

Before the World Trade Organization

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

Responses of Australia to the Panel's Questions

20 June 2022

Q4 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." Do you agree with this description of the applicable legal test under Article 2.1 of the TBT Agreement?

1. Previous Appellate Body decisions¹ provide guidance on the applicable legal test under Article 2.1 of the TBT Agreement. Australia recalls that in *US – Clove Cigarettes*, the Appellate Body stated the role of the Panel—after identifying detrimental impact on the conditions of competition—is to determine whether that impact is *solely* due to a legitimate regulatory distinction rather than from discrimination.² This indeed involves an examination of the objectives and whether they are legitimate, but also whether the distinction between the like products is legitimate, i.e., done in a fair and reasonable manner.³
2. The primary assessment is not just about the relationship between the objectives and the detrimental effect, but whether the detrimental effect is legitimate or 'even-handed'. That is, a panel must assess whether the measure at issue is designed or applied in an 'even-handed' manner.⁴
3. While that assessment takes place on a case-by-case basis, a measure would 'lack even-handedness' if it is 'designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination, and thus reflects discrimination'.⁵ However, this is not the only way to assess whether a measure lacks even-handedness.⁶ That examination would have to consider the design, operation, and application of the measures at issue including whether the measure is rationally related to the policy being pursued by the measure⁷ and other factors.⁸
4. As to the nature of the objectives that may be legitimate under Article 2.1, the Appellate Body in *US – Tuna II* referred to the sixth recital of the preamble to the TBT Agreement which lists objectives such as protection of human, animal, and plant health.⁹ Drawing on the surrounding text in the treaty, the non-exhaustive list of

¹ Appellate Body Report, *United States – COOL*; *United States – Clove Cigarettes*; *US – Tuna II (Mexico)*.

² Appellate Body Report, *United States – Clove Cigarettes*, para. 173.

³ Appellate Body Report, *United States – COOL*, para. 340.

⁴ See Appellate Body Report, *United States – Clove Cigarettes*, para. 182; *US – Tuna II (Mexico)*, paras. 212, 216, 225, 232, 281, 297, and 29; *United States – COOL*, paras. 271, 293, 328, and 349.

⁵ Appellate Body Report, *United States – COOL*, para. 340.

⁶ Appellate Body Report; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.31.

⁷ *Ibid.*, para. 7.91.

⁸ *Ibid.*, para. 7.95.

legitimate objectives in Article 2.2, also provides a good indication of what are likely to be justifiable objectives under Article 2.1.

Q5 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. 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?

5. Australia has provided a detailed assessment of Article 2.2 in its written submission¹⁰ and will focus here on the key differences in the text and legal tests of Articles 2.1 and 2.2.
6. As noted in the response to Question 4, the Article 2.1 legal test involves some assessment of the objectives of the measure. The Appellate Body has referred to the sixth recital of the preamble to the TBT Agreement which lists objectives such as protection of human, animal and plant health.¹¹ There are also some parallels with GATT Article XX, but as the TBT Agreement does not replicate GATT Article XX, the legal tests are different.¹² The non-exhaustive list of legitimate objectives provided in Article 2.2 provides a good indication of what are likely to be justifiable objectives under Article 2.1.
7. However, there are key differences in the text and legal test between the two articles, particularly the sequence in which the objectives are considered.
8. The text of Article 2.2. specifically refers to 'legitimate objectives', examples of which are listed in the provision. That is, there is an explicit reference to objectives, and their consideration. The legal test that has developed under Article 2.2—and similarly Articles 2.4, 2.5, and 5.2.4 where the term 'legitimate' also appears—therefore requires consideration of the objectives' legitimacy first, followed by an assessment of the trade measure's necessity.¹³ The latter includes consideration of the measure's contribution to the objectives, its trade restrictiveness, and whether there are less trade restrictive alternatives.¹⁴
9. Conversely, the text of Article 2.1 does not include any specific reference to 'legitimate objectives' or indeed any 'objectives'. The legal test of 'legitimate regulatory distinction', which has been applied in previous cases, is not present in the text itself but has been developed by the Appellate Body in interpreting the phrase

¹⁰ Australia's third party submission, paras. 7-24.

