US — Shrimp (ABR), supra* note 123, ¶ 143 (quoting *US — Gasoline (ABR), supra* note 123, ¶ 20).
[190] *China — Raw Materials (ABR), supra* note 115, ¶ 360.
[191] RED II, *supra* note 1, art. 26.

distinguishes the measures in this dispute from others that have been considered under Article XX(g), under which the measures at issue have typically distinguished between imported and domestic products (either *de jure* or *de facto*), such that the inquiry has been whether this distinction prevents an "even-handed" approach to limiting production or consumption in the pursuit of a WTO Member's conservation objective.[192] It would therefore appear that the EU can satisfy this requirement of Article XX(g).

Based on the above, it appears the WTO case law supports the notion that the Renewable Energy Package would be provisionally justified under Article XX(g), at least based on the face of the measures.

3. The Chapeau

As noted above, the *chapeau* of Article XX of the GATT 1994 provides that a measure that is provisionally justified under one of the subparagraphs of Article XX must not be "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".

In its early interpretation of the *chapeau*, the Appellate Body indicated that its function is to prevent the "abuse" or misuse of a Member's right to invoke the exceptions contained in the subparagraphs of Article XX.[193] This means that the invocation of the exception must be balanced against the rights that are to be enjoyed by other WTO Members under the terms of the GATT 1994.[194] The question of whether a measure is "applied" in a manner that upsets this balance "can most often be discerned from the design, the architecture, and the revealing structure of a measure".[195] Such a consideration is relevant to the establishment of whether the measure, "in its actual or expected application", constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[196]

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[192] *US — Gasoline (ABR), supra* note 123, ¶ 20; *US — Shrimp (ABR), supra* note 123, ¶¶ 144–145; *China — Rare Earths (ABR), supra* note 171, ¶¶ 5.93–5.94.
[193] *US — Gasoline (ABR), supra* note 123, ¶ 22; *EC — Seal Products (ABR), supra* note 51, ¶ 5.297.
[194] *US — Shrimp (ABR), supra* note 123, ¶ 156.
[195] *EC — Seal Products (ABR), supra* note 51, ¶ 5.302 (citing Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, ¶ 29, WTO Docs. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996) [hereinafter *Japan — Alcoholic Beverages II (ABR)*]).
[196] *Id.*; *US — Shrimp (ABR), supra* note 123, ¶ 160.

The Appellate Body has broken the legal standard within the *chapeau* to its constituent parts — *first*, the application of the measure must result in discrimination; *second*, that discrimination must be arbitrary or unjustifiable; *third*, the discrimination must occur between countries where the same conditions prevail.[197]

With respect to the "discrimination" element, Indonesia is likely to point to the discrimination it experiences as a result of the fact that its exports — palm oil-derived biofuels — suffer less favourable treatment vis-à-vis like domestic products, and that such products are not accorded the same advantages as imports of like products from other countries. It is important to note that these standards of discrimination are not identical[198] under the substantive obligations in Articles I:1 and III:4 of the GATT 1994, and as such, the "discrimination" standard under the *chapeau* is not automatically satisfied or proven by a finding of inconsistency with a substantive non-discrimination obligation in GATT 1994.[199] However, as the Appellate Body noted in *EU — Seal Products*, this does not mean that the "circumstances that bring about the discrimination that is to be examined under the *chapeau* cannot be the same as those that led to the finding of a violation of a substantive provision of the GATT 1994".[200] Indeed, in *EU — Seal Products*, the Appellate Body was satisfied that the cause of the discrimination under Article I:1 of the GATT 1994[201] should be examined under the "discrimination" standard in the *chapeau*. For reasons that will become clear presently, Indonesia is likely to pursue such an argument in this dispute.

Regarding the analysis of whether the relevant discrimination is "arbitrary or unjustifiable" in character, the Appellate Body has interpreted this standard based on a consideration of whether the discrimination "can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has

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[197] *US — Shrimp (ABR), supra* note 123, ¶ 150.

[198] *EC — Seal Products (ABR), supra* note 51, ¶ 5.298.

[199] *US — Gasoline (ABR)*, *supra* note 123, ¶ 23; *EC — Seal Products (ABR), supra* note 51, ¶ 5.298.

[200] *EC — Seal Products (ABR)*, *supra* note 51, ¶ 5.298 (referring to *US — Gasoline (ABR)*, *supra* note 123, ¶ 23).

[201] The Appellate Body endorsed the Panel's view in this case that the relevant discrimination under both Article I:1 and the *chapeau* was the different regulatory treatment that the measure accorded "to seal products derived from 'commercial' hunts, on the one hand, as compared to seal products derived from IC hunts, on the other hand, in combination with the fact that seal hunts in Canada and Norway are primarily 'commercial' hunts, whereas seal hunts in Greenland are predominantly IC hunts". *See EC — Seal Products (ABR)*, *supra* note 51, ¶¶ 5.316–5.318.

been provisionally justified under one of the subparagraphs of Article XX".[202] Put differently, "the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence".[203] In *US — Shrimp*, discussed above, the Appellate Body concluded that the measures resulted in arbitrary or unjustifiable discrimination because (i) the United States maintained a "rigid and unbending requirement" that countries exporting shrimp to the United States adopt a regulation in respect of the use of TEDs that was essentially the same as that maintained in the United States; (ii) the United States discriminated between shrimp-supplying countries regardless of the possibility that such countries may have maintained measures for the conversation of sea turtles, albeit in a form different from those applied by the United States; and (iii) the United States did not negotiate with all (but only some) WTO Members in the pursuit of international agreements for the protection and conservation of sea turtles.[204] Moreover, in *Brazil — Retreaded Tyres*, the Appellate Body considered Brazil's decision to import tyre castings from Mercosur countries, further to a decision by a Mercosur tribunal,[205] to be a rationale that bore no relationship to the accomplishment of Brazil's objective — that was, to reduce exposure to risks (i.e. mosquito-borne disease) arising from the accumulation of waste tyres to the maximum extent possible. The loosening of the import ban in response to the Mercosur tribunal decision was therefore considered by the Appellate Body to amount to arbitrary or unjustifiable discrimination, contrary to the *chapeau* of Article XX, because it bore no relationship to the objective pursued by Brazil's import ban.[206]

In the present context, Indonesia will be inclined to identify countries where similar conditions prevail (which we discuss next) and then argue that the discrimination between them is arbitrary or unjustifiable. Indonesia's primary way of doing this might be expected to be based on the ILUC risks associated with different crops. As discussed above, Indonesia is likely to challenge the EU's

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[202] 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*, ¶ 7.316, WTO Doc. WT/DS381/AB/RW (adopted Dec. 3, 2015) [hereinafter *US — Tuna II (Mexico) (Article 21.5–Mexico) (ABR)*].

[203] *See Brazil — Retreaded Tyres (ABR)*, *supra* note 128, ¶ 226.

[204] *See US — Shrimp (ABR)*, *supra* note 123, ¶¶ 163–176.

[205] The Mercosur tribunal found that the application by Brazil to Mercosur countries of the restriction on imports of remoulded tyres was inconsistent with the prohibition of new trade restrictions under Mercosur law. *See Brazil — Retreaded Tyres (ABR)*, *supra* note 128, ¶ 228.

