

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

Third-Party Oral Statement  
of the United States of America

April 27, 2021

Mr. Chairman, members of the Panel:

1. Thank you for this opportunity to present the views of the United States. In this statement, we will briefly address several interpretative issues concerning Article XX of the GATT 1994. First, we will set out the general framework that the Panel should follow when analyzing the EU's Article XX defenses. Next, we will explain why the EU's effort to collapse the analyses under Article XX(a), Article XX(b), and Article XX(g) of the GATT into a single analysis because of the cross-cutting nature of the objective of its measure is not supported by the text of these provisions. Finally, we will very briefly address the contention of certain third parties in this dispute that there is a territorial limitation on Article XX defenses, *i.e.*, that a Member cannot invoke Article XX with respect to events that arise outside of that Member's territory. This contention is meritless.

**I. The proper approach to an Article XX analysis**

2. Article XX of the GATT 1994 provides that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal, or plant life or health; . . . [or]

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

3. Thus, 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.

4. To establish that a measure is justified under Article XX, the text and structure of that provision set out two elements that the responding Member asserting the defense would be

expected to show, namely, that the measure at issue is: (1) provisionally justified under one of the Article XX subparagraphs and (2) applied consistently with the requirements of the chapeau. While Article XX analyses typically begin with an examination under one or more Article XX subparagraphs and then proceed to an examination of consistency with the chapeau, this order of analysis is not mandatory. Nothing in the text of Article XX suggests that it is not possible to conduct an appropriate legal analysis beginning with the chapeau. The chapeau and the subparagraphs are two independent but related requirements, both of which must be satisfied for a measure to be found justified under Article XX.

5. The EU has asserted defenses of challenged measures under subparagraphs (a), (b), and (g) of Article XX. These subparagraphs each incorporate two elements, namely: (1) the challenged measure must be adopted or enforced to pursue the objective covered by the subparagraph; and (2) the measure must be, in the cases of subparagraphs (a) and (b), “necessary” to the achievement of that objective, or in the case of subparagraph (g) “related to” the covered objective.<sup>1</sup>

6. 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.”<sup>2</sup> It also suggests that, because the legal requirements of each of these subparagraphs are “*in practice* very similar”<sup>3</sup>, the Panel may perform a single analysis whereby it assesses whether the measure is “rational and

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<sup>1</sup> *EC – Seal Products (AB)*, para. 5.169; *Brazil – Retreaded Tyres (AB)*, paras. 144-145; *Korea – Beef (AB)*, para. 157.

<sup>2</sup> EU First Written Submission, paras 1308-1309.

<sup>3</sup> EU First Written Submission, para. 1249 (original emphasis).

reasonable both in its design and application.”<sup>4</sup> Specifically, the EU asks the Panel to assess “whether the claimed objectives are ‘public morals’, ‘life or health of humans, animals or plants’ and ‘exhaustible natural resources’ objectives within the meaning of Article XX(a), (b) and (g), and whether the measures are ‘designed’ to protect those objectives (in other words, whether the measures are not incapable of contributing to those objectives).”<sup>5</sup>

7. The United States observes that it is for the responding Member to identify the objective that motivates a given measure. By invoking an Article XX general exception, the responding Member is indicating that, despite the apparent inconsistency of a measure with another WTO commitment, there is a basis in Article XX to justify the measure. If the Member did not identify the general exception at issue, it would simply not have asserted that there is any Article XX basis to justify the inconsistent measure.

8. If a complainant wishes to challenge the genuineness of a respondent’s professed objective, it can do so by demonstrating that the measure fails to contribute toward the alleged objective, and that less trade restrictive options are available to meet the objective in question. In this way, a complainant might show that the measure is not “necessary” or “relating” to the relevant objective of a given subparagraph. It is not for the respondent, or the Panel, to recharacterize or determine for itself the objective of the measure at issue.

9. However, 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. Many, if not all,

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<sup>4</sup> EU First Written Submission, para. 1252.

<sup>5</sup> EU First Written Submission, para. 1310.

domestic measures have multiple objectives. Where that is the case, respondents have – as the EU has here – invoked multiple subparagraphs of Article XX. To prevail on those claims, the respondent must substantiate each defense according to its own requirements.

10. Pursuant to the chapeau of Article XX, the party invoking Article XX has the burden of showing that any measure justified under an Article XX subparagraph does not discriminate “between countries where the same conditions prevail,” that such discrimination is not “arbitrary or unjustifiable,” and that the measure is not a “disguised restriction on trade.” Thus, while the subparagraphs of Article XX relate to specific objectives, the chapeau of Article XX may serve “to prevent the abuse or misuse of a Member’s right to invoke the exceptions contained in the [Article XX] subparagraphs.”<sup>6</sup>

11. It would not make sense to isolate the different aspects of a measure that pursue only some legitimate objectives but not others in assessing a measure’s compliance with the chapeau. If, based on the objective of conservation of natural resources, one aspect of a measure might seem arbitrary when only viewed in relation to this objective, but is nonetheless explained by the additional objective of protecting human health, then the measure could not be found to be arbitrary or unjustifiable, or a disguised restriction on trade, on that basis. Therefore, while it would not be appropriate for the Panel to review the EU’s measure under multiple subparagraphs together, the text and aim of the chapeau could require examination of multiple objectives of the measure at issue.

## **II. Whether Article XX defenses are available in connection with extraterritorial harm**

12. Lastly, the United States would like to very briefly address the argument made in the third-party submissions of Colombia and Malaysia regarding a supposed territorial limitation on

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<sup>6</sup> *EC – Seal Products (AB)*, para. 5.297.

Article XX defenses. According to Colombia and Malaysia, a Member cannot invoke Article XX to protect values and interests outside of that Member’s territory.<sup>7</sup> The text of Article XX does not support this position. As discussed earlier, Article XX allows Members to justify measures, if those measures “relate to” or “are necessary to” further certain enumerated objectives of the Member imposing the measure, and the measures do not discriminate “between countries where the same conditions prevail,” are not “arbitrary or unjustifiable,” and do not represent a “disguised restriction on trade.” However, 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.<sup>8</sup> This is consistent with the fact that the text of Article XX provides no basis for a territorial limitation. For these reasons, the United States does not support the territorial limitation to Article XX that Colombia and Malaysia have proposed.

## **V. Conclusion**

13. This concludes the U.S. oral statement. We thank the Panel for its consideration of the views of the United States and look forward to answering any questions the Panel may have.

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<sup>7</sup> See Colombia’s Third-Party Submission, paras. 342 *et seq.*; Malaysia’s Third-Party Submission, para. 131.

<sup>8</sup> See, e.g., *U.S. – Shrimp (AB)* (holding that a measure related to the protection of sea turtles in extraterritorial waters was justified under Article XX(g)); *EC – Seal Products (AB)* (holding that a measure related to seal hunting in extraterritorial waters was justified under Article XX(a)).