

BEFORE THE WORLD TRADE ORGANIZATION
DISPUTE SETTLEMENT BODY

*European Union & Certain Member States - Certain Measures Concerning
Palm Oil & Oil Palm Crop-based Biofuels (Malaysia), WT/DS600*

**Amicus Curia Written Submission of Veblen Institute for
Economic Reforms**

*To the attention of:
Mr Manzoor AHMAD, Chairperson of the Panel*

Geneva, 25 April 2022

It is well established that a panel can, at its discretion, accept and consider unsolicited *amicus curiae* briefs from non-governmental persons. Accordingly, the Veblen Institute for Economic Reforms (the “Veblen Institute” or the “Applicant”) respectfully submits this *amicus curiae* brief for the Panel’s consideration.

There is no particular procedure for submitting *amicus curiae* submissions. The present brief has been submitted electronically, via an email sent to Mr. John Adank (john.adank@wto.org), Director of the Legal Affairs Division at the World Trade Organization (“WTO”).

The Veblen Institute is a non-profit organization established in France in 2010. It aims at promoting ideas, policies and civil society initiatives for the ecological transition.¹ As stated in its articles of association:

*“The Veblen Institute aims to develop, disseminate and promote proposals for ecologically sustainable and just economic and social reforms. It also aims to support and actively participate in networks of actors working in this direction.”*²

The Veblen Institute focuses on economic issues in three ways: by renewing economic thought at a crossroads towards a sustainable society, by advocating for advanced public policies capable of defining the concrete adaptations of our current economic system, and by bringing technical expertise in all sector involved. To these ends, the Veblen Institute has been very active in addressing issues affecting, or relating to, the investment and trade system, including matters of European Union (“EU”) regulation.³

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This brief is intended to make a contribution to the Panel’s objective assessment of the matter that is very unlikely to be repetitive of parties’ or third parties’ arguments. We have carefully

¹ Veblen Institute, “[About Us](#)”.

² Veblen Institute, Articles of association (2021), Article 2, <https://www.veblen-institute.org/Statuts-de-l-association.html> (in French).

³ For a list of activities on these topics, see Veblen Institute, “[International Trade](#)”.

reviewed the written submissions of parties and third parties – otherwise confidential – that have voluntarily been made publicly available on the Internet.

This brief addresses a limited number of claims, and only certain aspects thereof. For strategic and policy reasons, the Veblen Institute chose to comment on Malaysia’s claims under Article III of the GATT. However, this brief supports that all the measures challenged by Malaysia can be justified under Article XX of the GATT.

Arguments advanced in this brief may apply *mutatis mutandis* to claims that the Veblen Institute does not directly address.

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Executive Summary

The objective of this amicus curiae brief, submitted by the Veblen Institute for Economic Reforms (the “Veblen Institute” or the “Applicant”), is to provide the Panel with its views on issues of interpretation and legal elements essential to resolving this dispute in a way that respects the scope of the regulatory autonomy of WTO Members and strike an appropriate balance between trade interest and environmental and climate concerns in accordance with the letter and spirit of the WTO agreements.

The Veblen Institute does not take a stance in this amicus curiae, on the relevance of using agrofuels (“biofuels”) in climate change policies or on the scientific questions of their impact on deforestation and climate change and among them the relative impact of cultivation of each feedstock used in their production. It is simply assumed, for the purpose of this submission, that the information and evidence supplied by the EU in this respect is reliable. The Veblen Institute’s objective is to defend a principled stance (based on applicable legal provisions) that a measure which is not protectionist shall be deemed prima facie consistent with GATT Article III, and that a measure genuinely aimed at mitigating climate change should be justified under GATT Article XX. In particular, the Veblen Institute supports that such a measure which differentiates between products on the basis of their processes and production methods should be deemed consistent with the GATT if it has been established that such a differentiation is legitimate.

First, the Veblen Institute recalls that the purpose of the national treatment obligation under the text of GATT Article III is to avoid internal measures being applied “so as to afford protection to domestic production”. It further submits that it is clear from this wording that what is prohibited is the application of measures whose intended result is protection of domestic production. The mere existence of a de facto detrimental impact on competitive opportunities for imported products is not necessarily inconsistent with Article III so long as the measure does not pursue a protectionist objective, which is consistent with the spirit of the GATT and the WTO Agreement, which respect policy space.

Second, the Veblen Institute insists that the measure is compatible with GATT Article XX if it is bona fide related to the stated objectives and, as the case may be, based on sufficient available scientific evidence.

I. Preliminary remarks

1. The objective of this brief is to advocate for a ruling that respects the scope of the regulatory autonomy of WTO Members, in accordance with the letter and spirit of the WTO agreements. It is so in particular with regard to governmental measures relating to environmental protection and climate change mitigation.

2. At the outset, the Applicant would like to respectfully recall the terms of the preamble of the Marrakesh Agreement Establishing the World Trade Organization (“WTO Agreement”), which reads in its relevant parts:

“The Parties to this Agreement,

*Recognizing that their relations in the field of trade and economic endeavour should be conducted **with a view to raising standards of living** [...], while allowing for the optimal use of the world’s resources in accordance with **the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development** [...]” (emphasis added)*

3. It is clear from this text that trade liberalization is not the sole objective of the multilateral trading system and is not an end in itself. Sustainable development and the preservation of the environment are also enshrined as fully-fledged goals of the WTO.

4. Since the establishment of the WTO in 1994 (even more so since the signature of the GATT 1947), the world has changed, and new threats to the global economy and welfare have emerged. Climate change have been recognized as a “common concern of humankind”,⁴ the biggest threat to health, life, and therefore the standards of living. Similarly exceeding other planetary boundaries is increasingly viewed as an existential threat.

5. Under the Paris Agreement, the community of nations has subscribed to the common objective of “*holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels*”.⁵ As the EU has pointed out, the Paris Agreement is “*the first-ever universal, legally binding global climate change agreement*”.⁶ To date, 163 of the 164 WTO Members have ratified it.⁷ The Paris Agreement thus establishes the “*common intentions of WTO*

⁴ Paris Agreement (12 December 2015), United Nations, Treaty Series, No. 54113, Preamble; ILC, Draft guidelines on the protection of the atmosphere, with commentaries (2021), [A/76/10](#) third preambular paragraph and commentary (compiling sources).

⁵ Paris Agreement, Article 2(1)(a).

⁶ UE First Written Submission, para. 294.

⁷ Only Yemen has not yet ratified it, but is a signatory. See Ratification status of the Paris Agreement, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=fr. In Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC – Approval and Marketing of Biotech Products)*, WT/DS291/R, adopted 29 September 2006, the Panel listed “several ways in which a sovereign State can decide not to accept other rules of international law”, such as the decision “not to sign the final text of the treaty in question” or the State legislature’s decision “not to ratify the

Members”,⁸ as it reflects consensus among WTO Members on the higher importance of climate-related policies and on their duty to address this urgent global threat.

6. In this context, a paradigm shift is unfolding: we are moving away from a situation where environmental protection was considered as a cost for business towards an understanding that unsustainable trade and the destruction of the environment, generate negative impacts on society as a whole and as such has considerable costs.⁹

7. The relevant parts of the Preamble of the WTO Agreement should have practical implications including with regard to climate change. The Preamble must be given full effect, in accordance with the principle of effectiveness of treaty interpretation.

8. For so doing, the WTO legal texts should be interpreted in light of these considerations, by fully considering WTO Members’ commitments under the Paris Agreement and the pressing need to address a “common concern of humankind”.

9. The Applicant supports that a balanced ruling that reconciles trade with global contemporary concerns is not necessarily revolutionary, but a ruling that is true to the roots of the world trading system. The case at hand offers the Panel the unique opportunity to deliver such a ruling.

10. The Applicant is of the view that WTO Members should be allowed to assume *de facto* discrimination whenever it is required to fulfil a legitimate objective or an unavoidable effect of such a policy (provided that the measure is not protectionist). This does not contradict the letter and spirit of the WTO Agreements.

11. Throughout this submission, the Applicant advances arguments in that sense.

II. The challenged measures do not violate Article III of the GATT

12. The Applicant will not delve into the measures at issue in this dispute or precise scientific or other factual elements, as this Panel has already plenty on the record. We would just like to highlight some issues of law which we think are essential to resolving this dispute, and respectfully submit our views concerning the proper application of certain GATT provisions.

treaty after it had been signed by its executive branch” (note 248). In the case of Yemen, it would be difficult to consider the absence of ratification (so far) as a sign of political intent ‘not to accept’ the Paris Agreement: given the current situation in Yemen, the ratification process is likely to be forced on hold and made practically impossible for the time being.

⁸ As understood in Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products (Peru – Agricultural Products)*, WT/DS457/AB/R, adopted 31 July 2015, para. 5.106.

⁹ See e.g. WTO, “[Public Forum reflects on need to strengthen collective action towards sustainable trade](#)” (1 October 2021), on the paradigm shift noted by Jean-Marie Paugam, WTO Deputy Director-General; USTR, Press release, “[Ambassador Katherine Tai’s Remarks As Prepared for Delivery on the World Trade Organization](#)” (October 2021). As regards the considerable impact of climate change on the whole society, see e.g. UN Secretary General’s statements at the launch of the latest IPCC report of 28 February 2022 at https://www.ipcc.ch/site/assets/uploads/2022/02/UN_SG_statement_WGII_Pressconference-.pdf

13. In addition, this brief will address all Malaysia’s claims under Article III (listed below), but will be limited to certain aspects thereof. Arguments presented below may apply *mutatis mutandis* to other claims.

