

The EU's 'Composite' GATT Article XX Defence in the Palm Oil Disputes at the WTO

Marc L. BUSCH^{*} & Petros C. MAVROIDIS^{**, ***}

In its palm oil disputes with Indonesia and Malaysia at the WTO, the EU proposed a novel approach to invoking three exceptions in framing an affirmative legal defence under Article XX of the General Agreement on Tariffs and Trade (GATT). The EU explained that it was raising subparagraphs (a), (b), and (g) as a 'composite whole'. While respondents have relied on multiple GATT XX items before, the EU's insistence that these items were non-separable represented a departure from established WTO practice. We argue that the EU's composite defence was both analytically unsound and legally consequential. Drawing on how composite variables are used in empirical research, we submit that the EU's defence was not intended to clarify the relationship among multiple regulatory objectives, but to obscure it. The main payoff was to prevent the complainants from proposing less trade-restrictive alternatives, which would increase the likelihood that its GATT XX defence would be provisionally justified and almost entirely obviate the function of the chapeau. If accepted by future WTO panels, this framing would risk Article XX's two-tier test, and upend the careful balance sought between regulatory autonomy and trade discipline.

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1 INTRODUCTION

Article XX of the General Agreement on Tariffs and Trade (GATT) occupies a central position in WTO law. It mediates the tension between Members' non-discrimination obligations and their authority to pursue non-trade policy objectives. While the Appellate Body (AB) has long accepted that a single measure can pursue multiple legitimate objectives, WTO adjudication has consistently treated each subparagraph as an independent legal basis that requires a separate analysis. In two recent disputes, *European*

^{*} Walsh School of Foreign Service, Georgetown University. Email: Marc.Busch@georgetown.edu.

^{**} Columbia University School of Law. Email: pmavro@law.columbia.edu.

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*Union – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels*¹ and *European Union and Certain Member States – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels*,² the EU asked the WTO to depart from past practice and consider GATT XX(a), (b) and (g) as a ‘composite whole’, meaning that these subparagraphs should be treated as non-separable. While the panels did not follow this approach, they also declined to reject it. If accepted by future WTO panels, this framing would risk Article XX’s two-tier test, and upend the careful balance sought between regulatory autonomy and trade discipline.

Our paper proceeds as follows. In section 2, we briefly describe why the EU invoked GATT XX(a), (b) and (g) in the palm oil disputes, how it treated these subparagraphs as non-separable, and why this effort was inconsistent with the requirements for properly using composite arguments. In section 3, we review the panels’ findings concerning GATT XX (b) and (g)³ and identify which steps of the first-tier test (i.e., ‘provisional justification’) would have unfolded differently had the panels accepted the EU’s composite defence. While the complainants and third parties hypothesized that the EU was trying to dilute the ‘necessity test’ in step two, we argue that the main payoff was to make it nearly impossible for Indonesia and Malaysia to propose less trade-restrictive alternatives in step four. In section 4, we conclude with a discussion of how the EU’s composite defence would have almost entirely obviated the second-tier test (i.e., the ‘chapeau’), and why the panels should have shut the door on it as a result.

2 THE PALM OIL DISPUTES: FACTS AND LEGAL CLAIMS

The palm oil disputes centred on several measures under the ‘EU Biofuels regime’ that incentivized the use of ‘oil crop-based biofuels’ in biodiesel sold for transport.⁴ These measures were pursued with the goal of reducing greenhouse gas (‘GHG’) emissions. To this end, the EU measures, based on legal instruments called RED II and the Delegated Regulation, set percentage targets that EU countries must meet for use of renewable energy sources in the transport sector, including biofuels that are made from oil-based feedstocks. Indonesia and Malaysia brought the WTO complaints because these measures exclude certain oil crop-based biofuels that rely on palm oil, due to concerns that their production increases GHG emissions.

¹ Panel Report, *European Union – Certain Measures Concerning Palm Oil and Palm Crop-Based Biofuels* (EU – Palm Oil (Indonesia)), WT/DS593/R adopted 24 Feb. 2025.

² Panel Report, *European Union and Certain Member States – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels* (EU and Certain Member States – Palm Oil (Malaysia)), WT/DS600/R adopted 26 Apr. 2024.

³ The panels exercised judicial economy with respect to GATT XX(a).

⁴ Malaysia’s complaint also covered related French and Lithuanian laws, but these were largely peripheral in the panel report.

Indonesia and Malaysia primarily took aim at the EU's 'indirect land use change' ('ILUC') measure. The ILUC accounts for how land with high-carbon stock is converted to agricultural use as a replacement for land that is currently used for biofuel feedstocks. In comparison, 'direct land use change' ('DLUC') occurs where high-carbon stock is converted directly to biofuel stocks. The key issue concerned how biofuels produced from oil crops, such as soybean- and rapeseed-oils that are produced in EU countries and other WTO Members, are treated in relation to palm oil and palm oil-based biofuel produced in Indonesia and Malaysia. Certain requirements in the EU Biofuels regime, notably a 7% maximum share and the ILUC-risk 'cap' and 'phase-out', were alleged to treat palm oil – and palm oil alone – unfairly by disqualifying it for EU incentives.

Indonesia and Malaysia raised legal claims under the Agreement on Technical Barriers to Trade (TBT) and GATT. The EU mounted an affirmative defence on the latter by invoking GATT XX(a), (b) and (g). As the EU explained in its first written submission in *EU – Palm Oil* (Indonesia), for example, 'the measures at issue are part of a comprehensive set of policies to address climate change, environmental protection and biodiversity loss, and to protect public morals in the European Union'.⁵ Crucially, these subparagraphs were framed as non-separable: '[t]he European Union relies concurrently on Article XX(a), (b) and (g) in the present proceedings. This means that the three values-based and science-based objectives are intertwined and for our composite defense to fail it would mean that the three justifications should fail together'.⁶ These two sentences motivate our paper.

