

*European Union – Certain Measures Concerning Palm Oil and Oil Palm
Crop-Based Biofuels
(DS600)*

**Third-Party Submission
of the United States of America**

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TABLE OF ACRONYMS

Acronym	Full Name
CAP	Conformity Assessment Procedure
GATT	General Agreement on Trade and Tariffs
ILUC	Indirect land use change
TBT Agreement	<i>Agreement on Technical Barriers to Trade</i>
WTO	World Trade Organization

TABLE OF REPORTS

Short title	Full Citation
<i>Australia – Apples (AB)</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010
<i>Australia – Tobacco Plain Packaging (AB)</i>	Appellate Body Report, <i>Australia - Certain Measures on Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> , WT/DS435/AB/R, WT/DS441/AB/R, adopted 29 June 2020
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
<i>Canada – Aircraft (AB)</i>	Appellate Body Report, <i>Canada - Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 2 August 1999
<i>Canada – Autos (AB)</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000
<i>China – Rare Earths (AB)</i>	Appellate Body Report, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R; WT/DS432/AB/R; WT/DS433/AB/R, adopted 19 June 2000
<i>China – Raw Materials (AB)</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
<i>DR – Cigarettes (AB)</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 25 April 2005
<i>EC – Asbestos (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Products Containing Asbestos</i> , WT/DS135/AB/R, adopted December 3, 2001
<i>EC – Large Civil Aircraft (AB)</i>	Appellate Body Report, <i>European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 18 May 2011

<i>EC – Sardines (AB)</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002
<i>EC – Seal Products (AB)</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
<i>EC – Seal Products (Panel)</i>	Panel Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/R / WT/DS401/R / and Add. 1, adopted 18 June 2014, as modified by Appellate Body Reports, WT/DS400/AB/R; WT/DS401/AB/R
<i>Korea – Beef (AB)</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R; WT/DS169/AB/R, adopted 11 December 2000
<i>US – Clove Cigarettes (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012
<i>US – COOL (Article 21.5) (AB)</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements - Recourse to Article 21.5 of the DSU by Canada and Mexico</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 29 May 2015
<i>US – FSC (AB)</i>	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations”</i> , WT/DS108/AB/R, adopted 24 February 2000
<i>US – Large Civil Aircraft (2nd Complaint) (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint</i> , WT/DS353/AB/R, adopted 12 March 2012
<i>US – Shrimp (AB)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 12 October 1998
<i>US – Softwood Lumber IV (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 19 January 2004
<i>US – Tuna II (Mexico) (AB)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012

<i>US – Tuna II (Mexico) (Panel)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R
<i>US – Wool Shirts and Blouses (AB)</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

I. INTRODUCTION

1. The United States welcomes the opportunity to provide its views on certain issues raised in this dispute. The United States has a strong interest in the proper interpretation of the *Agreement on Technical Barriers to Trade* (“TBT Agreement”) and the *General Agreement on Trade and Tariffs* (“GATT”). In this third-party submission, the United States provides its view of the proper legal interpretation of Articles 2.1, 2.2, 2.4, and 5.1 of the TBT Agreement and Article XX of the GATT.

2. In this dispute, Malaysia is challenging a series of EU measures that caps, and ultimately will phase out, the use of palm oil-based biofuel for the purposes of meeting renewable energy targets. This, according to Malaysia, will effectively eliminate the European Union as a market for palm oil-based biofuels. The European Union purportedly passed these measures to decrease its consumption of biofuels with a propensity to create environmentally harmful indirect land use change (ILUC). We refer to these measures as the “the High ILUC Risk Cap.” Malaysia also is challenging a French biofuel tax discount, which does not apply to palm oil-based biofuels, but does apply to other crop-based biofuels, as well as certain Lithuanian measures.

