

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

**U.S. RESPONSES TO QUESTIONS FROM THE PANEL TO THE THIRD PARTIES  
FOLLOWING THE THIRD-PARTY SESSION**

**June 20, 2022**

## 1. APPLICABILITY OF THE TBT AGREEMENT

1. **To all third parties [Advance question 1]: Please comment on Malaysia's argument that the high ILUC-risk cap and the high ILUC-risk phase-out measures lay down "related processes and production methods" within the meaning of Annex 1.1 of the TBT Agreement.**<sup>1</sup>

### U.S. Response:

1. Annex 1.1 of the TBT defines “technical regulation” as a “document which lays down product characteristics or their related processes and production methods...” Thus, for a measure to be a technical regulation, it must be one of two types of documents. First, one that sets out that a product possess or not possess a particular “product characteristic”. Second, one that prescribes processes or production methods related to a product characteristic –because “their” refers to the preceding “characteristics”.<sup>2</sup> Malaysia must therefore demonstrate that a “process or production method” is related to a product characteristic.”

## 2. ARTICLE 2 OF THE TBT AGREEMENT

2. **To all third parties [Advance question 2]: Please comment on the following statement of the European Union concerning "less favourable treatment", as expressed in Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994:**

**As regards the concept of "less favourable treatment", the Appellate Body has confirmed that the essence of the substantive non-discrimination obligation under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 is the same. Crucially, however both provisions permit distinctions to be made between categories of the "like" products and those distinctions per se do not amount to "less favourable treatment".**<sup>3</sup>

**For example, in *EC – Biotech*, the Panel rejected the complainants' claim that the respondent's alleged different treatment of biotech and non-biotech products constituted a violation of Article III:4 of the GATT. The panel found that the treatment might have a "detrimental effect on a given imported product" (i.e. the biotech products), but that this effect was the result of a "factor or circumstance unrelated to the foreign origin of the product", namely:**

**[...] a perceived difference between [...] products in terms of their safety [...].**<sup>4</sup>

### U.S. Response:

3. The United States agrees that Article 2.1 of the TBT Agreement “permit[s] distinctions to be made between categories of the ‘like’ products and those distinctions per se do not amount to ‘less favourable treatment’.” As we explained in our third party submission, like Article III:4 of the GATT 1994, Article 2.1 does not forbid Members from making regulatory

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<sup>1</sup> Malaysia’s first written submission, para. 504.

<sup>2</sup> First Submission of the European Union, para. 583.

<sup>3</sup> Appellate Body Report, *US – Clove Cigarettes*. (footnote original)

<sup>4</sup> See Panel Report, *EC – Measures affecting the approval and marketing of biotech products*, para. 7.2514, WT/DS291/292/293/R, circulated on September 26, 2006. (footnote original)

distinctions between different products that may fall within a single group of “like products”.<sup>5</sup> 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*.

4. 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”.<sup>6</sup>

5. In certain reports, the Appellate Body 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.”<sup>7</sup> 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. Under the Appellate Body’s erroneous approach<sup>8</sup>, *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. This approach is not supported by the text of the Agreement. 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.<sup>9</sup>

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<sup>5</sup> 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.”).

<sup>6</sup> 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)).

<sup>7</sup> *US – Clove Cigarettes (AB)*, para. 174 (emphasis added); *US – Tuna II (Mexico) (AB)*, para. 7.30; *US – COOL (AB)*, para. 268.

<sup>8</sup> 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](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).

<sup>9</sup> 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”; *Korea – Beef (AB)*, para. 144; *Mexico – Soft Drinks (Panel)*, para. 8.118.

- 3. To all third parties [Advance question 3]: Please comment on the nature of the comparison to be conducted under Articles 2.1 of the TBT Agreement and III:4 of GATT 1994, in light of the European Union's assertion that "Malaysia's case is wrongly premised on the notion that because it happens to only produce palm oil based biofuel from the group of like products, it can show less favourable treatment because the measure affects biofuels produced from palm oil. That is not the correct comparative exercise".<sup>10</sup>**

**U.S. Response:**

6. As we have stated in our answer to Question 2, Article 2.1 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*.

7. 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.”<sup>11</sup> 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. In the context of this dispute, the European Union argues that it adopted the High ILUC Risk Cap to “address climate breakdown, environmental protection and biodiversity collapse, and to protect public morals in the European Union.”<sup>12</sup> 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.