A. Malaysia’s claims

14. For the sake of clarity, Malaysia’s claims (based on Malaysia’s request for the establishment of a panel¹⁰) that the Applicant will directly address are set out below:

15. Malaysia claims *inter alia* that the EU measures identified in paragraph 23 of the panel request violate:

- Article III:4 of the GATT 1994, because the measures at issue, notably the 7% limit, the high ILUC-risk cap, the high ILUC-risk phase out, and the low ILUC-risk certification, accord less favourable treatment to imported palm oil and oil palm crop-based biofuel than they do to 'like' domestic feedstocks and derived biofuels;

16. Malaysia claims that the French measures identified in paragraphs 25 to 28 of its panel request violate:

- Article III:2, first sentence, of the GATT 1994, because the measure at issue, namely the exclusion from the French fuel tax reduction, results, in effect, in the application of a tax on imported oil palm crop-based biofuel in excess to the tax that applies to 'like' domestic biofuels;
- or, in the alternative, Article III:2, second sentence, of the GATT 1994, because the exclusion from the French fuel tax reduction results, in effect, in dissimilar taxation of imported oil palm crop-based biofuel vis-à-vis directly competitive or substitutable domestic biofuels, applied so as to afford protection to domestic production.

B. Preliminary remarks on the ultimate purpose of GATT Article III

17. At the outset, the Applicant would like to recall the object of the whole Article III of the GATT (“*National Treatment on Internal Taxation and Regulation*”) as set out in Article III:1. In the Applicant’s view, it must inform any legal analysis relating to Article III – and in particular the concept of “*treatment no less favourable*”.

1. The object and purpose of GATT Article III

18. GATT Article III:1 reads as follows:

“The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring

¹⁰ Request for the Establishment of a Panel by Malaysia, WT/DS600/6, 16 April 2021.

the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.”
(emphasis added)

19. The purpose of the national treatment obligation is to avoid internal measures being applied “so as to afford protection to domestic production”.

20. The Applicant submits that it is clear from this wording that what is prohibited is the application of **measures whose intended result is protection of domestic production.**

21. The Applicant considers that the terms of Article III:1 are neither obscure nor ambiguous. But in order to be systematic and precise, the Applicant will demonstrate that a textual interpretation in accordance with the customary rules of interpretation of public international law, codified in Article 31, and to the extent appropriate, Article 32 of the Vienna Convention on the Law of Treaties (hereinafter the “Vienna Convention”) supports its view.

22. Article 31(1) of the Vienna Convention provides:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”

23. Even if the ordinary meaning of a treaty text shall be ascertained by considering the context and object and purpose, its identification may start with the dictionary definitions of the terms to be interpreted.¹¹

24. According to the Oxford Dictionary of English (Third Edition), the phrase “so as to do something” means “*in order to do something*”. This clearly implies that the action to which the phrase refers (in the case at hand, applying a measure) is taken with a view to achieving an objective. This suggests the intention.

25. Had the drafters wanted to refer to a broader scope of measures, so as to include any measure having the effect – actual or potential – of protecting domestic production, they would have drafted Article III:1 so as to reflect this. For example, they could have used “such that it affords protection” “in a way that protects”, “which results in protection” or “which may have the effect of protecting”, etc. There are plenty of ways to indicate the mere consequences, regardless of the intention.

26. The general definition “protection” supplied by the Oxford Dictionary of English (Third Edition) is “*the action of protecting*”. The same dictionary provides several definitions of the verb “protect”. Obviously, the economic definition is the most relevant. It reads “*shield (a domestic industry) from competition by imposing import duties on foreign goods*”. Although the definition refers to the imposition of import duties, admittedly, shielding the domestic industry can be achieved by other means.

¹¹ Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/AB/R, adopted 20 April 2005, para. 164.

27. Context, object and purpose just serve to elucidate the meaning of existing treaty words and terms.¹² In this case, they are clear. In any event, we will examine the immediate context, and the general object and purpose of the GATT.

28. Let us turn to the immediate context of Article III:1. It immediately follows Article II on Schedules of Concessions. This indicates the rationale behind Article III of the GATT, which aims at ensuring that Members' internal charges and regulations do not frustrate the effect of their tariff concessions under Article II. Therefore, the main goal of Article III of the GATT is to prevent Members from resorting to internal measures in order to indirectly protect their domestic productions from competition boosted by their trade liberalization commitments.

29. In addition, Article III and the GATT in general must be read in conjunction with the WTO Agreement, as its Annexes (which include The Multilateral Agreements on Trade in Goods) are integral parts of the WTO Agreement. As such, the Preamble of the WTO Agreement informs the provisions of the GATT.¹³ And as the Appellate Body recognized in *US – Shrimp*, the Preamble “shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection **as a goal of national and international policy**” (emphasis added).¹⁴ Therefore, even though the Appellate Body said that the sheltering scope of GATT Article III is not limited to products bound under Article II,¹⁵ the interpretation of GATT provisions should show deference to the policy space of WTO Members as long as their measures do not aim at shielding domestic production but have legitimate goals (especially environmental protection).

30. This interpretation is consistent with the Appellate Body's reference to “protectionism”. As it has recognized in *Japan – Alcoholic Beverages*:

“The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures”. (emphasis added)¹⁶

31. It is clear from the above that the purpose of Article III of the GATT is to strike down internal measures that are protectionist and shield internal measures that pursue a legitimate objective in good faith.

2. Determinations under GATT Article III

32. This entails that a determination under any of the provisions of Article III should be a determination about the application of the challenged measures so as to afford protection to domestic production.

¹² Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) (US – Zeroing (EC))*, WT/DS294/AB/R, adopted 9 May 2006, para. 268.

¹³ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WT/DS58/AB/R, adopted 6 November 1998, para. 129.

¹⁴ Appellate Body Report, *US – Shrimp*, para. 129.

¹⁵ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages)*, WT/DS8/AB/R, adopted 1 November 1996, p. 17.

¹⁶ Appellate Body Report, *Japan – Alcoholic Beverages*, p. 16.

33. The logical consequence of the above is that the starting point for making such a determination should be the domestic production that the country in question intends to protect through the application of this measure. It is all about protection of domestic production, not about merely disfavouring or even targeting certain products or products from certain countries (the latter case being dealt with by Article I:1).

34. Therefore, the claimant must identify the “domestic production” that the respondent seeks to protect. In the case at hand, Malaysia has identified two distinct types of domestic productions: i) “*certain biofuel feedstocks, such as rapeseed, sunflower, and soybeans*” and ii) “*biofuels produced therefrom*”.¹⁷

35. The Applicant submits that the legal tests to be applied under the provisions of Article III and any legal interpretation thereof should be performed to determine whether the measures challenged in this dispute aim at protecting “*certain biofuel feedstocks, such as rapeseed, sunflower, and soybeans*” produced in the EU or “*biofuels produced therefrom*” in the EU, as the case may be.

36. This should be so if the Panel were to give full effect to the terms of Article III:1.

3. The terms of Article III:1 should be given full effect

37. The Applicant submits that the terms of Article III:1 should be given full effect. The Applicant would like to respectfully recall the principle of effective treaty interpretation “*according to which all terms of a treaty must be given a meaning*”.¹⁸ It involves that a treaty interpreter:

“... *must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.*”¹⁹

38. It follows that all the provisions of Article III should be interpreted in light of its fundamental purpose, which is to avoid protectionism in the application of internal measures.

39. Having recognized that the principle of effective treaty interpretation mandated such an approach,²⁰ the Appellate Body said that the principles set forth in this paragraph shall inform the rest of Article III (including provisions on “treatment no less favourable”):

¹⁷ Malaysia’s Panel request, para. 7.

¹⁸ Panel Report, *US – Gambling*, WT/DS285/R, adopted 20 April 2005, as modified by the Appellate Body Report, para. 6.49.

¹⁹ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US – Reformulated Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, footnote 12, p. 23. Cited in Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products (Korea – Dairy)*, WT/DS98/AB/R, adopted 12 January 2000, para. 80, and footnote 42.

²⁰ Appellate Body Report, *Japan – Alcoholic Beverages*, p. 17.

“Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs. In short, Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation.”²¹

40. In practice, this entails that, as the Appellate Body ruled in *EC – Bananas*, in relation to Article III:4 (but it applies to all the provisions of Article III):

“In short, there must be consonance between the objective pursued by Article III, as enunciated in the “general principle” articulated in Article III:1, and the interpretation of the specific expression of this principle in the text of Article III:4”²²

41. With these essential considerations in mind, we now turn to Malaysia’s claims and the correct tests and interpretations that, in the Applicant’s view, should be applied.

C. The French measures do not violate Article III:2, first sentence

42. Malaysia claims that the French measure (the exclusion from the French fuel tax reduction) violates Article III:2, first sentence of the GATT because it allegedly results, in effect, in the application of a tax on imported oil palm crop-based biofuel in excess to the tax that applies to “like” domestic biofuels (understood as biofuel feedstocks, such as rapeseed, sunflower, and soybeans).

43. For better readability (as we will refer to the second sentence for the sake of our argumentation) the whole Article III:2 is replicated below:

“The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.”