II. INTERPRETATION OF THE TBT AGREEMENT

A. Article 2.1 of the TBT Agreement

3. Malaysia claims that the High ILUC Risk Cap breaches Article 2.1 of the TBT Agreement because it accords “to Malaysia’s oil palm crop-based biofuel imported into the EU treatment less favourable than that accorded to ‘like products’ imported into the EU from other countries and to domestic ‘like products’.”¹ Article 2.1 of the TBT Agreement states:

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.

4. Thus, 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 In this way, Article 2.1 mirrors Article III:4 of the GATT 1994.³

¹ Malaysia’s First Written Submission, para. 488.

² *US – Clove Cigarettes (AB)*, para. 87; *US – Tuna II (Mexico) (AB)*, para. 202.

³ Article III:4 requires a complainant to demonstrate that (1) the measures at issue is either a law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use; (2) the imported and domestic products are “like;” and (3) the law or regulation provides to imported products treatment less favorable than that accorded to like domestic products. *See, e.g., Korea – Beef (Panel)*, para. 617.

5. With regard to the first element, Annex 1, paragraph 1, of the TBT Agreement defines “technical regulation” as a:

Document 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.⁴

6. Read together the first and second sentences of the definition make clear that technical regulations are documents with which compliance is mandatory and that “lay down product characteristics or their related processes and production methods” or “deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method” or both. The phrase “with which compliance is mandatory” applies to the terminology, symbols, packaging, marking or labelling requirements listed in the second sentence because the second sentence specifies alternative aspects with which a document meeting the definition of a technical regulation might deal; compliance with a document dealing with terminology, symbols, packaging, marking or labelling must still be mandatory for it to fall within the definition of a technical regulations. This is confirmed by the explanatory note to the definition of “standard” in Annex 1 of the TBT Agreement which provides that “[f]or purposes of this Agreement standards are defined as voluntary and technical regulations as mandatory documents.”

7. The Appellate Body in *EC – Asbestos* appears to mistakenly have read the second sentence as providing examples of “product characteristics” covered by the first sentence of the definition.⁵ The second sentence of the definition of technical regulation, however, does not contain examples of product characteristics; it sets out aspects other than product characteristics that may be the subject of a document with which compliance is mandatory and thus fall within the definition of a technical regulation. This can be discerned from the wording of the second sentence which states that “it may also or exclusively deal with.” The “it” refers back to the word “document” in the first sentence such that the document may in addition or instead deal with aspects that are not considered product characteristics, such as terminology or labeling requirements. The Appellate Body’s interpretation of the second sentence appears to ignore the word “also.” The Appellate Body’s approach thus appears not to give full effect to the terms of the relevant provisions of the TBT Agreement and is therefore not an approach that should be followed. It also overlooks that the word “also” was included in the second sentence of the definition of technical regulation as compared to the parallel provision of the “Tokyo Round

⁴ TBT Agreement, Annex 1, para. 1 (emphasis added).

⁵ Appellate Body Report, *EC – Asbestos*, para. 67. The panel in *EC – GIs* (Complaint by Australia) repeated this same mistake in concluding that labeling requirements themselves are product characteristics. Panel Report, *EC – GIs* (Complaint by Australia), para. 7449.

Standards Code” (the predecessor agreement to the TBT Agreement) which does not include the word “also.”⁶

8. In contrast with technical regulations, Annex 1, paragraph 2, of the TBT Agreement defines “standard” as follows:

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, *with which compliance is not 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.⁷

9. As noted above, under Annex 1, paragraph 1, of the TBT Agreement, a “document” constitutes a “technical regulation” if it “lays down product characteristics or their related processes and production methods” and if compliance with the content of such document is “mandatory.” Under Annex 1, paragraph 2, a “document” is a “standard” if it provides rules, guidelines, or characteristics for products or related processes and production methods, and if “compliance is not mandatory.” The term “document” means “something written, inscribed, etc., which furnishes evidence or information upon any subject.”⁸ Because the ordinary meaning of the term could cover a broad range of instruments,⁹ in general, a determination of whether a measure is a technical regulation or a standard will involve a fact-specific assessment of the measure at issue.