[206] *Id.* ¶¶ 224–233.

conclusion that palm oil is associated with as high a degree of ILUC as is concluded in the Production Expansion Report. In the context of the *chapeau*, this is relevant because (similarly to *US — Shrimp*) the EU is discriminating between biofuel-supplying countries based on a global conclusion with respect to the association between palm oil and ILUC, regardless of the connection between a given palm oil consignment and ILUC or, indeed, regardless of whether the supplying country maintains measures that address ILUC (either through limitations on land clearing, or GHG mitigation).

In addition, Indonesia could simultaneously argue that the ILUC effects of other crops — especially soy — have been *understated* in the Production Expansion Report. Indeed, one publicly available study of this issue ranks soy oil *together with* palm oil in terms of whether they should be identified as high ILUC risk, and recommends that both be categorised together for this purpose.[207] If this is correct, and/or if Indonesia can persuade the panel that there is no distinction between these feed crops for the purpose of identifying ILUC risk, there will be a strong argument that the EU is discriminating between Indonesia and soy-producing countries, and that such discrimination is not rationally connected to the EU's objective of reducing GHG emissions caused by ILUC. The EU would therefore be required to justify the basis upon which it arrived at its distinction between oils derived from these two crops — specifically, it will need to persuade the panel that the difference in the respective treatment given to these crops *is* rationally connected to its objective because the ILUC risk associated with the two feed crops is not comparable. In this respect, one reported comment by an EU official indicates that the EU identified a 10% threshold for expansion of production area to be designated as high ILUC risk, and that this is based on the notion that biofuels produced from crops exceeding an expansion of 14% will achieve no emission savings at all when compared with fossil fuels.[208] Soy falls below this threshold (8%) according to the Production Expansion Report; palm oil exceeds it comfortably (45%).[209] The EU will, therefore, be pressed to defend the basis upon which it arrived at its threshold levels and thus permitted this distinction; the panel's analysis in this respect may well turn on this point.

As noted, the panel will also need to consider whether any discrimination is between countries where the same conditions prevail. The Appellate Body has

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[207] *See* Chris Malins, *Risk Management: Identifying High and Low ILUC-risk Biofuels Under the Recast Renewable Energy Directive*, 3 CERULOGY (Jan. 2019).

[208] *See* Gerardo Fortuna, *Biofuels: Commission blacklists palm oil, throws soybeans lifeline*, EURACTIV, (Feb. 12, 2019), https://www.euractiv.com/section/agriculture-food/news/biofuels-commission-blacklists-palm-oil-throws-soybeans-lifeline/.

[209] Production Expansion Report, *supra* note 3, at 8.

indicated that the precise analysis in this respect depends on the particular subparagraph of Article XX under which the measure is provisionally justified.[210] Put differently, "the 'conditions' relating to the particular policy objective under the applicable subparagraph are relevant for the analysis under the chapeau".[211] Limiting itself to the arguments of the parties in *EC — Seal Products*, the Appellate Body noted that the EU (as respondent) had not argued that there were relevant differences in the welfare conditions between different countries in which seals were hunted, or between seal hunts that differed based on the identity of the hunter, or in the purpose of seal hunts between Canada, Norway, and Greenland.[212]

The EU bears the burden of proof in this respect,[213] and will argue that the discrimination in question under the *chapeau* is between countries that produce different feed crops, and that this difference in feed crop production is sufficient to indicate that the prevailing conditions in these different countries are not the same. This will again boil down to the extent to which the feed crops exported by each country are associated with an unacceptable (by the EU methodology) risk of ILUC. Indonesia will draw on the arguments above to argue that the conditions are the same between Indonesia (as a source of palm) and other countries (as sources of soy), insofar as there is no good reason to discriminate against the former given the ILUC risk associated with the latter.[214]

Based on the above, in the absence of a robust defence of the factual underpinnings of the Renewable Energy Package (which rebuts the points raised above), we consider it likely that the EU will not be able to discharge its burden of proof under the *chapeau* of Article XX to demonstrate that the measures satisfy the requirements therein.

4. A Jurisdictional Limitation Under Article XX?

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[210] *EC — Seal Products (ABR)*, *supra* note 51, ¶ 5.300; *Indonesia — Import Licensing Regimes(ABR), supra* note 116, ¶ 5.99.
[211] *EC — Seal Products (ABR)*, *supra* note 51, ¶ 5.300.
[212] *Id.* ¶ 5.317.
[213] *US — Gasoline (ABR)*, *supra* note 123, ¶ 22.
[214] Readers will note a tension here in the arguments that Indonesia will need to make. It will, on the one hand, be arguing that there is no basis for associating palm oil with a high risk of ILUC; it will, on the other, be arguing that to the extent that palm oil-derived biofuel can be associated with high ILUC risk, there is no reason to distinguish between it and biofuels derived from other feed crops because they pose an equivalent ILUC risk. Indonesia will need to take care when navigating these arguments so as not to appear contradictory.

The Appellate Body has noted, though not elaborated on, the question of whether Article XX of the GATT 1994 carries an inherent jurisdictional limitation, which might prevent WTO Members from addressing activities occurring outside their jurisdictions through the imposition of trade measures. In *US — Shrimp*, in the Appellate Body's assessment of whether the use of TEDs was a condition for market access, it touched on the issue of shrimp caught *outside* the US' jurisdiction. In that dispute, the Appellate Body noted that it would "not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g) [the exception in question] and if so, the nature or extent of that limitation".[215] It was able to resolve the dispute by noting that there was a "sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)", because the sea turtles at stake were "known to occur in waters over which the United States exercises jurisdiction".[216] In *EC — Seal Products*, the Appellate Body similarly chose not to examine the question of whether there is an implied jurisdictional limitation in Article XX(a) of the GATT 1994 (regarding measures necessary to protect public morals). In that case, the measures at issue addressed seal hunting activities occurring within and outside the European Community, as well as the seal welfare concerns of citizens and consumers within EU Member States.[217] In that dispute, the parties agreed that there was a sufficient nexus between the activities addressed by the measure and the EU.[218] This issue may arise in the context of this dispute, given that the effect of the Renewable Energy Package is to address GHG emissions caused by ILUC *outside of the EU*.

Much has been written about this issue.[219] Notwithstanding the academic debate in this respect, it is likely that a panel will address the issue in this dispute in the context of the formulation of the objective of the Renewable Energy Package. Specifically, it might be guided by the approach adopted by the Panel in *US — Tuna II (Mexico)*. In that dispute, the Panel (and then the Appellate Body) assessed the United States' measures regulating the circumstances under which products would be eligible to use a "dolphin safe" label on tuna products, particularly regarding the detrimental effect of certain fishing practices on dolphins. By doing

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[215] *US — Shrimp (ABR)*, *supra* note 123, ¶ 133.
[216] *Id.*
[217] *EC — Seal Products (ABR)*, *supra* note 51, ¶ 5.173.
[218] *Id.* ¶ 5.173, n. 1191.
[219] *See, e.g.*, Howse & Regan, *supra* note 89, at 274–279; Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, 36(2) WORLD TRADE J. 353 (2002); Margaret Young, *Trade Measures to Address Climate Change: Territory and Extraterritoriality*, *in* RESEARCH HANDBOOK ON CLIMATE CHANGE AND TRADE LAW 329–351 (Panagiotis Delimatsis ed., 2016).

so, the measures at issue had the effect of regulating fishing for tuna products within, and outside of, its jurisdiction. The Panel accepted the United States' characterisation of its objectives as, first, "ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins",[220] and second, "contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins".[221] By casting the objectives of the measure in this way, there was a clear link between the objective of the measure and the legislative jurisdiction of the United States.