44. Addendum to Article III:2 reads:

“A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition

²¹ Appellate Body Report, *Japan – Alcoholic Beverages*, p. 18.

²² Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas)*, WT/DS27/AB/R, adopted 25 September 1997, para. 98.

was involved between, on the one hand, the taxed product and on the other hand, a directly competitive or substitutable product which was not similarly taxed.”

1. The express reference to Article III:1 – or lack thereof – does not preclude the Panel from conducting a legal test aimed at revealing a non-protectionist objective

45. First of all, the Applicant would like to acknowledge the ruling of the Appellate Body in *Japan – Alcoholic Beverages*, according to which the presence of a “protective application” need not be established as a separate element under Article III:2, first sentence.²³

46. The Appellate Body explained that, by stating so, it intended to give effect to textual differences between Article III:2, second sentence which contains an express reference to the general principle set forth in Article III:1, and the other provisions of Article III which do not refer specifically to Article III:1.²⁴ In this respect, the Applicant submits the following:

47. This textualist and formalist interpretation has led to the construction of a theoretical distinction between (i) Article III:1 as a general principle informing the rest of Article III; and, (ii) Article III:1 as a stand-alone requirement in Article III:2, second sentence only.

48. This should not deprive Article III:1 of any effect. Should it be the case, this would contravene the fundamental principle of effectiveness of treaty interpretation and negate the spirit of the GATT’s provisions on national treatment. If the non-protectionist objective of a measure does not matter in applying Article III, such a non-protectionist measure could still be found in violation of Article III ... whose fundamental purpose is to avoid protectionism. Which is manifestly absurd.

49. The Applicant notes that the Appellate Body did not “forbid” or reject the examination of the policy objective as such.

50. Moreover, as the Appellate Body said, the fact that the presence of a protective application need not be established separately from the specific requirements of Article III:2, first sentence “*does not mean that the general principle of Article III:1 does not apply to this sentence*”.²⁵ And they “*believe the first sentence of Article III:2 is, in effect, an application of this general principle*”.²⁶

51. In the Applicant’s view, in applying Article III:2, first sentence, a panel should either examine the regulatory purpose of the measure at hand (we will address this issue in the section related to Article III:4 below) or interpret its terms so as to filter out protectionist measures and let non-protectionist measures pass.

²³ Appellate Body Report, *Japan – Alcoholic Beverages*, p. 18.

²⁴ *ibid.*, p. 18-19.

²⁵ Appellate Body Report, *Japan – Alcoholic Beverages*, p. 18.

²⁶ *ibid.*

52. The presence of an express reference to Article III:1 in Article III:2, second sentence and the lack thereof in the first sentence is far from indicating the importance that should be given to the fundamental principle that it contains. Rather, this textual difference supports the view that the terms of Article III:2, first sentence – because this sentence does not contain an express reference to the fundamental purpose of Article III – must be interpreted more rigorously, in order to account for the presence or absence of protectionist purpose.

53. This reasoning applies *mutatis mutandis* to GATT Article III:4.

2. The “likeness” determination

54. It stems from the above that in the context of Article III:2, first sentence, the term “like” shall be interpreted very narrowly, should the Panel decide not to consider the regulatory purpose as a separate step.

55. This is consistent with the Appellate Body’s statement in *Japan – Alcoholic Beverages* that:

“Because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not “like products” as contemplated by the first sentence, we agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn. Consequently, we agree with the Panel also that the definition of “like products” in Article III:2, first sentence, should be construed narrowly.”²⁷ (emphasis added)

56. We note that the Appellate Body later said in *Philippines – Distilled Spirits*, in the context of Article III:2, first sentence, that the “likeness” determination is “a determination about the nature and extent of a competitive relationship between and among the products”.²⁸ This statement referred to a previous Appellate Body’s ruling in *EC – Asbestos*, according to which “a determination of ‘likeness’ under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products”.²⁹

57. In the Applicant’s view, the Appellate Body unduly extended a ruling pertaining to Article III:4 to Article III:2, first sentence. This statement constitutes a generalization, and the principle that likeness is only concerned with the degree of competition is reductive and does not apply in all cases.

58. It is true that the existence of the second sentence of Article III:2, read in conjunction with the addendum to Article III:2 mandates a very narrow interpretation of likeness in the context of Article III:2, first sentence, as the second sentence concern “directly competitive or

²⁷ Appellate Body Report, *Japan – Alcoholic Beverages*, p. 19-20.

²⁸ Appellate Body Report, *Philippines – Taxes on Distilled Spirits (Philippines – Distilled Spirits)*, WT/DS396/AB/R, adopted 20 January 2012, para. 119.

²⁹ *ibid.*, fn 211, quoting Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos (EC – Asbestos)*, WT/DS135/AB/R, adopted 5 April 2001, para. 99.

substitutable” as opposed to “like” products in the first sentence. However, the meaning of “likeness” in Article III:2, first sentence and how narrowly it should be interpreted is not only a matter of competitive relationship and how close this relationship should be.

59. It also has to do with whether or not the panel will conduct a separate and distinctive examination of the protective aspect of the measure at hand. If not, “likeness” should be understood very strictly, so as not to strike down non-protectionist measures (as the statement of the Appellate Body in *Japan – Alcoholic Beverages* suggests).

60. For all these reasons, the Applicant submits that “likeness” in the context of Article III:2, first sentence requires a very high degree of similarity and should be understood as referring to a situation where the products that are being compared are almost identical, in all respects, including in view of a measure’s legitimate policy purpose. Only then can there be consonance between the objective pursued by Article III, as enunciated in the “general principle” articulated in Article III:1, and the interpretation of the specific expression of this principle in the text of Article III:2, first sentence.

61. The test to assess likeness in the context of Article III:2, first sentence should be designed accordingly.

62. In this regard, the Appellate Body in *Japan – Alcoholic Beverages* went on to state that the approach to identify likeness based on the criteria that were suggested in previous panel reports - the product’s end-uses in a given market; consumers’ tastes and habits, which change from country to country; the product’s properties, nature and quality – “*should be helpful*”, “*on a case-by-case basis*”, but added:

*“Yet this approach will be most helpful if decision makers **keep ever in mind how narrow the range of "like products" in Article III:2, first sentence is meant to be** as opposed to the range of "like" products contemplated in some other provisions [...]*” (emphasis added)³⁰

63. This indicates not only that this approach is in no way mandatory, but that it has to be used, in the context of Article III:2, first sentence in a way that leads to a determination of likeness narrowly interpreted. The Appellate Body underlined that a panel must exert discretionary judgment in this respect.³¹

64. The Applicant would like to respectfully invite the Panel to exert judgment as to what factors are relevant in making this determination, considering its decision as to whether or not to conduct a separate analysis on the presence of a “protective application” of the measure.

D. The French measures do not violate Article III:2, second sentence

65. Malaysia claims that the French measure, in the alternative, violates Article III:2, second sentence, of the GATT 1994, because the exclusion from the French fuel tax reduction allegedly results, in effect, in dissimilar taxation of imported oil palm crop-based biofuel vis-à-vis directly

³⁰ Appellate Body Report, *Japan – Alcoholic Beverages*, p. 20.

³¹ *ibid.*, p. 21.

competitive or substitutable domestic biofuels, applied so as to afford protection to domestic production.

66. In accordance with its conclusion in I-2-b above, the Applicant submits that the legal test to be applied under Article III:2, second sentence and any legal interpretation thereof should be aimed at determining whether the measure at hand aims at protecting domestic biofuels produced from certain feedstocks such rapeseed, sunflower and soybeans from imported products.

67. The Applicant understand that, for a violation to be found, three elements must be established:

- i) The taxed product (in this case oil palm crop-based biofuels) and EU products for which protection is allegedly sought (*i.e.* biofuels produced from certain feedstocks such as rapeseed, sunflower and soybeans) are “directly competitive and substitutable” products;
- ii) The directly competitive or substitutable imported products are not similarly taxed; and
- iii) The measure is applied “so as to afford protection” to the EU production, as defined by Malaysia.

68. Admitting *arguendo* that the Panel establishes the first two elements, the Applicant submits that it cannot be reasonably established that the measure at issue is applied “*so as to afford protection to domestic production*”. It is clear that the exclusion of oil palm crop-based biofuels (irrespective of their origin) alone from the fuel tax reduction was not designed to protect the EU production of biofuels.

69. In this regard, the Applicant would like to submit its interpretation of the “protective application” test, which the Appellate Body confirmed in *Japan – Alcoholic Beverages* shall be conducted as a separate step.³²

70. In this case, the Appellate Body said that:

*“Although it is true that **the aim of a measure** may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure.”*³³ (emphasis added)

71. In the Appellate Body’s own words, what needs to be ascertained is indeed “the aim” of the measure at issue. It recognized that enquiring into the intention of the legislators is not required.³⁴ But it does not mean that the aim of the measure should not be established. What the Appellate Body discussed in this case is the means to establish it. And according to it, the aim can be discerned through the examination of objective criteria. In other words, a panel is

³² Appellate Body Report, *Japan – Alcoholic Beverages*, p. 24.

³³ *ibid.*, p. 29.

³⁴ *ibid.*, p. 27.

not required to second guess the intention of policy makers, or merely rely on the reasons they provide. What the Appellate Body said is that the protectionist intent – or lack thereof – should rather be discerned from the application of the measure, hence the reference to the examination of “the design, architecture and structure” of the measure.