- 4. To all third parties [Advance question 4]: The European Union submits, in relation to Article 2.1 of the TBT Agreement, that "when analysing an allegation of de facto discrimination, if a Panel has determined that there are some detrimental effects on imported products, the Panel is required to further examine the nature of the objectives pursued by the measures and, if they are legitimate, the relationship between the legitimate objectives of the measure and the detrimental effects."<sup>13</sup> Do you agree with this description of the applicable legal test under Article 2.1 of the TBT Agreement?**

**U.S. Response:**

8. We agree in part, and disagree in part, with the European Union’s description of the proper analysis under Article 2.1. 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.

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<sup>10</sup> European Union’s first written submission, para. 724.

<sup>11</sup> Annex I.1 of the TBT Agreement.

<sup>12</sup> The European Union’s First Written Submission, para. 1296.

<sup>13</sup> European Union’s first written submission, para. 741.

9. 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. 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,<sup>14</sup> for example, then the measure would breach the national treatment or MFN obligation.

**5. To all third parties [Advance question 5]: The European Union submits that both Article 2.2 and Article 2.1 of the TBT Agreement require the identification of the objectives pursued and a consideration of their legitimacy.<sup>15</sup> Does an assessment of the existence of legitimate regulatory distinctions under Article 2.1 of the TBT Agreement involve a consideration of the legitimacy of the objective(s) of the measure, comparable to that under Article 2.2 of the same Agreement?**

**U.S. Response:**

10. At the outset, we refer the Panel to our earlier answer to Question 4, in which we set out the appropriate test under Article 2.1. As noted, we do not agree that it is the Panel’s role to consider the “legitimacy” of the objective pursued by the measure at issue. The Panel’s analysis under Article 2.1 should be limited to a determination of whether the detrimental impact is based on the origin of the product. The Article 2.2 analysis is different from the Article 2.1 analysis, due to the text of Article 2.2, which contains an explicit list of “legitimate objectives” for the purposes of that Article.

**6. To all third parties [Advance question 6]: Please comment on Canada's statement that "the parties' position that there are two distinct steps in the LRD test, including an initial first step that assesses whether a regulatory distinction is legitimate, departs from the test set out by the Appellate Body."<sup>16</sup> (Canada's third-party submission, paras. 2-8)**

**U.S. Response:**

11. Once again, we refer the Panel Answers Questions 4 and 5, in which we set out the appropriate test under Article 2.1. As we have noted, when undertaking an Article 2.1 analysis, it is not the Panel’s role to consider whether a regulatory distinction is “legitimate.” The Panel’s analysis should be limited to determining whether the objectives pursued are based on the origin of the product.

**7. To all third parties [Advance question 7]: The European Union submits, in the context of Article 2.2 of the TBT Agreement, that "[a]ny trade restrictiveness [of the measures at issue] should also be pondered against trade enhancing effects towards**

<sup>14</sup> See *Mexico – Soft Drinks (Panel)*, para. 8.119.

<sup>15</sup> European Union’s second written submission, para. 46.

<sup>16</sup> Canada’s third-party submission, para. 8.

**other WTO Members." (European Union's first written submission, para. 975) Do you agree with this assertion?**

**U.S. Response:**

12. In general, to establish whether a measure is “more trade-restrictive than necessary” under Article 2.2, 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 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.<sup>17</sup>

13. With respect to the specific question posed, we generally do not agree with the EU that the trade enhancing effects toward other WTO Members should be considered as a counterbalance to the trade restrictiveness of the measure on the complaining party. It will often be the case that when a measure restricts one trading partner’s access to a particular market, that trade with another trading partner will increase to fill the void. This does not change the fact that the measure is trade-restrictive for the purpose of an Article 2.2 analysis. However, if the enhanced trade from other Members furthers the objective of the measure at issue—for example, an environmental measure that restricts high-carbon imports from Country A and boosts low-carbon imports from Country B—then this trade enhancing effect on imports from Country B could be taken into account for the purposes of an analysis under Article 2.2.

**8. To all third parties: Please comment on Malaysia's argument in the context of its claim under Article 2.2 of the TBT Agreement, that the European Union relies largely on data "which is evidently too old and unreliable", and that "the responsible and reasonable approach would have been to use most recent data or, in its absence, to gather it." (Malaysia's second written submission, para. 154)**

**U.S. Response:**

14. The United States addresses Questions 8 and 9 together, below.

**9. To all third parties: Please explain whether in the context of Article 2.2 of the TBT Agreement, a technical regulation should at all times reflect the latest available technical and scientific information, where such information is relevant to its justification. In this context, please comment on the relevance of Article 2.3 of the TBT Agreement as context for the interpretation of the obligation in Article 2.2 (irrespective of whether a claim under Article 2.3 falls within the Panel's terms of reference).**

**U.S. Response:**

15. Under Article 2.2 of the TBT Agreement, “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.” When assessing those risks “relevant elements of consideration” include “available scientific and technical information.” However, Article 2.2

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<sup>17</sup> 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.”).

does not require that a WTO Member must, as the Panel’s question suggests, continually update its regulations to reflect the most recent “scientific and technical information.”