10. The second element of Article 2.1, whether a product is “like” another, is a fact-specific inquiry that must be decided on a case-by-case basis.¹⁰ Based on paragraph 18 of the *Report of the Working Party on Border Tax Adjustments*, past panels have often analyzed likeness under Article 2.1 by examining, *inter alia*, (i) the physical properties of the products; (ii) the products’ end-uses; (iii) consumers’ tastes and habits in respect of the products; and, (iv) the international tariff classification of the products.¹¹ Certain past panels have omitted a detailed analysis and assumed “likeness” in the circumstance when the measure at issue, on its face, discriminates

⁶ GATT, Agreement on Technical Barriers to Trade (1979), Annex 1. The Committee on Technical Barriers to Trade (TBT Committee) discussed this fact in June 1991 TBT Committee meeting. Finland, supported by the United States and the EC, noted that the then draft TBT Agreement included the word “also” at the beginning of the second sentence and this supported the view that the second sentence was additional to the first. *See* Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labeling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to the Product Characteristics, WT/CTE/W/10, G/TBT/W/11 (Restricted) 29 August 1995, para. 21.

⁷ TBT Agreement, Annex 1, para. 2 (emphasis added).

⁸ *Shorter Oxford English Dictionary*, 6th edn., A. Stevenson (ed.) (Oxford University Press, 2007), vol. 1, p. 731.

⁹ *See US – Tuna II (Mexico) (AB)*, para. 185.

¹⁰ *See US – Tuna II (Mexico) (Panel)*, para. 7.238.

¹¹ *See Report of the Working Party on Border Tax Adjustments*, adopted December 2, 1970, para. 18; *EC – Asbestos (AB)*, para. 101; *US – Tuna II (Mexico) (Panel)*, paras. 7.235, 7.238-247; *see also US – Clove Cigarettes (AB)*, paras. 118-120.

between products solely on the basis of origin.¹² Otherwise, panels have conducted a fact-specific analysis.¹³

11. With respect to the third element, “less favourable treatment,” a measure may, on its face, treat imported products less favorably than like domestic products (or other foreign products). Where the measure does not, 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”.¹⁴ 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*.

12. 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”.¹⁵ The context provided by Article III of the GATT 1994, on “National Treatment on Internal Taxation and Regulation”, similarly reflects that internal regulations “should not be applied to *imported and domestic products* so as to afford protection to *domestic* production.”¹⁶ Because *national* treatment is directed to preventing discrimination on the basis of national origin, certain past reports have correctly found that a measure does not “modif[y] the conditions of competition in the relevant market to the detriment of imported products,” if the alleged detriment is explained by *factors unrelated to the foreign origin* of the product.¹⁷

¹² See *US – COOL (Panel)*, para. 7.254.

¹³ See *US – Tuna II (Mexico) (Panel)*, paras. 7.235, 7.238-247; *US – Clove Cigarettes (Panel)*, paras. 7.122-123, 7.149-248; *US – Clove Cigarettes (AB)*, paras. 156-160; *EC – Seal Products (Panel)*, paras. 7.136-140.

¹⁴ See *EC – Asbestos (AB)*, para. 100 (“[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 favorable treatment” than that accorded to the group of “like” *domestic* products.”).

¹⁵ TBT Agreement, preamble, fifth para. See also TBT Agreement, Art. 5.1.1 (“[C]onformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of *like products originating in the territories of other Members* under conditions no less favourable than those accorded to suppliers of *like products of national origin or originating in any other country*, in a comparable situation[.]” (italics added)).

¹⁶ GATT 1994, Art. III:1.

¹⁷ See *DR – Cigarettes (AB)*, para. 96 (finding that “the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case” (italics added); *Korea – Beef (AB)*, para. 144; *Mexico – Soft Drinks (Panel)*, para. 8.118.

