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Cap on Palm Oil - Legal arguments

1. On 17 January 2018, the European Parliament adopted its positioning on the recast of the Renewable Energy Directive (RED II). It notably voted an amendment (No. 307) foreseeing that the contribution from biofuels and bioliquids produced from palm oil shall be 0% from 2021 for the purpose of calculating Member-States' gross final consumption of energy from renewable sources.
2. This measure is not a prohibition. This is a cap, among others, on the way various types of biofuels are taken into account for the calculation of Member States' specific target in the context of EU policy aiming at protecting environment and reducing GHG emissions so as to fulfill COP 21 International agreement.
3. In this context, there are arguments to consider that this policy which is fully compatible with 2015 *Paris Agreement on Climate*, is not in contradiction with the WTO law, as regards in particular the *General Agreement on Tariffs and Trade* (GATT).
4. As a preliminary remark, it should be mentioned that if Article III of the GATT prohibits discrimination between national and imported products, the measure voted by the Parliament does not entail any discrimination as such given that:
 - the contribution of all crop-based biofuels, so called first generation (1G) -including palm oil-, whether produced in the EU territory or imported, has always been capped for the calculation of Member States' consumption of renewable sources under Directive 2015/1513.
 - the new proposal of the Commission recasting the 2009/28 Directive goes further for all 1G biofuels, with a proposed transitional reduction down to 3,8% in 2030.
 - within this EU Policy there has always been other types of caps or targets, for various type of biofuels, such as 0,5% for advanced biofuels under Directive 2015/1513, which the Commission proposed to increase up to 6,8% in 2030 for biofuels other than 1G in its recast of the 2009/28 Directive.
 - these measures which all together define the EU policy for the contribution of EU and Member States to Paris Agreement and EU objectives have been so far considered as WTO compatible, including by the Commission, the Parliament, the Council. This is also the case for other types of targets and caps, such as the limited support to energy based on coal.
 - in this context, there is no difference of nature between these caps and targets, which use is limited to calculation purpose and which already cover palm oil, and the addition of new specific sub caps or targets.
 - As for any of the caps and targets mentioned above, all biofuels produced from palm oil as from other crops (soja, rapeseed, sunflower) or materials, are treated the same way within this EU policy, based on environmental criteria and regardless of their countries of origin.
5. Even if a discrimination would be recognized pursuant to Article III of the GATT (*quod non*), the general exceptions laid down in Article XX of the GATT could be invoked to justify such a measure.
 - I. **Article XX of the GATT provides for General Exceptions, as regards in particular environmental protection**
6. Article XX of the GATT lays out a number of exceptions where WTO members may be exempted from GATT rules. Two exceptions are of particular relevance to the protection of the environment: paragraphs (b) and (g) of Article XX.

7. Pursuant to Article XX (b) and (g), WTO members may indeed adopt policy measures that are inconsistent with GATT disciplines, but necessary to protect human, animal or plant life or health (paragraph (b)), or relating to the conservation of exhaustible natural resources (paragraph (g)). Similar justifications may also be invoked within the framework of other WTO agreements.

8. Article XX (b) and (g) of the GATT reads as follows :

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

[...]

(b) necessary to protect human, animal or plant life or health

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption” (emphasis added)”.

9. In the “*US - Gasoline*” case, the WTO’s Appellate Body clarified the function of Article XX with respect to national measures taken for environmental protection. It stated that:

“Article XX of the General Agreement contains provisions designed to permit important state interests - including the protection of human health, as well as the conservation of exhaustible natural resources - to find expression. [...] WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements” (emphasis added).

10. In particular, in the “*US - Shrimp*” case, the WTO’s Appellate Body stated that Article XX of the GATT could be used to justify measures requiring exporting Members to comply with certain environmental policies. It indicated in this respect that:

“It is not necessary to assume 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 under Article XX. Such an interpretation 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” (emphasis added).