In the present dispute, the chief difficulty faced by the EU derives from the methods of GHG emissions accounting under international law. Specifically, under the UNFCCC, the Kyoto Protocol, and the Paris Agreement, GHG emissions are based on production, rather than on consumption. As such, emissions are "territorially-bounded"; their calculation is linked to the jurisdiction in which the emissions are produced.[222] It is therefore unclear, at least at a high level, what basis the EU has for regulating the emissions caused by the production of goods in *another* jurisdiction; more specifically, the EU's basis for seeking to account for GHG emissions caused by the farming of palm oil in Indonesia through its own measures is dubious, by this reasoning.

It might be expected that the EU, and/or the panel, will use an approach similar to that in *US — Tuna II (Mexico)* to get around this issue. The EU might, for example, argue that the objective of the measures is to ensure that the EU market is not used to encourage the production of fuels which adversely affect the environment through the increase of GHG emissions caused by ILUC, in a manner similar to the characterisation in *US — Tuna II (Mexico)*. However, in that dispute, ensuring that the US market was not used to add to the demand for dolphin-unfriendly tuna products was more straightforward given the absence of equivalent measures in Mexico (which was the complainant). In this dispute, however, Indonesia has its *own* NDC under the Paris Agreement. This NDC notes that land-use change accounts for 60% of its emissions, and refers to measures that have been introduced in Indonesia to reduce emissions associated with land-use change.[223] It

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[220] *US — Tuna II (Mexico)*, *supra* note 90, ¶ 7.413, 7.401.

[221] *US — COOL (ABR)*, *supra* note 140, ¶¶ 7.394–7.425.

[222] See discussion in Young, *supra* note 219, and in Joanne Scott, *The Geographical Scope of the EU's Climate Responsibilities*, 17 CAMBRIDGE Y.B. EUR. LEGAL STUD. 1 (2015).

[223] Indonesia states in this document:

> Indonesia has taken significant steps to reduce emissions in land use sector by instituting a moratorium on the clearing of primary forests and by prohibiting conversion of its remaining forests by reducing

may, therefore, be difficult for the EU to argue that its market is being used to increase demand for GHG-intensive products if those emissions are indeed addressed in Indonesia. Moreover, putting aside the production-based calculation of GHG emissions, and without seeking to prejudge the success of these measures in Indonesia, this scenario naturally begs the question of whether the measures are necessary *at all* if measures to prevent ILUC have been implemented already — put differently, it may even be arguable that the measures make *no* contribution to their objective because they duplicate actions already taken in Indonesia.

This jurisdictional issue may therefore arise in the context of several different steps of the analysis under Article XX of the GATT 1994; the exact point in the analysis will depend on the arguments made by the parties. Regardless of the point of the analysis under which it is considered, it is likely to make the EU's defence of the Renewable Energy Package even more difficult.

5. Article XX: Conclusions

In summary, the EU faces several challenges in its defence of the Renewable Energy Package under Article XX of the GATT 1994. Though we consider it likely that the EU will be able to demonstrate that the measures are provisionally justified under Article XX(g), it is less clear to us that the EU will be able to demonstrate that the measures are provisionally justified under Article XX(b), due, in part, to the stricter "necessity" standard under the latter, and also the complexity of the factual arguments that are likely to be ventilated before the panel.

Perhaps more crucially, though, it is unlikely that the measures will satisfy the *chapeau* of Article XX (regardless of whether they are provisionally justified under either Article XX(b) or XX(g)), especially if Indonesia can successfully discredit the distinction between the ILUC risk associated with palm oil and that associated with other feed crops.

This conclusion certainly raises the issue of whether ILUC can be addressed through trade measures that discriminate against products that are associated with that phenomenon. As we have set out above, NPR-PPMs (here, the GHG

> deforestation and forest degradation, restoring ecosystem functions, as well as sustainable forest management which include social forestry through active participation of the private sector, small and medium enterprises, civil society organizations, local communities and the most vulnerable groups.

It does not elaborate on these measures, however. *See* Government of Indonesia, *First Nationally Determined Contribution: Republic of Indonesia*, 2 (Nov. 2016).

emissions associated with palm oil production) do not provide a basis for distinguishing between products for the purpose of determining whether non-discrimination obligations under the GATT are owed to them. Moreover, addressing ILUC in other countries through trade measures does not sit well with the concept in international environmental law of nationally determined contributions (and this will be one of the most interesting issues to come out of this dispute). To be sure, there are numerous elements of the design of the Renewable Energy Package that make it problematic under the WTO law, as we have discussed at length above. It may, on one hand, be reasonably posited that the difficulties we have identified cannot be extrapolated beyond the measures that constitute the Renewable Energy Package as they are drafted. However, as discussed, even measures that might address ILUC in a more targeted and/or less discriminatory manner raise difficult questions in respect of their trade-restrictive effect, or whether they are so burdensome as to be unfeasible in practice. It is tempting, therefore, to pose the question of whether ILUC should be addressed through means other than trade measures. As noted, a feasibility study prior to the enactment of the Renewable Energy Package included a review of mechanisms relating to investment in and financing of sustainable agriculture, which need not (at least at a high level) have any implications from a WTO law perspective.[224] In light of the conclusions outlined above, and in particular if these are confirmed by a WTO panel, the question of the suitability of trade measures for dealing with ILUC risk will necessarily be a live one.

IV. WHETHER THE RENEWABLE ENERGY PACKAGE IS INCONSISTENT WITH THE TBT AGREEMENT

Indonesia has challenged the Renewable Energy Package as being inconsistent with Articles 2.1, 2.2, 2.4, 2.5, 2.8, 2.9. 5.1, 5.2, 5.6, 5.8, 12.1 and 12.3 of the TBT Agreement. For reasons of brevity, and because of their crossover with the obligations discussed above, we focus only on the claims under Articles 2.1 and 2.2 of the TBT Agreement.

Indonesia's substantive claims under Articles 2.1 and 2.2 of the TBT Agreement require, as a threshold matter, that the Renewable Energy Package be a "technical regulation" within the meaning of Annex 1 of the TBT Agreement. If the measures are not a "technical regulation", they are not subject to these obligations. It should be noted that Indonesia's challenge under Articles 2.1 and 2.2 of the TBT Agreement is described in its Request for Consultations as the "limiting and phasing out [of] the use of oil palm crop-based biofuels for meeting EU renewable energy targets, taking into account the criteria for determining high ILUC-risk

[224] Ecofys, Milieu, COWI & EC, *supra* note 157, pt.II, at 128–133.

feedstock and the criteria for certifying low ILUC-risk biofuels".[225] This formulation is significant in that it appears to indicate that Indonesia seeks only to challenge, under Article 2.1 and 2.2, the elements of the measure at issue that limit the extent to which high ILUC-risk fuels can be taken into account for determining whether an EU Member State has achieved its renewable energy target. It suggests that Indonesia does *not* explicitly challenge the GHG and/or the sustainability criteria under these provisions, unlike its claims under the GATT 1994.

A. Whether the Renewable Energy Package is a "Technical Regulation"

Annex 1 of the TBT Agreement defines a "technical regulation" as a "[d]ocument 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."