2.1 THE EU'S 'COMPOSITE' ARGUMENT

When the EU debuted its Article XX defence in *EU – Palm Oil* (Indonesia), it variously framed subparagraphs (a), (b) and (g) as 'intertwined', a 'composite whole' or a 'three-pillar approach'.⁷ In *EU and Certain Member States – Palm Oil* (Malaysia), the EU went so far as to call them the 'whole salami',⁸ and even chided the complainant for 'salami-slicing' when it asked the panel to separate the subparagraphs.⁹ The EU's language in its first written submissions – which employ more than one hundred references to composite objectives or functional

⁵ First Written Submission of the European Union, *EU and Certain Member States–Palm Oil* (Malaysia) WT/DS/600/R (30 Nov. 2021), para. 1273.

⁶ First Written Submission of the European Union, *EU – Palm Oil* (Indonesia) WT/DS593/R (5 Mar. 2021), para. 1305. Emphasis added.

⁷ *Ibid.*, paras. 647, 157, and 1246, for example.

⁸ EU First Written Submission, *EU and Certain Member States – Palm Oil* (Malaysia), para. 1369.

⁹ *Ibid.*, para. 1360.

equivalents like ‘comprehensive’ and ‘overarching’ – makes clear that this framing was not inadvertent, but rather a sustained discursive strategy aimed at pre-empting subparagraph-specific analysis under Article XX.

To shed light on this discursive strategy, we conducted textual analyses of the EU’s first written submissions in the palm oil disputes with those in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seals)*¹⁰ and *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC – Approval and Marketing of Biotech Products)*.¹¹ The EU invoked GATT XX (a) and (b) in *EC – Seals* and GATT XX (b), (d) and (g) in *EC – Approval and Marketing of Biotech Products*, allowing us to contrast the structure and tone of the framing of its composite defence with its otherwise comparable GATT XX arguments.

First, we compared the length and placement of the paragraphs on the EU’s article GATT XX defence. The average paragraph length in the palm oil disputes and *EC – Seals* was nearly identical, while *EC – Approval and Marketing of Biotech Products* has far fewer – *but much longer* – Article XX paragraphs. What clearly distinguishes the palm oil disputes is that these paragraphs appear throughout the submissions, rather than being limited to a few sections, like in *EC – Seals*, or left till the end, as in *EC – Approval and Marketing of Biotech Products*.

Second, we examined sentiment scores across GATT XX paragraphs. In the palm oil disputes, the language was confident, declarative (i.e., categorical, non-tentative assertions), highly moralized (i.e., ethical judgments included in the description of regulatory aims), and included very few hedging terms (i.e., ‘arguably’, ‘to some extent’ or ‘may be understood as’). The normative tone struck is particularly interesting: moral terms increased from 4–8 per 10,000 words in the submissions to roughly twenty-nine per 10,000 words when looking just at those paragraphs concerning Article XX.

Contrast this with *EC – Approval and Marketing of Biotech Products*, which also featured a three-subparagraph GATT XX defence. Here, the EU used far fewer moral frames (roughly 1.5 per 10,000 words), despite the highly charged political nature of the dispute over genetically modified foods. Tellingly, however, the moral frames in the palm oil disputes were concentrated in those sections in which the EU was explaining its composite defence, while in *EC – Approval and Marketing of Biotech Products* they came up in context of genetically modified foods and the ‘precautionary principle’. Imperative modality was consistent, as was the use of

¹⁰ Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seals)* WT/DS/400/R and WT/DS401/R adopted 25 Nov. 2013.

¹¹ Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC – Approval and Marketing of Biotech Products)* WT/DS291/R, WT/DS292/R, and WT/DS293/R adopted 21 Nov. 2006.

hedging terms, even though the EU was positing a three subparagraph GATT XX defence in both disputes. Put simply, the EU used moralizing language with respect to its composite defence in the palm oil disputes, and nothing else.

Now consider *EC – Seals*, in which the EU invoked public morals, along with animal health and life. Here, the difference with the palm oil disputes is striking. All the first submissions score similarly on moralistic framing, imperative language and hedging. Yet they differ in one respect: the placement, rather than the volume, of sentiment. In the palm oil disputes, categorial language was used to constrain the Article XX inquiry,¹² while in *EC – Seals* it was used to justify moral conclusions (i.e., the need to prevent animal cruelty). The difference lies in function, not tone: In the palm oil disputes, the EU moralized about its composite defence, whereas in *EC – Seals*, it moralized about the treatment of the seals.

Our point is that the EU made a substantial investment in framing its composite argument as a discursive strategy. The aim of which was to better the odds of prevailing with its GATT XX defence, as we elaborate below. For its part, the EU demanded that its composite argument was ‘not a novel interpretation, but a consolidation and systematization of the legal test, robustly grounded in the very text of the provisions at issue and in the existing Appellate Body case-law’.¹³ We strongly disagree.

2.2 WHY THE ‘COMPOSITE’ ARGUMENT IS A NOVEL ISSUE?

At the outset, we want to emphasize that the invocation of three GATT XX exceptions is *not* what made the EU’s composite argument novel. To date, two or more exceptions have been raised in sixteen WTO disputes, with three cited in seven, including *US – Gasoline*, *EC – Approval and Marketing of Biotech Products*, *Brazil – Taxation (EU)*, *Indonesia – Import Licensing Regimes*, *Brazil – Taxation (Japan)*, *EU – Palm Oil (Indonesia)* and *EU and Certain Member States – Palm Oil (Malaysia)*. In all these disputes, panels and the AB considered each GATT XX subparagraph separately, even where they acknowledged that the challenged measure pursued more than one legitimate end. In other words, two or three

¹² We note that case law under Art. XX(a) has been developing in a manner that probably ‘invited’ liberal understandings of the term ‘public morals’. Charnovitz (1998) and Feddersen (1998) took opposite views regarding the extension of this provision beyond issues relating to trade of pornographic material. Recently however, in *Brazil-Taxation (EU)*, the panel did not exclude that even classic political-economy motivated industrial policy could come under Art. XX(a).