16. Nor does the context provided by Article 2.3 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. For instance, the most recent data may be an outlier that is at odds with previous findings. In situations such as this, a WTO Member may use its judgment and expertise to determine whether the most recent data available warrants a change to its existing technical regulations.

**10. To all third parties [Advance question 8]: What level of detail does a WTO Member need to provide in an explanation of justification for the measures at issue, to satisfy the obligation in Article 2.5 of the TBT Agreement?**

**U.S. Response:**

17. TBT Article 2.5 provides, in relevant part: “A Member preparing, adopting, or applying a technical regulation which may have a significant effect on the trade of other Members, shall upon the request of another Member, explain the justification for that technical regulation in terms of paragraphs 2 to 4.”

18. According to the text, a Member must explain its justification for a technical regulation when another Member inquires about the measure. Article 2.5 requires the Member to whom the request is made to provide a justification for its measure in the terms provided in the relevant provisions of the TBT Agreement. TBT Article 2.5 does not require the responding Member to answer every specific detailed question that it receives, including questions that do not relate to Articles 2.2, 2.3, or 2.4.

**3. ARTICLE 5 OF THE TBT AGREEMENT**

**11. To all third parties [Advance question 9]: The European Union argues that low ILUC-risk classification is about "non-product related process and production methods and not about product characteristics" and therefore falls outside the scope of the TBT Agreement.<sup>18</sup> Do you agree?**

**U.S. Response:**

19. For the low ILUC-risk classification to fall within the ambit of the TBT Agreement, it must qualify as a “technical regulation.” Annex 1.1 of the TBT Agreement defines “technical regulation” as a “document which lays down product characteristics or their related processes and production methods...” Thus, for a measure to be a technical regulation, it must be a document that either: (i) sets out that a product possess or not possess a particular characteristic, or (ii) prescribes certain processes or production methods related to a product characteristic. If the Panel agrees with the EU that neither criteria is met in this case, then the low ILUC-risk classification would fall outside the scope of the TBT Agreement.

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<sup>18</sup> European Union’s second written submission, para. 179.

**12. To all third parties [Advance question 10]: According to the Appellate Body, under Article 5.1.1 of the TBT Agreement:**

**[T]he assessment of whether access is granted under conditions no less favourable 'in a comparable situation' should focus on factors having a bearing on the conditions for granting access to conformity assessment to suppliers of like products and the ability of the regulating Member to ensure compliance with the requirements in the underlying technical regulation or standard. Thus, factors relevant to the inquiry of whether a 'comparable situation' exists have to affect the specific suppliers to which the conditions for access to conformity assessment granted by the importing Member relate.<sup>19</sup>**

Malaysia argues that "the fact that the biofuels of EU suppliers and suppliers from other countries are not subject to low ILUC-risk certification does not mean that the Malaysian, EU, and other suppliers are not 'in a similar situation'. If this were the case, no conformity assessment procedure would ever be found to be inconsistent with Article 5.1.1 of the TBT Agreement."<sup>20</sup> The European Union argues that the relevant comparison under Article 5.1.1 concerns oil palm crop-based biofuels only because they alone are subject to conformity assessment. To this effect, the European Union states that "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."<sup>21</sup>

Please explain whether the obligation in Article 5.1.1 of the TBT Agreement applies in respect of products which are all subject to a conformity assessment procedure (some of which may incur some difference in treatment under that procedure) and concerns equal access to a conformity assessment procedure for all such products, or whether a violation of Article 5.1.1 may also arise from a situation where only some products are subject to a conformity assessment procedure and for that reason are subject to a difference in treatment.

**U.S. Response:**

20. 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.

21. Article 5.1.1 focuses on treatment accorded through conformity assessment procedures (CAPs) themselves. It relates to situations where two (or more) like products receive differential treatment under a CAP. It does not apply where one product is subject to a CAP while another is not. It follows that the fact that non-palm-oil-based biofuels are not subject

<sup>19</sup> Appellate Body Report, *Russia – Railway Equipment*, para. 5.153.

<sup>20</sup> Malaysia’s first written submission, para. 752.

<sup>21</sup> European Union’s second written submission, para. 183.



to the CAP while palm-oil-based biofuels are subject to the CAP would not be a basis for a breach of Article 5.1.1. This does not mean that these same facts could not potentially be the basis of a breach of other provisions of the TBT Agreement or the GATT.