Based on this definition, a measure will constitute a technical regulation depending on whether it satisfies three cumulative criteria:

(i) The document must apply to an identifiable product or group of products;
(ii) The document must lay down one or more characteristics of the product or its related processes and production methods; and
(iii) Compliance with the product characteristics must be mandatory.[226]

1. Identifiable Product or Group of Products

Regarding the *first* requirement, the agreement does not mandate that the technical regulation expressly identifies the products that fall within its scope; it requires only that the products to which it applies are "identifiable".[227]

In this respect, Article 25 of the RED II sets out that the share of renewable energy within the final consumption of energy in the transport sector should be at least 14% by 2030.[228] Article 26(2) of the RED II states in full that:

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[225] Indonesia's Request for Consultations, *supra* note 8, ¶¶ 34(i)–34(ii).
[226] Appellate Body Report, *US — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 183, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012) [hereinafter *US — Tuna II (Mexico)(ABR)*].
[227] *EC — Asbestos (ABR)*, *supra* note 63, ¶ 70.

> 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%.[229]

The terms "biomass", "biomass fuels", "bioliquids", and "biofuels" are all defined in the RED II.[230] "Biofuels", for example, are defined as "liquid fuels for transport produced from biomass".[231]

In terms of ILUC risk, Article 26(2) mandates that the Commission adopt a delegated act 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".[232] This is done through the ILUC Regulation, which "lays down the criteria for determining the high ILUC-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed, and for certifying low ILUC-risk biofuels, bioliquids and biomass fuels".[233] It sets out the methodology for determining high ILUC-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed.[234]

It is also noted that in the RED II "low indirect land-use change-risk biofuels, bioliquids and biomass fuels" are defined to mean:

> [B]iofuels, 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

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[228] RED II, *supra* note 1, art. 25(1).
[229] *Id.* art. 26(2).
[230] *Id.* arts. 2(24), 2(27), 2(32) & 2(33) (respectively).
[231] *Id.* art. 2(33).
[232] *Id.* art. 26(2).
[233] *Id.* art. 1.
[234] *Id.* art. 3.

> 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.[235]

Article 26(2) of the RED II also mandates that the Commission adopt a delegated act to set out the criteria for certification of low ILUC-risk biofuels, bioliquids and biomass fuels, which is done through the ILUC Regulation.[236]

Reading these aspects of the Renewable Energy Package together, it is clear that they identify the products to which the measures apply (to establish what may count towards consumption of renewable energy), either because of the definitions in the RED II, or under the methodology set out in the ILUC Regulation for distinguishing among different types of feedstock from which those defined products may be derived. This indicates that the Renewable Energy Package applies to an "identifiable product or group of products" within the meaning of Annex 1 of the TBT Agreement.

2. The Document Lays Down One or More Characteristics of the Product or its Related Processes and Production Methods

The second requirement for a measure to be characterised as a technical regulation is that it sets out one or more characteristics of the product or its related processes and production methods. Such an assessment "must be made in the light of the characteristics of the measure at issue and the circumstances of the case", giving "particular weight to the 'integral and essential' aspects of the measure".[237]

The panel in this dispute is likely to draw significant guidance from the Appellate Body's reasoning in *EC — Seal Products*. The measure at issue in that dispute — the EU Seal Regime — set out "rules concerning the placing on the market of seal products", which was permitted "only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence". Further "derogations" from the prohibition permitted the importation of a seal product by a traveller under prescribed conditions, or where the seal products in question resulted from by-products of certain marine resource management hunting, and was marketed on a non-profit basis.[238] The Panel in that dispute found that the EU Seal Regime therefore "prohibit[ed] all seal products,

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[235] *Id.* art. 2(37).
[236] *Id.* art. 4.
[237] *EC — Seal Products (ABR)*, *supra* note 51, ¶ 5.19.
[238] *Id.* ¶ 5.16.

whether they [were] made exclusively of seal or contain seal as an input", though it made an exception with regard to the import and/or placing on the market of seal products in these three situations. On this basis, the Panel found that the "prohibition on seal-containing products under the EU Seal Regime lays down a product characteristic in the negative form by requiring that all products not contain seal".[239]

The Appellate Body disagreed with the Panel's analysis. In doing so, it was critical of the Panel's focus on the prohibition on seal products, without correctly considering the "permissive" elements that allowed seal products under certain conditions.[240] The Appellate Body read the Panel as having "treated the identity of the hunter, the type of hunt, and the purpose of the hunt as 'product characteristics' within the meaning of Annex 1.1", based on their being "objectively definable features" of seal products that "lay down particular 'characteristics' of the final products". The Appellate Body was particularly critical of this reasoning, noting that it saw "no basis in the text of Annex 1.1, or in prior Appellate Body reports, to suggest that the identity of the hunter, the type of hunt, or the purpose of the hunt could be viewed as product characteristics", nor a basis for finding that the exceptions under the EU Seal Regime set out product characteristics.[241] The Appellate Body ultimately did not consider it appropriate to complete the Panel's analysis by assessing whether the EU Seal Regime set out "related processes and production methods" within the meaning of Annex 1.1 to the TBT Agreement.[242] Regardless, the critical point for the present purpose is the Appellate Body's main conclusion that the integral and essential aspects of that measure — the prohibition on seal products and the exceptions for seal products "based on the identity of the hunter or the type or purpose of the hunt from which the product [was] derived" — indicated the EU Seal Regime was concerned with establishing the conditions for placing seal products on the EU market, and that those conditions indicated that the measures did not lay down product characteristics.

In the context of the measures challenged by Indonesia, this reasoning is likely to be relied on heavily by the EU. Recall that the RED II does not prohibit the use of palm oil-derived biofuels. Instead, it limits the share of high ILUC-risk biofuels that may be taken into account in an assessment of whether the relevant renewable

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[239] *EC — Seal Products*, *supra* note 91, ¶¶ 7.104–7.106.
[240] *EC — Seal Products (ABR)*, *supra* note 51, ¶ 5.28.
[241] *Id.* ¶ 5.45.
[242] *Id.* ¶ 5.69.

energy target has been met.[243] A determination as a high ILUC-risk feed stock is based on, cumulatively:

- Whether 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
- Whether the share of such expansion into land with high-carbon stock is higher than 10%, in accordance with a specified formula.[244]

Low ILUC-biofuels may only be certified as such if they (i) comply with the sustainability and GHG emissions saving criteria; (ii) have been produced from additional feedstock obtained through additionality measures (as defined); and (iii) supporting evidence of such is "duly collected and thoroughly documented by the relevant economic operators".[245]

In our view, there are parallels between the Renewable Energy Package and the measures analysed by the Appellate Body in *EC — Seal Products*. Specifically, the Renewable Energy Package sets out criteria for the circumstances in which palm oil-derived biofuel can be taken into account when assessing whether an EU Member State has achieved the renewable energy target for the transport sector. These circumstances are, specifically, the ILUC-related characteristics of the feed crop used in the biofuel. Critically, however, these characteristics *appear to have no bearing on the characteristics of the biofuel itself*, nor *on the characteristics of the feed crop*. The distinction is drawn based on the circumstances that *precede* the cultivation of the feed crop in question and, in particular, whether that cultivation involves crop expansion into carbon-rich areas (and, by extension, ILUC and consequent GHG emissions). In our view, this could be seen as broadly equivalent to legal marketing of seal products being based on the identity of the hunter or the type or purpose of the hunt from which the product was derived — in both cases, the phenomenon that serves as the distinction between the different products has no bearing on their characteristics, as per the Appellate Body's logic in *EC — Seal Products*.