13. 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.”¹⁸ Thus, 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. In the context of this dispute, the European Union argues that it adopted the High ILUC Risk Cap to further “climate change mitigation, [and] environmental and biodiversity objectives.”¹⁹ If the Panel were to conclude that any different and detrimental treatment is based on those concerns – and not the foreign origin of product – then the Panel should find that an Article 2.1 national treatment claim is not well-founded.

14. In more 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.”²⁰ 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. As the United States has explained above, past panel reports have correctly found measures to be consistent with Article III:4 of the GATT 1994 if the detrimental impact experienced by imports was explained by factors unrelated to the foreign origin of the product. The Appellate Body’s more recent interpretations of the analogous Article 2.1 national treatment provision have deformed this evaluation, however. Under the Appellate Body’s erroneous approach²¹, any detrimental impact could constitute a breach – not because the impact is *related to* the foreign origin of the product, but because the measure was not constructed so as to *eliminate* any detrimental impact not *exclusively* related to the regulatory distinction.

15. The Appellate Body’s erroneous approach may also 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. For example, in *US – COOL*, the Appellate Body’s findings related

¹⁸ Annex I.1 of the TBT Agreement.

¹⁹ The European Union’s First Written Submission, para. 705.

²⁰ *US – Clove Cigarettes (AB)*, para. 174 (emphasis added); *US - Tuna II (Mexico) (AB)*, para. 7.30; *US – COOL (AB)*, para. 268.

²¹ See United States Trade Representative, Report on the Appellate Body of the World Trade Organization (Feb. 2020), pp. 90-95, available at https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (last accessed March 19, 2021); see, e.g., Dispute Settlement Body, Minutes of the Meeting Held on June 18, 2014, WT/DSB/M/346, para. 7.7 (statement of the United States concerning the Appellate Body report in *EC – Seal Products (AB)* (DS400, DS401)); Dispute Settlement Body, Minutes of the Meeting Held on May 29, 2015 (WT/DSB/M/362), para. 1.18 (statement of the United States concerning the Appellate Body report in *US – COOL (Article 21.5)* (DS384, DS386), expressing concerns with the Appellate Body’s findings concerning Article 2.1 of the TBT Agreement).

not to the detrimental impact on imports, but what the Appellate Body considered to be a disproportionate burden *on upstream producers and processors*.²² The Appellate Body stated that “this lack of correspondence between the recordkeeping and verification requirements, on the one hand, and the limited consumer information conveyed through the retail labelling requirements and exemptions therefrom, on the other hand, is of central importance to our overall analysis under Article 2.1 of the TBT Agreement.” The Appellate Body’s analysis thus turned the less favorable treatment test on its head, and made it not about discrimination, but about whether the measure was considered to be appropriately tailored to the objective of the measure. The text of Article 2.1 does not create the need or the authority to conduct such an analysis, however, to assess whether there is origin-based discrimination.

16. The Appellate Body’s approach in essence imposes an obligation on the complainant to demonstrate the degree of trade restrictiveness of the measure in question. However, 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.

17. 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). For example, under Article 2.2 – as explained below – a respondent’s measure will be found more trade-restrictive than necessary if another measure is available to the Member that makes a similar contribution to the Member’s objective but with a less restrictive effect on trade. That is, trade-restrictiveness is anticipated and permitted in the pursuit of a legitimate objective, so long as the measure taken is not *more* trade-restrictive than *necessary*. The Appellate Body’s trade-restrictiveness test under Article 2.1, by contrast – lacking the appropriate textual basis that Article 2.2 has – does not consider the availability or appropriateness of alternative measures at all. Instead, it treats trade-restrictiveness as if it were discrimination and prohibits it unless, for example, the costs imposed are not disproportionate (or incommensurate) with the benefits achieved.