¹³ Second Written Submission of the European Union, *EU – Palm Oil (Indonesia)* WTO/DS593/R (2 Jul. 2021), para. 435. Emphasis added.

exceptions were considered in turn, but never as a new, fused protected interest, which is what the EU's composite defence amounted to.

By framing its composite argument, the EU borrowed the vocabulary of empirical research, but not its logic. In statistics, composite variables are meant to serve a very specific and disciplined purpose. They are designed to reduce dimensionality by aggregating several highly correlated underlying measures into a single, interpretable variable that captures the latent phenomenon more efficiently than a single indicator. This is common in clinical trials in medicine, where, for example, death, hospitalization, and organ failure can be combined into a composite endpoint.¹⁴ They are also used in political science, where, for example, composite indices like 'state capacity' or 'regime quality' are built from multiple, conceptually related subcomponents.¹⁵

Three features define proper composite construction in empirical work: first, the components must be conceptually related (i.e., they must plausibly measure facets of a single underlying latent construct); second, the relationship among the components must be theoretically specified (i.e., researchers must explain how the components connect, whether they are substitutable, and how the composite is weighted or not); and third, the composite must be more interpretable, not less, as a result of the exercise (i.e., the point to reducing dimensionality is to make the underlying construct easier to understand). The EU's composite argument satisfies none of these conditions.

First, GATT XX(a), (b) and (g) are *not* three measures of a single latent phenomenon. They are (or should be, at the very least) distinct legal exceptions, with different textual hooks, different tests, and separate lines of AB jurisprudence. There is no plausible latent variable – no 'underlying construct' – that they jointly measure: if health protection and public morals are synonymous, why dedicate two paragraphs to describe the same issue? On the other hand, the scope between XX(a) and XX(b) on the one hand, and XX(g) on the other, must be siloed from each other, otherwise the adjudicator would be undoing the balance of rights and obligations struck by the framers: clearly the GATT framers wanted a more demanding test for whatever comes under XX(a) and (b), than for transactions coming under (g). Environmental conservation in GATT XX(g) does not conceptually collapse into 'public morals' under XX(a). Nor does the protection of human, animal and plant life and health under XX(b) map onto a moral or environmental latent factor. Treating them as 'intertwined' parts of a single whole departs from the very precondition for a statistical composite.

¹⁴ See e.g., K. Dash, S. Goodacre & L. Sutton, *Composite Outcomes in Clinical Prediction Modeling: Are We Trying to Predict Apples and Oranges*, 80(1) *Annals Emergency Medicine* 12–19 (2022), doi: 10.1016/j.annemergmed.2022.01.046.

¹⁵ See e.g., K. A. Bollen, *Structural Equations With Latent Variables* (NY: Wiley 1989).

There is a legal corollary to these concerns. If, for example, protecting exhaustible natural resources could be pursued through GATT XX(a) and XX(g), XX(a) would fall into disuse, since there would be no incentive to invoke the more onerous necessity test in lieu of clearing the lower bar of satisfying the ‘relating to’ standard, as we discuss below. Moreover, even assuming concurrent invocation of both provisions, it would be the duty of the adjudicator, as per the Vienna Convention, to ensure that one provision is not over-interpreted so as to make another redundant.

Second, the EU *never* put forward a theory about how GATT XX(a), (b) and (g) relate to one another. In empirical research, the structure of a composite must be explicit. Are the components weighted? Are increases in one dimension allowed to offset decreases in another? Are all components required to exceed a threshold? The problem is that a composite argument cannot be interpreted without such a theory. Yet, the EU failed to explain whether public morals concerns compensate for weaker conservation arguments, or vice versa. And it never articulated whether these objectives were additive, multiplicative, or lexically ordered. The EU simply made assertions about the ‘whole salami’, which is metaphor, not theory.

Third, and most critically, the EU’s composite *reduced* interpretability, rather than increasing it. In proper statistical usage, a composite clarifies the underlying construct and constrains post hoc reasoning: because its design is fixed ex ante, the researcher cannot change the rules of interpretation when looking at the results. By contrast, the EU’s composite argument encouraged post hoc theorizing. With no clear specification of the relationships among GATT XX(a), (b) and (g), the EU maintained flexibility to argue that Indonesia’s and Malaysia’s less trade-restrictive alternatives did not satisfy ‘the whole’. This is the opposite of what composite variables are meant to achieve, and the EU was betting on this when it explained that ‘[t]he complainant has to propose a solution that would be capable of achieving the same level of protection of all three intertwined objectives at the same time’.¹⁶ In what proportions? With what (if any) trade-offs? Without answers to these questions, the EU’s three-part composite GATT XX defence simply creates a moving target. We will refer to this below as ‘proportionality-by-stealth’.

In sum, the EU borrowed the language of composite measurement while ignoring the discipline that makes it useful. A statistical composite narrows analytical discretion by specifying how multiple components jointly define a single construct. The EU’s composite expanded discretion – its own, as well as the panels’ – by refusing to specify ex ante how the components relate. Instead of

¹⁶ Responses by the European Union to Questions Following the Panel’s First Substantive Meeting with the Parties, *EU – Palm Oil (Indonesia)* WT/DS/593/R (27 May 2021), para. 411. Emphasis added.

reducing dimensionality, the EU increased it, inventing a defence out of whole cloth that could not be falsified.

