

**EU Biofuels Sustainability Standards and Certification Systems –  
How to Seek WTO-Compatibility**

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## **EU Biofuels Sustainability Standards and Certification Systems – How to Seek WTO-Compatibility**

### **Abstract**

Biofuels are increasingly being produced and consumed as a partial substitute to fossil-fuel based transport fuels in the fight against climate change. Sustainability criteria have been introduced recently by some countries to help ensure biofuels perform better than fossil fuels environmentally. Concerns have been expressed from various quarters that such criteria could represent World Trade Organisation (WTO)-incompatible barriers to trade. The present paper addresses two specific issues. First, it argues that biofuels can be expected to be treated like any other traded product under WTO law. Thus an importing country could not impose different trade measures dependent on whether the biofuel complied with its sustainability criteria. Second, the Technical Barriers to Trade Agreement (TBTA) provides guidance on how to draw up criteria to help ensure WTO compatibility. This cannot guarantee compatibility, but it can help reduce significantly the chances of WTO Members bringing actions against a fellow Member's biofuels sustainability criteria. There is little direct case law to draw upon but it is argued that, if the TBT guidance is followed, in the long term the absence of case law can be taken as an indication that the sustainability criteria established are WTO-compatible.

## **1. Introduction**

In his 2009 Presidential Address to the Agricultural Economics Society, Alan Swinbank discussed a wide range of issues pertaining to the WTO-compatibility of EU bioenergy policies. Whilst he felt that many key aspects were likely to conform with WTO rules, he expressed concerns over environmental sustainability criteria (ESC). The aim of the present paper is to explore this specific issue in more detail. It considers EU sustainability criteria, and the process of developing certification systems for producers. We seek both to identify ways in which ESC could come into conflict with key WTO rules; and to draw on the WTO Agreements themselves to identify ways by which to minimise the possibility of conflicts arising. These principles thus have general application to any country seeking to establish ESC. In this paper we focus on biofuels (ethanol and biodiesel) used in transportation, as this is presently the principal form of traded bioenergy subject to ESC.

In the last decade, the production of feedstocks and their conversion into biofuels has expanded dramatically (encouraged in most countries by substantial public policy interventions and incentives). Whilst this was conceived mainly as a domestic solution to domestic energy concerns, international biofuels trade has begun to emerge and has the potential to expand substantially and rapidly. One of the energy concerns countries seek to address is fossil fuels' contribution to carbon emissions and global warming. This focus has, in turn, led to much attention being paid to these aspects of biofuels' production and usage, their 'sustainability', as it would be perverse if biofuels resulted in greater environmental stress by emitting more greenhouse gases (GHGs) than the fossil fuels they are (partially) replacing.

This has, in turn, raised questions as to whether ESC and certification systems conform to World Trade Organisation (WTO) rules and principles. The preamble to the Agreement Establishing the WTO refers to boosting trade "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". Yet to what extent can the standard trade liberalising logic of the WTO, concerning market access, market shares and trade liberalisation, apply in the biofuels case? Domestic public policy creates both the market and the sustainability criteria; they are mutually constitutive as opposed to a case where there

is a pre-existing market which a public policy instrument subsequently seeks to protect.

As the policy issue of environmental sustainability has emerged and become more prominent, so a literature has sought to determine the WTO-compatibility of biofuels sustainability criteria/standards (see, *inter alia*, Howse *et al*, 2006; Charnovitz *et al*, 2008; Erixon, 2009; Echols, 2009; Swinbank, 2009; Lendle and Schaus, 2010). Moreover a number of papers, written mainly by legal scholars, ponder explicitly the legal possibility of whether biofuels can be treated differently in terms of trade policy instruments, depending on whether they have been produced sustainably or not (see, *inter alia*, Switzer, 2007; De Vera, 2008; Tarasofsky, 2008; Condon, 2009; de Gorter and Just, 2009; Mitchell and Tran, 2009; Switzer and McMahon, 2010).

