Veblen Institute for Economic Reforms

Presentation of the Amicus Curiae Briefs submitted by the Veblen Institute Reforms before the Dispute Settlement Body of the WTO

European Union - Certain Measures Concerning Palm Oil & Oil Palm Cropbased Biofuels, WT/DS593 (Indonesia)[1] and WT/DS600 (Malaysia)[2]

I- What is at stake in the "palm oil" cases

a) The challenged measures:

In order to achieve its climate change mitigation objectives, the EU has adopted a set of measures[3] that i) raises targets for Renewable Energy Sources consumption and ii) defines a series of **sustainability and greenhouse gas (GHG) emission criteria that biofuels, bioliquids and biomass fuels used in transports must comply with** to be counted towards the targets. The stated objective of these measures is to ensure that **the GHG impact of the production of feedstocks do not offset the positive impact associated with the consumption of biofuels** produced from these feedstocks (*i.e.* net GHG emissions savings).

Sustainability criteria include the risk of "indirect land used change" (ILUC), which may cause the release of CO2 stored in trees and soils. An EU Delegated Regulation sets out criteria used to define high ILUC-risk and low ILUC-risks at feedstock-level, based on a study commissioned by the European Commission. **In application of those criteria, it appears that palm oil is the only high ILUC-risk feedstock**.

Such measures result in the **gradual phasing out of the contribution to the renewable energy target of biofuels produced from palm oil (with the exception of those complying with some certification requirements)** and their ineligibility for member States' financial support schemes for the consumption of biofuels, bioliquids and biomass fuels.

[1] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds593_e.htm
[2] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds600_e.htm
[3] Directive (EU) 2018/2001 on the promotion of the use of energy from renewable resources ("RED II") and Commission Delegated Regulation (EU) 2019/807 supplementing Directive (EU) 2018/2001, and the calculation of the ILUC-risk.

Indonesia and Malaysia have challenged these EU measures as well as France's and Lithuania's measures taken in accordance with these EU measures (notably the exclusion of palm oil from the French fuel tax reduction).

b) Possible implications for governmental measures against climate change

Both Indonesia and Malaysia argue that these measures *de facto* discriminate against palm oil as a feedstock and biofuels produced from palm oil as they **put these products at a disadvantage in the EU market relative to biofuels produced from other feedstocks** (such as soybeans, rapeseed and sunflowers) that are produced in the EU and third countries - violating thereby the most favoured nation treatment and national treatment obligations. Furthermore, they point out that the EU Delegated Regulation does not present convincing scientific arguments for classifying palm oil as high ILUC-risk, so that such a discriminatory and trade-restrictive measure cannot be justified on grounds of environmental protection.

This case concerns the **legality of measures distinguishing between goods based on criteria of sustainability of their production process**. This raises two fundamental questions:

- Whether and to what extent measures discriminating goods based on their production processes (and that leave no physical trace in these goods) are *prima facie* inconsistent with the GATT if they result in *de facto* disparate impact on the conditions of competition amongst imported products and/or between imported and domestic products;
- The extent of the policy space enjoyed by States in deciding on regulatory distinctions/sustainability criteria on which to design/base their measures of environmental protection/climate change mitigation.

The rulings of the Dispute Settlement Body (DSB) in these cases will not only be important for the challenged measures but they may also be landmark decisions on the legality of measures of environmental protection. Whereas decisions finding that the challenged EU measures are WTO compliant would be a good signal for the possibility for countries to adopt measures aimed at mitigating climate change, **a negative decision could act as a deterrent**. In addition, compliance with GATT obligations interpreted in an unduly extensive manner **would considerably undermine the effectiveness of climate change mitigation measures**.

II- The Veblen Institute's objectives

The objective of the Veblen Institute in this dispute was 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 interests and environmental and climate concerns in accordance with the letter and spirit of the WTO agreements.

The Veblen Institute is of the view that such an appropriate balance can be achieved only if WTO Members retain sufficient regulatory autonomy to apply non-protectionist measures that they consider, pursuant to an objective assessment, adequate in curbing GHG emissions. Ruling otherwise would deter governments from taking swift and effective actions which the climate emergency requires, and jeopardize the fulfilment of the objectives of sustainable development and preservation of the environment enshrined in the preamble of the Marrakesh Agreement Establishing the WTO (the "WTO Agreement").

The Veblen Institute does not take a stance in its amicus curiae brief 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.

III- The Veblen Institute's main arguments

The Veblen Institute called for a ruling that stays true to the roots of the world trading system, and respects the letter and spirit of the WTO Agreements. In essence, a ruling which:

- Gives full and practical effect to the preamble of the WTO Agreement, which declares sustainable development and the preservation of the environment fully-fledged goals of the WTO;
- Admits that not all measures that *de facto* adversely impact competitive opportunities for imported products are necessarily *prima facie* inconsistent with the GATT obligation of non-discrimination. Ruling otherwise would contradict the letter and spirit of GATT's provisions on national treatment, whose purpose is to avoid protectionism - not to prohibit measures pursuing a legitimate regulatory objective;
- Recognizes sufficient autonomy to States in deciding on regulatory distinctions/sustainability criteria on which to design/base their measures of environmental protection/climate change mitigation, absent any relevant international consensus.

