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

THIRD PARTY EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

June 27, 2022

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY SUBMISSION

I. INTERPRETATION OF ARTICLE 2.1 OF THE TBT AGREEMENT

1. 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'." 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. 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.

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 limit climate change, protect biodiversity, and address public morals concerns. 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.

II. INTERPRETATION OF ARTICLE 2.2 OF THE TBT AGREEMENT

11. 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. 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." According to Malaysia, the European Union adopted the measure to address "the expressed primary objective of … the avoidance of additional GHG emissions by limiting direct and indirect land-use change." 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." 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 Malaysia 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 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.

IV. INTERPRETATION OF ARTICLE 5.1 OF THE TBT AGREEMENT

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

20. According to Malaysia and Colombia (arguing as a third party), 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.

II. CONFIDENTIALITY

21. In this dispute, Malaysia has filed several documents and excerpts of documents from DS593, the Indonesia/EU-Palm Oil case. Those documents—including an expert report, and portions of Indonesia's submission and a third-party submission—were to be treated as confidential per Article 18.2 of the DSU. While these disputes both deal with the same EU measures, the two disputes are distinct. Further, the third parties in DS593 (the Indonesia/EU-Palm Oil case) and DS600 (the Malaysia/EU-Palm Oil case) are not identical, and thus, the disclosure of confidential documents from DS593 (the Indonesia/EU-Palm Oil case) in the present DS600, Malaysia/EU-Palm Oil case, is more than theoretical.

22. The United States takes its confidentiality obligations in WTO dispute settlement very seriously, and we rely on other Members to do the same. We caution Members to remain aware of, and abide by, their obligations, and to maintain strict confidentiality protocols at all times. This includes instances such as the present situation, where multiple disputes are ongoing that involve overlapping factual and legal issues.

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

23. Response to Question 3: Article 2.1 of the TBT Agreement prohibits measures that accord less favorable treatment to imported products as compared to like domestic products *based on origin*. Thus, the European Union is correct that the proper exercise is *not* to compare the impact of the measure on imports from various countries. The proper exercise is to examine the measure at issue to determine if that measure affords less favorable treatment to like products based on origin. 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." Thus, if a panel determines 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.

24. Response to Question 4: We agree in part, and disagree in part, with the European Union's description of the proper analysis under Article 2.1, as quoted in Question 4 from the Panel. We do not agree that it is the Panel's role to "examine the nature of the objectives pursued by the measures" to determine if they are "legitimate." The Panel's analysis in this respect should be limited to a determination of whether the detrimental impact is based on the origin of the product in question. We agree with the European Union that a panel must examine "the relationship between the legitimate objectives of the measure and the detrimental effects." To complete this examination, a panel must take 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.

25. Response to Questions 8 and 9: Article 2.2 does not require that a WTO Member must, as the Panel's questions suggest, continually update its regulations to reflect the most recent "scientific and technical information." The context provided by Article 2.3 also does not suggest such a requirement. Under Article 2.3, WTO Members must monitor existing measures, and may need to alter those measures if "circumstances or objectives giving rise to their adoption" change. While it may be the case that the "latest available" information on a given issue will affect the circumstances or objectives of a technical regulation, it does not follow that it always must.

26. Response to Question 16: Article 12.3 of the TBT Agreement only requires that Members take account of the needs of developing country Members in the "preparation and application" of a measure, "*with a view*" to ensuring that these measures do not create unnecessary obstacles to trade. The ordinary meaning of the phrase "with a view" is "with the aim of attaining or accomplishing" or "with the hope or intention of." In this sense, Article 12.3 does not require the developed country Member to accept every recommendation presented by

the developing country Member but rather to proceed with the aim of ensuring that its measure does not create an unnecessary obstacle to exports.

27. Response to Question 17: GATT Article XI:1 relates only to "prohibitions or restrictions" on the importation or exportation of products. Furthermore, Article XI:1 proscribes restrictions "on the importation" or "on the exportation" of any product, but not restrictions on the level of imports or exports. Instead, the terms used— "importation" and "exportation"—reach the *process* of importing or exporting.

28. Response to Question 19: 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 in its application." 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. That the language at issue in those subparagraphs—*i.e.*, "necessary to" versus "relating to"—differs, suggests that these provisions do articulate different requirements.