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

REQUEST FOR CONSULTATIONS BY INDONESIA

The following communication, dated 9 December 2019, from the delegation of Indonesia to the delegation of the European Union, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the European Union, pursuant to Article 4 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 14 of the Agreement on Technical Barriers to Trade ("TBT Agreement") and Article 30 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") regarding certain measures imposed by the European Union and the Member States affecting palm oil and oil palm crop-based biofuels from Indonesia.

Indonesia considers that these measures appear to violate the TBT Agreement, the GATT 1994 and the SCM Agreement.

A. Background

1. Indonesia is the largest producer of palm oil in the world. Palm oil is derived from pressing the mesocarp of the fruit of oil palms. The European Union grows a number of food and feed crops and produces certain food and feed crop-based biofuels. However, it does not produce palm oil.¹ One usage of palm oil imported into the European Union is for producing oil palm crop-based biofuel or Fatty Acid Methyl Ester ("FAME"). Palm oil can also be processed in Indonesia before being exported as oil palm crop-based biofuel (that is, as FAME) to the European Union.
2. International standards and certification schemes aimed at ensuring that palm oil is produced in a sustainable manner are available. Such standards and schemes include those developed by the Roundtable on Sustainable Palm Oil ("RSPO"), International Sustainability and Carbon Certification ("ISCC"), Roundtable on Sustainable Biomaterials ("RSB RED EU"), Indonesian Sustainable Palm Oil ("ISPO") and Malaysian Sustainable Palm Oil ("MSPO").
3. The European Union has adopted certain measures affecting palm oil and oil palm crop-based biofuels which appear to be contrary to its World Trade Organization ("WTO") obligations. For the purpose of meeting European Union ("EU") targets for the share of renewable energy in the gross final consumption of energy (including in the transport sector), the European Union requires that biofuels meet certain sustainability and greenhouse gas ("GHG") emissions saving criteria. In this context, the European Union has considered whether biofuels produced from food or feed crops that result in land use change may be counted towards those targets. Initially, the European Union focused on the emissions caused by direct land use.

¹ European Union External Action, [Palm Oil Facts & Figures on Trade and Sustainability](#), Fact Sheet PO-01, 4 September 2019.

4. More recently, the European Union has sought to address the risk of so-called indirect land use change ("ILUC") effects. The European Union has done so despite the fact that it accepts that "ILUC cannot be observed or measured" and that, at best, modelling can be used but it has a number of limitations.² The European Union has also acknowledged that "ILUC emissions cannot be measured with the level of precision required to be included in the EU GHG emission calculation methodology".³
5. In the context of addressing the risk of ILUC, the European Union has adopted certain measures that specifically affect palm oil and oil palm crop-based biofuels. As a result of those measures, palm oil is the only food or feedstock which the European Union considers to pose a high-ILUC risk. Therefore, unless oil palm crop-based biofuel is certified as low-ILUC risk, its share in meeting EU renewable energy targets must be capped at 2019 levels and ultimately phased out by the end of 2030. Support schemes put in place by Member States are aimed at incentivising the use of biofuels for meeting the EU renewable energy targets. In essence, only biofuels satisfying sustainability and GHG emissions saving criteria and that are not of high ILUC-risk can benefit from those support schemes.
6. All of these recent EU measures and related Member States' measures have a severe impact on access of Indonesian palm oil and oil palm crop-based biofuels to the EU market.

B. The measures at issue

Directive (EU) 2018/2001 (RED II)

7. RED II sets a general renewable energy policy framework in the European Union. It was adopted on 11 December 2018 and entered into force on 24 December 2018. It must be transposed by the Member States by 30 June 2021.⁴
8. RED II introduces two main types of renewable energy targets.⁵
9. First, RED II imposes a new binding EU target of a share of at least 32 % of renewable energy in the EU gross final consumption of energy by 2030.⁶ From 1 January 2021, the share of energy from renewable sources in each Member State's gross final consumption of energy may not be lower than the baseline share included in the third column of the table in Part A of Annex I to RED II.⁷
10. Second, RED II sets a distinct target for mainstreaming the use of renewable energy in the transport sector. Each Member State must require 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 2030.⁸ The calculation of that share is subject to the rules found in Articles 26 and 27 of RED II.
11. Article 26(1) states that the share of biofuels, bioliquids and biomass fuels consumed in transport, where produced from food and feed crops, may not be 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. Article 26(1) also allows

² Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the status of production expansion of relevant food and feed crops worldwide, COM(2019) 142 final (13 March 2019), p. 4.