If the Renewable Energy Package does not lay down product characteristics, the question will become whether they lay down "processes and production methods" (PPMs) that are "related" to "product characteristics within the meaning of Annex 1.1 of the TBT Agreement". In the reasoning of the Appellate Body, the reference to "or their related processes and production methods" indicates "that the subject matter of a technical regulation may consist of a process or production method

[243] RED II, *supra* note 1, arts. 26(2) & 25(1).
[244] The ILUC Regulation, *supra* note 33, art. 3.
[245] *Id.* art. 4.

that is related to product characteristics"; whether a measure lays down related PPMs must be determined through an examination of whether the PPMs laid down by the measure "have a sufficient nexus to the characteristics of a product in order to be considered related to those characteristics".[246]

The precise contours of the required "nexus" between the PPMs laid down by a measure and the characteristics of a product have not been elaborated by a panel or by the Appellate Body. In *EC — Seal Products*, the Appellate Body appeared disappointed that the parties had not developed arguments in respect of whether the identity of the hunter or the type or purpose of the hunt from which the seal product was derived bore a sufficient nexus to the seal product itself; in the absence of such arguments, or reasoning by the Panel in this respect, it did not consider it appropriate to complete the Panel's analysis by considering whether the EU Seal Regime laid down "related processes and production methods" within the meaning of Annex 1.1 to the TBT Agreement.[247] Specifically, the Appellate Body was not satisfied that there had been the required "argumentation by the participants and exploration in questioning" of this issue, and it declined to discuss it.[248] This reticence by the Appellate Body is atypical — indeed, one of the main criticisms levelled against it is that its pronouncements exceed what is necessary to resolve a particular dispute.[249] It is persuasive to consider that, had the Seal Regime laid down "PPMs" that were "related" to the product characteristics of seal products, and had thus been within the scope of the TBT Agreement (contrary to the Appellate Body's finding), then the Appellate Body would have explored this issue and reached this conclusion. To the extent this is true, and that any PPMs laid down by the Seal Regime measure were not related to the "product characteristics" of seal products, this would, in our view, serve as a useful analogy with the measures challenged by Indonesia in this dispute. Indeed, we have discussed above whether the distinctions drawn by the Renewable Energy Package with respect to ILUC risk are PR-PPMs or NPR-PPMs, and have concluded that the latter is the case. In this context, we view the ILUC-risk requirements as being little more related to the characteristics of biofuel products than the identity of the hunter or the purpose of the hunt in *EC — Seal Products*.[250]

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[246] *EC — Seal Products (ABR)*, *supra* note 51, ¶ 5.12.

[247] *Id.* ¶ 5.69.

[248] *Id.* Typically, the Appellate Body will only complete a panel's analysis in certain circumstances, such as whether there are sufficient undisputed facts on the record to provide a basis for its own analysis. *See, e.g.*, *Korea — Beef (ABR)*, *supra* note 98, ¶ 128.

[249] *See* U.S.T.R., REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION, pts. II.C & II.D (Feb. 2020).

[250] It is perhaps important here to draw a distinction between the decision in *EC — Seal Products* and that in *US — Tuna II (Mexico)*. In *US — Tuna II (Mexico)*, the Appellate Body

Based on the foregoing, we expect that the panel will find that the Renewable Energy Package does not lay down one or more characteristics of the product or its related processes and production methods within the meaning of Annex 1.1 of the TBT Agreement. By extension, the Renewable Energy Package is not a "technical regulation" within the meaning of Annex 1 of the TBT Agreement and thus is not subject to Articles 2.1 and 2.2 of that Agreement.

3. Whether Compliance with the Product Characteristics Is Mandatory

As the Renewable Energy Package does not lay down product characteristics or their related "PPMs" within the meaning of Annex 1, the question of whether the final element of the definition of "technical regulation" — that compliance with those product characteristics be mandatory — becomes a moot point.

In any event, it is worth noting that the RED II uses language (shall) that might denote the mandatory nature of the calculation of renewable energy use by EU Member States in their implementing legislation, and in particular that high ILUC-risk biofuels cannot be taken into account in determining renewable energy usable beyond the limits specified in the RED II (i.e. the level of consumption of such fuel in 2019, reducing to 0% by 2030).[251]

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was asked to consider whether the United States' dolphin-safe tuna labelling regime fell within the definition in Annex 1 of the TBT Agreement. The measures themselves laid down the criteria under which tuna products could use the "dolphin-safe" label, thereby "establish[ing] a single and legally mandated set of requirements for making any statement with respect to the broad subject of 'dolphin-safety' of tuna products in the United States". Eligibility for the label depended (in summary) on the manner in which tuna products were caught, and in particular whether they were caught in manner that was harmful to dolphins. One might argue that this method of catching tuna similarly has no bearing on the tuna product itself and is neither a "product characteristics" nor a "related" PPM. However, the critical difference in that dispute was that the measures at issue were understood to relate to the eligibility to use the "dolphin safe" *label* on tuna products. Annex 1.1 to the TBT Agreement states that a technical regulation may "include" or "deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method". The term "labelling requirements", as interpreted by the Appellate Body, refers to "provisions that set out criteria or conditions to be fulfilled in order to use a particular label". Though the measures addressed, indirectly, the manner in which tuna was caught, they nonetheless were a measure governed labelling requirements for tuna products, measures which are explicitly included within the scope of "technical regulations" under Annex 1.1 of the TBT Agreement. *See US — Tuna II (Mexico)(ABR)*, *supra* note 226, ¶¶ 183–199.

[251] RED II, *supra* note 1, art. 26(2).

4. Summary Regarding the Application of the TBT Agreement

Summarising these elements of the definition of Annex 1, the Renewable Energy Package is not, in our view, a "technical regulation" within the meaning of that definition. As such, it is not a measure to which Article 2.1 or Article 2.2 would apply, as is implied by Indonesia in its Request for Consultations. We expect the panel to reach this conclusion.

In the event that the panel were to not apply Annex 1 in the manner that we have discussed above, it would proceed with an analysis of the consistency of the measures with the obligations cited by Indonesia in its Request for Consultations. It is worth noting that there is a substantial degree of crossover between the elements of a legal analysis under Articles 2.1 and 2.2 of the TBT Agreement, and with the provisions of the GATT 1994 which we have so far discussed. For this reason, the panel is likely to leverage a number of its factual and legal conclusions in conducting an analysis under Articles 2.1 and 2.2. We explain below what this analysis may look like.

B. Article 2.1 of the TBT Agreement

Article 2.1 of the TBT Agreement provides 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".[252]

Article 2.1 contains a national treatment obligation (prohibiting treatment less favourable to like imported products) and a most-favoured nation obligation (prohibiting such treatment in respect of like products originating in any other country). In demonstrating that a technical regulation is inconsistent with Article 2.1, a complaining Member must demonstrate:

- that the imported and domestic products at issue are "like products"; and

[252] Agreement on Technical Barriers to Trade, art. 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1153 (1994), 1867 U.N.T.S. 187.