Not surprisingly, there was considerable confusion in the palm oil disputes about what the EU was trying to do with its composite defence, so much so that the complainants and third parties largely underestimated its novelty. As we discuss below, they opined that the EU wanted to water down the necessity test applied, whereas we argue that the main payoff was to make it impossible for the complainants to propose a less trade-restrictive alternative. This would increase the likelihood that the panels would provisionally justify the EU's defence, as per GATT XX's first-tier test, and possibly boost the odds of it clearing the chapeau, as per its second-tier test.

3 ARTICLE XX IN THE GATT: RATIONALE AND PRACTICE

The GATT was conceived primarily as an instrument disciplining border measure, particularly tariffs. Articles I and II constrain discrimination among like products and unilateral tariff escalation. The concept of 'like products', developed through jurisprudence, is deliberately insulated from regulatory intent. Whether likeness is assessed through tariff classification or consumer perception, neither benchmark incorporates public morals, public health considerations, or environmental protection, for example.

This insulation is not by mistake. GATT does not limit regulation as such, but rather discrimination. Members can regulate extensively, even asymmetrically, provided they do not differentiate among like products on the basis of origin.

Article XX is therefore indispensable. It supplies the legal mechanism through which WTO Members can justify otherwise inconsistent measures. Without Article XX, the GATT would approximate an instrument of deregulation.¹⁷ With it, regulatory autonomy is preserved, though subject to legal discipline.

GATT Article XX defenses are subject to a two-tier test: the first involves provisionally justifying the measure under the subparagraph(s) invoked, and the second satisfying the requirements of the chapeau. We focus on the implications of the EU's composite argument for the first-tier test, but conjecture about what it could mean for the second.

As the AB explained in *US – Gambling*, for sub-paragraphs that include a necessity test, the first-tier involves a process of 'weighing and balancing' three considerations: (1) the importance of the interest protected by the measure; (2) the extent to which the measure contributes to achieving the end being pursued; and

¹⁷ For reasons highlighted in Bhagwati and Ramaswami (1963) and Sykes (2015), GATT would have failed had it been intended as an instrument of deregulation.

(3) the impact of the measure on trade.¹⁸ Separately, there must be (4) an assessment to determine whether the measures' goals could be achieved with a less trade-restrictive alternative. A key point with respect to this last requirement is that the task of putting forward a less trade-restrictive alternative falls originally on the complainant, who must demonstrate the existence of a similar measure; ultimately, the respondent invoking the exception is tasked with the demonstration that the measure proposed was not reasonably available to it. In our view, this is the key to understanding why the EU invested in the language – if not the logic – of a composite argument.

Ultimately, both panels in the palm oil disputes adhered to convention and separately took up GATT XX(a), (b) and (g).¹⁹ Since they did not shut the door on the EU's composite defence, however, it is important to consider which step of the first-tier test would have been the most impacted had the panels entertained it. As we explain below, the complainants and third parties were of the view that the EU was trying to dilute the necessity test in step two. We disagree, arguing that the main point of the EU's composite defence was to make it nearly impossible for Indonesia and Malaysia to propose a less trade-restrictive alternative in step four.

A paragraph-level comparison of the panels' GATT XX analyses in *EU–Palm Oil (Indonesia)* and *EU and Certain Member States – Palm Oil (Malaysia)* shows that roughly 85% of the reasoning is identical, with the differences limited largely to party-specific factual references rather than doctrinal analysis. As a result, and for the sake of brevity, we mostly quote from *EU – Palm Oil (Indonesia)*, which, although issued second, is regarded as the 'master template', and is thus more representative of the panel's reasoning than *EU and Certain Member States – Palm Oil (Malaysia)*.

3.1 THE IMPORTANCE OF THE MEASURE

Not once has a panel ever called into question the legitimacy of the protected interest cited by a respondent as the basis for invoking an Article XX subparagraph. The EU's composite defence would have done nothing to improve these odds.

In the palm oil disputes the panels followed the order in which the EU raised its GATT XX claims, and began with subparagraph (g), asking whether seeking to limit the risk of ILUC-related GHG emissions 'prima facie falls within the scope of one or more of the legitimate objectives specified in the text of Article 2.2 and/or

¹⁸ Appellate Body Report, *United States-Measures Affecting Cross-Border Supply of Gambling and Betting Services (US-Gambling)*, WT/DS285/AB/R, adopted 20 Apr. 2005, paras 304–307.

¹⁹ *EU-Palm Oil (Indonesia)*, para. 7.195.

Article XX'.²⁰ The panels recalled the AB's insistence that GATT XX(g) must be read 'in light of contemporary concerns of the community of nations about the protection and conservation of the environment', and that, in this regard, the exception must be understood to cover both living and non-living exhaustible natural resources.²¹ Pointing to Recitals 80 and 81 of RED II, which raise the need to limit the risk of ILUC-related GHG emissions, the panels concluded that it was satisfied that the measure falls within the meaning of GATT XX(g) and TBT 2.2.²²

The panels then turned to GATT XX(b), stating that a 'broad range of policies has been found to fall within the scope of measures taken for the protection of human, animal and plant life or health', from reducing air pollution to protecting wild monkeys.²³ The panels also observed that the AB has said that 'measures adopted in order to attenuate global warming and climate change' are relevant under GATT XX(b), like the panel in *Brazil – Taxation (EU)* found with respect to reducing CO₂.²⁴ The panel concluded it was 'therefore satisfied that the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels prima facie falls within the scope of the objective of protecting human, animal or plant life or health within the meaning' of GATT XX(b), TBT 2.2 and the Preamble of TBT.²⁵

As for GATT XX(a), the panels chose to exercise judicial economy, explaining that it was 'unpersuaded that there is any need to make an additional ruling on whether the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels would fall within the scope of the objective of protecting EU public morals'.²⁶ Specifically, the panels said that 'this would merely serve to establish an additional basis for the overall conclusion that the measure pursues a legitimate objective for the purposes of Article 2.2' and would 'not alter the conclusion' in terms of the EU's GATT XX defence.²⁷

Before concluding on this, it is appropriate to ask whether the EU bundled all three objectives into one composite objective to overstate the importance of its measure. In other words, if the panel had agreed to the EU's composite approach, would it have found the measure to be *more* important? And would this have mattered for the panel's weighing and balancing analysis, given the prior AB findings that the relative importance of the measure is a key factor in this regard?