72. In *Chile – Alcoholic Beverages*, the Appellate Body confirmed this understanding and even went further to state, referring to its report in *Japan – Alcoholic Beverages*:

*“We emphasized in that Report that, in examining the issue of “so as to afford protection”, “it is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent.” The subjective intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters. It does not follow, however, that the statutory purposes or objectives – that is, the purpose or objectives of a Member’s legislature and government as a whole – to the extent that they are given objective expression in the statute itself, are not pertinent.”*³⁵ (emphasis added, footnotes omitted)

73. On the contrary, according to the Appellate Body:

“a measure’s purposes, objectively manifested in the design, architecture and structure of the measure, are intensely pertinent to the task of evaluating whether or not that measure is applied so as to afford protection to domestic production”.³⁶

74. The panel’s findings of “protective application”, endorsed by the Appellate Body, were not based on the declared objectives alone. But they were based on an examination of the measure’s design, architecture and structure of the measure at issue in relation to its declared objectives. According to the Appellate Body, this is “a task that is unavoidable in appraising the application of the measure as protective or not of domestic production”.³⁷

75. In practice, this means that a panel will just try to establish whether the declared objective is plausible in view of the objective features of the measure, or whether it is evident that those features have been deliberately designed so as to place a higher tax burden on imported products than on directly competitive and substitutable domestic products.³⁸

76. The declared objectives of the measure at hand are clear: to incentivize economic operators to incorporate biofuels meeting sustainability criteria in the fuel that they release, thereby contributing to achieving climate change and environmental objectives. This is evidenced from the legislative history of the measure, as well as a decision by the French *Conseil constitutionnel* (constitutional council) – the highest constitutional court in France – which recognised that the French measure pursues legitimate climate change mitigation

³⁵ Appellate Body Report, *Chile – Taxes on Alcoholic Beverages (Chile – Alcoholic Beverages)*, WT/DS87/AB/R, adopted 12 January 2000, para. 62.

³⁶ *ibid.*, para. 71.

³⁷ Appellate Body Report, *Chile – Alcoholic Beverages*, para. 72.

³⁸ *ibid.*, para. 63-74.

objectives and did so “based on the current state of knowledge and the worldwide conditions of exploitation of palm oil, retained objective and rational criteria in relation to the aim pursued”.³⁹

77. The tax reduction scheme is based on sustainability criteria, which lead to the exclusion of oil palm crop-based fuels. This is coherent with the declared objective which is to incentivize the use of sustainable biofuels as opposed to biofuels that do not meet these criteria. These sustainability criteria were not chosen so as to protect the domestic production. This is obvious from the legislative history of the measure and the decision of the *Conseil constitutionnel* referred to above. Whether or not the measure, so designed, is necessary for achieving the stated objectives is irrelevant.⁴⁰

78. In addition, had France intended to protect its production of biofuels, it would certainly not have done so by merely excluding oil palm crop-based fuels from a tax reduction scheme. Not only does France produce biofuels incorporating palm oil, but it imports biofuels from other feedstocks more similar to its domestically produced biofuels (and these benefit from tax reduction). Malaysia itself complains that the French measure confers an advantage to “like” products from other countries.

79. For all these reasons, the Applicant submits that the French measure cannot be found to violate GATT Article III:2, second sentence.

E. The EU measures do not violate Article III:4

80. Malaysia claims that the EU measures violate Article III:4 of the GATT 1994, because the measures at issue, notably the 7% limit, the high ILUC-risk cap, the high ILUC-risk phase out, and the low ILUC-risk certification, allegedly accord less favourable treatment to imported palm oil and oil palm crop-based biofuel than they do to “like” domestic feedstocks and derived biofuels.

81. Article III:4 reads, in its relevant parts:

“The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. [...]”

82. At the outset, the Applicant would like to refer the Panel to the arguments that it advanced in the section on Article III:2, first sentence of this brief, as they apply *mutatis mutandis* to the application of Article III:4.

³⁹ Conseil constitutionnel, Decision [n° 2019-808 QPC](#) (11 October 2019).

⁴⁰ Appellate Body Report, *Chile – Alcoholic Beverages*, para. 72.

83. In addition, the Applicant would like submit its analysis i) on “like products” ii) on the interpretation of “treatment no less favourable” and iii) the relationship between GATT Article III and GATT Article XX.

1. “Like” products

84. The Applicant refers the Panel to section III-C-2 above, and submit that the same conclusions apply to the determination of likeness in the context of Article III:4.

85. Should the Panel decide to go on with the traditional approach to likeness determination, based on the series of criteria set out above (which supposes, in our view, that the Panel will conduct an analysis of “protective application”), the Applicant would like to submit the following:

86. Firstly, for the reasons already exposed section III-C-2, even if the Panel limits its analysis to establishing the extent and nature of the competitive relationship between imported products and domestic products, “likeness” should be narrowly interpreted. Establishing that the two groups of products are “directly competitive or substitutable” is not sufficient.

87. Secondly, concerning consumers’ tastes and preferences, the Applicant would like to submit the following: if what the Panel seeks to establish is the extent of the competitive relationship between palm oil and other feedstocks on the one hand, and between oil palm crop-based biofuels and biofuels from other feedstocks on the other hand, consumers’ tastes and preferences should be those of those who purchase these products and make the potential decisions to substitute one product for another. In the case at hand, these are economic operators that produce biofuels or blend biofuels with fossil fuels. These economic operators are sufficiently informed so that they are able to distinguish between palm oil and other feedstocks, and between oil palm crop-based biofuels and biofuels produced from other feedstocks. Therefore, they can form and express preferences for some products over others. The question is whether they actually have preferences that materialize in purchasing decisions. In this respect, the Applicant would like to invite the Panel to consider the influence of final consumers’ preferences regarding palm oil versus other feedstocks, as fuel producers’ preferences are directly influenced by them. This is evidenced by the fact that certain fuel producers have communicated on the fact that they will not process palm oil anymore.

88. In the Applicant’s view, the way to assess this criterion should be decided on a case-by-case basis. It may require carrying out a factual analysis, especially about the ways and means final consumers are informed about production processes of fuels, and the actual influence of these preferences on feedstocks and biofuels purchasers.

2. “Treatment no less favourable”

89. Admitting *arguendo* that the Panel establishes “likeness” and that the measure falls within the scope of Article III:4, it will remain to be established, for a violation to be found,

that the measure accords imported products treatment no less favourable than that accorded to “like” domestic products.

90. The Appellate Body ruled, in *EC – Bananas*, that because Article III:4 does not specifically refer to Article III:1, a determination of whether there has been a violation of Article III:4 does not require a separate consideration of whether a measure is applied so as to afford protection to domestic production.⁴¹ The Applicant reiterates the same arguments advanced in respect of Article III:2, first sentence. If a panel does not conduct a “protective application” test separately from the specific elements of Article III:4, then, it has to make sure that these elements are interpreted so as to ensure consonance between these specific elements and the fundamental purpose of Article III, as expressed in Article III:1. So, should the panel choose not to conduct a separate test for “protective application” determination, it must consider the regulatory purpose as part of the “likeness” determination, or it should do so in relation to the determination of the treatment of imported products as compared to like domestic products.

91. According to the Appellate Body, “[w]hether or not imported products are treated “less favourably” than like domestic products should be assessed [...] by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products”.⁴² It is now well-established that Article III requires WTO Members to ensure effective equality of competitive opportunities between imported and domestic products. The Applicant acknowledges that a measure, origin-neutral on its face, can be found inconsistent with the national treatment obligation. We agree with the Appellate Body that ruling otherwise would render the provisions of Article III largely ineffective in preventing the application of measures which, although *de jure* non-discriminatory, are protectionist. Therefore, we do acknowledge that certain measures that are only *de facto* discriminatory can be found to violate Article III:4. However, it does not mean that any measure that has a *de facto* disparate impact on competitive opportunities for imported products versus domestic products violates Article III:4.

92. In our view, nothing prevents a panel from interpreting the term “treatment no less favourable” so as to take into account the protectionist purpose (or lack thereof). All the above indicates that such an interpretation is even mandated by the principle of effective treaty interpretation and necessary to render a ruling on Article III:4 consistent with the spirit of the GATT and the WTO Agreement. The Appellate Body itself ruled that panels could do so in interpreting the term “treatment no less favourable” in the context of Article 2.1 of the Agreement on Technical Barriers to Trade: where the measure at issue results in a *de facto* detrimental impact on competitive opportunities for imported products, it can still be found non-discriminatory if such a detrimental impact “*stems exclusively from a legitimate regulatory*

⁴¹ Appellate Body Report, *EC – Bananas*, para. 212-216.

⁴² Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea – Various Measures on Beef)*, WT/DS161/AB/R, adopted 10 January 2001, para. 137.

distinction".⁴³ We do not see any reason why panels could not consider the regulatory purpose in making determinations of "treatment no less favourable".

93. Moreover, the Applicant submits that the test applied to determine the presence of a "protective application" in the context of Article III:2, second sentence could be relevant in determining in determining "less favourable treatment" under Article III:4. If a disparate impact is observed, a panel could examine the design, architecture and structure of the measure at issue in relation to its declared objectives. This would allow the panel to determine whether the measure has been deliberately designed to protect the domestic production identified by the complainant.