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, COM(2019) 142 final (13 March 2019), p. 4. See also recital 81 in the preamble to Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), OJ 2018 L 328, p. 82 ("RED II").

⁴ Article 36(1) of RED II.

⁵ The rules governing the calculation of the share of renewable energy are laid down, in particular, in Articles 7, 26 and 27 of RED II. Other targets apply in respect of, for example, the share of renewable energy in the heating and cooling sector (Article 23 of RED II).

⁶ Article 3(1) of and recital 8 in the preamble to RED II.

⁷ Article 3(4) of RED II.

⁸ Article 25(1) of RED II.

Member States to set lower limits and, in so doing, to distinguish between biofuels, bioliquids and biomass fuels produced from food and feed crops and specifically from oil crops.

12. Article 26(2) states that the share of high ILUC-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. Furthermore, from 31 December 2023 until 31 December 2030, that limit is to decrease gradually to 0%. An exemption to those limitations applies for biofuels, bioliquids or biomass fuels certified as "low ILUC-risk". Low ILUC-risk biofuels, bioliquids and biomass are defined as "biofuels, bioliquids and biomass fuels, the feedstock of which was produced within schemes which avoid displacement effects of food and feed-crop based biofuels, bioliquids and biomass fuels through improved agricultural practices as well as through the cultivation of crops on areas which were previously not used for cultivation of crops, and which were produced in accordance with the sustainability criteria for biofuels, bioliquids and biomass fuels laid down in Article 29".⁹
13. Biofuels, bioliquids and biomass fuels must fulfil, *inter alia*, the sustainability and GHG emissions saving criteria, even if it is recognised that those criteria do not account for ILUC emissions which, in any event, cannot be calculated.¹⁰ Those criteria apply to biofuels, bioliquids and biomass used for meeting the EU renewable energy targets, measuring compliance with renewable energy obligations or being eligible for financial support under the support schemes for the consumption of biofuels, bioliquids and biomass fuels.¹¹ The sustainability criteria are laid down in Article 29(2)-(7); the GHG emissions saving criteria are found in Article 29(10).¹²
14. Compliance with the sustainability and GHG emissions saving criteria is to be verified through the use of a mass balance system.¹³ Voluntary national or international standard setting schemes may be used subject to the Commission's approval.¹⁴
15. Finally, Article 30(8) instructs the Commission to adopt implementing legislation laying down rules regarding, *inter alia*, adequate standards of reliability, transparency and independent auditing that must be satisfied by all voluntary schemes available for verifying compliance with the sustainability and GHG emissions saving criteria as well as the provisions on low or high direct and indirect LUC-risk biofuels, bioliquids and biomass fuels.¹⁵

Member States' measures

16. Similar to RED I,¹⁶ RED II envisages that the renewable energy targets will be reached as a result of Member States adopting support schemes.¹⁷ Those support schemes are aimed at incentivising the use of renewable energy through various measures, ranging from investment funding, tax exemptions or reductions and tax refunds to direct price support schemes.¹⁸
17. Since the entry into force of RED II, Member States have adopted and are likely to adopt legislation excluding palm oil and/or oil palm crop-based biofuels from measures taken to meet the renewable energy targets.
18. These measures include, but are not limited to, tax measures adopted by France that incentivise the consumption of biofuels in order to meet the targets imposed by EU law. In particular, France has introduced an annual tax on the making available of fuel for consumption ("the French fuel

⁹ Article 2(37) of RED II.

¹⁰ Recital 81 in the preamble to RED II; recitals 3 and 4 in the preamble to Delegated Regulation 2019/807.

¹¹ Articles 7(1) and 29 of RED II. See also recital 94 in the preamble to RED II.

¹² Article 31 of and Annex V to RED II lays down rules for calculating the GHG impact of biofuels, bioliquids and their fossil fuel comparators.

¹³ Article 30 of RED II.

¹⁴ Article 30(4)-(7) of RED II.

¹⁵ Article 30(8) of RED II.

