European Union – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels
(DS593)

THIRD PARTY EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

June 3, 2021

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY SUBMISSION

I. INTERPRETATION OF ARTICLE 2.1 OF THE TBT AGREEMENT

1. Indonesia claims that the High ILUC Risk Cap breaches Article 2.1 of the TBT Agreement because it "discriminates between like oil crop-based biofuel of different foreign origin and between oil palm crop-based biofuel from Indonesia and like oil crop-based biofuel of EU origin." To establish a breach of Article 2.1, the complainant must prove three elements: (i) that the measure at issue is a technical regulation; (ii) that the imported and domestic products are "like"; and (iii) that the treatment accorded to imported products is less favorable than that accorded to like domestic products or like products from other countries.

2. With respect to the third element, a complainant may seek to establish sufficient facts to demonstrate that the measure, *de facto*, treats imports less favorably than like domestic products (or other foreign products). Like Article III:4 of the GATT 1994, Article 2.1 does not forbid Members from making regulatory distinctions between different products that may fall within a single group of "like products". Nor does Article 2.1 prohibit measures that may result in some detrimental effect on imported products as compared to some like domestic products. Instead, what Article 2.1 prohibits are measures that accord less favorable treatment to imported products as compared to like domestic products *based on origin*.

3. The conclusion that Article 2.1 is directed to controlling origin-based discrimination is based on its text, in its context. The provision itself compares the treatment accorded to different products on the basis of origin: "products imported from the territory of any Member", "products of national origin", and "products originating in any other Member". Similarly, the preamble to the Agreement reflects that measures should not be "applied in a manner which would constitute a means of arbitrary or unjustifiable *discrimination between countries* where the same conditions prevail".

4. Examination of the reasons for any distinctions made among a group of like products is particularly important in the context of technical regulations, where measures may necessarily draw distinctions between products based on "product characteristics or their related processes and production methods." If a respondent demonstrates that different and detrimental treatment is based on, for example, the environmental or public health aim pursued—and not the foreign origin of a product—then the measure does not amount to less favorable treatment under Article 2.1.

5. In recent reports, the Appellate Body has found that, in the context of the TBT Agreement, any detrimental impact found to exist with respect to imported products will constitute a breach of Article 2.1 unless the "detrimental impact on imports *stems exclusively from* legitimate regulatory distinctions." This requirement—that any detrimental impact "stem exclusively from" a legitimate regulatory distinction—has no basis in the text of the TBT Agreement and significantly narrows the scope of regulatory action permitted under the Agreement.

6. The Appellate Body's erroneous approach may invite panels to attempt to balance the detrimental impact of a measure against its contribution to the objective at issue – an assessment that is more about proportionality (weighing costs and benefits), and less about origin-based discrimination.

7. As the European Union recognizes in this dispute, the Appellate Body's approach is "a requirement which in essence imposes a further obligation on the complainant to demonstrate the degree of trade restrictiveness of the measure in question." The European Union is correct – but this "further obligation" is not found in Article 2.1 nor necessary to assess origin-based discrimination. The United States agrees that it is important under the TBT Agreement to assess the trade-restrictiveness of a measure. However, in a manner *unique* to the TBT Agreement, trade restrictiveness already comprises an affirmative obligation under Article 2.2. That is, where a technical regulation does not discriminate inconsistently with Article 2.1, for example, that measure may separately breach a Member's obligations if it is nonetheless more trade restrictive than necessary to fulfil a legitimate objective under Article 2.2 of the TBT Agreement.

8. In eliding these two provisions, the Appellate Body has not only narrowed the scope of actions that would otherwise survive a less favorable treatment examination (under the equivalent of Article III:4), it has narrowed the scope of actions that could survive a trade-restrictiveness review (under what should be Article 2.2). Thus, while the Appellate Body may have intended to permit a broad scope of justified regulatory action in creating its "legitimate regulatory distinction" test, by collapsing the obligations in 2.1 and 2.2, the Appellate Body in fact combined more restrictive interpretations of each provision into a single test under Article 2.1. This Panel should not repeat the same error. Instead, the Panel should interpret Article 2.1 based on its text, and as panels and the Appellate Body have interpreted the same obligation under the GATT for decades, assess whether any different and detrimental impact is based on factors unrelated to a product's foreign origin. In so doing, the Panel would restore the balance in the WTO "between, on the one hand, the pursuit of trade liberalization and, on the other hand, Members' right to regulate."