**13. To all third parties [Advance question 11]: Malaysia considers that due to the lack of implementing rules, "low ILUC-risk certification procedures have not been undertaken and completed as expeditiously as possible because they could not be applied at all." (Malaysia's second written submission, para. 296). Is Article 5.2.1 of the TBT Agreement engaged, where a conformity assessment procedure cannot be undertaken at all, e.g. due to a lack of implementing legislation?**

**U.S. Response:**

22. 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. ...

23. As a general matter, if the Panel accepts Malaysia’s factual claim that the EU’s CAP cannot “be applied at all,” this could potentially be the basis for a claim that the CAP had “the effect of creating unnecessary obstacles to international trade,” and thus breached Article 5.1.2. Determining whether the CAP can be applied, however, will depend on the Panel’s assessment of all the factual circumstances, including the EU’s claim that the CAP has not yet taken effect and that implementing legislation for the CAP is forthcoming.

**14. To all third parties [Advance question 12]: The European Union submits that "given that on any analysis the 'measures' complained of will not have any practical effect until December 2023 and the Union has yet to adopt the detailed implementing rules, Malaysia's claims are hypothetical and premature."<sup>22</sup>**

**a. On what basis should the Panel entertain this claim or not?**

**b. At what point in time does the obligation in Article 5.2.1 of the TBT Agreement apply?**

**U.S. Response:**

24. The EU’s argument relates to Article 5.2.1 of the TBT Agreement, which states that:

When implementing the provisions of [Article 5.1], Members shall ensure that conformity assessment procedures *are undertaken and completed as expeditiously as possible* and in a no less favourable order for products originating in the territories of other Members than for like domestic products.”

25. Thus, Article 5.2.1 relates to the “undertaking” and “completion” of CAPs, *i.e.*, to the *application* of CAPs. If the CAP at issue in this case has not yet been—and cannot yet be—applied, then Malaysia will not be able provide the evidence necessary to prove its Article

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<sup>22</sup> European Union’s first written submission, para. 1082.

5.2.1 claim. This does not mean, of course, that claims based on *other* obligations under the TBT Agreement are necessarily invalid.

#### 4. ARTICLE 12 OF THE TBT AGREEMENT

**15. To all third parties [Advance question 13]: Malaysia contends that "active consideration [of the special development, financial and trade needs of developing country Members] must be visible and cannot be implicitly assumed".<sup>23</sup> Please describe the kind of evidence that would be sufficient to demonstrate that a Member adopting or applying a technical regulation or a conformity assessment procedure did "take account of" the needs of developing country Members under Article 12.3 of the TBT Agreement.**

#### U.S. Response:

26. In order to establish a breach Article 12.3, the complaining party must demonstrate the following: (1) that it is a developing country; (2) that the other Member did not take account of its special development, financial or trade needs during the preparation and application of a technical regulation; and (3) that the Member did not take account of these needs *with a view* to ensuring that the technical regulation does not create unnecessary obstacles to export.

27. The evidentiary burden is on the complaining party to demonstrate that the developed country member did not take account of the needs of the complaining party. Evidence that could potentially meet that burden could include, for example, documents demonstrating that the complaining party had no opportunity to comment on the relevant measures prior to their adoption by the developed country member.

**16. To all third parties [Advance question 14]: Please comment on the following statements in Malaysia's first written submission, relating to the interpretation of Articles 12.1 and 12.3 of the TBT Agreement:**

**874. While Malaysia is aware of the relevant case law and findings by the panels in *US – Clove Cigarettes* and *US – COOL*, it considers that the panels have been too undemanding with respect to the conditions linked to the obligations under Article 12.3 of the TBT Agreement. In this context, Malaysia considers that there must be actual evidence that a Member applying a technical regulation or conformity assessment procedure took account of the needs of developing country Members.**

**875. Malaysia respectfully considers that the panels in *US – Clove Cigarettes* and *US – COOL* were too undemanding in their interpretation of Article 12.3 of the TBT Agreement with respect to the obligations linked to the "special development, financial and trade needs of developing country Members". More specifically, Malaysia considers that the commitment under Article 12.3 of the TBT Agreement cannot be interpreted merely as a "procedural requirement" that, on the basis of the panel's finding in *US – COOL*, does not even need to "document specifically in their legislative process and rule-making process how they actively considered the special development, financial and trade needs of developing country Members". Instead, Malaysia considers that the commitments under Article 12.3 of the TBT Agreement clearly entail a substantive requirement to actually "take account of the**

<sup>23</sup> Malaysia's second written submission, para. 309.

**special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members”.**

...