¹⁶ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ 2009 L 140, p. 16 ("RED I").

¹⁷ Articles 4 to 6 of RED II.

¹⁸ Article 2(5) of RED II.

tax"). The rate of that tax decreases as the share of renewable energy sources (that is, sustainable biofuel and renewable fuels) in the fuel increases.¹⁹ For the purpose of that legislation, biofuel is sustainable if it satisfies the sustainability criteria in RED I (which are now included and expanded upon in RED II). However, the benefit that would accrue as a result of those tax measures is, starting from 1 January 2020, not available in respect of palm oil because French law expressly excludes from the definition of biofuels oil palm crop-based biofuels, regardless of whether they are sustainable or not.²⁰ Furthermore, it appears that, starting from 2020, biofuel produced from high ILUC-risk feedstock, even if it is sustainable, is excluded from the French fuel tax reduction. The introduction of that limitation is linked to RED II and Delegated Regulation 2019/807.²¹ Thus, for the purpose of the French fuel tax, oil palm crop-based biofuels are excluded from the concept of biofuels.²²

19. The Member States will be adopting further measures in light of the need to implement, in particular, RED II (including the limitation and phasing out of oil palm crop-based biofuels from the renewable energy targets).

Delegated Regulation 2019/807

20. On 13 March 2019, the European Commission adopted Delegated Regulation 2019/807²³ supplementing RED II, as envisaged by Article 26(2) of RED II. That regulation entered into force on 10 June 2019. It is due to be reviewed by the European Commission by 30 June 2021.²⁴ The European Commission adopted Delegated Regulation 2019/807 without having carried out any impact assessment. This was done "despite the political importance of the file" and in light of the short time frame between the entry into force of RED II and the deadline set in Article 26(2) of RED II.²⁵
21. Delegated Regulation 2019/807 distinguishes between criteria for determining what are high ILUC-risk feedstock and low ILUC-risk biofuels, bioliquids or biomass fuels. In setting those criteria, the European Commission opted for an approach based on the alleged overall worldwide position with respect to each particular feedstock, and not for a transparent methodology based on the circumstances in a particular country or the particular circumstances of production, including the management of land.
22. Article 3 identifies the cumulative criteria that apply for determining what is high ILUC-risk feedstock for which a significant expansion of the production area into land with high-carbon stock is observed. In particular, high ILUC-risk feedstock is identified by reference to the average

¹⁹ Article 266 *quindecies* of the French Customs Code, as modified by Article 192 of Loi n° 2018-1317 du 28 décembre 2018 de finances pour 2019. See also Décret no 2019-570 du 7 juin 2019 portant sur la taxe incitative relative à l'incorporation de biocarburants, JORF no 0133 of 9 June 2019, no. 13; Ministère de l'Action et des Comptes publics, Circulaire du 12 juin 2019 – Taxe incitative relative à l'incorporation de biocarburants (TIRIB), NOR: CPAD1917078C, available at https://www.douane.gouv.fr/sites/default/files/bod/src/dana/da/Energie-environnement-loi%20de%20finances_19-023.pdf and Annexes, available at https://www.douane.gouv.fr/sites/default/files/bod/src/dana/da_annexes/Energie-environnement-loi%20de%20finances_19-023_1.pdf.

²⁰ Article 266 *quindecies* of the French Customs Code, as modified by Article 192 of Loi n° 2018-1317 du 28 décembre 2018 de finances pour 2019; Décret no 2019-570 du 7 juin 2019 portant sur la taxe incitative relative à l'incorporation de biocarburants, JORF no 0133 of 9 June 2019, no. 13.

²¹ Ministère de l'Action et des Comptes publics, Circulaire du 12 juin 2019 – Taxe incitative relative à l'incorporation de biocarburants (TIRIB), NOR: CPAD1917078C, Section V, points 46 to 51, available at https://www.douane.gouv.fr/sites/default/files/bod/src/dana/da/Energie-environnement-loi%20de%20finances_19-023.pdf Annexes, available at https://www.douane.gouv.fr/sites/default/files/bod/src/dana/da_annexes/Energie-environnement-loi%20de%20finances_19-023_1.pdf.

²² *Ibid.*

²³ Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels, OJ 2019 L 133, p. 1.