We do not challenge this legal analysis but instead seek to offer a grounded policy perspective. The key trade policy concern is simple: WTO rules and case law suggest that biofuels will not be allowed to have differential policy treatment based on the sustainability of production methods. The focus thus shifts to ensuring that sustainability criteria (principally on the import/consumption side) and certification systems (principally on the export/production side) are compatible both with each other and with WTO rules and precepts. We argue that the core principles of the General Agreement on Tariffs and Trade (GATT) apply to biofuels and that the Technical Barriers to Trade Agreement (TBTA) offers guidance to the establishment of WTO-compatible criteria and certification systems. This does not eliminate the possibility of challenges against ESC, but following certain clear rules can help reduce the chances of a challenge occurring.

The paper, first, outlines EU ESC. Second, we highlight the principal GATT articles relevant to ESC and consider how potential trade problems –and thus possible actions at the WTO – can be avoided. Third, we consider how the development of ESC in an international setting, in accordance with principles laid down in WTO Agreements, creates wider synergies that can enhance international biofuels trade further. Ultimately, biofuels are subject to the broad principles and detailed rules of the WTO. Also, whilst the options for ensuring the WTO-compliance of ESC are limited, they

do exist; moreover the lack of options helps present the feasible alternatives more clearly.

## **2. EU Biofuels Environmental Sustainability Criteria – An Introduction**

In this section we outline the principal features of the EU biofuels environmental sustainability criteria (ESC). It is beyond the scope of the present paper to discuss in detail the history and evolution of these criteria. For further details see, *inter alia*, the 2003 Biofuels Directive;<sup>1</sup> Commission of the European Communities, 2005; Commission of the European Communities, 2007; the Explanatory Memorandum to Commission of the European Communities, 2008a; and Commission of the European Communities, 2008b.

The current EU sustainability criteria were introduced simultaneously into two pieces of legislation in 2009, as Article 17 of the Renewable Energy Directive (RED) and Article 7(b) of the (revised) Fuel Quality Directive (FQD),<sup>2</sup> compliance with which is required to ensure the biofuels count towards national and EU targets and eligibility for financial assistance. First, biofuels must deliver greenhouse gas (GHG) emissions reductions over fossil fuels – of at least 35% initially (or from 2013 if the production facility was operating before 2008); at least 50% for 2017. From 2018, biofuels produced in plants which began production in 2017 must deliver savings of at least 60%. Details are provided in the legislation regarding how to calculate these GHG emissions reductions.

Second, biofuels feedstock production cannot occur on certain types of land with a specific function or status before 2008. Lands excluded for biodiversity reasons are:

- primary forests and woods, undisturbed or lacking “visible” human activity;

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<sup>1</sup> Directive 2003/30/EC of 8 May 2003 on the Promotion of the Use of Biofuels or Other Renewable Fuels for Transport. Official Journal of the European Union L123, 17.5.2003, pp. 42-46.

<sup>2</sup> Respectively, Directive 2009/28/EC of 23 April 2009 on the Promotion and the use of Energy from Renewable Sources... Official Journal of the European Union L140, 5.6.2009, pp. 16-62; Directive 2009/30/EC of 23 April 2009 Amending Directive 98/70/EC as Regards the Specification of Petrol, Diesel and Gas-Oil and Introducing a Mechanism to Monitor and Reduce Greenhouse Gas Emissions.... Official Journal of the European Union L140, 17.5.2003, pp. 88-113.

- land protected under law, international or inter-governmental agreement (unless feedstock production did not compromise the nature-protection goals);
- highly biodiverse grassland (except, for “non-natural” grassland, if biofuel feedstock harvesting is required for grassland status to be maintained). NB By the end of 2010, the Commission had still to produce a definition of highly biodiverse grassland.

A second set of exclusions affect certain types of land, where carbon would be released if disturbed by feedstock production:

- wetlands;
- continuously forested area;
- undrained peatland (unless feedstock production and harvesting does not require the land to be drained).

In addition, and important for the WTO context, these criteria apply to all feedstocks sourced within and outside the EU. Also, member states cannot impose additional and more stringent requirements than these. Furthermore, in the two-yearly reports to be submitted by the Commission from 2012, reference shall be made to whether or not countries that are a significant source of feedstocks (again, inside and outside the EU), have implemented a range of International Labour Organisation Conventions, the Cartagena Protocol on Biosafety and the Convention on International Trade in Endangered Species of Wild Fauna and Flora. As discussed further below, it is significant that whilst social criteria are a compulsory part of the reporting process, they are not part of the formal criteria which define biofuels sustainability.