11. In view of these provisions, several arguments could therefore be invoked to justify the compatibility of the measure adopted by the Parliament on palm oil with the GATT.

II. Article XX of the GATT should apply to the Parliament’s positioning on palm oil

12. It resorts from the WTO case-law that for a national measure to fall within Article XX(b) and (d) of the GATT a three-tier test should apply:

- the measure shall be designed (i) to protect human, animal or plant life or health or (ii) to ensure the conservation of exhaustible natural resources ;
- the measure shall be necessary to fulfill these objectives ;

- the measure shall not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.
13. **First and second conditions** - As regards the first and second condition, it may be argued that given the numerous negative environmental and social consequences triggered by the production of palm oil for biofuels, the measure - which is limited to determine the way palm oil is taken into account within certain environmental objectives - effectively intends, and is necessary, to protect human, animal or plant life or health and to ensure the conservation of exhaustible natural resources.
14. In its *Report on palm oil and deforestation of rainforest* adopted in March 2017¹, the European Parliament effectively pointed out the unsustainable effects of palm oil. It notably indicated in its *Explanatory Statement* that :
- “Tropical ecosystems, and in particular rain forests – which account for just 7% of the world’s vegetation – are facing their greatest challenge since the dawn of man. Not only is hugely valuable vegetation being lost, but so too are many animal species, including some that had not even been discovered. The impact of palm oil cultivation is, however, not limited to rainforests. Adjacent marine ecosystems are also under growing pressure. Irreplaceable groundwater is being lost, and rivers are drying out. Massive peat and forest fires are occurring, and the climate is changing in the affected regions, contributing to global climate change. These changes do not only affect tropical flora and fauna; they also affect local inhabitants, whose livelihoods are closely linked to those ecosystems. Palm oil is thus becoming the root of numerous social and economic conflicts. The speed with which these changes are happening is alarming, and it therefore calls for an immediate response”* (emphasis added).
15. This statement from the European Parliament clearly emphasizes the fact that the production of palm oil entails negative consequences on the human, animal or plant life or health, but also on the conservation of exhaustible natural resources.
16. In view of these explanations, several arguments may therefore be put forward to justify the use of the two environmental exceptions laid down in Article XX (b) and (g), as well as the necessity of the measure voted by the European Parliament to achieve these objectives.
17. In any case, the aim of this measure is not to ban as such the import of biofuels produced from Palm Oil in the European Union, but only to forbid their contribution to the calculation of Member States’ consumption of energy from renewable sources.
18. For that reason, the measure may be seen as necessary and proportionate given that it aims at encouraging the use of sustainable biofuels, without preventing as such exporting members to commercialize biofuels produced from palm oil in the EU territory nor EU producers to produce and commercialize biofuels from palm oil.
19. **Third condition** - Finally, it may also be argued that the measure does not entail either arbitrary or unjustifiable discrimination, or disguised restrictions on international trade given that, as already indicated above (see paragraph 4):
- the contribution of all crop-based biofuels (including palm oil) and from other types of biofuels (other than palm oil), whether produced in the EU territory or imported, is subject to specific caps and targets for the calculation of Member States’ consumption of renewable sources ;
 - within these caps and targets, all biofuels (produced from palm oil or from other material) are treated in the same way within the EU territory, regardless of their countries of origin ;

¹ 2016/2222(INI).

- this established EU practice has never been challenged before WTO.
20. In addition, it should also be recalled that for a discrimination or restriction to occur, the products at stake should be comparable. In this respect, contrary to biofuels produced from palm oil, other crop-based biofuels are more sustainable and entail the co-production of high-value protein feed.
 21. On this basis, it may therefore be argued that crop-based biofuels (such as the ones produced from rapeseed or sunflower) are not comparable to biofuels produced from palm oil, as regards at least their contribution to environment protection and the production of high value vegetal proteins, and that therefore no arbitrary or unjustifiable discrimination, or disguised restrictions is to be characterized.