**877. Article 12.1 of the TBT Agreement requires WTO Members "to provide differential and more favourable treatment to developing country Members to this Agreement". Therefore, WTO Members must be able to evidence, within the legal instrument containing the measure or related documents, how the special development, financial, and trade needs of developing country Members have indeed been taken into account. Such evidence should take the form of special provisions in the measures at issue, which are tailored to address the special needs of developing country Members and to provide differential and more favourable treatment to developing country Members. Arguably, only this would constitute an "active and meaningful consideration" to the special development, financial and trade needs of developing country Members as enunciated by the Panel in *US – COOL*.<sup>24</sup>**

### **U.S. Response:**

28. In order to establish a breach of Article 12.3, the complaining party must demonstrate the following: (1) that it is a developing country; (2) that the other Member did not take account of its special development, financial or trade needs during the preparation and application of a technical regulation; and (3) that the Member did not take account of these needs *with a view* to ensuring that the technical regulation does not create unnecessary obstacles to export. With respect to element (2), the burden is not, as Malaysia suggests, on the developed country member to produce “actual evidence that a Member applying a technical regulation or conformity assessment procedure took account of the needs of developing country Members.” Instead, the burden is on the complaining party to demonstrate that the developed country member did not do so.

29. Furthermore, 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.”<sup>25</sup> 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.

### **5. ARTICLE XI OF THE GATT 1994**

**17. To all third parties [Advance question 15]: the European Union argues that "any hypothetical negative effect of the high ILUC-risk cap and high ILUC-risk phase-out on the import of palm oil biofuels in the European Union is not due to the fact that the high ILUC-risk cap and the high ILUC-risk phase-out impose or make effective a condition limiting the quantity of imports of those products, but - according to**

<sup>24</sup> Malaysia’s first written submission, paras. 874-875 and 877.

<sup>25</sup> *New Shorter Oxford English Dictionary*, vol 2, at 3578 (1993).

**Malaysia itself - the consequence of a purely internal event, i.e. a supposed decrease in domestic demand for those products due to their reduced eligibility for the EU renewable energy target." (European Union's first written submission, para. 1202)**

**In *Dominican Republic – Import and Sale of Cigarettes*, the panel considered the meaning of restriction on importation under Article XI:1 to be a limitation "specifically related to the importation" or one that is "instituted or maintained 'with regard to' or 'in connection with'" importation.<sup>26</sup>**

**Does a measure which decreases domestic demand amount to a restriction on importation under Article XI:1 of the GATT 1994? Or is the influence of such a measure on demand for imported products an incidental effect that is not relevant for the purpose of Article XI:1?**

**U.S. Response:**

30. The United States recalls the text of Article XI:1 of the GATT 1994, which states:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any Member *on the importation* of any product of the territory of any other Member or *on the exportation* or sale for export of any product destined for the territory of any other Member. (emphasis added)

31. It follows that 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.<sup>27</sup> If the Panel concludes that the measures at issue here only impact domestic demand, but do not, in and of themselves, amount to prohibitions or restrictions on the process of importation, then the obligations under Article XI:1 would not apply.

**6. ARTICLE X OF THE GATT 1994**

**18. To all third parties [Advance question 16]: The Appellate Body found that the "text of Article X:3(a) clearly indicates that the requirements of 'uniformity, impartiality and reasonableness' do not apply to the laws, regulations, decisions and rulings themselves, but rather to the administration of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is entitled 'Publication and Administration of Trade Regulations', and a reading of the other paragraphs of Article X, make it clear that Article X applies to the administration of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994."<sup>28</sup>**

<sup>26</sup> Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.258.

<sup>27</sup> See *The New Shorter Oxford English Dictionary*, 4<sup>th</sup> edn, Lesley Brown et al. (eds.) (Oxford University Press, 1993), Vol. 1, at 1324 (defining “importation” as, “the action of importing or bringing in something”); *The New Shorter Oxford English Dictionary*, 4<sup>th</sup> edn, Lesley Brown et al. (eds.) (Oxford University Press, 1993), Vol. 1, at 889 (defining “exportation” as “the action or practice of exporting”).

<sup>28</sup> Appellate Body Report, *EC – Bananas III*, para. 200.