EU criteria thus identify specific land and production types, target GHG emissions reductions, and make the receipt of economic benefits (notably direct or indirect government support) conditional on compliance with the criteria and benchmark international agreements. Production from older plants must deliver on GHG emissions reductions targets after a few years; and the criteria apply equally to imported and domestically-produced biofuels.

### **3. WTO Trade Concerns**

The principal concern of the present paper is the extent to which sustainability criteria are consistent with WTO rules. With biofuels production and trade being so new,

there is very little direct legal or case evidence to work on, although general WTO legal principles, tested via non-biofuels case law, can be drawn upon for guidance. Implicit in this is the assumption that biofuels will not be treated differently to other goods in the WTO. This brings us to the first issue: currently, there is no distinct Harmonised Commodity Description and Coding System (HS) classification for either ethanol or biodiesel. Ethanol is classified under HS Chapter 22 (“beverages, spirits and vinegar”), which falls under the Agreement on Agriculture (AoA) – although, as Howse *et al* (2006: 11-12) point out, if the WTO Members so wished, they could exclude ethanol from the AoA by an appropriate listing in the Annex. Biodiesel, meanwhile, falls under HS Chapter 38 (“miscellaneous chemical products”). It is beyond the scope of the present paper to explore the implications of this in detail; see, *inter alia*, Howse *et al*, 2006; Condon, 2009; Harmer, 2009; Le Roy *et al*, 2009; Swinbank, 2009; Switzer and McMahon, 2010. It is worth noting that in neither case are the biofuels identified separately from other products under those headings. Moreover, for ethanol this is complicated further because of sub-divisions into either undenatured ethyl alcohol or various types of denatured ethyl alcohol.

The WTO rules and principles relevant to biofuels ESC are as for any other commodity. Most Favoured Nation (MFN), non-discrimination and national treatment all apply, as do the uses of key policy instruments, notably customs duties (GATT Article II), internal taxation (Article III), quantitative restrictions (Article XI), or domestic subsidies (The Subsidies and Countervailing Measures Agreement, SCM – see Harmer, 2009, for details). Another option, not considered further here, could be to subsidise overseas production as part of development assistance, which could offer almost unlimited policy freedom. Whilst biofuels production, usage and trade give rise to a wide range of WTO-compatibility concerns (see, for example, Swinbank, 2009), the design and implementation of sustainability criteria lead us to focus on GATT Article III, “National Treatment on Internal Taxation and Regulation”. Whilst Article XI might be considered relevant, we note that “the interpretative Note Ad Article III stat[es] that, *when a domestic measure applies both to domestic and imported products*, it is Article III [as opposed to Article XI] that is applicable.” (Tarasofsky, 2008: 8, emphasis added). Thus so long as sustainability criteria set facially-neutral obligations on all biofuels production regardless of source, Article III is appropriate.

A key question is whether countries can treat biofuels differently in trade policy terms, depending on whether they have been produced ‘sustainably’ or not. Article III introduces the concept of ‘like’ products, requiring that regardless of origin, imported products cannot be treated less favourably than domestically-produced like products. This does not, however, require identical treatment (for example in terms of policy instruments used), a point returned to later. Condon (2009: 906ff) makes it clear how important the concept of product likeness is to the functioning of the GATT Agreement, as it is central to the principle of non-discrimination. The Appellate Body (AB) in the EC-Asbestos case referred to a 1970 GATT Working Party Report to identify four criteria that, whilst “neither treaty mandated nor a closed list of criteria” help establish product likeness (Condon, 2009: 906. See also Switzer, 2007: 36):

- Sharing physical properties, nature or quality
- Serving the same or similar end-uses
- Whether consumers perceive or treat the products as serving the same or similar end uses
- Sharing the same international tariff classification