¹¹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 212.

¹² Appellate Body Report, *United States – Clove Cigarettes*, paras. 91 and 100.

¹³ Appellate Body Report, *United States – COOL*, paras. 369 and 372; *US – Tuna II (Mexico)*, para. 318.

¹⁴ See Australia's third party submission, paras. 11-24.

'treatment no less favourable'. First, there is an assessment of whether there is a detrimental effect and second whether that is a result of the aforementioned 'legitimate regulatory distinction'. That assessment entails whether the detrimental impact which stems from the measure may be justified according to the objectives.¹⁵ However, it is not solely the objectives that must be considered 'legitimate', but also whether the regulatory distinction is 'legitimate'. This involves an assessment of whether the objectives are justifiable, but, unlike the test in Article 2.2 where the objectives are considered first, it occurs after determining whether there is detrimental effect.

10. Overall, while both the legal tests use the term 'legitimate', they are used differently, and not just to assess the objectives in the case of Article 2.1.

Q7 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 other WTO Members." (European Union's first written submission, para. 975) Do you agree with this assertion?

11. Australia has provided a detailed assessment of the legal test for 'trade restrictiveness' in its written submission.¹⁶ Australia's answer here will specifically focus on the legal issue of 'trade enhancing effects'.
12. The legal standard under Article 2.2 requires a demonstration that the technical regulation at issue imposes a limiting effect on international trade.¹⁷ This usually refers to conditions of competition between domestic and imported products (the national treatment obligation) or non-discrimination between imported products (the most-favoured-nation obligation). For national treatment purposes, changed conditions for imported products compared to domestic products might be enough to indicate that a measure is trade restrictive for the purposes of Article 2.2.¹⁸ However, we recall the Appellate Body in *Australia – Tobacco Plain Packaging* found the 'mere fact of modification of the conditions of competition in a market would not necessarily suffice for a panel to conclude on the degree of trade restrictiveness, if any, of a particular technical regulation.'¹⁹
13. The Appellate Body in *Australia – Tobacco Plain Packaging*, also considered reduction in competitive opportunities for some imported products compared to other products—including domestic, from other Members, and other products from the same Member.²⁰ In reiterating that a panel must assess the degree to which a measure

¹⁵ Appellate Body Report, *United States – Clove Cigarettes*, para. 173.

¹⁶ Australia's third party submission, paras. 11-16.

¹⁷ Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.384; *United States – COOL (Article 21.5)*, para. 5.208.

¹⁸ Appellate Body Report, *United States – COOL*, para. 477.

¹⁹ Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.389.

²⁰ *Ibid*, para 6.387.

causes a limiting effect on international trade, it recalled the Panel (in that case) had decided 'consideration can be given to both "import-enhancing and import-reducing effects on the trade of other members".'²¹ This leaves open the possibility for trade-enhancing effects to be considered when assessing the measures.

14. However, that does not mean a panel should not consider the conditions of competition as a whole for imported products from a Member.²² In Australia's view, in the context of a most-favoured-nation assessment, any trade-enhancing effects can be taken into account when considering conditions of competition as a whole for products from a particular Member. However, this does not mean that trade-enhancing effects for one Member would cancel out trade-restrictive effects for another Member.

Q17 [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 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.

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?

15. Australia is not commenting on the specific facts of the case but the legal test which should be applied for GATT Article XI:1. That test applies to measures which are restrictions effective 'on the importation' of goods. The text of the Article refers to measures 'other than duties, taxes or other charges' which seek to restrict goods being imported or exported. Article XI does not prohibit *all* barriers to entry into the market, but *only* those that constitute prohibitions or restrictions on the importation (or exportation) of the products.
16. To judge whether a measure is subject to GATT Article XI:1, Australia refers to the Panel Reports in *Dominican Republic – Import and Sale of Cigarettes* and *India –*

²¹ Ibid, para. 6.389 (quoting Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.1088).

²² Ibid.