9. The question of whether any detrimental impact is based on factors not relating to the origin of the products in question is one that should be answered taking all relevant facts into account. For example, if the regulatory purpose invoked bears a rational relationship to the measure at issue, this would be indicative of non-discrimination. Similarly, if the measure is apt to advance the regulatory purpose identified by the regulating Member, this too would be indicative of non-discrimination. A panel would evaluate this as part of the overall assessment of whether a measure modified the conditions of competition to the detriment of imported or other foreign products. If an evaluation of the measure did not support the proposition that detrimental impact was non-origin-based, or if an examination of the facts reveals the regulatory distinction to be a proxy for origin, for example, then the measure would breach the national treatment or MFN obligation.

10. For the reasons set out above, the Panel should interpret and apply Article 2.1 of the TBT Agreement according to its text as directed to prohibiting origin-based discrimination. As past reports on Article III:4 concluded, different and detrimental treatment of imports will constitute a breach of the obligation where the alleged detriment is not explained by factors unrelated to the foreign origin of the product, such as where the measure and distinction at issue does not bear a rational relationship to the regulatory purpose invoked. Here, the European Union argues that the regulatory purpose of the High ILUC Risk Cap is to further "climate change mitigation, [and] environmental and biodiversity objectives." If, taking into account all the facts, the Panel finds that the impact on Indonesian imports is not origin-based, then the Panel should conclude that Indonesia has not met its burden to demonstrate "less favourable treatment" under Article 2.1.

II. INTERPRETATION OF ARTICLE 2.2 OF THE TBT AGREEMENT

11. Indonesia also argues that the High ILUC Risk Cap breaches Article 2.2 of the TBT Agreement by creating unnecessary obstacles to international trade in palm oil and oil palm crop-based biofuel. According to Indonesia, the High ILUC Risk Cap "do[es] not pursue a legitimate objective" and is "more trade-restrictive than necessary," and thus, breaches Article 2.2. The European Union argues that "the measures at issue have neither the purpose nor the effect of creating 'unnecessary obstacles to trade', given that: they pursue legitimate objectives; and they are not more trade-restrictive than necessary in order to fulfil those objectives."

12. The first sentence of Article 2.2 establishes the general rule that Members shall ensure that technical regulations do not create unnecessary obstacles to international trade, while the second sentence of Article 2.2 makes this general rule operational by explaining that "for this purpose" "technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective."

13. If the measure contributes, or is apt to contribute to, a legitimate objective, then a measure is inconsistent with Article 2.2 only if the measure is "more trade-restrictive than necessary to fulfill" that legitimate objective. To establish that this is the case, a complaining Member must prove that: (1) there is a reasonably available alternative measure; (2) that fulfills the Member's legitimate objective at the level that the Member considers appropriate; and (3) is significantly less trade restrictive. As is the case for the parallel provision in the SPS Agreement, the key legal question for Article 2.2 is whether the importing Member could have adopted a less trade-restrictive measure to achieve its objective at the chosen level.

14. The first step is for the panel to consider the extent to which the challenged measure contributes, or is apt to contribute, to the Member's "legitimate objective." In this case, Indonesia and the European Union use different framing to characterize the "legitimate objective" underlying the High ILUC Risk Cap. According to Indonesia, the European Union adopted the measure to address broad concerns related to "environmental protection in general and the reduction of GHG emissions in particular." The European Union frames its objective much more specifically, explaining that "the values protected by the measures at issue are not just reducing GHG emissions, but addressing together climate change, environmental protection and biodiversity loss, and protecting the public morals in the European Union." The United States observes that it is for the respondent—not the complainant—to identify the legitimate objectives that motivate a given measure. If a complainant wishes to challenge the genuineness of a respondent's professed objective, it can do so by demonstrating that the measure makes no (or little) contribution toward the alleged objective, and that thus, less trade restrictive options are available to meet the objective in question.

15. Therefore, the Panel should base its analysis on the extent to which the High ILUC Risk Cap contributes, or is apt to contribute, the objective identified by the European Union; and whether another less trade-restrictive measure identified by Indonesia is available to the European Union that makes, or is apt to make, a similar contribution.