All four factors, explicitly or implicitly, refer to demand-side factors. The fourth factor is, as discussed, not without problems, but in terms of ‘ethanol’, ‘biodiesel’, etc is a useful indication of closeness within a product classification. The other three refer to intrinsic features and consumption-related characteristics; there is nothing here that supports a definition of product likeness based on Processing and Production Methods (PPMs). In an earlier GATT case, tuna-dolphin, (ruled on in 1994 but not adopted; see, *inter alia*, de Vera, 2008: 673-674 for details), the ruling went against *unilateral* US import restrictions (based on whether tuna were caught using dolphin-friendly techniques or not). The Panel argued that like products should be defined only by the products themselves, not PPMs (see Condon, 2009: 908).

A subsequent case, shrimp-turtle, “suggests that WTO jurisprudence may be more amenable to considerations of sustainable development” (de Vera, 2008: 673) than earlier GATT rulings, suggesting there may be a role for production-related criteria in the definition of product likeness, at least insofar as they relate to sustainable

development. The US issued licenses for imports of shrimp only if they were caught using methods that did not endanger sea turtles. Although the AB ruled against this measure, it was not because it was unilateral but because the measure “was applied in an arbitrarily discriminatory way.” (de Vera, 2008: 674). We consider the question of arbitrary and discriminatory measures at greater length below.

Is it conceivable that the third criterion, consumer preferences – including consumer perceptions – can allow for biofuels to be treated as unlike, based on whether they were produced sustainably or not? We argue there are two distinct reasons why WTO rules are unlikely to sanction such a policy distinction. The first is that both case law and WTO principles point this way. To use an analogy in the context of environmental concerns, such a reading of WTO rules would allow countries to impose barriers against any imports whose production methods (including energy generation) had relatively high GHG emissions (for example from older coal-fired power stations). For such an approach to be sanctioned by the WTO, they would also have to go against current practice, making policy decisions over countries’ internal choices of production methods, sources of comparative advantage, and so on.

The second is more practical in nature and represents a potential Catch 22 situation: consumers need access to all types of biofuel to be able to express a preference freely, but governments may wish to exclude certain types of biofuel on the basis of actual or claimed consumer preference. Moreover, it would have implications for private sector firms working with such legislation (for example car-makers who produce vehicles capable of running on ethanol or biodiesel blends). The 1981 Spanish Coffee case under the GATT left open the possibility that revealed consumer preferences may permit differential treatment of goods based on production methods; but the ruling on EC-Sardines made it clear that policy-makers must avoid introducing measures based on consumer preferences that have been manipulated. Ultimately, any Panel or AB would have to determine likeness case by case; thus limiting any potential for *ex ante* learning by policy-makers from existing case law in the design of policies for other commodities (Charnowitz *et al*, 2008: 10; for more on consumer preferences and product likeness see, *inter alia*, Cheyne, 2009; Switzer and McMahon, 2010).

The foregoing leads us to conclude that biofuels ESC will be subject to GATT Article III. Given this, however, might it be possible to identify “General Exemptions” using GATT Article XX (see, for example, the AB ruling in the shrimp-turtle case)? Article XX offers ten exemptions to the GATT rules, so long as 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, or a disguised restriction on international trade”. Two exemptions in particular feature in analyses of biofuels policies. Article XXb identifies measures “necessary to protect human, animal or plant life or health”; Article XXg identifies measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”. In this paper, we focus on Article XXg, as case law indicates Article XXb applies principally to domestic concerns (as used, *inter alia*, in relation to clean air and to Brazil’s environment). Article XXg does not apply to cross-border measures automatically, but by referring to “domestic” production and consumption, a distinction is drawn with production and/or consumption in other countries (see also Condon, 2009: 918).<sup>3</sup>

Important for the debate over sustainability, moreover, Article XXg is a ‘conserving’ paragraph, a means of conserving exhaustible natural resources. This suggests that ESC also need to be clear on what is being conserved, if Article XXg is to be used as a defence against any possible WTO challenge. EU criteria refer to certain land types and biodiversity. One could even argue that by producing renewable fuels to substitute for fossil fuels, countries were seeking to conserve finite and depleting reserves of the latter “exhaustible natural resources”. Ultimately, we suggest the success of an Article XX exemption for biofuels ESC would rest on those criteria addressing directly the ‘conserving’ agenda of Article XXg. An important aspect to this was raised by the AB report on the shrimp-turtle case, where it was argued that the meaning of “natural resources” is “by definition, evolutionary”, based on “contemporary concerns of the community of nations about the protection and conservation of the environment” (quoted in Condon, 2009: 912). How this might affect any dispute featuring Article XXg, however, as yet remains untested.