18. Thus, while the Appellate Body may have intended to permit a broad scope of justified regulatory action in creating its “legitimate regulatory distinction” test,²³ by collapsing the

²² *US – COOL (AB)*, para. 347 *et seq.*

²³ In *U.S. – Cloves (AB)*, immediately before introducing the “legitimate regulatory distinction” test, the Appellate Body discussed aspects of the TBT Agreement that suggest that the intended scope of allowable regulatory action under Article 2.1 is broad. For instance, the Appellate Body stated that “the balance that the preamble of the TBT Agreement strikes between, on the one hand, the pursuit of trade liberalization and, on the other hand, Members’ right to regulate, is not, in principle, different from the balance that exists between the national treatment obligation of Article III and the general exceptions provided under Article XX of the GATT 1994” (para. 109); “[w]e consider that the sixth recital of the preamble of the TBT Agreement provides relevant context regarding the ambit of 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.”²⁴

19. 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,²⁵ for example, then the measure would breach the national treatment or MFN obligation.

20. 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 limit climate change, protect biodiversity, and address public morals concerns.²⁶ If, taking into account all the facts, the Panel finds that the impact on Malaysian imports is not origin-based, then the Panel should conclude that Malaysia has not met its burden to demonstrate “less favourable treatment” under Article 2.1.

B. Article 2.2 of the TBT Agreement

‘treatment no less favourable’ requirement in Article 2.1, by making clear that technical regulations may pursue the objectives listed therein, provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the TBT Agreement” (para. 173); “the object and purpose of the TBT Agreement is to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members’ right to regulate” (para. 174).

²⁴ *U.S. – Cloves (AB)*, at para. 109.

²⁵ *See Mexico – Soft Drinks (Panel)*, para. 8.119.

²⁶ *See* The European Union’s First Written Submission, para. 742.

21. Malaysia 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.²⁷ 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.”²⁸

22. Article 2.2 of the TBT Agreement states:

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.

23. 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.”

24. If the measure contributes to, 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.²⁹

25. 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, Malaysia and the European Union use different framing to characterize the “legitimate objective” underlying the High ILUC Risk Cap. According to Malaysia, the European Union adopted the measure to address “the expressed primary objective of ... the avoidance of additional GHG

²⁷ See Malaysia’s First Written Submission, paras. 586 *et seq.*

²⁸ The European Union’s First Written Submission, para. 771.

²⁹ See *Australia – Apples (AB)*, para. 356 (“[T]he legal question [for Article 5.6 of the SPS Agreement] is whether the importing Member could have adopted a less trade-restrictive measure.”).

emissions by limiting direct and indirect land-use change.”³⁰ The European Union argues that the measures at issue are meant to address the “composite” objectives of “combating climate change, biodiversity loss and protecting the EU public morals,” claiming that these objectives are “interlinked.”³¹ 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.

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

C. Article 2.4 of the TBT Agreement

27. Malaysia argues that the European Union breaches Article 2.4 of the TBT Agreement because the High ILUC Risk Cap is “not based on the relevant international standards.”³² Malaysia argues that “(i) relevant international standards exist; (ii) the EU has not used these standards as a basis for the technical regulations at issue; and (iii) the relevant international standards are effective and appropriate means for the fulfilment of the legitimate objective(s) pursued by the EU.”³³ The European Union argues that the international standards referred to by Malaysia do not specifically address the issues for which the measures were designed, and that thus, the measures do not “do not ‘contradict’ any international standard ... because they address a matter which is outside of the scope of those standards.”³⁴

28. Article 2.4 of the TBT Agreement states:

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

29. With respect to whether a relevant international standard exists, 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

³⁰ Malaysia’s First Written Submission, para. 602.

³¹ The European Union’s First Written Submission, para. 793.

³² Malaysia’s First Written Submission, paras. 692 *et seq.*

³³ Malaysia’s First Written Submission, para. 695.