²⁴ Article 7 of Delegated Regulation 2019/807.

²⁵ European Commission, Explanatory Memorandum to the Commission's proposal for Delegated Regulation 2019/807, C(2019) 2055 final (13 March 2019), p. 1.

annual expansion of the production area since 2008 and a formula expressing the share of that expansion into land with high-carbon stock.

23. Article 3 must be read together with the Annex to Delegated Regulation 2019/807. That annex, organised according to three categories of food or feedstock (cereals, sugar crops and oil crops) and individual types of oil crops (such as rapeseed, palm oil, soybean and sunflower oil crops), lists fixed values for: (i) the first criterion in Article 3(a) expressed in kilo hectare (kha) and percentage points and (ii) the shares operating as constants in the formula. Article 3 itself sets the fixed value of the productivity factor for each individual type of feedstock. When the fixed values and constants are used for, for example, the various oil crops, the criteria set out in Article 3 mean that only palm oil is considered to be a high ILUC-risk feedstock.
24. As a result, in accordance with Article 26(2) of RED II read together with Delegated Regulation 2019/807, palm oil is the only feedstock that is high ILUC-risk and of which the share in the target of renewable energy must be gradually reduced and, ultimately, fully eliminated by 2030. For other feedstock, the same limitation and phase out requirements do not apply.
25. Although the European Union has produced a report on the status of production expansion of relevant food and feed crops worldwide,²⁶ that report offers no adequate (scientific) basis for the criteria defined in Article 3 of Delegated Regulation 2019/807 and the fixed values and constants used in that provision and in the Annex to Delegated Regulation 2019/807.
26. Article 4, read together with Article 5, identifies the cumulative criteria that must be met in order to certify biofuels, bioliquids and biomass fuels as low ILUC-risk. These criteria include the sustainability and GHG emissions saving criteria and the need to comply with additionality requirements. Because of the criteria set out in Article 3, all of the conditions laid down in Articles 4 and 5 of Delegated Regulation 2019/807 in practice apply solely to biofuels made from oil palm crops. It follows that only oil palm crop-based biofuels must be certified as low ILUC-risk in order to be used for meeting the EU renewable energy targets or benefit from Member States' support schemes. In any event, it appears that the conditions set out in Articles 4 and 5 of Delegated Regulation 2019/807 are designed in a manner so as to preclude any oil palm crop-based biofuels from meeting them.
27. So far, the European Union has not yet made available the specific procedures according to which certification of biofuels, bioliquids and biomass fuels as low ILUC-risk must take place or explained adequately the (scientific) basis for the conditions laid down in Articles 4 and 5 of Delegated Regulation 2019/807. Article 6 merely refers to the need to submit reliable information, to arrange for an adequate standard of independent auditing and proof of auditing and to comply with Article 30 of RED II.
28. The measures at issue include, but are not limited to, and are evidenced by the following legal and other instruments, considered alone and in combination:

EU measures

- i. Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), OJ 2018 L 328, p. 80;
- ii. Commission Delegated Regulation (EU) 2019/807 of 13 March 2019 supplementing Directive (EU) 2018/2001 of the European Parliament and of the Council as regards the determination of high indirect land-use change-risk feedstock for which a significant expansion of the production area into land with high carbon stock is observed and the certification of low indirect land-use change-risk biofuels, bioliquids and biomass fuels, OJ 2019 L 133, p. 1;
- iii. 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

²⁶ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the status of production expansion of relevant food and feed crops worldwide, COM(2019) 142 final (13 March 2019).

production expansion of relevant food and feed crops worldwide, COM(2019) 142 final (13 March 2019); and

any annexes thereto, amendments, supplements, replacements, renewals, extensions, implementing measures or any other related measures, and any exemptions applied.

Member States' measures

- i. Article 266 *quindecies* of the French Customs Code, as modified by Article 192 of Loi n° 2018-1317 du 28 décembre 2018 de finances pour 2019;
- ii. French Décret no 2019-570 du 7 juin 2019 portant sur la taxe incitative relative à l'incorporation de biocarburants, JORF no 0133 of 9 June 2019, no. 13;
- iii. French Ministère de l'Action et des Comptes publics, Circulaire du 12 juin 2019 – Taxe incitative relative à l'incorporation de biocarburants (TIRIB), NOR: CPAD1917078C;

- b. any other Member States' measures implementing RED II; and

any annexes thereto, amendments, supplements, replacements, renewals, extensions, implementing measures or any other related measures, and any exemptions applied.