3. *Relationship with GATT Article XX*

94. The Applicant notes that the Appellate Body said that, for the purposes of an analysis under Article III:4, a panel is not required to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction.⁴⁴

95. The Appellate Body recalled that, by contrast, consideration of the regulatory objective in applying the national treatment rule under the WTO Agreement on Technical Barriers to Trade ("TBT Agreement") is justified by the absence in the TBT Agreement of "general exceptions" such as those contained in Article XX of the GATT, while the object and purpose of the TBT Agreement is to strike a balance between trade liberalization and Members' right to regulate trade.⁴⁵ According to the Appellate Body, "*in the GATT 1994 this balance is expressed by the national treatment rule as qualified by the exceptions in Article XX, while, in the TBT Agreement, this balance is to be found in the national treatment provision itself, read in the light of its context and its object and purpose*".⁴⁶

96. This jurisprudence seems to suggest that the GATT national treatment rule qualified by the exceptions in Article XX is *in fine* equivalent to the TBT national treatment rule as developed by case-law. This is not the case, *inter alia* for the following reasons:

97. Firstly, the list of regulatory objectives in Article XX is exhaustive. By contrast, the list of legitimate objectives in the TBT Agreement – considered in the national treatment analysis – is not. It follows that pursuant to case-law, not all internal measures pursuing a non-protectionist regulatory objective could be justified under Article XX. What if, by any possibility, climate change mitigation was not a policy objective covered by Article XX? Would a measure pursuing this objective be found inconsistent with Article III for the sole reason that

⁴³ Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)*, WT/DS406/AB/R, adopted 24 April 2012, para.175.

⁴⁴ Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)*, WT/DS400/AB/R, adopted 18 June 2014, para. 5.117.

⁴⁵ Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)*, WT/DS406/AB/R, adopted 24 April 2012, para. 174, referring to para. 95.

⁴⁶ *ibid.*, para. 109.

it has a disparate impact on competitive opportunities? Or would a panel examine the regulatory purpose in determining whether the measure at issue is consistent with Article III:4?

98. Secondly, as the Appellate Body said in the context of Article III:2, second sentence, an examination of a measure's design, architecture and structure of the measure in view of its declared objectives does not require a determination of whether or not the measure is necessary for achieving the stated objective, as this could be required under Article XX.

99. Thirdly, Article XX would not be rendered ineffective by consideration of the regulatory purpose in applying Article III:4. We recall that the Appellate Body confirmed that consideration of the regulatory purpose is relevant in determining whether a measure violates Article III:2, second sentence. It is hard to see why applying the same principle to Article III:4 would make Article XX ineffective. Besides, Article XX would still be effective to justify other *prima facie* GATT-inconsistent measures: internal measures imposing origin-based discrimination, measures inconsistent with other GATT articles...

100. Finally, the Applicant would like to emphasize again, in this context, what it has repeatedly said throughout this brief: the principle of effective treaty interpretation commands to interpret Article III on its own terms. And as demonstrated above, the existence of Article XX on general exceptions alone does not suffice to not do so.

F. Concluding remarks

101. The Applicant agrees that certain measures that are origin neutral on their face can be considered as inconsistent with Article III, so long as they are protectionist. But we are of the view that any measure that results in a *de facto* detrimental impact on competitive opportunities for imported products is not necessarily inconsistent with Article III.

102. If the existence of a disparate impact was sufficient to found a violation, virtually no internal measure pursuing a legitimate, non-protectionist objective could comply with Article III of the GATT. This situation would be inconsistent with the spirit of the GATT and the WTO Agreement, which respect policy space.

103. If what mattered to find a violation was the mere disparate impact on imported products versus domestic like products, this would entail that countries (to ensure GATT-compliance) would design their legitimate policy measures based not only on the regulatory objective, but also market shares, the market structure and conditions of competition... In turn, this would entail that governments would be required to adjust their regulatory measures as these market conditions change, so as to make sure that they have no side effect at any time (*i.e.* disparate impact on competitive opportunities for imported and domestic products).

104. Most importantly, this would diminish the effectiveness of legitimate policies. Sometimes, disparate impact is an unavoidable collateral damage of a regulatory measure. At other times, discrimination *per se* is the only effective tool for achieving a legitimate objective.

III. Should the challenged measures be found *prima facie* inconsistent with the GATT, they are nevertheless justified under GATT Article XX

105. The Applicant submits that, should the challenged measures be found *prima facie* inconsistent with the GATT, they are nevertheless justified under GATT Article XX.

106. The Applicant would like to highlight before the Panel additional arguments serving the demonstration that these measures i) all fall under the scope of three exceptions listed in Article XX – namely Article XX(a), Article XX(b) and Article XX(g) – and ii) comply with the requirements of the *chapeau*.

A. Policy objectives covered by GATT Article XX (“General Exceptions”)

107. At the outset, the Applicant would like to make the following remarks.

108. First, the Applicant would like to refer the Panel to the argument it made in Section I of this submission, with regard to measures falling under the scope of GATT Article III: should the policy objective of a measure fall outside the purview of GATT Article XX, it should be relevant in determining the measure’s consistency with the national treatment obligation. Given the ultimate purpose of Article III (which is to avoid the protectionist application of a measure), the regulatory objective must be scrutinized to assess its GATT-consistency at one stage or another of the panel’s review.

109. Second, the Applicant submits that, in any event, all measures aiming at achieving the Paris Agreement target for mitigating climate change and greenhouse gas emissions at the global level can necessarily be reviewed under Article XX. As recalled in section II of this brief, among the WTO Agreement’s objectives are sustainable development and the protection of the environment. In this respect, it is worth recalling that case-law has embraced an evolutionary approach to environmental concerns, following which terms in the WTO Agreements must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.⁴⁷ From this perspective, it is hard to support that these objectives do not cover the protection of the world atmosphere and climate.

110. As the Appellate Body recognized in *US – Shrimp*:

*“While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy.”*⁴⁸

111. As suggested above, the Appellate Body confirmed that the Preamble of the WTO Agreement informs the GATT 1994 and other covered agreements.⁴⁹

⁴⁷ Appellate Body Report, *US – Shrimp*, para. 129, applying this reasoning to Article XX(g).

⁴⁸ *ibid.*, para. 129.

⁴⁹ *ibid.*

112. The Applicant supports that the Preamble should be read in light of contemporary concerns and, more specifically, the consensus among WTO Members regarding the higher importance of climate-related policies and on their duty to urgently deal with a “common concern of humankind”.

113. It should also be noted that the challenged measures were adopted as part of this duty under the Paris Agreement, as the EU has repeatedly suggested.⁵⁰

114. The Preamble’s “refreshed” reference to sustainable development and environmental protection must therefore inform GATT Article XX and be given full effect, by duly taking account of these circumstances.

115. Besides, as the Appellate Body said in *EC – Tariff Preferences*, the fact that a measure allegedly pursues one of the fundamental objectives of the WTO (as opposed to distinct and separate from the objectives of the WTO Agreement) does not preclude the regulating Member from invoking Article XX as a defence.⁵¹

116. This is quite the contrary. Absent WTO positive regulation on environmental protection and climate response measures, Article XX should be the least of the possibilities to defend climate mitigation measures.

B. The challenged measures can be justified under Article XX(g)

117. The Applicant contends that the challenged EU measures, which ultimately seek to protect the atmosphere by preserving biodiversity and carbon sinks (*i.e.* carbon-rich tropical forests), can be reviewed under Article XX(g).

1. The challenged measures concern “the conservation of exhaustible natural resources”

118. At the outset, the Applicant recalls that the Appellate Body in *US – Shrimp* emphasized the need for an evolutionary interpretation of the term “exhaustible natural resources”, which “*must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment*”.⁵² The Appellate Body further noted that, “*from the perspective embodied in the preamble of the WTO Agreement*”, “*the generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’*”.⁵³ In the *EC – Biotech* case, the Panel clarified that other treaties are relevant as they provide “*evidence of the ordinary meaning of terms*” of GATT.⁵⁴

⁵⁰ UE First Written Submission, paras 169, 256, 294-299, 331 and 345.

⁵¹ Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (EC – Tariff Preferences)*, WT/DS246/AB/R, adopted 7 April 2004, para. 95.

⁵² Appellate Body Report, *US – Shrimp*, para. 129.

⁵³ *ibid.*, para. 130.

⁵⁴ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.92.

119. Although recognition by international treaties does not seem to automatically warrant the exhaustible nature of the resource, such a recognition makes the exhaustible character “*very difficult to controvert*”.⁵⁵ The Appellate Body inferred from the acknowledgement of the international community of the importance to protect certain type of resources that those resources should be covered by Article XX(g).⁵⁶ It can be deduced from this reasoning that the value attributed to the protection of certain resources nowadays at the national and international levels has an impact on the delineation of the scope of Article XX(g).

120. There is wide acknowledgement in international law that the atmosphere is a natural resource. The authoritative International Law Commission (“ILC”) Guidelines on the protection of the atmosphere clearly state, as an overarching principle, that atmosphere is a natural resource – and no ordinary one, as it is referred to as the “*Earth’s largest single natural resource and one of its most important*”.⁵⁷ In addition, atmospheric pollution and atmospheric degradation are now established to be a “common concern of humankind”,⁵⁸ which leaves no doubt as to whether measures aiming to protect the atmosphere fall under Article XX(g).