³⁴ The European Union’s First Written Submission, para. 994.

made available to the public.”³⁵ 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.”³⁶

30. 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.” The panel in *EC – Sardines* explained further that:

[A]n ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued. An inappropriate means will not necessarily be an ineffective means and vice versa. That is, whereas it may not be specially suitable for the fulfilment of the legitimate objective, an inappropriate means may nevertheless be effective in fulfilling that objective, despite its ‘unsuitability’. Conversely, when a relevant international standard is found to be an effective means, it does not automatically follow that it is also an appropriate means. The question of effectiveness bears upon the results of the means employed, whereas the question of appropriateness relates more to the nature of the means employed.³⁷

31. Malaysia identifies certain ISO standards as the relevant international standards that the European Union should have applied.³⁸ Malaysia explains that these standards are relevant because they “set out principles, requirements, and guidelines for determining the carbon footprint of products, including biofuel.”³⁹ The European Union disagrees, arguing that the more specific aim of the measures is limiting ILUC risk, and that “ILUC risks and ILUC emissions are not an integral part of the ISO standards mentioned by Malaysia.”⁴⁰ As noted above, it is for the respondent to identify the objectives motivating a challenged measure. If the Panel agrees with the European Union that the ISO standards Malaysia 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.

D. Article 5.1 of the TBT Agreement

32. Malaysia claims that the conformity assessment procedure (CAP) for the High ILUC Risk Cap breaches Article 5.1 of the TBT Agreement. Malaysia argues that the CAP does not

³⁵ ISO/IEC Guide 2 (1991), para. 3.2.1.

³⁶ TBT Agreement, Annex 1.2, 1.4.

³⁷ See *EC – Sardines (Panel)*, para. 7.116.

³⁸ Malaysia’s First Written Submission, paras. 745 *et seq.*

³⁹ Malaysia’s First Written Submission, para. 700.

⁴⁰ The European Union’s First Written Submission, para. 989.

conform to Article 5.1.1 of the TBT Agreement because it “discriminates against Malaysian suppliers of oil palm crop-based biofuel as compared to the suppliers of the EU or other foreign origin of oil crop-based biofuel produced from feedstocks other than palm oil.”⁴¹ The European Union argues that the CAP does not violate Article 5.1.1 because, *inter alia*, the “low ILUC-risk certification scheme does not ‘grant access’ under conditions that are ‘less favourable’ to suppliers of ‘like products’ of national origin or originating in any other country.”⁴²

33. TBT Article 5.1.1 provides that, where Article 5.1 applies, Members shall ensure that:

[C]onformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers’ right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system.

34. Thus, 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.”

35. As to the first element, Annex 1 of the TBT Agreement defines a “conformity assessment procedure” as “[a]ny procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.” The explanatory note to this definition provides greater clarity, explaining that “[c]onformity assessment procedures include, *inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.”

36. The second element, whether the products at issue are “like products,” is analogous to the analysis under Article 2.1 of the TBT Agreement, as well as other provisions of the WTO Agreements, including Article I:1 of the GATT 1994. A panel must examine “likeness” based upon the specific facts at issue. Past reports have generally analyzed likeness on the basis of fact-specific criteria⁴³ with factors including: (1) the properties, nature and quality of the products; (2) end-uses of the products; (3) consumers’ tastes and habits in respect of the products; and (4) the international classification of the products for tariff purposes. Certain panel reports have assumed “likeness” when the measure at issue, on its face, discriminates between products solely on the basis of origin.

⁴¹ Malaysia’s First Written Submission, para. 745.

⁴² The European Union’s First Written Submission, para. 1043.

⁴³ See, e.g., *US – Clove Cigarettes (AB)*, paras. 104-233

37. The third element entails a comparison between the “access” granted to suppliers of products of a complaining Member and to suppliers of like products “originating in” other Members, “in a comparable situation.” “Access” is defined in Article 5.1.1 as entailing the “right to an assessment of conformity under the rules of the procedure.” Thus, the comparison is between the right to an assessment granted to suppliers of products “originating in” the complaining party, on the one hand, and to suppliers of products “originating in” the responding party or other Members, on the other. (It is the origin of the products that is relevant to the comparison.)