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

29. By limiting and phasing out the use of only oil palm crop-based biofuels in order to meet EU renewable energy targets and subjecting such biofuels to the conditions laid down in Articles 4 and 5 of Delegated Regulation 2019/807 and a certification requirement, Indonesia considers that the measures at issue discriminate against palm oil and oil palm crop-based biofuels, which are primarily imported into the European Union, in favour of like products that are either of EU origin or imported.
30. The design and operation of the measures means that the quantity of imports of palm oil and oil palm crop-based biofuels into the EU market will be severely restricted and will result in unnecessary obstacles to trade in oil palm crop-based biofuels.
31. The measures at issue were adopted without any adequate statement on the underlying scientific evidence or impact assessment, resulting also in administration of the measures that is contrary to the European Union's WTO obligations. Nor were the special needs of developing countries, such as Indonesia, taken into account.
32. While it appears that the criteria for low ILUC-risk biofuels exclude the possibility of oil palm crop-based biofuels meeting those criteria, adequate certification procedures, in any event, appear to be lacking.
33. The measures at issue are also concerned with regulating trade in biofuels based on a description of an abstract and unsubstantiated high-ILUC risk concept rather than with the performance of such biofuels.
34. As a result, the measures at issue appear to be inconsistent with the TBT Agreement and the GATT 1994, in particular:

TBT Agreement

- i. by limiting and phasing out the use of palm oil crop-based biofuels for meeting EU renewable energy targets, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for certifying low ILUC-risk biofuels, the measures at issue appear to create unnecessary obstacles to international trade in oil palm crop-based biofuels going beyond what is required for achieving a legitimate objective, in violation of Article 2.2 of the TBT Agreement;

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- ii. by 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 like biofuels to the low ILUC-risk criteria, the measures at issue appear to discriminate among like biofuels of different origins, in violation of Article 2.1 of the TBT Agreement;
 - iii. by limiting and phasing out the use of oil palm crop-based biofuels for meeting EU renewable energy targets, taking into account also 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 like biofuels to the low ILUC-risk criteria, the measures at issue appear to discriminate between imported oil palm crop-based biofuels and like biofuels of EU origin, in violation of Article 2.1 of the TBT Agreement;
 - iv. by 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 using relevant international standards, the European Union appears to have failed to use relevant international standards as a basis for its technical regulations, in violation of Article 2.4 of the TBT Agreement;
 - v. by preparing, adopting or applying the limitation and phasing out requirements for oil palm crop-based biofuels, taking into account the criteria for determining high ILUC-risk feedstock and the criteria for certifying low ILUC-risk biofuels, the European Union appears to have failed, upon the request of Indonesia, to explain the justification for those measures in terms of Articles 2.2 to 2.4 of the TBT Agreement, in violation of Article 2.5 of the TBT Agreement;
 - vi. by regulating trade in biofuels based on a description of an abstract and unsubstantiated high-ILUC risk concept instead of the performance of such biofuels, the European Union appears to have failed to act in accordance with Article 2.8 of the TBT Agreement;
 - vii. by adopting a technical regulation that has a significant effect on trade of other Members in circumstances where either a relevant international standard does not exist or the content of the technical regulation does not accord with a relevant international standard without the required publication and notification of that regulation and organising an adequate process for commenting, the European Union appears to have failed to act in accordance with Article 2.9 of the TBT Agreement;
 - viii. by preparing, adopting or applying conformity assessment procedures for certifying only oil palm crop-based biofuels as low ILUC-risk, the European Union appears to treat suppliers of oil palm crop-based biofuels from Indonesia less favourably than suppliers of like biofuels from other countries, in a comparable situation, in violation of Article 5.1.1 of the TBT Agreement;
 - ix. by preparing, adopting or applying conformity assessment procedures for certifying oil palm crop-based biofuels as low ILUC-risk, the European Union appears to create unnecessary obstacles to international trade, in violation of Article 5.1.2 of the TBT Agreement;
 - x. by failing to make available conformity assessment procedures for certifying oil palm crop-based biofuels as low ILUC-risk, the European Union appears to have failed to comply with the obligations under Article 5.2 of the TBT Agreement;
 - xi. by requiring certification that has a significant effect on trade of other Members in circumstances where either a relevant international standard does not exist or the content of the conformity assessment procedures does not accord with a relevant international standard without the required publication and notification of that certification procedure and organising an adequate process for commenting, the

