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

Third-Party Submission
of the United States of America

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TABLE OF ACRONYMS

Acronym	**Full Name**
CAP	Conformity Assessment Procedure
ILUC	Indirect land use change
TBT Agreement	*Agreement on Technical Barriers to Trade*
WTO	World Trade Organization

TABLE OF REPORTS

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

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

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

2. In this dispute, Indonesia 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 Indonesia, 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." Indonesia 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 (the "Biofuel Tax Discount").

II. INTERPRETATION OF THE TBT AGREEMENT

A. Article 2.1 of the TBT Agreement

3. Indonesia claims that the High ILUC Risk Cap breaches Article 2.1 of the TBT Agreement because it "discriminates between like oil crop-based biofuel of different foreign origin and between oil palm crop-based biofuel from Indonesia and like oil crop-based biofuel of EU origin."[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]

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

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[1] Indonesia's First Written Submission, para. 467.

[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.

> 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 Standards Code" (the predecessor agreement to the TBT Agreement) which does not include the word "also."[6]

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[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.

[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,

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. Under this definition, 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."[8] 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."[9] Because the ordinary meaning of the term could cover a broad range of instruments,[10] 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.[11] 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.[12] Certain past panels have omitted a detailed analysis and assumed "likeness" in the circumstance when the measure at issue, on its face, discriminates between products solely on the basis of origin.[13] Otherwise, panels have conducted a fact-specific analysis.[14]

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).

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] *EC – Seal Products (AB)*, para. 5.10.

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

[10] *See US – Tuna II (Mexico) (AB)*, para. 185.

[11] *See US – Tuna II (Mexico) (Panel)*, para. 7.238.

[12] *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.

[13] *See US – COOL (Panel)*, para. 7.254.

[14] *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.

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".[15] 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".[16] 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."[17] 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.[18]

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."[19] 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

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[15] *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.").

[16] 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)).

[17] GATT 1994, Art. III:1.

[18] *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.

[19] Annex I.1 of the TBT Agreement.

objectives."[20] 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."[21] 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 approach[22], *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 not to the detrimental impact on imports, but what the Appellate Body considered to be a disproportionate burden *on upstream producers and processors*.[23] 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

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[20] The European Union's First Written Submission, para. 705.

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

[22] *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).

[23] *US – COOL (AB)*, para. 347 *et seq*.

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. As the European Union recognizes in this dispute, the Appellate Body's approach is "a requirement which in essence imposes a further obligation on the complainant to demonstrate the degree of trade restrictiveness of the measure in question."[24] The European Union is correct – but this "further obligation" is not found in Article 2.1 nor necessary to assess origin-based discrimination. The United States agrees that it is important under the TBT Agreement to assess the trade-restrictiveness of a measure. However, in a manner *unique* to the TBT Agreement, trade restrictiveness already comprises an affirmative obligation under Article 2.2. That is, where a technical regulation does not discriminate inconsistently with Article 2.1, for example, that measure may separately breach a Member's obligations if it is nonetheless more trade restrictive than necessary to fulfil a legitimate objective under Article 2.2 of the TBT Agreement.

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,[25] 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

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[24] The European Union's First Written Submission, para. 598.

[25] 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 '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).

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."[26]

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,[27] 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 further "climate change mitigation, [and] environmental and biodiversity objectives."[28] If, taking into account all the facts, the Panel finds that the impact on Indonesian imports is not origin-based, then the Panel should conclude that Indonesia has not met its burden to demonstrate "less favourable treatment" under Article 2.1.

B. Article 2.2 of the TBT Agreement

21. Indonesia also argues that the High ILUC Risk Cap breaches Article 2.2 of the TBT Agreement by creating unnecessary obstacles to international trade in palm oil and oil palm crop-based biofuel.[29] According to Indonesia, the High ILUC Risk Cap "do[es] not pursue a legitimate objective" and is "more trade-restrictive than necessary," and thus, breaches Article 2.2.[30] 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."[31]

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[26] *U.S. – Cloves (AB)*, at para. 109.

[27] *See Mexico – Soft Drinks (Panel)*, para. 8.119.

[28] The European Union's First Written Submission, para. 705.

[29] *See* Indonesia's First Written Submission, paras. 559 *et seq*.

[30] Indonesia's First Written Submission, para. 559.

[31] The European Union's First Written Submission, para. 771.

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, 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.[32]

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, Indonesia and the European Union use different framing to characterize the "legitimate objective" underlying the High ILUC Risk Cap. According to Indonesia, the European Union adopted the measure to address broad concerns related to "environmental protection in general and the reduction of GHG emissions in particular."[33] The European Union frames its objective much more specifically, explaining that "the values protected by the measures at issue are not just reducing GHG emissions, but addressing together climate change, environmental protection and biodiversity loss, and protecting the public morals in the European Union."[34] 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.

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[32] *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.").

[33] Indonesia's First Written Submission, para. 581.

[34] The European Union's First Written Submission, para. 854.

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

C. Article 2.4 of the TBT Agreement

27. Indonesia argues that the European Union breaches Article 2.4 of the TBT Agreement because it imposed the High ILUC Risk Cap "without using relevant international standards."[35] Indonesia states that the measure does not "refer[] to any international standard or to the fact that the European Union considered whether any relevant international standard exists or there are such standards of which the completion is imminent."[36] The European Union argues that "the [international] standards referred to by Indonesia are only partially relevant and that they are, in any event, ineffective and inappropriate for the fulfilment of the legitimate objectives pursued by the EU measures."[37]

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. The Parties agree that for Indonesia's Article 2.4 claim to succeed, Indonesia bears the burden of establishing that "relevant international standards exist" and that "those standards are effective and appropriate for fulfilling the legitimate objectives (if any) pursued by the European Union."[38]

30. 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 made available to the public."[39] 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."[40]

31. Regarding whether a given international standard is "ineffective or inappropriate" to fulfill the legitimate objectives pursued, the term "ineffective" refers to something which not

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[35] Indonesia's First Written Submission, paras. 669 *et seq*.