38. Further, the comparison is between the access granted to suppliers of like products originating in another country, “in a comparable situation.” The definition of “comparable” is “able to be compared.”⁴⁴ “Compare,” in turn, is defined as “liken, pronounce similar” and “be compared; bear comparison; be on terms of equality with.”⁴⁵ The word thus suggests that two situations are of the same type, such that they can be compared, and that they are “similar” or equal. The panel in *Russia – Railways* considered that “whether a situation is comparable must be assessed on a case-by-case basis and in the light of the relevant rules of the conformity assessment procedure and other evidence on record.”⁴⁶

39. In response to Malaysia’s claim, the European Union argues that for the purposes of the Article 5.1 analysis, palm oil-based biofuels are not “in a comparable situation” to other crop-based biofuels, because other crop-based biofuels are not subject to the CAP.⁴⁷ According to the European Union, “when assessing whether suppliers are in a comparable situation, the scope of the assessment is not between producers of all oil crop based biofuels and producers of palm-oil based biofuels. Instead, it is between different suppliers of ‘like’ products which are subject to the ‘conformity assessment’ in the first place.”⁴⁸ In short, the European Union argues that because only palm oil-based biofuels are subject to the CAP, then the CAP—that is, the process itself—cannot discriminate between palm oil-based biofuels and other biofuels.

40. Therefore, 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.

41. Malaysia’s second Article 5.1 claim is that the European Union breaches Article 5.1.2 because “the EU, by applying the conformity assessment procedure at issue, creates unnecessary obstacles to international trade.”⁴⁹ More specifically, Malaysia argues that the “trade-

⁴⁴ *Shorter Oxford English Dictionary*, vol. 1, p. 457, 4th edn, (1993).

⁴⁵ *Shorter Oxford English Dictionary*, vol. 1, p. 457, 4th edn, (1993).

⁴⁶ *Russia – Railways (Panel)*, at para. 7.283.

⁴⁷ The European Union’s First Written Submission, para. 1051.

⁴⁸ The European Union’s First Written Submission, para. 1051.

⁴⁹ Malaysia’s First Written Submission, para. 745.

restrictiveness of low ILUC-risk certification is more than necessary to fulfil the primary objective pursued by this measure,” which violates Article 5.1.2.”⁵⁰

42. Article 5.1.2 of the TBT Agreement provides that, where Article 5.1 applies, Members shall ensure that:

[C]onformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, *inter alia*, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.

43. Thus, for a complaining Member to establish that a measure is inconsistent with Article 5.1.2, it must show that the measure involves a CAP and that such CAP is “prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.” The second sentence of the article then describes a way in which a measure could be applied in a manner that would contravene the obligation set out in the first sentence.⁵¹

44. The first element of Article 5.1.2, that the measure at issue involves a “conformity assessment procedure,” is the same as the first element of Article 5.1.1 and was discussed above in that context.

45. With respect to the second element, a key inquiry is whether a conformity assessment procedure is with a view to or the effect of creating “unnecessary obstacles to international trade.” The pertinent definition of “obstacle” is “a thing that stands in the way and obstructs progress; a hindrance; an obstruction.”⁵² “Necessary” refers to something that “cannot be dispensed with or done without; requisite; essential; needful.”⁵³ An “unnecessary obstacle” to international trade therefore suggests something that blocks or hinders trade between Members that is not requisite or essential.

46. The second sentence of Article 5.1.2 states that “[t]his means ... that conformity assessment procedures shall not be more strict or more strictly applied than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards.” Thus, under Article 5.1.2, an “unnecessary obstacle” is one that is not “necessary to give the importing Member adequate confidence” that products conform to the applicable technical regulation or standard. As to the level of confidence, Article 5.1.2 refers to “adequate confidence . . . taking account of the risks non-conformity would create.” That is, a procedure that is more strict (or more strictly applied) than is necessary to provide to the

⁵⁰ See Malaysia’s First Written Submission, para. 761.