- in respect of the *national treatment* obligation, that the technical regulation accords less favourable treatment to imported products than to like domestic products;[253] or
- in respect of the *most-favoured nation* obligation, that the technical regulation accords less favourable treatment to imported products of one or more origins than to like products originating in any other country.[254]

1. Whether the Products at Issue Are "Like Products"

We have already discussed whether the products at issue in this dispute are like products, albeit in the context of Articles I:1 and III:4 of the GATT 1994. To reiterate our comments in those contexts, we consider that it is likely that a panel will find that biofuel derived from high ILUC-risk feed crops is "like" biofuel derived from low ILUC-risk feed crops, and that products that do not fulfil the sustainability and GHG emissions saving criteria are "like" products that do fulfil the sustainability and GHG emissions saving criteria.[255] For the purpose of Article 2.1, the key issue is whether a panel is likely to simply transpose its findings in relation to "likeness" under these two provisions into its analysis of "likeness" in Article 2.1.

Notwithstanding earlier comments by the Appellate Body that the "accordion of likeness" stretches and squeezes depending on the provision in which it appears,[256] the Appellate Body has nonetheless made clear that the concept should be approached from a "competition-oriented perspective" under Article 2.1 of the TBT Agreement, just as under Article III:4 of the GATT 1994.[257] This is because:

> [t]he very concept of "treatment no less favourable", which is expressed in the same words in Article III:4 of the GATT 1994 and in Article 2.1 of the TBT Agreement, informs the determination of likeness, suggest[s] that likeness is about the "nature and extent of a competitive relationship between and among products". Indeed, the concept of "treatment no less favourable" links the products to the marketplace, because it is only in the marketplace that it can be determined how the measure treats like imported and domestic products. … [A] panel should determine the nature and the extent of

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[253] *US — Clove Cigarettes (ABR)*, *supra* note 74, ¶ 87; *US — COOL (ABR)*, *supra* note 140, ¶ 267.
[254] *US — Tuna II (Mexico) (ABR)*, *supra* note 226, ¶ 215.
[255] *See* discussion *supra* Part III.A.
[256] *Japan — Alcoholic Beverages II (ABR)*, *supra* note 195, ¶ 21.
[257] *US — Clove Cigarettes (ABR)*, *supra* note 74, ¶¶ 108–113.

> the competitive relationship for the purpose of determining likeness in isolation from the measure at issue, to the extent that the latter informs the physical characteristics of the products and/or consumers' preferences.[258]

In the context of Articles I:1 and III:4 of the GATT 1994, we have predicated our understanding of "likeness" on the nature and the extent of the competitive relationship between the relevant products, including the extent to which this manifests in questions of the comparability of the products' characteristics, end uses and consumers' preferences. Given the cross-over between the approaches to understanding likeness in Articles I:1 and III:4 of the GATT 1994, and in Article 2.1 of the TBT Agreement, the panel in this dispute is likely to adopt its findings in respect of "likeness" under the GATT 1994 and transpose them into its analysis under Article 2.1 of the TBT Agreement. This approach would lead the panel to conclude that, for the purpose of Article 2.1, biofuels derived from high ILUC-risk feed crops are like biofuels derived from low ILUC-risk feed crops.[259]

2. Whether the Measure at Issue Accords Less Favourable Treatment to Imported Products than to Like Domestic Products, or to Products of Certain Origins

In respect of the "less favourable treatment" standard, the Appellate Body has indicated that guidance for the interpretation of this term in the context of Article 2.1 can also be drawn from Article III:4 of the GATT 1994. Specifically, like Article III:4, Article 2.1 prohibits both *de jure* and *de facto* less favourable treatment. A panel must, therefore, assess the implications for competitive conditions in the particular market to which the measure is applied, and "understand whether the measures modify those conditions to the detriment of imported products".[260]

With respect to the national treatment element of Article 2.1, the panel, in this case, would be able to rely to a large extent on its analysis under Article III:4, given that the "less favourable treatment" applies to both provisions.[261] In our discussion of national treatment under Article III:4 of the GATT 1994, we noted that a panel in this case was likely to reach a conclusion that the Renewable Energy Package treats the group of imported biofuels less favourably, vis-à-vis the group of like domestic biofuels, insofar as the former would include high ILUC-risk products

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[258] *Id.* ¶ 111.

[259] *See supra* p. 40. Recall that it appears that Indonesia does *not* explicitly challenge the GHG and/or the sustainability criteria under Article 2.1.

[260] *US — COOL (ABR)*, *supra* note 140, ¶¶ 269–270.

[261] *US — Tuna II (Mexico) (Article 21.5–Mexico)(ABR)*, *supra* note 202, ¶ 7.278.

and would thus be detrimentally impacted in comparison with the latter. Given the commonality of the standards under Article III:4 of the GATT 1994 with the standard under Article 2.1 of the TBT Agreement, and the competition-oriented nature of the test under each provision, it can be expected that a similar conclusion will be reached in the latter context.

In respect of the MFN obligation in Article 2.1 of the TBT Agreement, it is important to note that it does not apply the same legal standard as under the MFN obligation in Article I:1 of the GATT 1994. The MFN obligation under Article 2.1 applies a "treatment no less favourable" standard, whereas the MFN obligation in Article I:1 of the GATT 1994 is expressed through an obligation to extend any "advantage" granted by a Member to any product originating in or destined for any other country "immediately and unconditionally" to the "like product" originating in or destined for all other Members.[262] These different standards do not, however, undermine the fact that they are both:

> concerned, fundamentally, with prohibiting discriminatory measures by requiring, in the context of Article I:1, equality of competitive opportunities for like imported products from all Members, and, in the context of Article III:4 [under the "no less favourable treatment standard"], equality of competitive opportunities for imported products and like domestic products.[263]

Given the "important parallels" that exist between a panel's analysis of the effect of a measure on the conditions of competition in the responding Member for like products imported from any other country under both Article 2.1 of the TBT Agreement and Article I:1 of the GATT 1994, findings under the latter provision may reasonably be relied on by a panel when making its assessment under the former.[264]

In its assessment of the MFN obligation under Article 2.1, the panel will need to consider whether the Renewable Energy Package provides less favourable treatment to the group of imported products imported from certain WTO Members than that provided to the group of like products imported from other WTO Members. In respect of high ILUC-risk feed crops, Indonesia will be required to identify only that there is a group of imported biofuels that contains high ILUC-risk feed crops (namely, those of Indonesia, and also Malaysia), and a group of like products that does not contain high ILUC-risk feed crops (i.e., those

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[262] *Id.* ¶ 7.277; *EC — Seal Products (ABR)*, *supra* note 51, ¶ 5.81.
[263] *EC — Seal Products (ABR)*, *supra* note 51, ¶ 5.82.
[264] *US — Tuna II (Mexico) (Article 21.5–Mexico)(ABR)*, *supra* note 202, ¶ 7.278.

biofuels exported from non-palm oil exporting countries). The adverse effects of the measures fall on the former.[265]