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<sup>3</sup> An issue for future research is whether this domestic/international distinction will begin to break down if domestic activities are seen to affect human health and biosystems internationally.

#### **4. The TBT Agreement: What to do or how to do it?**

Another WTO Agreement relevant to biofuels is the Technical Barriers to Trade Agreement, TBTA (see, *inter alia*, Howse *et al*, 2006; Switzer, 2007; Charnowitz *et al*, 2008; Condon, 2009). The TBTA seeks to strike a balance between, on the one hand, countries' rights to protect, *inter alia*, human, animal and plant life and health, and security interests, alongside the need to develop technical regulations and standards; with, on the other hand, the basic trade principles of the GATT (the Preamble to the TBTA states it seeks "to further the objectives of the GATT"). With biofuels, technical specifications are essential, not only to facilitate trade but, more fundamentally, to ensure they function as transport fuels. In the present paper we shall discuss two aspects of the TBTA. First, we shall consider briefly the features of goods such as biofuels, as traded commodities under the GATT. Second we explore in detail what the TBTA says about how to establish international standards agreements.

It was argued above that the criteria used for determining product likeness focus on demand-side features. Paragraph 1 of Annex 1 to the TBTA, however, defines a Technical Regulation as one "which lays down product characteristics or their related processes and production methods, with which compliance is mandatory". This suggests a product's PPMs have the same standing as the nature of the good itself. Furthermore, in several cases, such as Japan-Alcoholic Beverages and EC-Asbestos, "the physical characteristics of a good *are only one* consideration to the determination as to whether products are 'like'." Switzer (2007: 36-37, emphasis in original).

The Uruguay Round was negotiated as a Single Undertaking, a notion which applies also to the implementation of the different Agreements. It cannot be inferred that a policy referring to PPMs complies automatically with the GATT, as the latter does not contain that concept; but the Preamble to the TBTA establishes not only the role of furthering the objectives of the GATT, but also protecting the environment and human, animal or plant life or health (repeating goals for GATT Article XX). It also repeats a critical element from the chapeau to Article XX, demanding that the measures implemented avoid arbitrary or unjustifiable discrimination between countries; and avoid hidden trade barriers (Article 2 of the TBTA additionally reinforces non-discrimination and national treatment). This repetition and

reinforcement of key GATT principles leads us to identify what we consider as the key role of the TBTA for biofuels ESC: the guidance it offers over how to establish criteria that avoid arbitrary and unjustifiable discrimination and avoid hidden trade barriers. In short, GATT 1994 tells us what can and cannot be done; the TBTA provides guidance about how to establish ESC.

Article 2.1 of the TBTA requires that “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country”. The phrase “no less favourable” does not mean, however, that treatment must be identical (Howse *et al*, 2006: 24). Equivalence of effect means countries should cooperate and be open about detailed criteria (see below). Switzer (2007: 37) argues, following the EC-biotech case, differential treatment can avoid falling foul of this aspect of law if “unfavourable treatment to imported products...can be explained by ‘factors or circumstances’ unrelated to origin...[Thus] a measure which differentiates between otherwise ‘like’ products on the basis of their GHG emission reduction levels may not necessarily result in a finding of less favourable treatment if the conduct can be explained by reasons unrelated to origin.” That said, Paragraph I of Annex 3 to the TBTA (the “Code of Good Practice” for standard-setting) requires that, “[w]herever appropriate, the standardizing body shall specify standards based on product requirements in terms of performance rather than design or descriptive characteristics”, which again emphasises demand-side features of biofuels.