121. In particular, the fact that the international community, including all WTO Members, have recognized in the Paris Agreement the “*need for an effective and progressive response to the urgent threat of climate change*”⁵⁹ can only support this conclusion.

122. The Appellate Body also clarified the meaning of “exhaustible”, which refers to resources that are “*in certain circumstances [...] susceptible of depletion, exhaustion and extinction, frequently because of human activities*”.⁶⁰ In the *US – Gasoline* case, the Appellate Body confirmed the panel’s conclusion that clean air is a natural exhaustible resource that could be “depleted” and that a policy to prevent this depletion is covered under Article XX(g) GATT.⁶¹

123. In the case at hand, there is plenty of evidence showing that the resources protected (biodiversity, lands with high carbon stocks and the atmosphere) are not only susceptible of depletion but are being harmed beyond repair. Efforts to decarbonize and address climate

⁵⁵ Appellate Body Report, *US – Shrimp*, para.128.

⁵⁶ *ibid.*, para. 131.

⁵⁷ ILC, Draft guidelines on the protection of the atmosphere, with commentaries (2021), [A/76/10](#), first preambular paragraph and commentary: “[...] *acknowledging the essential importance of the atmosphere for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems*” and citing relevant international declarations, treaties and case law that listed it as a natural resource. See e.g. Official Records of the Economic and Social Council, Fiftieth Session, Supplement No. 6 (E/4969-E/C.7/13), section 4 (“other natural resources”), para. 94 (d); Declaration of the United Nations Conference on the Human Environment (“Stockholm Declaration”) (1972); World Charter for Nature, General Assembly resolution 37/7 (28 October 1982), annex, general principles, para. 4.

⁵⁸ *ibid.*, third preambular paragraph and commentary. See e.g. Paris Agreement, Preamble.

⁵⁹ Paris Agreement, Preamble.

⁶⁰ Appellate Body Report, *US – Shrimp*, paras 128 and 131.

⁶¹ Appellate Body Report, *US – Reformulated Gasoline*, p. 14-22.

change mitigation implementing the Paris Agreement may thus be defended under the provision.

2. *Remarks concerning extraterritoriality*

124. It must be noted that the Appellate Body gave extra-territorial scope to Article XX(g) in the case *US – Shrimp* noting that in the case at hand there was a sufficient nexus between the animals protected and the United States – although it left unclear whether this “sufficient nexus” with the regulating country was a pre-requisite for a measure related to the conservation of exhaustible natural resources outside of its jurisdiction to be justified under Article XX(g).⁶²

125. In the *US – Shrimp case*, such a nexus seemed to result from the migratory nature of species concerned, which may be found in the waters of the United States.⁶³

126. In any event, in the case at hand, the existence of a sufficient nexus can be established, in light of the very nature of the resource that is aimed at being preserved.

127. There is scientific and international consensus that climate change is a “common concern of humankind” and a global phenomenon that transcends borders and jurisdictions.⁶⁴ Destruction of biodiversity and GHG emissions elsewhere adversely affect the atmosphere, which has necessarily an impact in the EU. For example, the Paris Agreement preamble notes “*the importance of ensuring the integrity of all ecosystems [...] and the protection of biodiversity*” for climate change mitigation purposes.

128. The ILC Guidelines on the protection of the atmosphere express the obligation incumbent on States to “*protect the atmosphere*”, by taking “*appropriate measures [...] to prevent, reduce or control atmospheric pollution and atmospheric degradation*”.⁶⁵ It is also accepted that atmospheric degradation is understood to have a global dimension, as it is defined as “*the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth’s natural environment*”.⁶⁶ It can thus be inferred that States have a shared responsibility with regard to the preservation of “*predictable weather patterns and biodiversity*”.⁶⁷

129. Therefore, given that the atmosphere is by nature a global resource and that all States may be affected by its disruption, each WTO Member holds a legitimate interest in adopting measures relating to “*the conservation of a certain global temperature, of forests and biodiversity*”,⁶⁸ regardless of where the source of atmospheric degradation is located. In other words, there is necessarily a sufficient nexus between the EU and the protected values.

⁶² Appellate Body Report, *US – Shrimp*, para. 133.

⁶³ Appellate Body Report, *US – Shrimp*, para. 133.

⁶⁴ As elaborated in detail by the EU.

⁶⁵ ILC, Draft guidelines on the protection of the atmosphere, Guideline 3.

⁶⁶ *ibid.*, commentary to guideline 3, para. 3.

⁶⁷ EU First Written Submission, para. 1346.

⁶⁸ *ibid.*, para. 1351.

3. Degree of connection between the means and the objective

130. It must be stressed that while Articles XX(a) and XX(b) cover measures “necessary” to pursue a legitimate objective, subparagraph (g) covers measures “relating” to the conservation of exhaustible natural resources. It is commonly argued that this difference in wording translates into different tests to assess whether a measure is “justifiable”. Where Article XX(b) involves a process of weighing and balancing of multiple factors, Article XX(g) does not. Under this view, subparagraph XX(g) must be construed as covering a wider scope of measures than subparagraph XX(b).

131. In *China – Rare Earths*, the Appellate Body held that the term “relating to” in subparagraph XX(g) requires “*a close and genuine relationship of ends and means*” between the measure at issue and the conservation objective of the Member applying the measure.⁶⁹ The Appellate Body explained that the measure will not satisfy this requirement if it is “*merely incidentally or inadvertently aimed at a conservation objective*”.⁷⁰ It must be “*primarily aimed at*” the conservation of an exhaustible natural resource; however, there is no requirement for the regulation to be essential for the conservation.⁷¹

132. In the case at hand, it is quite straightforward that the EU measures are “primarily aimed at” the conservation objective. As the EU has provided ample evidence, the measures pursue an objective of climate change mitigation:⁷² by impeding additional deforestation and land-use change with a view to reduce GHG emissions, they prevent further degradation of the atmosphere. Climate change mitigation should therefore be equated to the prevention of further degradation of the atmosphere.

4. The challenged measures are made effective in conjunction with restrictions on domestic production or consumption

133. Finally, in order to be justified under Article XX(g), the measure must be “*made effective in conjunction with restrictions on domestic production or consumption*”.

134. In *US-Gasoline*, the Appellate Body construed this requirement as “*a requirement of even-handedness*” in the imposition of restrictions upon the production or consumption of exhaustible natural resources,⁷³ meaning that such restrictions must be accompanied with similar restrictions on domestic production or consumption.⁷⁴

⁶⁹ Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (China – Rare Earths)*, WT/DS431/AB/R, adopted on 29 August 2014, para. 5.90.

⁷⁰ *ibid.*

⁷¹ See Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon (Canada – Herring and Salmon)*, L/6268, adopted 22 March 1988, para. 4.6.

⁷² See EU First Written Submission, Section 5.1 “Climate change mitigation”.

⁷³ Appellate Body Report, *US – Gasoline*, p. 20.

⁷⁴ Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials (China – Raw Materials)*, WT/DS394/AB/R, adopted 22 February 2012, para. 360.

135. In the case at hand, it is undisputable that the limitation in the extent to which biofuels can be accounted for in the calculation of renewable energy consumption is even-handed as it applies irrespective of whether the product is imported or produced in the EU, and is the result of an objective methodology.

C. The challenged measures can be justified under Article XX(b)

136. In support of the contention that the challenged measures, which intend to fight climate change and implement the Paris agreement, fall within the purview of Article XX(a), the Applicant submits further arguments showing that they pursue the objective to protect “life or health of humans, animals or plants”, principally with respect to the level of scientific evidence that is expected and the alleged trade-restrictiveness of the measure.

1. The acceptable level of scientific evidence in achieving the level of protection set by the EU

137. These measures were adopted pursuant to a cautious approach, in accordance with the precautionary principle.

138. While the precautionary principle is not mentioned in the GATT, nothing in Article XX prevents a precautionary approach, provided the requirements of the *chapeau* are met. In particular, it is worth recalling that under WTO law, Members are free to set their own level of protection – thus allowing the EU to set a very high level of protection, provided that it does so on a non-discriminatory basis. By analogy, this view finds further support in case law concerning the SPS Agreement, as the Appellate Body has recognized that Members may take measures under Article XX(b) based on respected minority scientific views.⁷⁵

139. In practice, following the precautionary principle even entails “*an obligation to even take account of mere indications pointing to the possibility of serious or irreversible impairments, as long as these indications are sufficiently reliable*”.⁷⁶

140. The EU has already brought significant scientific evidence in support of the challenged measures. A large number of serious scientific studies highlight the greater risks caused by palm oil produced for biofuels, compared to palm oil used for food, especially with regard to the potential extent of indirect land-use change and deforestation that could be induced by an increased global demand for biofuels (to which to EU may contribute through its renewable energy policy incentives). Based on these scientific assessments, the EU has considered that refraining from “fuelling” such an increase in palm oil-based biofuels was warranted. This shows that the measures were designed with great care not to overly impair trade. This is equally true with regard to the French measures and their legislative background (see above).

⁷⁵ Appellate Body Report, *EC – Asbestos*, para. 178.

⁷⁶ Bundesverfassungsgericht (German Constitutional Court), [Press release](#), Constitutional complaints against the Federal Climate Change Act partially successful.