**Malaysia submits that the high ILUC-risk cap, high ILUC-risk phase out, and low ILUC-risk certification measures, fall within the scope of Article X:3(a) of the GATT 1994 because they are "regulations of general application pertaining to restrictions on imports of oil palm crop-based biofuel and of palm oil and affecting the sale or use of these products" and are therefore are "measures of the kind falling under Article X:1". (Malaysia's first written submission, para. 968)**

**By contrast, the European Union submits that the relevant question when assessing the scope of Article X:3(a) is "whether the substance" of these measures is "administrative in nature, or instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994". (European Union's first written submission, para. 1218)**

**Please explain whether Article X:3(a) enables Member States to challenge the *administration* of measures of the kind falling under Article X:1, even if the "substance" of those measures is not administrative in nature.**

### U.S. Response:

32. The answer to this question flows from the text of the covered agreement. GATT 1994 Article X:3 governs the “administration” of trade laws, rules and regulations that are identified in Article X:1. The meaning of the term “administer” is to “put into practical effect” or to “apply”. If a Member challenges the *administration* of a measure falling under Article X:1, whether that administration is comprised of actions taken by the Member or other legal instruments promulgated by the Member, then that challenge may be cognizable under Article X:3(a). If, however, the Member’s challenge instead focuses on the *substance* of the measure—*e.g.*, that the measure itself is unreasonable, not that the measure is administered unreasonably—then that challenge would be more appropriately dealt with under other provisions of the GATT.

### **7. ARTICLE XX OF THE GATT 1994**

**19. To all third parties [Advance question 17]: Please comment on the European Union's description of the "necessary" and "relate to" tests under Article XX as "very similar", at paragraphs 1265 to 1272 of its first written submission. In addressing this question, please describe your understanding of the similarities and differences between the legal tests under paragraphs (a), (b) and (g) of Article XX of the GATT 1994, and the approach to be followed, where multiple subparagraphs of Article XX are invoked concurrently.**

### U.S. Response:

33. 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.

34. 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>29</sup>

35. 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>30</sup> It also suggests that, because the legal requirements of each of these subparagraphs are “*in practice* very similar”<sup>31</sup>, 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.”<sup>32</sup> Specifically, the EU asks the Panel “to ascertain whether the measure is apt to, or ‘not incapable’ of contributing to th[e asserted] objectives[s].”<sup>33</sup>

36. 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.

37. That the language at issue—*i.e.*, “necessary to” versus “relating to”—differs, suggests that these provisions do articulate different requirements. The ordinary meaning of “necessary to” is “absolutely needed to.”<sup>34</sup> The ordinary meaning of “related to” is “to be connected with.”<sup>35</sup> Thus, to show a measure is “necessary to” accomplish some objective may typically require more evidence of the contribution of the measure to that objective.

## 8. AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

**20. To all third parties: In relation to the meaning of the phrase “explicitly limits access to a subsidy to certain enterprises” as used in Article 2.1(a) of the SCM Agreement, please comment on the following arguments of Malaysia and the European Union:**

**Malaysia (first written submission, para. 1117): “[T]he French fuel tax reduction, is a de jure specific subsidy under Article 2.1(a) of the SCM Agreement, access to which is limited to certain enterprises, in particular, to the economic operators that release for consumption petrol and diesel fuels that contain biofuels other than oil palm crop-based biofuel ...”**

**European Union (first written submission, paras. 1668-1670): “[T]he French measure does not differentiate between companies, industries, or enterprises: it encourages the behaviour of any enterprise active in releasing fuels for consumption to incorporate renewable energy sources in that fuel. ... [T]he economic operators**

<sup>29</sup> EC – Seal Products (AB), para. 5.169; Brazil – Retreaded Tyres (AB), paras. 144-145; Korea – Beef (AB), para. 157.

<sup>30</sup> EU First Written Submission, para. 1342.

<sup>31</sup> EU First Written Submission, para. 1265 (original emphasis).

<sup>32</sup> EU First Written Submission, para. 1272.

<sup>33</sup> EU First Written Submission, para. 1344.

<sup>34</sup> Merriam Webster definition, available at: <https://www.merriam-webster.com/dictionary/necessary>

<sup>35</sup> Merriam Webster definition, available at: <https://www.merriam-webster.com/dictionary/related%20to>

**liable to pay the TIRIB ... for the release for consumption of these fuels ... Among this group of enterprises there is no group that only incorporates a given type of biofuels. In summary, Malaysia does not really identifies [sic] an industry or a group of enterprises to which the alleged subsidy is explicitly limited."**

**U.S. Response:**

38. The United States takes no position with respect to the factual assertions in the above-quoted passages. Regarding the legal standard under Article 2.1(a) of the SCM Agreement, the term “certain enterprises” refers to “a single enterprise or industry or a class of enterprises or industries that are known and particularized.”<sup>36</sup> This term involves “a certain amount of indeterminacy at the edges,” and a determination of whether a group of enterprises or industries constitute “certain enterprises” can only be made on a case-by-case basis.<sup>37</sup> Although the industries and enterprises must be “known and particularized,” they need not be “explicitly identified” for the subsidy to be considered *de jure* specific.<sup>38</sup> The “central inquiry” under Article 2.1 is to determine “whether a subsidy is specific to ‘certain enterprises’ within the jurisdiction of the granting authority.”<sup>39</sup>