III. INTERPRETATION OF ARTICLE 2.4 OF THE TBT AGREEMENT

16. With respect to whether a relevant international standard exists under Article 2.4, the TBT Agreement does not define the term "international standard." This term, however, is

defined in ISO/IEC Guide 2 as a "[s]tandard that is adopted by an international standardizing/standards organization and made available to the public." Moreover, the TBT Agreement defines "standard" as "a document approved by a recognized body," and specifies that an "international body" is a "body ... whose membership is open to the relevant bodies of at least all Members."

17. Regarding whether a given international standard is "ineffective or inappropriate" to fulfill the legitimate objectives pursued, the term "ineffective" refers to something which not "having the function of accomplishing", "having a result", or "brought to bear", whereas "inappropriate" refers to something which is not "specially suitable", "proper", or "fitting." If the Panel agrees with the European Union that the ISO standards Indonesia cites are not effective and appropriate to address the specific objectives that the European Union has identified, this would suggest that an element of an Article 2.4 claim has not been made out.

IV. INTERPRETATION OF ARTICLE 5.1 OF THE TBT AGREEMENT

18. Indonesia claims that the conformity assessment procedure (CAP) for the High ILUC Risk Cap breaches Article 5.1 of the TBT Agreement. To establish that a measure is inconsistent with Article 5.1.1, a complaining Member must demonstrate three elements: (1) the measure concerns a "conformity assessment procedure"; (2) the products at issue are "like products"; and, (3) access to the CAP is granted on a "less favourable" basis to suppliers of products originating in the territory of a Member than to "suppliers of like products of national origin or originating in any other country, in a comparable situation."

19. In assessing this claim, the Panel must determine whether the difference in treatment under conformity assessment procedures provides a sufficient basis for finding that like products are nonetheless not "in a comparable situation" or whether the difference in treatment is such that imported products are treated less favorably than like domestic products.

EXECUTIVE SUMMARY OF THE U.S. ORAL STATEMENT

I. THE PROPER APPROACH TO AN ARTICLE XX ANALYSIS

20. Article XX sets out the circumstances in which measures that have been found to be inconsistent with another provision of the GATT will nevertheless be justified and therefore not be found inconsistent with a Member's WTO obligations. The EU has asserted defenses of challenged measures under subparagraphs (a), (b), and (g) of Article XX.

21. The EU argues that the measures at issue are part of a comprehensive set of policies taken to address multiple objectives that are "within the framework of the values recognized as legitimate objectives by Article XX(a), (b) and (g) of the GATT 1994." It also suggests that, because the legal requirements of each of these subparagraphs are "in practice very similar" , the Panel may perform a single analysis whereby it assesses whether the measure is "rational and reasonable both in its design and application."

22. While a respondent might characterize the objective of a measure as being comprehensive and falling under multiple subparagraphs, that does not mean the respondent is relieved of its burden to articulate and substantiate the relationship between the measure and the

objective identified in each of the various subparagraphs in the manner required - *i.e.*, to demonstrate that it is "necessary to" or "relating to" the given objective.

II. WHETHER ARTICLE XX DEFENSES ARE AVAILABLE IN CONNECTION WITH EXTRATERRITORIAL HARM

23. According to Colombia and Malaysia, a Member cannot invoke Article XX to protect values and interests outside of that Member's territory. Nothing in the text of Article XX supports the type of territorial limitation for the objective of the Member imposing the measure that Colombia and Malaysia are proposing. Furthermore, many measures involving extraterritorial interests have been challenged in the past, and those same measures have been found to satisfy the requirements of the subarticles of Article XX.

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

24. Response to Question 2: Articles 7.1 and 6.2 of the DSU set out panels' terms of reference. Under Article 7.1, when the DSB establishes a panel, the panel's terms of reference are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint." Thus, under the DSU, a panel's terms of reference define which measures and which claims it may consider. A panel may not consider any measures or claims not set out in the complaining Member's panel request. However, a panel's terms of reference do not define the scope of products a panel may analyze with respect to a discrimination claim. In particular, a panel's terms of reference do not limit the arguments a complainant might make in substantiating a claim, or the defenses and arguments a responding party may invoke.