²⁰ *Ibid.*, para. 7.279.

²¹ *Ibid.*, para. 7.283.

²² *Ibid.*, paras 7.285–7.286.

²³ *Ibid.*, para. 7.288.

²⁴ *Ibid.*, para. 7.357.

²⁵ *Ibid.*, para. 7.286.

²⁶ *Ibid.*, para. 7.293.

²⁷ *Ibid.*, para. 7.293.

We can only speculate that the EU must have considered that the panels would (wrongly) believe that a measure that pursued a single, integrated moral-environmental-health objective was, indeed, relatively more important. But again, this would not have had any discernable impact on the how the panels ruled.

3.2 CONTRIBUTION OF THE MEASURE

Several third parties, including Canada and the US, were convinced that the EU's composite defence would lead the panels to conflate the test for 'relating to' in XX(g) with the test for 'necessary' in XX(b), thereby diluting it.²⁸ The EU dismissed this concern out of hand, insisting that the AB 'has already explained that the necessity and the "relate to" legal tests in Articles XX (b) and (g) are very similar, because in both cases the contribution of the measure at issue to the stated objectives boils down to a "close and genuine relationship of ends and means"'.²⁹ The EU went so far as to opine that a 'Member should not be able to circumvent the legal test in the more specific provision by hiding under a legal test in what it perceives as a more permissive provision'.³⁰ But substantively, the EU was baffled by the concern over dilution, demanding that case law was on its side, and that the chapeau would serve as a crucial check on any real or perceived abuse.

We do not agree with the EU's perspective that 'relating to' and 'necessary' are essentially the same. There is a reason why the framers chose different terms which echo the first and second step of the classic 'proportionality' step, as is known in many constitutional orders. During the first step, all the panel can look for is whether the means can appropriately achieve the stated ends without inquiring into their impact on other values that the framers want to promote as well. At best, the EU's composite defence could have helped solidify this reasoning. In *Brazil – Taxation (EU)*, for example, the EU had already argued that the tests for 'necessary' and 'relating to' work largely the same way,³¹ and was frustrated by those third parties who alleged that it was trying to dilute the test for 'necessary' with the test for 'relating to'.³²

In terms of XX(g), the AB had likewise explained in *China – Raw Materials* that the phrase 'relating to' means 'a close and genuine relationship of ends and

²⁸ Responses by the European Union to Questions Following the Panel's First Substantive Meeting with the Parties in *EU – Palm Oil (Indonesia)*, questions 87 and 88.

²⁹ *Ibid.*, para. 431.

³⁰ *Ibid.*, para. 436.

³¹ Second Written Submission of the European Union, *Brazil – Certain Measures Concerning Taxation and Charges (Brazil–Taxation (EU))* WT/DS472/R (15 Apr. 2016), para. 38. Italics in the original.

³² Responses by the European Union to Questions Following the Panel's First Substantive Meeting with the Parties, *EU – Palm Oil (Indonesia)*, paras 435–436.

means'.³³ It also means that the end pursued must be 'made effective in conjunction with restrictions on domestic production or consumption'.³⁴ Thus, the measure must be 'aimed at' the protected interest along with other measures, including non-trade related ones. In *China – Rare Earths*, for example, the AB agreed with the panel that China's export quotas on rare earths, tungsten and molybdenum had not been implemented hand in hand with non-trade related domestic conservation measures.³⁵

In the palm oil disputes, the panels favorably cited the AB's interpretation of 'relating to' in *China – Raw Materials* and *Brazil – Retreaded Tyres*. The panels then drew on their findings concerning TBT 2.2 and concluded that since the measure was 'apt to make a material contribution' to limiting ILUC-related GHG emissions associated with crop-based biofuels, it related to the conservation of exhaustible natural resources.³⁶ Moreover, the high-ILUC risk cap and phase-out was also deemed to be 'made effective in conjunction with restrictions on domestic production and consumption'.³⁷

In contrast, the expectation of 'necessary' in XX(b) is arguably more demanding. In *Korea – Various Measures on Beef*, the AB said that 'necessary refers, in our view, to a range of degrees of necessity', from 'indispensable' to 'making a contribution', with 'necessary' closer to former.³⁸ In *Brazil – Retreaded Tyres*, the AB elaborated on this: '[t]o be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban'.³⁹

In terms of GATT XX(b), the panels also imported its findings under TBT 2.2 and 'preliminarily concluded that the high ILUC-risk cap and phase out is necessary to fulfil the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels' because the measure is 'apt to make a material contribution' to this end.⁴⁰ The panels thus used the same 'apt to' standard

³³ Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials* (*China – Raw Materials*), WT/DS394/AB/R; WT/DS395/AB/R; WT/DS398/AB/R adopted 22 Feb. 2012, para. 355.

³⁴ *Ibid.*, para. 356.

³⁵ Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* (*China – Rare Earths*), WT/DS431/AB/R; WT/DS432/AB/R; WT/DS433/AB/R adopted 7 Apr. 2014, para. 5.168.

³⁶ *EU – Palm Oil (Indonesia)*, para. 7.371.

³⁷ *Ibid.*, para. 7.1078.

³⁸ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (*Korea – Various Measures on Beef*), WT/DS161/AB/R; WT/DS169/AB/R adopted 10 Jan. 2001, para. 161.