39. Subparagraphs (a) through (c) of Article 2.1 articulate principles that inform this central inquiry. Article 2.1(a) identifies circumstances in which a subsidy is *de jure* specific (*i.e.*, where limitations on eligibility explicitly favor certain enterprises).<sup>40</sup> Article 2.1(b) identifies circumstances in which a subsidy shall be regarded as non-specific (*i.e.*, where “objective criteria or conditions” exist that “guard against selective eligibility”).<sup>41</sup> Objective criteria or conditions are described in footnote 2 to Article 2.1(b) as “criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.”<sup>42</sup> Subparagraphs (a) and (b) both “direct scrutiny to the eligibility requirements imposed by the granting authority or the legislation pursuant to which the granting authority operates.”<sup>43</sup>

40. Article 2.1(c) provides that, “notwithstanding any appearance of non-specificity” resulting from application of Articles 2.1(a) and 2.1(b), a subsidy may nevertheless be “in

<sup>36</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.

<sup>37</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.

<sup>38</sup> *US – Carbon Steel (India) (AB)*, para. 4.365. *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.

<sup>39</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366.

<sup>40</sup> SCM Agreement, Article 2.1(a) provides as follows: “Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.” *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 367, 369.

<sup>41</sup> SCM Agreement, Article 2.1(b) provides as follows:

Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

Footnote omitted. *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 367, 369.

<sup>42</sup> SCM Agreement, Art. 2.1(b), footnote 2.

<sup>43</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 368.

fact” specific.<sup>44</sup> Application of Article 2.1(c) is a fact-driven, context-dependent exercise. By providing for a *de facto* specificity analysis, Article 2.1(c) “reflects the diversity of facts and circumstances that investigating authorities may be confronted with when analysing subsidies covered by the SCM Agreement.”<sup>45</sup>

41. The principles described above should be applied concurrently, and although Article 2.1 suggests that the specificity analysis ordinarily will proceed sequentially, it is not necessary that it do so.<sup>46</sup> Nothing in the SCM Agreement indicates that an investigating authority must examine whether a subsidy is specific under each subparagraph of Article 2.1 in every case. When the evidence under consideration unequivocally indicates specificity or non-specificity under one subparagraph of Article 2.1, further consideration under other subparagraphs of Article 2.1 may be unnecessary.<sup>47</sup>

**21. To all third parties: In relation to the meaning of the phrase "government revenue that is otherwise due is foregone or not collected" as used in Article 1.1(a)(1)(ii) of the SCM Agreement, please comment on the following arguments of Malaysia and the European Union:**

**Malaysia (first written submission, paras. 1075-1079): "The amount of the tax corresponds to the difference between the national target percentage (i.e., the required level of incorporation of renewable biofuels in conventional fuels, namely petrol and diesel) and the actual level of eligible biofuel that is incorporated. The closer the level of eligible biofuel incorporation to the national target percentage, the lower the tax that must be paid by the economic operators releasing for consumption in France petrol and diesel fuels containing eligible (i.e., renewable) biofuels. ... Under this rather common scenario, i.e., one in which the economic operators that incorporate and release for consumption in France petrol and diesel fuels containing eligible biofuels, the French Government does not collect at all or not in full the tax revenue, which it would normally collect. ... [T]he French Government has by 'its own choice' established 'for itself' the rules of taxation for petrol and diesel fuels released for consumption in France. More**

<sup>44</sup> SCM Agreement, Article 2.1(c) provides as follows:

If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

<sup>45</sup> *US – Countervailing Measures (China) (Panel)*, para. 7.240.

<sup>46</sup> *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 796 (explaining that “the language of Article 2.1(c) . . . indicates that the application of this provision will *normally* follow the application of the two subparagraphs of Article 2.1” (italics added)).

<sup>47</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371. The Appellate Body also “caution[ed] against examining specificity on the basis of the application of a particular subparagraph of Article 2.1, when the potential for application of other subparagraphs is warranted in the light of the nature and content of measures challenged in a particular case,” implying that when the potential for application of other subparagraphs is *not warranted*, Article 2.1 does not require such an examination. *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371 (italics added). See also *US – Carbon Steel (India) (Panel)*, para. 7.119; *EC – Large Civil Aircraft (AB)*, para. 945; *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 754.