⁵¹ See *EC – Seals (Panel)*, paras. 7.512-513.

⁵² *Shorter Oxford English Dictionary*, vol. 2, p. 1970 4th edn, (1993).

⁵³ *Shorter Oxford English Dictionary*, vol. 2, p. 1895 4th edn, (1993).

importing Member the sufficient confidence that the products do conform – for example, because sufficient confidence can be provided through a less strict conformity assessment procedure – would breach Article 5.1.2.

47. The text of Article 5.1.2 does not require that a complaining party identify a less trade-restrictive alternative measure that provides adequate confidence, nor establish the existence of such an alternative.⁵⁴ However, as under Article 2.2 of the TBT Agreement, which uses “comparison with proposed alternative measures ... as a ‘conceptual tool’ for the purpose of assessing whether a challenged technical regulation is more trade restrictive than necessary,”⁵⁵ such a comparison also may be used as a tool under Article 5.1.2, despite that it is not a legal element required under this provision.⁵⁶

48. Malaysia cites several alleged shortcomings in the European Union’s CAP, including that “obtaining low ILUC-risk certification is currently altogether impossible because of the lack of further implementing legislation.”⁵⁷ The European Union “acknowledges that it has not yet adopted detailed implementing rules on [low ILUC-risk] certification. ... However, ... the adoption of the implementing act is not indispensable to carry out low-ILUC risk certification, as it is demonstrated by the fact that a voluntary scheme already issues low-ILUC certification.”⁵⁸ Therefore, the Panel must determine whether the current, ongoing lack of implementing rules is itself an “obstacle to trade” in breach of Article 5.1.2.

III. INTERPRETATION OF ARTICLE XX OF THE GATT

49. In this section, the United States will briefly address 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.

50. 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

⁵⁴ See *US – Tuna II (Mexico) (AB)*, para. 322.

⁵⁵ *US – COOL (Article 21.5) (AB)*, para. 5.200; *US – Tuna II (Mexico) (AB)*, para. 322.

⁵⁶ The United States notes that the Committee on Technical Barriers to Trade has outlined a number of approaches to facilitate the acceptance of conformity assessment results. Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995, Annexes to Part 1, G/TBT/1/Rev.12, 21 January 2015, p. 45. These may be relevant as indicating approaches that other WTO Members have considered not to hinder trade, relatively speaking, and that can provide a high level of confidence that products conform to the requirements of technical regulations and standards.

⁵⁷ Malaysia’s First Written Submission, para. 771.

⁵⁸ See the European Union’s First Written Submission, para. 1081.

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.

51. 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.

52. 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.

53. 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.⁵⁹

54. 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."⁶⁰ 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 measures at issue are

⁵⁹ *EC – Seal Products (AB)*, para. 5.169; *Brazil – Retreaded Tyres (AB)*, paras. 144-145; *Korea – Beef (AB)*, para. 157.

⁶⁰ The European Union's First Written Submission, para. 1342.

‘rational and reasonable’ in their design.”⁶¹ The EU argues that the Panel’s role is to “ascertain whether the measure is apt to, or ‘not incapable’ of contributing to” the stated objective(s).⁶²

55. 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.

56. 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.

57. 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, 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.

58. 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.”⁶³

59. 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

⁶¹ The European Union’s First Written Submission, para. 1265.

⁶² The European Union’s First Written Submission, para. 1344.

⁶³ *EC – Seal Products (AB)*, para. 5.297.

together, the text and aim of the chapeau could require examination of multiple objectives of the measure at issue.

IV. CONCLUSION

60. The United States thanks the Panel for its consideration of the U.S. views on issues raised in this dispute.