An important feature of the TBTA is that it promotes the use of “international standards and conformity assessment systems” in developing technical regulations and standards. Article 2.5 states that regulations introduced for a legitimate reason and which accord with international standards “shall be rebuttably presumed not to create an unnecessary obstacle to international trade.” On the other hand where international standards do not exist, if the proposed standard differs from existing international standards, or if those existing standards “may have a significant effect on trade of other Members”, not only can a Member propose a standard itself, but the TBTA gives clear guidance as to how it should do so. Article 2.9 details an open process which gives other Members opportunities to engage in the standard-setting process,

whilst Article 2.12 requires that a reasonable period of time be left between agreement and implementation of standards, to give exporting Members – especially developing countries – time to adapt to them.

Thus the TBTA promotes the use of existing international standards, permits Members to establish new standards where appropriate international standards do not exist, and requires that process to be conducted in an open and multilateral way. This, to quote both GATT Article XX and the TBTA, should ensure the agreed standard avoids “arbitrary or unjustifiable discrimination”. Furthermore, if the (importing) country setting the standard has engaged with other Members fully and openly, the chances those same Members will then bring an action against those standards are greatly reduced. Swinbank (2009: 499), referring to the AB ruling in the shrimp-turtle case argues regarding EU sustainability criteria, that “the EU would need to show it has engaged in meaningful negotiations with its main suppliers to determine credible environmental sustainability criteria”. We argue that the approach set down in the TBTA reduces the chances of the EU finding it needed to do that in the first place.

As a footnote to this part of the discussion on the TBTA, it is interesting to note Article 2.7, which states that “Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.” This is similar to the EU principle of mutual recognition, a keystone of the SEM. There is thus scope for different WTO members’ legislation delivering regulatory equivalence, which avoids the considerable negotiating costs of regulatory harmonisation. The EU precedent also gives mutual recognition significantly stronger legal underpinnings than the WTO DSP; whilst re-emphasising the benefits of a multilateral approach to standards-setting.

Sustainability standards set, currently, by developed country importers, must then be respected by exporters, many of whom will be developing or emerging economies. Again, this refers to how something should be done as much as what it is to be done, therefore the TBTA is an important reference point. It has already been noted that the TBTA supports an open and collective process for the setting of standards. Another feature is that whilst its principal focus is the work of WTO Members (in particular

the “Central Government Bodies” of Article 2), there is explicit scope for non-governmental organisation (NGO) involvement in standard-setting.

With biofuels, relevant NGOs working on standards and certification include the feedstock-specific Better Sugarcane Initiative (BSI), the Roundtable on Sustainable Palm Oil (RSPO) and the Roundtable on Responsible Soy Association (RTRS), whilst there is also a Roundtable on Sustainable Biofuel (RSB) which covers all biofuel feedstocks. The TBTA, first, makes explicit reference to the active role NGOs can play. Second, these NGOs operate in an open and transparent manner consistent with the principles underpinning the TBTA. Moreover, these representative bodies include (non-governmental) representation from all the relevant producing countries, thus ensuring breadth of participation which links all the way back to individual producers. They also ensure a direct process link between NGOs and WTO Members (for a wider discussion see, *inter alia*, Tallontire and Blowfield, 2000; Bernstein and Hannah, 2008; Brassett *et al*, 2010). This is exemplified by the BSI, whose current Production Standard is being assessed by the European Commission to determine compliance with EU standards. The general BSI Standard contains five core principles, sub-divided into multiple indicators. For the “BSI EU”, a sixth category has been added, containing two further indicators to seek to ensure full compliance with the EU ESC.

## **5. Evidence on the Negotiation and Implementation of Sustainability Standards**

Interviews have revealed that the EU criteria were designed with WTO concerns expressly in mind. There was an initial period of consultation; the implementation and reporting rules apply equally to all biofuels, regardless of source; the criteria draw a sharp distinction between those elements which are compulsory and those which are not; and a range of international agreements are drawn upon, with respect to both the compulsory and voluntary reporting components of the criteria, and the criteria reflect the conserving agenda of Article XXg.<sup>4</sup> Moreover, EU rules prevent member states

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<sup>4</sup> An early draft version of a document setting out detailed implementing rules for EU sustainability criteria, leaked in February 2010, included text that suggested palm oil plantations could be defined as ‘forests’ and thus be deemed sustainable, if they formed part of a ‘continuously forested area’. The

adding further criteria, which will ensure that if the EU criteria are WTO-compatible, they will remain so when implemented by the member states (see Swinbank, 2009). Member states must produce National Action Plans to show how they will deliver on the sustainability criteria (Switzer and McMahon, 2010: 6), which provides a checkpoint for monitoring this.