³⁹ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* (*Brazil – Retreaded Tyres*), WT/DS332/AB/R adopted 17 Dec. 2007, para. 210. Emphasis added.

⁴⁰ *EU – Palm Oil (Indonesia)*, paras 7.1095–7.1096.

from TBT 2.2 in evaluating the phrase ‘relating to’ under XX(g) and ‘necessary’ under XX(b).

In its analysis of TBT 2.2, the panels examined the contribution made by the EU’s measures to the ends pursued. The panels noted that it was not necessary for it to quantify the risks or establish their probability of materializing, and mentioned *Brazil – Retreaded Tyres* in this regard, observing that while the 7% maximum share and high ILUC-risk cap and phase out ‘do not take the form of a ban on imports of any crop-based biofuel’,⁴¹ by design, they have a limiting effect. To be sure, RED II will eliminate the demand for, and consumption of, crop-based biofuels posing a high ILUC risk by 2030.⁴² The panels said this contribution could not be quantified, but observed the AB had accepted that a measure could be deemed ‘necessary’ even if the contribution was ‘not immediately observable’.⁴³ Importantly, the panels noted that the 7% maximum and high ILUC-risk cap and phase out were, in fact, ‘apt to make a material contribution to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels’.⁴⁴

Indonesia, for example, sought to cast doubt on this contribution, arguing there was no evidence to bear it out⁴⁵; that it would actually increase GHG emissions given problematic substitution effects⁴⁶; that the effects of palm oil have already played out⁴⁷; and that palm oil does not account for enough of EU demand to make a difference.⁴⁸ Indonesia’s panel disagreed, insisting that ‘[t]he measures seek to address certain negative externalities of the European Union’s policy promoting the use of renewable energy sources in the transport sector’,⁴⁹ and were thus ‘apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels’.⁵⁰ If the EU’s composite defence was meant to dilute the necessity test, the reality is that case law had already done the job.

That said, the EU’s composite defence played out in a subtle, but important, way. The panel had identified one operative objective for both XX(b) and XX(g): ‘limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels’. This qualified as both protecting human, animal or plant life or health,

⁴¹ *EU – Palm Oil (Indonesia)*, para. 7.359.

⁴² *Ibid.*, para. 7.125.

⁴³ *Ibid.*, para. 7.359.

⁴⁴ *Ibid.*, para. 7.363.

⁴⁵ *Ibid.*, para. 7.362.

⁴⁶ *Ibid.*, para. 7.364.

⁴⁷ *Ibid.*, para. 7.366.

⁴⁸ *Ibid.*, para. 7.358.

⁴⁹ *Ibid.*, para. 7.370.

⁵⁰ *Ibid.*, para. 7.371.

as per XX(b), and conserving exhaustible natural resources, as per XX(g). The panel did not require the EU to show different kinds of harm or distinct regulatory purposes under each subparagraph. In fact, the panel applied the same contribution logic, observing that it was sufficient that the measure was ‘apt to make a material contribution’, which could be inferred from the measure’s limiting effect on demand. Put another way, the distinct causal inquiries traditionally associated with XX(b) – necessity – and XX(g) – relationship to conservation – were collapsed into a single design-based inference.

3.3 TRADE RESTRICTIVENESS OF THE MEASURE

The panels used their analysis under TBT 2.2 to evaluate the trade-restrictiveness of the EU’s measure. The panels explained that it could use either qualitative or quantitative arguments in this regard, along with evidence revealed by the measure’s ‘design and operation’.⁵¹ The complainants argued that the 7% maximum, and especially the high-ILUC risk cap and phase out, were tantamount to a ban on palm oil. The EU dismissed this, urging that biofuels not eligible to be counted toward RED II’s target were available for sale domestically⁵²; RED II created the market for biofuels at the expense of fossil fuels⁵³; and that the complainants could make up lost sales by exporting to India and China.⁵⁴ In short order, the panels dispensed with the EU’s arguments, and found that ‘by design’, the EU’s 7% maximum and high-ILUC risk cap and phase out have a ‘limiting effect on trade’.⁵⁵ Nothing about the EU’s composite argument would have changed this result.

3.4 LESS TRADE-RESTRICTIVE ALTERNATIVES

In the EU’s first and second submissions and its responses to questions from the panels and third parties, its composite defence primarily took aim at this step. In its first written submission in *EU and Certain Member States – Palm Oil (Malaysia)*, for example, the EU insisted that ‘for an appropriate less trade restrictive alternative, the complainant has to propose a solution that would be capable of achieving the same level of protection of all three intertwined objectives at the same time’.⁵⁶ It urged that ‘for our composite defense to fail it would mean that the three

⁵¹ *Ibid.*, para. 7.334.

⁵² *Ibid.*, para. 7.338.

⁵³ *Ibid.*, para. 7.340.

⁵⁴ *Ibid.*, para. 7.342.

⁵⁵ *Ibid.*, para. 7.345.