The main points of the Veblen Institute's argumentation are the following:

a) The preamble of the WTO Agreement shall be given full effect

Sustainable development and the preservation of the environment are enshrined as fully-fledged goals of the WTO in the preamble of the WTO Agreement.

Since the establishment of the WTO in 1994 (even more so since the signature of the GATT 1947), new threats to the global economy and welfare have emerged. Climate change has been acknowledged as a "common concern of humankind" by Parties to the Paris Agreement, the biggest threat to health, life, and therefore the standards of living. The relevant parts of the preamble of the WTO Agreement should be read in light of these 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 climate change.

The preamble of the WTO Agreement – which informs the WTO legal texts - must be given full effect, in accordance with the principle of effectiveness of treaty interpretation. GATT provisions should be interpreted in light of these considerations.

b) Measures that adversely impact competitive opportunities for imported products vis-à-vis domestic products do not violate GATT national treatment provisions if such impact results from a legitimate (non-protectionist) regulatory distinction

The Veblen Institute recalled that the fundamental purpose of GATT Article on *National Treatment*, as expressed in Article III:1, is to avoid protectionism in the application of internal measures. It is to strike down internal measures that aims at protecting the domestic industry and shield internal measures that pursue a legitimate objective in good faith.

In our view, it follows that **WTO Members should be allowed to assume a *de facto* disparate impact on conditions of competition whenever it is required to fulfil a legitimate objective or if the detrimental effect on imported products is an unavoidable effect of such a legitimate, non-protectionist policy**.

Pursuant to the fundamental principle of effectiveness in treaty interpretation, there must be consonance between the objective pursued by Article, as enunciated in Article III:1 and the interpretation of specific terms in Article III, as stated by the Appellate Body. In our view, for doing so, a panel shall either:

- **Interpret the terms so as to filter out protectionist measures and let non-protectionist measures pass**. For example, **"likeness"** between imported and domestic products should be understood very strictly, so as not to strike down non-protectionist measures. It 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**;

  or

- Examine the regulatory purpose of the measure at hand. 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.

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). 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. Therefore, this would contradict the letter and spirit of the GATT.

c) Should the challenged measures be found prima facie inconsistent with the GATT, they are nevertheless justified under GATT Article XX

Should the challenged measures be found inconsistent with the GATT, they are justified under GATT Article XX ("General Exceptions"). The main points of the brief are the following:

Article XX(g) covering measures "relating to the conservation of exhaustible natural resources […]"

The Veblen Institute called for a ruling that recognises climate mitigation measures are eligible for a defence under GATT Article XX(g). As acknowledged by the Appellate Body, from the perspective embodied in the preamble of the WTO Agreement, the terms of Article XX(g) are not static but by definition evolutionary. Read in light of contemporary concerns of the community of nations about the protection and conservation of the environment, it is clear that Article XX(g) covers measures primarily aiming at mitigating climate change.

Article XX(b) covering measures "necessary to protect human, animal or plant life or health"

As recalled throughout the submission, the community of nations as a whole has designated climate change as the most urgent issue of all, a "common concern of humankind", the biggest threat to health and life. The WTO Members have unanimously embraced this view. Accordingly, in determining whether the measure is "necessary" – *i.e.* by weighing and balancing a series of factors which prominently include the importance of the objective pursued, the contribution of the measure to this objective and the trade restrictiveness of the measure – the panel should assign special importance to the objective of climate change mitigation.

Concerning the contribution of the measure to the objective pursued, the Veblen Institute recalled that i) WTO Members are free to set their own level of protection (which in the case at hand is very high) and that ii) nothing in Article XX prevents a cautious approach in trying to achieve the desired level of protection, in accordance with the precautionary principle. It entails that governments shall consider mere indications pointing to the possibility of serious or irreversible impairments as long as these indications are sufficiently reliable, and may take measures based on respected minority scientific views.

The chapeau

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"*.

The Appellate Body recognized that i) the *chapeau* is an "expression of the principle of good faith" and that it aims to make sure that here is no misuse or abuse of the right to invoke an exception and ii) whether the recourse to the right to invoke an exception nullifies or impairs the balance of rights and obligations constructed by the Members themselves in that Agreement.

First, the Veblen Institute supported that the test to establish whether the requirements of the *chapeau* are met should aim at discerning whether the WTO Member in question has exercised this right *bona fide*. Ultimately, this comes down to discerning the intention behind the measure at hand. As long as there is a rational basis, in view of the declared objective, for the distinctions made between and among products resulting in discrimination, that discrimination should not be seen as "arbitrary" or "unjustifiable". In the case at hand, the European Union presented evidence that 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. 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.

Second, the Veblen Institute argued that in resolving the question of where to draw this "line of equilibrium" between competing rights, one should consider the perspective embodied in the preamble of the WTO Agreement, read in light of contemporary concerns.

In our view a panel should consider the following in trying to "mark out the line" and establish a balance between two rights:

- 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;

- 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.

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Full briefs available here: https://www.veblen-institute.org/Intervention-of-the-Veblen-Institute-in-palm-oil-disputes-at-the-WTO.html

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