25. Response to Question 4: First, we note that the European Union does not characterize this paragraph as a statement setting out a "standard of review," as the question suggests, and we do not consider it necessary or helpful for the Panel to view the statement in that way. With respect to the substance of the statement, the United States agrees that it is not the Panel's role to second guess a Member's interpretation and application of scientific research. A Member is free to choose the level of protection it believes appropriate in developing domestic policies. This includes the way in which that Member responds to the available scientific research, and therefore also means that a Member need not base its regulations on the majority scientific view in all cases, provided it respects its SPS commitments, such as to maintain its measures with sufficient scientific evidence.

26. Response to Question 5: Under Article 2.2 of the TBT Agreement, a Member may choose its own level of protection. Article 2.2 refers to the "fulfill[ment]" of objectives. In light of the sixth preambular recital of the TBT Agreement, this "fulfill[ment]" refers to a Member's right to achieve legitimate objectives "at the levels it considers appropriate." To the extent that the precautionary principle is germane to the interpretation of the TBT Agreement, that principle is reflected in the text of the TBT Agreement itself. The Panel thus should interpret the text according to customary rules of international law, as is required by the DSU.

27. Response to Question 6: In *US – Tuna II*, the dispute referred to in the Panel's question, the panel and Appellate Body erred in finding that the regulation at issue was "mandatory"

within the meaning of the Annex, and therefore a "technical regulation" for purposes of the TBT Agreement. Therefore, the Appellate Body's analysis in that dispute is of limited utility. In addition, however, the Appellate Body did not find that the U.S. tuna measure was a technical regulation within the meaning of Annex 1.1 because it "set down product characteristics or their related processes and production methods." Rather, the basis of the original panel's finding that the measure was a technical regulation, which the Appellate Body affirmed, was that the measure established "labelling requirements" within the meaning of the second sentence of Annex 1.1. In this dispute, however, neither party has argued that the challenged measure is a technical regulation based on the second sentence of Annex 1.1. Indonesia argues that the measure sets down product characteristics or their related processes and production methods within the meaning of the first sentence of Annex 1.1, while the EU contends that it does not. Therefore, the Panel's analysis should focus on whether the challenged measure is a technical regulation for that reason and not for another reason, such as the Appellate Body found in *US – Tuna II*.

28. Response to Questions 9 and 10: With respect to Article 12.3, the phrase "take account of" means "to consider along with other factors in reaching a decision." Thus, Article 12.3 simply requires a developed country Member to "consider" the special needs of developing country Members "with a view to ensuring that" their measures do not create unnecessary obstacles to trade"; Article 12.3 does not require a developed country Member to ensure that its measures do not have such effect on such Members. It follows that to substantiate a claim under Article 12.3, a complainant would need to show evidence that a respondent did not "consider" the needs of developing countries when designing the measure at issue. Such evidence could take various different forms depending on the specific facts of the case at hand. This interpretation contrasts to the mandatory language reflected in Article 2.2, which requires Members to ensure that their measures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.

29. Response to Questions 11 and 12: The text of Article 5.1.2 of the TBT Agreement does not require a complaining Member to identify and establish a less trade-restrictive alternative measure that provides "adequate confidence" of conformity. However, in referring to "necessary," the second sentence provides that proving the existence of an available, less "strict" or "strictly applied" alternative CAP that provides such "adequate confidence" would establish that a challenged CAP is inconsistent with Article 5.1.2. There are significant textual differences between Article 5.1.2 and Article 2.2 of the TBT Agreement. First, Article 5.1.2 and Annex 1.3 specify the purpose of conformity assessment procedures as being to ensure that products conform to the relevant technical regulation or standard, while Article 2.2 refers to an open list of "legitimate objectives." Second, Article 2.2 refers to the "fulfill[ment]" of objectives, which, in light of the sixth preambular recital of the TBT Agreement, has been interpreted as referring to a Member's right to achieve legitimate objectives "at the levels it considers appropriate." Article 5.1.2, by contrast, refers to the "adequate confidence" of a Member that products conform with a technical regulation or standard. Thus, the text of Article 5.1.2 must be the basis for interpreting that provision; similarities to other provisions should not interfere with faithfully interpreting the provision itself.