There is, however, an additional element to an assessment of less favourable treatment under Article 2.1 of the TBT Agreement. Specifically, Article 2.1 does not prohibit "any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions"; indeed, a detrimental impact on competitive opportunities for imports that stems exclusively from a legitimate regulatory distinction is permitted.[266] This difference in legal standards arises from the fact that, under the GATT 1994, the positive non-discrimination obligations (such as the MFN and national treatment obligations in Article I:1 and Article III:4, respectively) are balanced against the exceptions in Article XX. Under the TBT Agreement, there is no such exception provision. To address the difference in this balance between rights and obligations in the two agreements, the Appellate Body has interpreted the TBT Agreement with reference to its preamble. It has concluded that the TBT Agreement and the GATT 1994 overlap in scope and have similar objectives, such that the agreement should be interpreted harmoniously[267] and, indeed, that the balance set out in the GATT 1994 and the TBT Agreement is not, in principle, different.[268] Thus, the obligation to avoid unnecessary obstacles to trade is "qualified" by the explicit recognition of Members' right to regulate in order to pursue certain legitimate objectives.[269] As such:

> Members' right to regulate should not be constrained if the measures taken are necessary to fulfil certain legitimate policy objectives, and provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the Agreement. We thus understand the sixth recital to suggest that Members have a right to use technical regulations in pursuit of their legitimate objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the TBT Agreement.[270]

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[265] See the Appellate Body's expression of the application of the less favourable treatment standard in *Thailand — Cigarettes (Philippines)(ABR), supra* note 112, ¶ 134.
[266] *US — Clove Cigarettes (ABR)*, *supra* note 74, ¶¶ 174–175.
[267] *Id.* ¶ 91.
[268] *Id.* ¶ 96.
[269] *Id.* ¶ 94.
[270] *Id.* ¶ 95.

The panel will therefore have to assess whether the less favourable treatment caused by the Renewable Energy Package stems exclusively from a legitimate regulatory distinction — this is the second step in the less favourable treatment analysis under Article 2.1. In elaborating on this requirement, the Appellate Body has considered whether the relevant measures are "even-handed" in the manner in which they address their objective.[271] This concept of "'even-handedness' is the central concept for determining whether the less favourable treatment afforded by the measures at issue stems exclusively from a legitimate regulatory distinction."[272] The Appellate Body has further elaborated that a regulatory distinction cannot be said to be designed and applied in an even-handed manner if it is "designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination",[273] and that it is "likely" that such an assessment would involve consideration "of the nexus between the regulatory distinctions found in the measure and the measure's policy objectives, including by examining whether the requirements imposed by the measure are disproportionate in the light of the objectives pursued".[274] Therefore, there are considerable similarities between the standard to be applied in an assessment of whether less favourable treatment stems exclusively from a legitimate regulatory distinction, under Article 2.1, and whether a measure fails to satisfy the *chapeau* of Article XX of the GATT 1994 (because it is applied in a manner that constitutes arbitrary or unjustifiable discrimination). Indeed, though the provisions are distinct, the Appellate Body in *US — Tuna II (Mexico) (Article 21.5–Mexico)* noted that the Panel, in that case, was "not wrong" in seeking guidance from case law developed under the *chapeau* in this respect, given the insight such case law can provide in understanding "arbitrary or unjustifiable discrimination" and how this might operate in the context of Article 2.1.[275]

In Part IV.A above, we discussed whether the Renewable Energy Package is applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, within the meaning of the *chapeau* of Article XX of the GATT 1994. With respect to the *discrimination* element, Indonesia is likely to point to the discrimination it experiences as a result of the fact that palm oil-derived biofuels suffer less favourable treatment vis-à-vis like domestic products, and like products imported from other countries, as a result of the fact that the use of those products cannot be taken into account when assessing whether an EU Member State has achieved its renewable energy targets.

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[271] *US — Tuna II (Mexico)(ABR)*, *supra* note 226, ¶ 232 (referring to *US — Clove Cigarettes (ABR)*, *supra* note 74, ¶ 182).
[272] *US — Tuna II (Mexico) (Article 21.5–Mexico)(ABR)*, *supra* note 202, ¶ 7.96.
[273] *Id.* ¶ 7.97 (citing *US — COOL (ABR)*, *supra* note 140, ¶ 271).
[274] *US — Tuna II (Mexico) (Article 21.5–Mexico)(ABR)*, *supra* note 202, ¶ 7.97.
[275] *Id.* ¶ 7.91.

Concerning whether such discrimination is *arbitrary or unjustifiable*, Indonesia is likely to argue that the distinction the Renewable Energy Package draws between high and low ILUC-risk feed crops (and in particular, the difference in the ILUC risk associated with palm oil and other feed crops, notably soy) is illusory. Moreover, it will argue that the EU is discriminating between biofuel-supplying countries based on a global conclusion with respect to the association between palm oil and ILUC, thus ignoring whether the supplying country maintains measures that address ILUC (either through limitations on land clearing, or GHG mitigation). Such arguments would, if accepted, illustrate that the distinctions drawn by the Renewable Energy Package between different feed crops is not rationally connected to the EU's objective of reducing GHG emissions caused by ILUC, and thus amounts to arbitrary or unjustifiable discrimination.

In the context of its assessment of whether the less favourable treatment afforded by the measures at issue to imported goods derives from a legitimate regulatory distinction under Article 2.1 of the TBT Agreement, the panel in this dispute is likely to rely on these factual findings under Article XX. It is also likely to give them a similar legal characterisation, given the similarities between the applicable legal standards under this part of the "less favourable treatment" test under Article 2.1 and under the *chapeau* of Article XX of the GATT 1994. Its ultimate conclusion will, as noted above, depend on difficult factual issues, and the extent to which Indonesia can persuasively impugn the basis on which the EU distinguishes between different feed crops, and its reliance on historical information to assess current specific risks. Just as we considered it difficult for the EU to discharge its burden of proof under Article XX in this respect, we similarly consider that the panel will be inclined to find that the measures do not stem from a legitimate regulatory distinction for the purpose of Article 2.1.

We are therefore of the view that, if the panel were to consider Indonesia's claims under Article 2.1 of the TBT Agreement (which we contend it would not, given that the Renewable Energy Package is not a technical regulation), it would find the measures inconsistent with that provision.

C. Article 2.2 of the TBT Agreement

Article 2.2 of the TBT Agreement provides 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.

The Appellate Body has described the analysis required to determine whether a measure is "more trade restrictive than necessary" within the meaning of Article 2.2:

> In sum, we consider that an assessment of whether a technical regulation is "more trade-restrictive than necessary" within the meaning of Article 2.2 of the TBT Agreement involves an evaluation of a number of factors. A panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken. In particular, it may be relevant for the purpose of this comparison to consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available.[276]

An analysis under Article 2.2 therefore first involves a "relational analysis" of i) the degree of contribution made by the technical regulation to the legitimate objective at issue; (ii) the trade-restrictiveness of the technical regulation; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the technical regulation. These factors are then taken into account in the context of a "comparative analysis" that will be required in "most cases".[277] Such an analysis derives from the expression "more … than" in the second sentence of Article 2.2, which suggests that in most cases a panel's analysis will involve a comparison of the three factors in the "relational analysis" with possible alternative measures that

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[276] *US — Tuna II (Mexico)(ABR)*, *supra* note 226, ¶ 322.