[36] Indonesia's First Written Submission, para. 669.

[37] The European Union's First Written Submission, para. 877.

[38] Indonesia's First Written Submission, para. 671; *see* European Union's First Written Submission, paras. 879 *et seq*.

[39] ISO/IEC Guide 2 (1991), para. 3.2.1.

[40] TBT Agreement, Annex 1.2, 1.4.

"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.[41]

32. Indonesia identifies certain ISO standards as the relevant international standards that the European Union should have applied.[42] Indonesia explains that these standards can be used to "determin[e], based on a life cycle analysis, the carbon footprint of products and the sustainability of biofuel,"[43] and argues that the ISO standards are effective and appropriate because they "fulfil the European Union's alleged objective of addressing GHG emissions in connection with the production of biofuel."[44]

33. The European Union disagrees. First, the European Union describes the objective of its measures in more specific terms, explaining that the aim of the High ILUC Risk Cap is "not just reducing GHG emissions, but addressing together climate change, environmental protection and biodiversity loss, and protecting the public morals in the European Union."[45] As noted above, it is for the respondent to identify the objectives motivating a challenged measure.

34. Second, the European Union argues that the ISO standards are not effective and appropriate for addressing its stated objectives, including the prevention of biodiversity loss—an issue that the European Union links to ILUC risk. The European Union states that "ILUC risks are not an integral part of the respective ISO standards. Indeed, as Indonesia itself explains, the ISO has explicitly excluded GHG emissions related to ILUC from a number of its standards … The implication is that the known climate change and environmental risks associated with ILUC, are not properly addressed by the existing ISO standards."[46] If the Panel agrees with the European Union that the ISO standards Indonesia cites are not effective and appropriate to

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[41] *See EC – Sardines (Panel)*, para. 7.116.

[42] Indonesia's First Written Submission, para. 675.

[43] Indonesia's First Written Submission, para. 674.

[44] Indonesia's First Written Submission, para. 770.

[45] The European Union's First Written Submission, para. 854.

[46] The European Union's First Written Submission, para. 883.

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

35. Indonesia claims that the conformity assessment procedure (CAP) for the High ILUC Risk Cap breaches Article 5.1 of the TBT Agreement.[47] Indonesia's first argument is that the CAP does not conform to Article 5.1.1 of the TBT Agreement because it "discriminates against Indonesian suppliers of oil palm crop-based biofuel."[48] 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."[49]

36. 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.

37. 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."

38. 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."

39. 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

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[47] *See* Indonesia's First Written Submission, paras. 881 *et seq*.

[48] Indonesia's First Written Submission, para. 881.

[49] The European Union's First Written Submission, para. 948.

fact-specific criteria[50] 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.

40. 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.)

41. 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."[51] "Compare," in turn, is defined as "liken, pronounce similar" and "be compared; bear comparison; be on terms of equality with."[52] 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."[53]

42. In response to Indonesia'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.[54] 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. It is between different suppliers of 'like' products which are subject to the 'conformity assessment' in the first place."[55] 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.

43. 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

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

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

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

[53] *Russia – Railways (Panel)*, at para. 7.283.

[54] The European Union's First Written Submission, paras. 955 *et seq*.

[55] The European Union's First Written Submission, para. 956.

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.

44. Indonesia's second Article 5.1 claim is that the European Union breaches Article 5.1.2 by "imposing a conformity assessment procedure for certifying oil palm crop-based biofuel as low ILUC-risk which creates unnecessary obstacles to international trade" and "is more strict or applied more strictly than necessary to give the European Union adequate confidence that products conform with the applicable technical regulations, taking account of the risks non-conformity would create."[56]

45. 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.

46. 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.[57]

47. 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.

48. 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."[58] "Necessary" refers to something that "cannot be dispensed with or done without; requisite; essential; needful."[59] An "unnecessary obstacle" to international trade therefore suggests something that blocks or hinders trade between Members that is not requisite or essential.

49. 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

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[56] *See* Indonesia's First Written Submission, paras. 924 and 928.

[57] *See EC – Seals (Panel)*, paras. 7.512-513.

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

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

"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 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.

50. 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.[60] 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,"[61] 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.[62]

51. Indonesia does not explicitly suggest a less strict conformity assessment procedure that would provide adequate confidence regarding the ILUC risk of biofuels. Instead, Indonesia cites alleged shortcomings in the European Union's CAP, including that the European Union has failed to "(i) adopt the necessary rules for establishing how certification may be obtained and (ii) explain the meaning of the low ILUC-risk criteria."[63] These deficiencies, according to Indonesia, "mak[e] it [im]possible for oil palm crop-based biofuel to obtain and benefit from that certification."[64]

52. The European Union argues that it is in the process of preparing the necessary implementing rules for the CAP,[65] and that because the European Union "has yet to adopt the detailed implementing rules, Indonesia's claims that the European Union already created an obstacle to international trade on the basis of substantive requirements is unfounded."[66] 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.

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[60] *See US – Tuna II (Mexico) (AB)*, para. 322.

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

[62] 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.

[63] Indonesia's First Written Submission, para. 936.

[64] Indonesia's First Written Submission, para. 936.

[65] *See* the European Union's First Written Submission, para. 979.

[66] *See* the European Union's First Written Submission, para. 980.

III. CONCLUSION

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