⁵⁶ EU First Written Submission, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 1398.

justifications should fail together’,⁵⁷ and that ‘it is up to Malaysia to suggest an alternative measure that is reasonably available and makes the same contributions to the protection of the European Union’s multiple legitimate policy objectives, but is less trade restrictive’.⁵⁸

Likewise, in its second written submission in *EU – Palm Oil (Indonesia)*, the EU chastised the complainant for missing this point, remarking that ‘Indonesia does not understand the intertwined nature of the multiple objectives pursued. It maintains that the objectives should be analysed separately’.⁵⁹

The panels did not oblige the EU, choosing instead to review proposed alternatives against XX(b) and (g) separately, and considered less-trade restrictive alternatives for the former. Indonesia, for example, proposed eight less trade-restrictive alternatives (versus Malaysia’s six), including a ‘legality scheme’ such as EU’s Forest Law Enforcement, Government and Trade scheme; certification under EU’s Illegal, Unreported and Unregulated fishermen scheme; certification by non-governmental organizations; market access quotas; sustainability certification under Indonesia-EFTA Comprehensive Economic Partnership Agreement; and an EU deforestation-free initiative.⁶⁰ In reviewing each of these, the panel explained that ‘it is necessary, but not sufficient, that any proposed alternative measure be less trade-restrictive, be reasonably available, and make an equivalent contribution’.⁶¹ The panel further said that it had to ‘consider whether any proposed alternative is correctly viewed as an alternative to, or rather as complementary to, the 7% max share and the high ILUC-risk cap and phase-out’.⁶²

Citing the AB in *Brazil – Retreaded Tyres*, the panel noted that in terms of GATT XX’s necessity test, ‘complementary’ or ‘mutually supportive’ proposals ‘cannot be considered real alternatives’.⁶³ The panel went on to explain that:

[a]n alternative measure is therefore one that either could not co-exist with a challenged measure as it currently stands, or that could co-exist but whose implementation alongside the challenged measure would negate or render redundant or immaterial the contribution that the challenged measure is apt to make to its objective.⁶⁴

With this definition in mind, the panel considered all eight of Indonesia’s alternatives, concluding that (1)–(4) were complementary measures; (5) would make ‘less of a contribution to the measure’s objective’; (6) was insufficiently defined; (7)

⁵⁷ *Ibid.*, para. 1329.

⁵⁸ *Ibid.*, para. 1400.

⁵⁹ EU Second Written Submission, *EU – Palm Oil (Indonesia)*, para. 450.

⁶⁰ *EU – Palm Oil (Indonesia)*, para. 7.379.

⁶¹ *Ibid.*, para. 7.384.

⁶² *Ibid.*, para. 7.384. Emphasis in the original.

⁶³ *Ibid.*, para. 7.384.

⁶⁴ *Ibid.*, para. 7.386.

was of doubtful effectiveness; and (8) was a complementary measure.⁶⁵ The panel therefore concluded that ‘none of the alternative measures put forward by Indonesia demonstrate that the 7% maximum share and the high ILUC-risk cap and phase-out are more trade-restrictive than necessary to limit the risk of ILUC-related GHG emissions associated with crop-based biofuels’.⁶⁶

This assessment was demanding of Indonesia, but had the panel bought into the logic of the EU’s composite defence, it would have been all but impossible. As we discuss above, framing GATT XX(a), (b) and (g) as a composite, without explaining the relationships among these subparagraphs, their proportions or weights in forming a synthetic whole, or how trade-offs between the protected items might rebalance the desired outcome, would turn XX(b) into a moving target. This, we submit, was the point, though not the endgame.

By obfuscating the complainants’ efforts to propose a less trade-restrictive alternative the EU seems to have expected that this would influence the panels’ assessment of the chapeau as well. The EU’s composite defence introduced proportionality-by-stealth. In other words, by asserting that the challenged measures pursued a single, integrated moral-environmental-health objective, the EU sought to require panels to evaluate less trade-restrictive alternatives against an undifferentiated bundle of values, rather than against the discrete legal standards set out in the text of Article XX. In practical terms, this would collapse the less trade-restrictive alternative inquiry into a global balancing act: an alternative would fail not because it was ineffective under Article XX(a) or (b)’s necessity test or insufficiently related to conservation under Article XX(g), but because it did not deliver an equivalent level of protection across all the asserted objectives simultaneously.

As the panels clearly recognized, once framed this way, disentanglement becomes impossible – not because the objectives are factually unrelated, but because the legal benchmark itself has been redefined as a proportionality assessment untethered to any single subparagraph.

The panels’ refusal to adopt this composite framing preserves the central function of the less trade-restrictive alternative test as a legal discipline, rather than a policy judgment. Article XX’s architecture requires that alternatives be assessed relative to a particular objective and a particular standard – ‘necessary’ in Article XX(a) and (b), or ‘relating to’ conservation under Article XX(g). Allowing those standards to merge would effectively immunize measures from meaningful alternatives scrutiny, as almost any alternative could be rejected for failing to advance the full moral-environmental-health package to the same degree. By

⁶⁵ *Ibid.*, para. 7.386.

⁶⁶ *Ibid.*, paras 7.387–7.415.

insisting on separate subparagraph analysis, and declining to measure alternatives against a composite objective, the panels rejected proportionality-by-stealth and reaffirmed that Article XX does not authorize open-ended value balancing. Instead, it imposes structured, text-based constraints that preserve the justiciability of the exceptions and prevent the less trade-restrictive alternative inquiry from collapsing into an exercise in regulatory deference.

Based on the analysis above, the panels provisionally justified the EU's measure under GATT XX(b) – like XX(g) – although the defence ultimately failed to clear the chapeau because the high ILUC-risk cap and phase out was found to be 'administered in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail'.⁶⁷ The panels explained this finding as a result of the EU's failure to 'conduct a timely review of the data used to determine which biofuels are high ILUC risk' and various 'deficiencies in the design and implementation of the low ILUC-risk criteria for certification procedure',⁶⁸ both of which were central to their ruling on TBT 2.1.

The panels' language was also revealing. While the EU articulated its composite defence in terms of moral necessity and factual inseparability, the panels answered back with procedural sequencing and doctrinal containment. The EU's reliance on moralized framing was meant to elevate the composite objective beyond contestation, implicitly insisting upon deference to regulatory judgment. For their part, the panels hedged with procedural language that neither embraced nor rejected the EU's underlying moral claims but rendered them legally tractable by translating them into discrete doctrinal categories.