**specifically, it does not collect revenue 'otherwise due' through the provision of fiscal incentives to economic operators incorporating biofuels other than oil palm crop-based biofuel into petrol or diesel fuels and subsequently release those fuels for consumption in France."**

**European Union (first written submission, paras. 1621-1634):**  
"[T]he TIRIB is not designed to produce revenue for the government but to influence the behaviour of economic operators ... if one wants to find a 'general rule' which reflects the 'normal' or 'common situation' under the regime of the TIRIB ... that would be a situation where the economic operators incorporate a sufficient quantity of 'renewable' biofuels in the fuel they release in the French market so that they are not liable to pay that tax (or have to pay only part of the tax). The exception, which reflects an uncommon situation, is therefore the release in the French market of fuel not containing 'renewable' biofuel which triggers payment of the tax. ... all taxpayers that incorporate 'renewable' biofuels and their income are treated the same way, as they will not be liable to pay any amount pursuant to the TIRIB if they contribute to its objective to the extent required. By the same token, all taxpayers that do not incorporate any 'renewable' biofuels are treated the same. ... because the challenged tax treatment constitutes the normative benchmark (i.e. it is the tax treatment applied to all comparable income of any comparably situated taxpayers and also the general rule of taxation under the TIRIB), the government is not foregoing any revenue that is otherwise due through TIRIB."

**U.S. Response:**

42. The United States takes no position with respect to the factual assertions in the above-quoted passages. Regarding the legal standard, Article 1.1(a)(1)(ii) of the SCM Agreement provides, in relevant part, that a financial contribution exists where “government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits).” The word “revenue” is defined as, *inter alia*, “[i]ncome, *spec.* from property, possessions, or investment, esp. of an extensive kind.”<sup>48</sup> The word “foregone,” which, in the context of subparagraph (ii) is the past tense of the verb forgo (or forego), is defined as, *inter alia*, “[a]bstain or refrain from.”<sup>49</sup> Read together, the words “revenue foregone” thus mean the difference between the income that a government could have collected and the income that it did collect.

43. If the Panel accepts the European Union’s argument that “the ‘normal’ or ‘common’ situation’ under the regime of the TIRIB ... [is] that ... economic operators ... are not liable to pay that tax,” that would indicate that the European Union is not “forgoing” revenue by not collecting the tax from operators that incorporate a sufficient quantity of renewable biofuels.

**22. To all third parties: Please comment on the following argument of Japan (Japan's third party submission, paras. 16-20):**

**Japan requests the Panel to consider the nature, design and operation of the subsidy at issue when examining the effect of subsidy. The Appellate Body has repeatedly emphasized the relevance of the nature of the subsidies for the analysis of**

<sup>48</sup> *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4<sup>th</sup> ed.), Volume 2, p. 2579 (italic original).

<sup>49</sup> *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4<sup>th</sup> ed.), Volume 1, p. 1005.

**causation. [citing Appellate Body Report, *US – Upland Cotton*, para. 450; Appellate Body Report, *EC – Large Civil Aircraft*, para. 1376] ... The relevance of the nature, design, and operation of subsidies may be illustrated with the following examples. Japan believes that where certain subsidies have positive effects not only on the recipients, but also on any private entity in the relevant industry, such subsidies may be found not to cause serious prejudice depending on factual circumstances, including their 'nature' as shown in the *US – Upland Cotton* case. For example, research and development activities by a business enterprise are likely to generate technological spill-over effect in the relevant industry or in other industries. Subsidies to such activities to recompense such spill-over effect will help achieve the optimal level of the activities. Such subsidies ensure, rather than harm, the proper functioning of the competitive market. On the contrary, if evidence shows that actors need not act based on commercial considerations due to subsidies they receive, it would provide a strong indication that the conditions of competition in the market are distorted, and thus, may be found to have adverse effect. Thus, the Panel should consider the nature, design, and operation of the French fuel tax reduction when considering the effect of the subsidy and, in particular, in determining whether the effect of the challenged subsidy is *significant* lost sales within the meaning of Article 6.3(c) of the SCM Agreement.**

**U.S. Response:**

44. In general terms, the United States agrees with Japan that “the Panel should consider the nature, design, and operation of the French fuel tax reduction when considering the effect of the subsidy and, in particular, in determining whether the effect of the challenged subsidy is *significant*...”

45. More specifically, an evaluation of a claim of serious prejudice requires an analysis of whether, “but for” the subsidization, serious prejudice would have occurred. That causation test is implicit in the requirement that the indicators of serious prejudice under Article 6.3 be “the effect” of subsidies, and explicit in the Article 5 admonition that “[n]o Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of another Member.” This standard has two important implications. First, if a serious prejudice factor (significant price suppression, significant lost sales, etc.) is the effect not of the alleged subsidies, but instead is the effect of some factor (or combination of factors) other than subsidization, the complainant cannot prevail. Second, if there is prejudice, but it does not rise to the level of “serious,” the complainant cannot prevail.