[277] *US — COOL (ABR)*, *supra* note 140, ¶ 374 (referring to *US–Tuna II (Mexico)(ABR)*, *supra* note 226, ¶ 318).

may be reasonably available and be less trade restrictive than the challenged measure, taking account of the risks non-fulfilment would create.[278]

As is clear from the above summary, the analysis under Article 2.2 of the TBT Agreement closely resembles that which must occur under the "necessity" test in Article XX(b) (and other subparagraphs) of the GATT 1994. Indeed in developing this formulation, the Appellate Body referred to case law under Article XX of the GATT 1994 (as well as Article XIV of the General Agreement on Trade in Services (GATS).[279] The Panel in *EC — Seal Products* relied on its factual findings under Article 2.2 to inform its findings under Article XX of the GATT 1994[280] and the Appellate Body did not impugn this approach, save for the comment that there are differences in the text of Article 2.2 of the TBT Agreement and Article XX(a) of the GATT 1994 that may have a bearing on the interpretation of these provisions.[281]

It is therefore pertinent to summarise the discussion above as it will inform the panel's relational analysis. First, with respect to the "objective" of the Renewable Energy Package, it is likely that this will be accepted as being the protection of human, animal or plant life or health through the reduction of GHG emissions caused by ILUC, notwithstanding that Indonesia may make certain contrary arguments. In the context of Article 2.2. of the TBT Agreement, the "protection of human health or safety, animal or plant life or health, or the environment" is recognised as being a legitimate objective. Second, with respect to the "trade restrictiveness" of the Renewable Energy Package, the panel will be likely to identify that the measures exhibit a "considerably" trade-restrictive effect based on their limiting effect on the competitive opportunities for imported biofuels compared to the situation before the measures were enacted.[282] Third, with respect to the "contribution" made by the Renewable Energy Package to its objective, we

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[278] *US — Tuna II (Mexico)(ABR)*, *supra* note 226, ¶ 320.

[279] *Id.* ¶¶ 317–320 (referring to *China — Publications and Audiovisual Products (ABR)*, *supra* note 128, ¶ 252; *Korea — Beef (ABR)*, *supra* note 98, ¶ 161, 166; *Brazil — Retreaded Tyres (ABR)*, *supra* note 128, ¶ 178; *US — Gambling (ABR)*, *supra* note 128, ¶¶ 306–308.

[280] *See, e.g.*, *EC — Seal Products*, *supra* note 91, ¶¶ 7.634–7.636.

[281] *EC — Seal Products (ABR)*, *supra* note 51, ¶ 5.205. As discussed above, the Appellate Body also (in a different context) noted that, "so long as the similarities and differences between Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 are taken into account, it may be permissible to rely on reasoning developed in the context of one agreement for purposes of conducting an analysis under the other"; *see US — Tuna II (Mexico) (Article 21.5 – Mexico) (ABR)*, *supra* note 202, ¶ 7.347.

[282] *US — COOL (Article 21.5–Canada and Mexico)(ABR)*, *supra* note 140, ¶ 5.208, n.643 (referring to *US — COOL (ABR), supra* note 140, ¶ 477 (citing *US — COOL*, *supra* note 140, ¶¶ 7.356, 7.376–7.380)).

identified a number of potential fact-specific arguments that might be made in this context, but also that a panel is likely to find that the measures are at least apt to make a contribution to their objective.

Finally, Article 2.2 of the TBT Agreement requires, as part of this relational analysis, that the panel "tak[e] account of the risks non-fulfilment would create". More specifically, this requires consideration of "the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure".[283] This obligation informs the assessment of alternative measures under the comparative analysis (below) — "the comparison of the challenged measure with a possible alternative measure should be made in the light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective".[284] Relevant considerations in this respect, as specified in Article 2.2, are — available scientific and technical information, related processing technology or intended end-uses of products.

Under this element of Article 2.2, the EU can be expected to refer to the scientific literature surrounding the effects of climate change, and to link directly the failure to reduce GHG emissions to climate change and to those effects. It will also highlight the consequences of the failure to address these risks and argue, it might be expected, that such consequences would be particularly serious. Taking these risks into account, the EU is likely to argue that any alternative measure would not make an equivalent contribution to its objectives.

Having reached conclusions under the "relational analysis", the panel will turn to its "comparative analysis", under which it would consider whether there are possible alternative measures that may be reasonably available and less trade-restrictive than the challenged measure, that would make an equivalent contribution to the objective taking account of the risks non-fulfilment would create.[285]

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[283] *US — Tuna II (Mexico) (ABR)*, *supra* note 226, ¶¶ 318, 322.

[284] *Id.* ¶ 321.

[285] *Id.* ¶¶ 320–323; *US — COOL (Article 21.5–Canada and Mexico) (ABR)*, *supra* note 140, ¶ 5.213. This assumes that the scenarios identified by the Appellate Body in which a comparative analysis of this nature may be unnecessary do not arise in this dispute — namely, where the measure is not trade-restrictive or makes no contribution to the achievement of the legitimate objective pursued. *See US — Tuna II (Mexico)(ABR)*, *supra* note 226, ¶ 322, n. 647; *US — COOL (ABR), supra* note 140, ¶ 376, n. 748.

As discussed in the context of Article XX of the GATT 1994, there are alternative measures which Indonesia could suggest, and that these support the notion that the measures are more trade restrictive than necessary.[286] In the context of Article 2.2, the panel is likely to rely on these findings. In taking into account the nature of the risks and the gravity of the consequences, even assuming that these are determined to be very serious, the panel is likely to find that the contribution that such alternatives would make to the EU's objective is still "equivalent" to that made by the measures at issue, given that there is scope for reducing the trade restrictive effect of the measures without necessarily frustrating the EU's GHG-related objective.[287]

In summary, the operation of Article 2.2 of the TBT Agreement indicates that there are strong grounds for Indonesia to challenge the Renewable Energy Package, and it is likely that a WTO panel would find the measures inconsistent with that provision. As noted, however, this conclusion is an *arguendo* one only, given that the Renewable Energy Package is not, in our view, a "technical regulation" within the meaning of Annex 1 of the TBT Agreement, and as such Article 2.2 does not apply to it.

V. CONCLUSIONS

In our view, the EU's Renewable Energy Package will, if assessed by a WTO panel based on Indonesia's complaint, be found to be inconsistent with the EU's obligations under WTO law. Specifically, we expect that a panel will find that the measures are inconsistent with Article I:1 and Article III:4 of the GATT 1994. We also expect that a Panel will find that the measures do not satisfy the requirements of the exceptions in Article XX of the GATT 1994. We are also of the view that a panel would find that the measures are not inconsistent with Articles 2.1 or 2.2 of the TBT Agreement, because the measures are not a "technical regulation" within the meaning of Annex 1 of that Agreement (which is a prerequisite for being subject to the disciplines in Article 2). Were a panel to find that the measures *are* a technical regulation, then Articles 2.1 and 2.2 would apply, and we believe that a panel would find the measures to be inconsistent with these provisions. If the panel reaches these conclusions, then it will recommend to the WTO Dispute Settlement Body that it request the EU to bring these measures into conformity with its obligations under the WTO Agreement.

Putting aside these formal conclusions, there are more novel and systemic issues that arise in this dispute. As discussed, we think the panel will impugn the EU's

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[286] *See* discussion *supra* Part III.D.
[287] *Id.*

reliance on historical generalisations of risk to regulate current risks. This panel's report will also shed light on the relationship between international environmental law and WTO law, insofar as a WTO Member attempts to address GHG emissions in another jurisdiction. The prospect that this panel will reach the conclusion that the Renewable Energy Package is inconsistent with WTO law will no doubt fuel the idea that WTO law tips the balance too heavily in favour of trade obligations over broader regulatory rights; what the panel's conclusions may well leave open, however, is the extent to which trade measures can address ILUC in other jurisdictions at all.