Finally, a word about the chapeau. The EU did not explicitly connect its composite defence to Article XX's second-tier test, but we contend that, had it been accepted, it would undermine the chapeau's function within the structure of the general exceptions. The chapeau is designed to prevent abuse of otherwise legitimate exceptions by requiring that measures not be applied in a manner constituting 'arbitrary' or 'unjustifiable' discrimination, or a 'disguised restriction on international trade'. It is the point in Article XX at which panels assess whether regulatory distinctions are even-handed, proportionate, and administratively justified across comparable conditions.

The EU's composite defence operates in the opposite direction. By asserting that multiple objectives under Articles XX(a), (b) and (g) are inseparable and must be assessed as an 'intertwined whole', the composite approach seeks to shield the measure from granular scrutiny. If discrimination or differential treatment is justified by reference to non-separable moral, health and environmental goals,

⁶⁷ *Ibid.*, para. 8.1(t)(iv).

⁶⁸ *Ibid.*, para. 8.1(t)(iv).

then the chapeau's key inquiry – whether distinctions are arbitrary or unjustifiable – loses traction. Almost any differentiation can be defended as necessary to preserve the integrity of the composite objective, making it difficult for panels to isolate and evaluate the legitimacy of regulatory distinctions.

In this sense, the composite defence displaces the chapeau's function, rather than engaging it. The chapeau presupposes that objectives can be identified, disaggregated, and treated against patterns of application. The composite defence denies that premise, insisting instead that objectives collapse into one another and cannot be meaningfully separated for legal analysis. Accepting such an approach would effectively short-circuit the chapeau by transforming it from a constraint on abuse into a deferential afterthought, applied only once the measure has already been insulated by a holistic justification.

The EU's litigation posture in the palm oil disputes implicitly acknowledges this tension. While the EU forcefully advanced a composite defence at the level of Article XX subparagraphs, it did not attempt to extend that logic to the chapeau. Instead, it relied on conventional arguments concerning even-handedness, comparable conditions, and administrative neutrality. This strategic separation underscores that the composite defence is not merely independent of the chapeau but structurally in tension with it. The chapeau is the site where aggregation must stop; the composite defence is an attempt to ensure that that aggregation never meaningfully begins.

In sum, the EU's composite defence was not simply an innovative reading of Article XX, but an effort to bypass the internal safeguard that prevents the general exceptions from becoming open-ended proportionality clauses. The panels' refusal to adopt the composite approach thus protects not only the integrity of individual subparagraphs, but the chapeau's role as the final – and indispensable – check on regulatory overreach.

4 CONCLUDING REMARKS

The panels' decision to analyse Article XX(b) and (g) separately, and exercise judicial economy with respect to XX(a), effectively mooted the composite framing. But because the EU's defence ultimately failed to clear the chapeau, it might be argued that there was no need for the panels to engage a novel – and likely disruptive – argument that would not have changed the outcome.

This interpretation, while plausible, underestimates the doctrinal significance of the panels' silence.

First, the panels did not merely decline to rely on the composite framing; they also declined to reject it. At several points, the reports acknowledge that the challenged measures pursued multiple objectives and suggest that an alternative

measure must make an equivalent contribution to ‘the objective(s) of the measure at issue’. Read in isolation, this language is unobjectionable, and consistent with prior jurisprudence. Read in context, however, it risks being understood as accommodating the very form of composite reasoning the EU advanced, without requiring respondents to specify how multiple objectives interact or constrain one another.

Second, panels routinely confront arguments that they choose not to endorse explicitly, but the absence of a reasoned rejection can nonetheless shape expectations about what forms of argumentation remain available in future disputes. This is particularly so in the post-AB environment, where panel reports carry greater practical weight and where ambiguity is less likely to be resolved through appellate clarification. In this context, leaving the composite argument formally unaddressed risks normalizing it as a permissible – if untested – litigation strategy.

Third, the panels’ silence matters because the EU’s composite argument was not peripheral to the dispute. It was raised early, emphasized repeatedly, and defended vigorously against objections by the complainants and several third parties. Malaysia explicitly urged the panel to address and reject the composite framing, but the panel declined to do so.⁶⁹ This choice cannot be dismissed as an oversight; it reflects an institutional preference to resolve the dispute on narrower grounds. That preference is understandable, but it does not eliminate the need for doctrinal clarity where a novel argument directly implicates how GATT exceptions are assessed.

Fourth, and most importantly, the panels’ silence leaves unresolved how future panels should handle less trade-restrictive alternative inquiries where respondents invoke multiple, loosely specified objectives. Existing jurisprudence permits panels to require that an alternative make an equivalent contribution to each relevant objective. But that discipline presupposes that the objectives themselves are articulated with sufficient precision to allow meaningful comparison. By declining to confront the EU’s attempt to collapse three distinct Article XX subparagraphs into a single, undefined whole, the panels avoided clarifying whether respondents bear an obligation to specify how multiple objectives relate to one another for the sake of provisional justification, and even for clearing the chapeau.

From this perspective, the panels’ silence was not doctrinally neutral. It preserves flexibility in the short run, but at the cost of predictability in the long run. It leaves open the possibility that future respondents may repackage composite GATT XX defenses as multi-objective claims – potentially reinforced by parallel

⁶⁹ *EU and Certain Member States–Palm Oil (Malaysia)*, para. 6.87.

findings under TBT Article 2.2 – and then argue that complainants have failed to meet an indeterminate benchmark.

The concern, therefore, is not that the panels reached the wrong conclusion in the palm oil disputes. It is that their silence leaves unresolved a structural question about Article XX: whether the first tier of the analysis requires respondents who invoke multiple exceptions to articulate a coherent theory of how those exceptions jointly constrain the evaluation of alternatives. Absent such a requirement, the two-tier test for GATT XX risks becoming less determinate, and the disciplining function of the first tier correspondingly weaker.

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