

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

Third-Party Oral Statement
of the United States of America

May 11, 2022

Mr. Chairman, members of the Panel:

1. Thank you for this opportunity to present the views of the United States. In this statement, we will briefly address two issues: first, an interpretive issue related to the extraterritorial scope of Article XX of the GATT 1994; and second, issues related to confidentiality that have arisen in this dispute.

I. The proper approach to an Article XX analysis

2. Article XX sets out the circumstances in which measures that have been found to be inconsistent with another provision of the GATT will nevertheless be justified and therefore not be found inconsistent with a Member's WTO obligations.

3. In these proceedings, Colombia¹ has argued as a third party that a Member cannot invoke Article XX to protect values and interests outside of that Member's territory. Colombia refers to this as an "implied jurisdictional limitation."² In its second submission, Malaysia highlighted Colombia's argument, noting that the existence of this supposed territorial limitation "is still an open question."³ To the contrary, the text of Article XX does not support this sort of territorial limitation.

4. Article XX allows Members to justify measures, if those measures "relate to" or "are necessary to" further certain enumerated objectives of the Member imposing the measure, and the measures do not discriminate "between countries where the same conditions prevail," are not "arbitrary or unjustifiable," and do not represent a "disguised restriction on trade." However, nothing in the text of Article XX supports the type of territorial limitation for the objective of the Member imposing the measure that Colombia is proposing. Furthermore, many measures

¹ Colombia's Third-Party Submission, paras. 3.48 *et seq.*

² Colombia's Third-Party Submission, para 3.48.

³ Malaysia's Second Written Submission, para. 207.

involving extraterritorial interests have been challenged in the past, and those same measures have been found to satisfy the requirements of the subarticles of Article XX.⁴ This is consistent with the fact that the text of Article XX provides no basis for a territorial limitation. For these reasons, the United States does not support the territorial limitation to Article XX that Colombia has proposed.

II. Confidentiality

5. The United States would also like to comment on a confidentiality issue that has arisen in these proceedings. As Indonesia noted in its third-party submission,⁵ in this dispute, Malaysia has filed several documents and excerpts of documents from DS593, the Indonesia/EU—Palm Oil case. Those documents—including an expert report, and portions of Indonesia’s submission and a third-party submission—were to be treated as confidential per Article 18.2 of the DSU. While these disputes both deal with the same EU measures, the two disputes are distinct. Further, the third parties in DS593 (the Indonesia/EU—Palm Oil case) and DS600 (the Malaysia/EU—Palm Oil case) are not identical, and thus, the disclosure of confidential documents from DS593 (the Indonesia/EU—Palm Oil case) in the present DS600, Malaysia/EU—Palm Oil case, is more than theoretical.

6. The United States takes its confidentiality obligations in WTO dispute settlement very seriously, and we rely on other Members to do the same. We caution Members to remain aware of, and abide by, their obligations, and to maintain strict confidentiality protocols at all times.

⁴ See, e.g., *U.S. – Shrimp (AB)* (holding that a measure related to the protection of sea turtles in extraterritorial waters was justified under Article XX(g)); *EC – Seal Products (AB)* (holding that a measure related to seal hunting in extraterritorial waters was justified under Article XX(a)).

⁵ Indonesia’s third-party submission, paras. 142-144.

This includes instances such as the present situation, where multiple disputes are ongoing that involve overlapping factual and legal issues.

7. We also note that Malaysia had other opportunities to provide the Panel with the same information without breaching the confidentiality of documents in other proceedings. For example, Malaysia might have adopted the same or similar arguments as its own and presented them in its own capacity as the complainant in this dispute. In addition, the Members that prepared the two DS593 submissions (in the Indonesia/EU—Palm Oil case) from which Malaysia provided excerpts—Indonesia and Brazil—are both third parties to the present dispute. Malaysia might have requested the support of those Members on the relevant issues in this dispute, such that the Members could have provided their views directly in their own submissions to the Panel.

III. Conclusion

8. This concludes the U.S. oral statement. We thank the Panel for its consideration of the views of the United States and look forward to answering any questions the Panel may have.