European Union appears to have failed to act in accordance with Article 5.6 of the TBT Agreement;

- xii. by failing to publish promptly or otherwise make available the conformity assessment procedures for low ILUC-risk certification, the European Union appears to have acted contrary to Article 5.8 of the TBT Agreement.
- xiii. by failing to take into account, in the preparation and application of the technical regulations and conformity assessment procedures at issue, circumstances specific to the developing countries where palm oil and oil palm crop-based biofuel are produced, the European Union appears to have failed to ensure that those measures do not create unnecessary obstacles to exports from developing country Members, in violation of Articles 12.1 and 12.3 of the TBT Agreement;

GATT 1994

- xiv. by 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 measures at issue appear to restrict importation of palm oil and oil palm crop-based biofuels, in violation of Article XI:1 of the GATT 1994;
- xv. by 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 originating in third countries, in violation of Article I:1 of the GATT 1994;
- xvi. by 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 feedstock as high ILUC-risk and subjecting other like 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 between imported palm oil and oil palm crop-based biofuels and like products of EU origin, in violation of Article III:4 of the GATT 1994; and
- xvii. by adopting the criteria laid down in Articles 3 to 5 of Delegated Regulation 2019/807, the European Union appears to have failed to administer RED II in a reasonable, impartial and uniform manner, in violation of Article X:3(a) of the GATT 1994.

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

- 35. By not making the reductions to the fuel tax available for oil palm crop-based biofuels, the French measures discriminate against oil palm crop-based biofuels, which are primarily imported into the European Union, in favour of other crop-based biofuels that are either produced in the European Union or imported.
- 36. By providing for reductions to the fuel tax for biofuels from specific feedstock, France in effect foregoes government revenue that is otherwise due and thereby confers a benefit to the producers of those biofuels. By excluding oil palm crop-based biofuels from those tax reductions, the French fuel tax is designed and operates in such a manner so as to impede and displace imports of oil palm crop-based biofuels from Indonesia into the French market. The French fuel tax also results in lost sales of the oil palm crop-based biofuels from Indonesia in the French market.
- 37. As a result, Member States' measures such as the French fuel tax appear to be inconsistent with the GATT 1994 and the SCM Agreement:

- i. by making reductions to the fuel tax available for oil crop-based biofuels but excluding oil palm crop-based biofuels from those reductions, such measures appear to discriminate among like biofuels originating in third countries, in violation of Article I:1 of the GATT 1994;
 - ii. by making reductions to the fuel tax available for oil crop-based biofuels but excluding oil palm crop-based biofuels from those reductions, such measures appear to discriminate between imported oil palm crop-based biofuels and other biofuels of domestic origin, in violation of Article III:2 of the GATT 1994; and
 - iii. by making reductions to the fuel tax available for crop-based biofuels but excluding oil palm crop-based biofuels from those reductions, such measures appear to amount to a subsidy within the meaning of Article 1.1(a)(ii) of the SCM Agreement, that confers a benefit on producers of biofuels other than palm oil-based biofuels and is specific within the meaning of Article 2 of the SCM Agreement, that has an adverse effect on the interests of Indonesia and, in particular, constitutes serious prejudice to the interests of Indonesia pursuant to Article 5(c) of the SCM Agreement, apparently contrary to Articles 3.1(b) and 5 of the SCM Agreement.
38. Indonesia reserves the right to raise matters in respect of other EU Member States' measures relating to RED II during the consultations and in any future request for the establishment of a panel.

E. Conclusion

39. Indonesia considers that these measures appear to nullify or impair the benefits accruing to it directly or indirectly under the cited covered agreements.
40. Indonesia reserves its rights to raise additional matters during the course of the consultations and in any future request for the establishment of a panel.
41. Indonesia looks forward to receiving the European Union's response to this request and to fixing a mutually acceptable date for consultations.
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