Autos, where the ordinary meaning of a restriction 'on' importation was described as 'with respect to' importation.²³ That is, for a restriction to be subject to Article XI:1, it should be 'with regard to' or 'in connection with' the importation of the relevant product.²⁴

17. The coverage of Article XI and Article III:4 is distinct. In the case of imported products, Article XI:1 applies to products at the point of importation (as they enter the market) and Article III:4 applies to products after they have been imported (when they are already in the market). While the scope of Article XI:1 has been interpreted broadly, it should not be interpreted so broadly as to render Article III:4 meaningless. There are also clear parameters on Article XI:1 in the text of the GATT. *Note Ad to Article III* explicitly says that even if a measure covered by Article III:4 is enforced at the border, it is still covered by Article III, not Article XI. This means any measure which is not *exclusively* 'with regard to' or 'in connection' with importation, even when it is enforced at the border, would be considered an internal measure and covered by Article III.²⁵
18. To decide whether a measure is 'with regard to' or 'in connection' with importation, a panel should consider the design, context and architecture of the measure²⁶ and consider if the measure is *in essence* one that operates as a restriction.²⁷ Whether a decrease in demand meets those requirements will depend on the facts of the case.
19. However, in Australia's view, generally speaking, a measure which has an incidental effect on imports because of a decrease in domestic demand, is more likely to be considered an internal measure, rather than an import restriction.

Q19 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.

20. Australia submits that distinct tests have been developed under each paragraph of Article XX of the GATT 1994 which are based on the different language used in each paragraph and require that different elements be proven.
21. As outlined in Australia's written submission,²⁸ paragraphs (a) and (b) of Article XX require that the measures at issue are "necessary". The Appellate Body has found in

²³ Panel Report, *India – Autos* 7.257; *Dominican Republic – Import and Sale of Cigarettes*, para. 7.258.

²⁴ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.258.

²⁵ *Ibid*, para.7.260.

²⁶ Appellate Body Report, *Argentina – Import Measures*, para.5.217.

²⁷ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.266.

²⁸ Australia's third party submission, para. 28.

numerous cases that an analysis of 'necessity' in the context of Article XX involves a holistic weighing and balancing of a number of distinct factors, such as: the relative importance of the interests or values furthered by the challenged measure; the contribution of the measure to the objectives pursued by it; and the trade restrictiveness of the measure at issue.²⁹ Further, in most cases, a panel must then compare the challenged measure and possible alternative measures that achieve the same level of protection while being less trade restrictive.³⁰

22. By contrast, the standard under paragraph (g) of Article XX, requires that the measures at issue 'relate to' the conservation of exhaustible natural resources. In *China – Rare Earths* the Appellate Body held that this standard required "a close and genuine relationship of ends and means" between the measure at issue and the conservation objective.³¹ In particular, it would not be sufficient for the GATT-inconsistent measure to be "merely incidentally or inadvertently aimed at a conservation objective"³². The Appellate Body further highlighted that the absence of a domestic restriction, or the way in which a challenged measure applies to domestic production or consumption, could be relevant to the assessment of whether the challenged measure 'relates to' conservation.³³
23. Accordingly, the different text used in Articles XX(a) and (b) (i.e. "necessary") and Article XX(g) ("relating to") set considerably different legal standards. Reliance upon Articles XX(a) and (b) requires more than the mere establishment of a "close and genuine relationship of ends and means" between the measure at issue and the legitimate policy objectives. It requires the weighing and balancing of a range of factors, and often a comparison with less trade restrictive alternatives, to determine that the measure is actually "necessary" to achieve that objective. In Australia's view, the legal standards for "necessity" and "relates to" are distinct and should not be conflated.
24. It follows that, where multiple paragraphs of Article XX are invoked concurrently, each paragraph should be assessed separately according to the relevant legal standard for each.

²⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, para 178 - 182; *US – Gambling*, para. 307; *Korea – Various Measures on Beef*, para. 164; *Colombia – Textiles*, paras. 5.71-5.74.

³⁰ *Ibid.*

³¹ Appellate Body Reports, *China – Rare Earths*, para. 5.90.

³² *Ibid.*

³³ *Ibid.*