2. *The necessity test for climate change mitigation measures*

141. Furthermore, as the Appellate Body has explained, “a necessity analysis involves a process of “weighing and balancing” a series of factors”.⁷⁷ These factors “prominently” include **the importance of the objective**, along with the contribution of the measure to that objective, and the trade-restrictiveness of the measure.⁷⁸

142. As recalled above, the community of nations as a whole has designated climate change as the most urgent issue of all, a “common concern of humankind”. And the WTO Members have unanimously embraced this view. Therefore, the objective of climate change mitigation, now at the core of the WTO Agreement Preamble’s reference to the protection of the environment, must be assigned special importance in the necessity analysis.

143. As outlined above, the EU biofuels regime and the challenged measures in particular seek to contribute to the achievement of the common temperature reduction target set by Article 2 of the Paris Agreement.

144. In addition, it is undisputed that, in an open world, many climate mitigation measures pertaining to a trade-related sector would be void if it did not focus on consumption, instead of domestic production only. This is supported by case law and the Appellate Body’s acknowledgement that:

“[an interpretation assuming that] *requiring from exporting countries compliance with, or adoption of certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification of Article XX [...] renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply*”.⁷⁹

145. In particular, developed countries, including the EU Member States, bear a greater burden as they are expected to move forward more rapidly by changing their consumption practices in order to address climate change – as acknowledged by States under the Paris Agreement:

“[...] Also recognizing that sustainable *lifestyles* and sustainable patterns *of consumption* and production, with *developed country Parties taking the lead*, play an important role in addressing climate change”⁸⁰

146. The Applicant submits that these words should guide the Panel’s assessment in striking the balance in the series of factor it is called upon to consider.

⁷⁷ Appellate Body Report, *EC – Seal Products*, para. 5.169.

⁷⁸ *ibid.*; and Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.

⁷⁹ Appellate Body Report, *US – Shrimp*, para. 121.

⁸⁰ Paris Agreement, Preamble.

147. Indeed, there would be no coherence whatsoever if the EU was not mindful of the environmental consequences caused elsewhere by consumption in its own territory, and regulating without giving this due consideration would in fact undermine any efforts designed to achieve meaningful changes in consumption practices in the EU. It is also not disputed that the challenged measures are part of the EU’s renewable energy policy and aim to fulfil the 32% target by ensuring that biofuels are produced from agricultural raw material which does not originate from biodiverse areas, in order to prevent further deforestation and worsening of climate change. It is thus a matter for the EU to prevent the damages caused by its consumption elsewhere through its renewable energy policy. Put differently, the challenged measures would only seek to remedy the EU’s own damaging activity on the environment.

148. In doing so, the EU has also sought to minimise the negative impacts on trade and developing countries as much as possible without compromising the efficacy of the measures. For instance, it has carved out an exception with a low-ILUC risk certification, as well as the possibility to review the rules periodically to ensure they are based on the best available science. But the fact remains that an effective policy aiming at changing towards “sustainable lifestyles” and “sustainable patterns of consumption” *necessarily* implies some trade restrictive effects.

149. In the Applicant’s view, the foregoing should be of particular weight in the balancing process against the – otherwise low – trade-restrictiveness of the EU measures, and in assessing their overall necessity.

D. The challenged measures can be justified under Article XX(a)

150. Article XX(a) allows Members to justify violations of GATT rules if the measure is necessary to protect “public morals”. The challenged EU measures clearly qualify as measures designed to protect public morals *i.e.* capable of making a material contribution to this objective. The Applicant would like to provide additional factual background substantiating this claim, in addition to a brief clarification of the scope of “public morals”.

151. In light of the dynamic approach to the meaning of “public morals” adopted in the *US – Gambling*⁸¹ and *China – Audiovisuals*⁸² cases and the discretion granted to WTO Member in this regard, there is little doubt that this term extends to the concerns of a WTO Member as to the immorality of consuming products produced in a manner that is perceived (and proven) to be highly detrimental to the fight against climate change – especially where climate change is universally referred to as a “common concern of humankind”.

152. In its first submission, the EU has provided ample evidence that the EU biofuels regime and the challenged measures reflect the shared public morality of Europe, as the protection of the environment, and the fight against climate change and biodiversity loss in particular, are very important concerns for EU citizens and their representatives. This has translated into

⁸¹ Panel Report, *US – Gambling*, para. 6.461.

⁸² Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products)*, WT/DS363/R, adopted 19 January 2010, as modified by Appellate Body Report, WT/DS363/AB/R, para 7.759.

massive mobilization of the civil society, not only environmental NGOs but the population at large, with significant youth engagement. For instance, climate litigation has been increasingly used by civil society, with the support of European citizens.⁸³

153. It is also well-established that the EU citizens' concerns are particularly high with regard to palm oil specifically, in light of the destructive effects on the environment and the climate caused by palm oil production.⁸⁴

154. In recent years, several polls have shown that EU citizens were overwhelmingly concerned with their contribution to global deforestation. A YouGov poll highlighted that 87% of Europeans were in favour of new laws to ensure products sold in EU countries do not contribute to global deforestation;⁸⁵ a third even wanted to prohibit palm oil use in transport as soon as possible.⁸⁶ According to another poll, 69% of EU citizens would support measures to end policy support and subsidies for palm oil in biodiesel in Europe.⁸⁷ In France, another 2018 poll has shown that 71% of the population was opposed to the use of palm oil in transport biofuels and 83% expected the French government to support the EU Parliament's position on this issue.⁸⁸ Generally, EU governments,⁸⁹ citizens⁹⁰ and NGOs⁹¹ have all called for regulatory measures to ensure that products placed on the EU market have not caused deforestation.

155. In addition, as stressed by the EU, this concern from the public is justified by a number of scientific studies that have stressed the negative impacts of palm oil production, which expands into lands with high carbon stocks takes place "*at an alarming rate*" (see above).⁹² Although an objective, scientific justification is not necessary to assess the legitimacy of public morals, this gives credit to the importance of such a concern.

156. Therefore, it is clear that EU citizens do not want to contribute to damaging the environment in Europe and elsewhere through their consumption.

157. The challenged measures contribute to minimizing the EU citizens' responsibility in damaging the environment through their consumption in that it reduces EU demand for deforestation-associated palm oil, with a view to protect biodiversity, reduce GHG emissions

⁸³ <https://www.urgenda.nl/en/themas/climate-case/>; <https://laffairedusiecle.net/>.

⁸⁴ EU Parliament, [Report on palm oil and deforestation of rainforests](#) (17 March 2017).

⁸⁵ EIA, "[Poll shows EU citizens overwhelmingly want new laws to halt deforestation](#)"; Greenpeace, "[87% of Europeans support new laws to combat global deforestation, new poll](#)".

⁸⁶ Canopée, "[Un sondage européen révèle que les citoyens veulent en finir avec les biocarburants qui contribuent à la déforestation](#)".

⁸⁷ Transport & Environment, "[Seven in 10 Europeans are against burning palm oil in their cars](#)"; Les Amis de la Terre, "[Sept européens sur dix sont contre l'utilisation d'huile de palme dans les carburants](#)".

⁸⁸ FOP, "[Biocarburants : les Français condamnent les importations de palme](#)".

⁸⁹ The Guardian, "[EU states call for tough action on deforestation to meet 2020 UN goal](#)".

⁹⁰ See the following citizens' petitions, which have gathered over 650,000 signatures against the use of palm oil in biofuels: <https://www.rainforest-rescue.org/petitions/1137/times-almost-up-tell-the-eu-to-act-on-deforestation-now>; <https://actions.sumofus.org/a/eu-commission-no-palm-oil-in-our-tanks-stop-subsidising-palm-oil-biodiesel>. Another petition in France gathered close to 300,000 signatures against the use of palm oil for biofuels in Total's plan in La Mède.

⁹¹ FERN, "[Tackling deforestation and forest degradation: a case for EU action in 2017](#)" (2017).

⁹² UE First Written Submission, para. 1309.

and ultimately fight climate change. Refusing to be associated with the cutting down of forests essential for climate and carbon storage is not only legitimate, but is the only available and effective response of the EU to assume its fair share of responsibility.

158. The EU challenged measures are thus meeting the demand expressed by European citizens and consumers who refuse to contribute to practices that are contrary to their ethical imperatives and which they already have democratically decided to reject.

E. The *chapeau*

159. Once a measure has been provisionally found to be justified under one (or several) subparagraphs of Article XX, it must pass the test of the *chapeau*. Once again, the Applicant will would just like to respectfully bring to the attention of the Panel its views concerning the proper application of certain GATT provisions.

1. General remarks on the *chapeau*

160. The requirements of the *chapeau* of Article XX are twofold: a measure provisionally justified under one of the subparagraphs of Article XX must not be applied in a manner that would constitute “arbitrary or unjustifiable discrimination” between countries where the same conditions prevail or in a manner that would constitute “a disguised restriction on international trade”.⁹³

161. As repeatedly stated by the Appellate Body, the *chapeau* is an “*expression of the principle of good faith*”.⁹⁴ It follows that the *chapeau* aims to make sure that here is no misuse or abuse of the right to invoke an exception: such a right must be exercised *bona fide*.⁹⁵

162. Therefore, the test to establish whether the requirements of the *chapeau* are met should aim at discerning whether or not the WTO Member in question has exercised this right *bona fide*. Ultimately, this comes down to discerning the intention behind the measure at hand. In the present case, the EU and France did not have a hidden agenda. They did not adopt the measures at issue under the guise of environmental and/or public morals protection with a view to justifying them later under Article XX – if necessary. This is evidenced from the legislative history and the general context of the adoption of these measures, as a result of longstanding debates and concerns in the EU and France regarding the impact of palm oil cultivation on the environment. Besides, it must be recalled that if a measure is reviewed under the *chapeau*, it is because it has been established beforehand that it genuinely relates to or is necessary for achieving (as the case may be) one of the policy objectives listed under Article XX.

163. With this in mind, it cannot reasonably be supported that climate change mitigation and environmental protection are a mere “packaging” or “green cover” for unjustifiably

⁹³ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)*, WT/DS332/AB/R, adopted 17 December 2007, para. 215.

⁹⁴ See e.g. *ibid.*, paras 215 and 224.

⁹⁵ Appellate Body Report, *US – Shrimp*, para.158.

discriminatory measures or disguised restrictions on trade. This supports the view that the EU and France have not abused their right.

164. In addition, the Appellate Body in *US – Shrimp* has clarified that the *chapeau* is concerned with whether an abuse of right “*results in a breach of the treaty rights of the other Members*”.⁹⁶ More specifically:

“Accordingly, the task of interpreting and applying the chapeau is “the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement”. The location of this line of equilibrium may move “as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ”.”⁹⁷ (emphasis added)

165. The Applicant submits that in resolving the question of where to draw this “line of equilibrium” one should consider the perspective embodied in the preamble of the WTO Agreement, read in light of contemporary concerns.

166. In this respect, the Applicant would like to recall this important statement of the Appellate Body in *US – Shrimp*, highlighting the significance of the preamble of the WTO Agreement in interpreting the *chapeau*.

“It is proper for us to take into account, as part of the context of the chapeau, the specific language of the preamble to the WTO Agreement, which, we have said, gives colour, texture and shading to the rights and obligations of Members under the WTO Agreement, generally, and under the GATT 1994, in particular.”⁹⁸

167. In the same case, the Appellate Body referred to the objective of “sustainable development” and noted in this regard “*certain developments*” which occurred “*since this preambular language was negotiated*” and “*which help to elucidate the objectives of WTO Members with respect to the relationship between trade and the environment*”. In this case, at the time, it was the Decision to establish the Committee on Trade and Environment, which refers to the Rio Declaration on Environment and Development and Agenda 21.⁹⁹ Therefore, we respectfully call on the Panel to consider subsequent developments which are relevant to elucidating the objectives of WTO Members with respect to the relationship between trade and the environment (such as the discussions held at the WTO on trade and the environment,¹⁰⁰

⁹⁶ Appellate Body Report, *US – Shrimp*, para. 158.

⁹⁷ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 224.

⁹⁸ Appellate Body Report, *US – Shrimp*, para. 155.

⁹⁹ *ibid.*, para. 154.

¹⁰⁰ WTO, “[Members launch discussions under trade and environmental sustainability work plan for 2022](#)” (March 2022).

calls for inter-institutional cooperation and declarations concerning the role of the WTO is achieving sustainable goals¹⁰¹).

168. In view of the above as well as contemporary concerns and developments highlighted by the EU and the present brief, the Applicant respectfully submits that the Panel should consider the following in trying to “mark out the line” and establish a balance between two rights:

169. Substantial rights afforded under the GATT and other WTO agreements should be assessed with due consideration for the understanding that unsustainable trade cannot be warranted under WTO rules and undermines the very purpose of the multilateral trade system, and ultimately undermines trade.

170. Climate action (which results in a collective benefit) not only stems from the Member’s *right* to protect the interests it wishes, but from its *duty* to act to address the most urgent threat to humankind, which necessarily entails the establishment of sustainable trade relations.

2. *The challenged measures comply with the requirements of the chapeau*

a. The measures at issue are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail

171. The Appellate Body in *US – Shrimp* provided an overview regarding the three constitutive elements of the concept of “arbitrary or unjustifiable discrimination between countries where the same conditions prevail”: i) the application of the measure must result in discrimination, ii) the discrimination must be “*arbitrary or unjustifiable in character*” and iii) the discrimination must occur between countries where the same conditions prevail - not only between different exporting Members, but also between exporting Members and the importing Member concerned.¹⁰²

172. Malaysia seems to suggest that palm oil-based biofuels are suffering from an unjustifiable and arbitrary discrimination compared to other feed crops, which would be inconsistent with the chapeau. The Applicant consider this falsely depicts the situation, and is not constitutive of a means of arbitrary or unjustifiable discrimination within the meaning of the chapeau, for the following reasons.

173. Admitting *arguendo* that discrimination is established, for a measure resulting in discrimination to be inconsistent with the *chapeau*, such discrimination must be “arbitrary or unjustifiable in character”. The Appellate Body has made abundantly clear that an analysis thereof is primarily concerned with the rationale put forward to explain the discriminatory

¹⁰¹ See for example, the interview of the Director General of the WTO in the Financial Times: <https://www.ft.com/content/b0bcc93c-c6d6-475e-bf32-0d10f71ef393>.

¹⁰² Appellate Body Report, *US – Shrimp*, para. 150.

application of the measure at hand.¹⁰³ In this respect, we would like to emphasize that the constitutive elements of the term “arbitrary or unjustifiable discrimination” should be assessed with a view to establishing whether or not the regulating Member acted *bona fide*.

174. The Appellate Body has interpreted the analysis of whether the relevant discrimination is “arbitrary or unjustifiable” in character based on a consideration of whether the discrimination “*can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX*”.¹⁰⁴ Therefore, as long as there is a rational basis for the distinctions made between and among trade products resulting from the trade discrimination in a *bona fide* climate measure, that discrimination should not be seen as “arbitrary” or “unjustifiable”.

175. In the present case, it is evident from the measures’ legislative history that the legislator’s intention was to differentiate between products based on the impact of their production process on the environment (as demonstrated by available scientific studies and models) as evidenced above in Section IV.D.¹⁰⁵ The discrimination is the result of an objective assessment that is based on the fact that specific and serious hazard are associated with palm oil specifically.¹⁰⁶

176. The genuine character of the rationale put forward is further evidenced by the fact that the EU legal framework is not rigid. On the contrary, it allows for consideration of future available scientific evidence, as a result of which other feedstocks than palm oil could be impacted, if needed.

177. Finally, a determination of compliance with the *chapeau* requires to consider whether discrimination occurs between countries where the same conditions prevail. First, it is worth recalling that the measures apply to products irrespective of their origin. They are origin neutral on their face. Second, even if these measures result in *de facto* discrimination between countries, it cannot be supported that the same conditions prevail in countries producing palm oil, and countries producing other feedstocks. The very fact that oil palms can only grow in a rainforest climate – e.g. consistently high humidity and temperatures – necessarily restricts the areas of land available for plantations, whose expansion consecutive to a global increase in demand for biofuels is highly likely to be undertaken at the expense of carbon-rich rainforest, as opposed to other feed crops.

¹⁰³ See for example Appellate Body Report, *Brazil – Retreaded Tyres*, paras 229-230; Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.316.

¹⁰⁴ Appellate Body Report pursuant to Article 21.5 of the DSU, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico))* (Article 21.5–Mexico) WT/DS381/AB/RW, adopted 3 December 2015, para. 7.31.

¹⁰⁵ See e.g. EU Parliament, Report on palm oil and deforestation of rainforests (17 March 2017).

¹⁰⁶ *ibid.*

178. It stems from all the above that the measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

b. The measures at issue do not constitute disguised restrictions on international trade

179. The Appellate Body in *US – Gasoline* ruled that:

“the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.”¹⁰⁷

180. We refer the Panel to the arguments advanced in the previous section: as long as there is a rational basis for the distinctions made between and among trade products resulting from the trade discrimination in a *bona fide* climate measure, that discrimination should not be seen as “arbitrary” or “unjustifiable”, let alone a disguised restriction. Moreover, as repeatedly explained throughout this brief, nothing in the design, structure, implementation, legislative history of these measures suggests that the EU and France deliberately targeted palm oil or Malaysia for reasons unrelated to the objectives of these measures

¹⁰⁷ Appellate Body Report, *US – Gasoline*, p. 25.

TABLE OF CASES (*in order of appearance*)

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<i>EC – Approval and Marketing of Biotech Products</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, adopted 29 September 2006
<i>Peru – Agricultural Products</i>	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R, adopted 31 July 2015
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<i>Chile – Alcoholic Beverages</i>	Appellate Body Report, <i>Chile – Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, adopted 12 January 2000

<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, adopted 10 January 2001
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<i>EC – Tariff Preferences</i>	Appellate Body Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/AB/R, adopted 7 April 2004
<i>China – Rare Earths</i>	Appellate Body Report, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum</i> , WT/DS431/AB/R, adopted on 29 August 2014
<i>Canada – Herring and Salmon</i>	Panel Report, <i>Canada – Measures Affecting Exports of Unprocessed Herring and Salmon</i> , L/6268, adopted 22 March 1988
<i>China – Raw Materials</i>	Appellate Body Report, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R, adopted 22 February 2012
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<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010
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<i>US – Tuna II (Mexico) (Article 21.5–Mexico)</i>	Appellate Body Report pursuant to Article 21.5 of the DSU, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/RW, adopted 3 December 2015
<i>US – Malt Beverages</i>	Panel Report, <i>United States – Measures Affecting Alcoholic and Malt Beverages</i> , DS23/R - 39S/206 adopted 19 June 1992