Labour standards are mentioned in the EU ESC, but are not imposed on producers as a pre-condition for sustainability. Some authors (notably Charnowitz *et al*, 2008) have argued labour standards can be designed and implemented in ways consistent with WTO rules. Whilst the European Parliament supported compulsory labour standards, it was felt within the Commission that such rules would overstep some peoples' 'red lines' and thus would almost certainly trigger an action in the WTO. Instead, reporting requirements will enable examples of good practice to be highlighted (in a manner familiar to the Commission in its information gathering and dissemination role on EU social policies, undertaken as part of the Open Method of Coordination).

That said, problems remain with the EU ESC. They were put in place before key concepts were defined, for example 'highly biodiverse grassland. Second, whilst the default values for GHG emissions savings from different feedstocks published in the RED can be replaced with actual values, it may be both difficult and costly for developing countries in particular to do so. A further problem – of which the EU standards are only one contributory part – is the global proliferation of sustainability standards (Desplechin, 2010) – a problem which further strengthens the need for and benefit to be gained from multilateral negotiation. Finally, even though mutual recognition of standards has advantages, the equivalence of different standards and rules may still be difficult and costly to determine.

A second example of the sustainability process in action comes from developments through 2010 concerning the certification of palm oil production by the Roundtable on Sustainable Palm Oil (RSPO). First, Unilever announced it would buy only RSPO-certified palm oil by 2015. Second, the Dutch government presented a manifesto,

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offending text was removed from the final published version, although it is not known if that removal was in response to the leak and subsequent furore, or as a result of normal internal discussion.

signed by all the suppliers and purchasers of palm oil, to trade only RSPO-certified palm oil in The Netherlands by 2015. Agreements such as this are important for such schemes, as they indicate such certification is both commercially relevant and practical to implement. They also render moot issues surrounding the expression of consumers' preferences. It should, however, be recognised that both campaign groups and RSPO members acknowledge their certification scheme cannot yet be taken as a cast-iron guarantee of sustainability of source. It is, however, an important step towards sustainable production, which also creates synergies that can facilitate the further development of trade in such commodities.

As a footnote to this, Annex I of the TBTA confirms that “This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.” This distinction is potentially important as voluntary schemes do not have to be notified to the WTO. Interviews have revealed that the Brazilian government, for example, is taking a hands-off approach to such schemes, but monitors them very carefully to ensure WTO rules are not violated in their implementation, to the disadvantage of Brazilian producers and exporters. Note also that, from the users' perspective, EU rules do not prevent the import of biofuels produced unsustainably; but such biofuels would not count towards blenders' or countries' usage or GHG emissions-reductions targets).

Thus, to return to a question posed at the beginning of this paper, biofuels and their related ESC are mutually constitutive, created by a common set of public policies. The traditional trade liberalising logic of the WTO, in one sense, cannot apply because there is no unliberalised market to liberalise. Instead, with universal extant rules and principles to draw upon, the policies which apply to the features of this commodity, such as ESC, must set up as WTO-compatible *ab initio*. We have argued that the WTO Agreements themselves give clear steer on how to do this. Several interviewees commented about policy uncertainty created by the lack of case law to

draw upon. We would argue that the emergence of case law in this area would merely indicate policy-makers failed to follow WTO guidance.

## **6. Conclusions**

A key motivation for environmental sustainability criteria (ESC) is to ensure that biofuels embody clear environmental benefits, especially regarding GHG emissions reductions, compared with the fossil-fuel based transport fuels they are, in part, replacing. Questions have been raised about the WTO-compatibility of these schemes. In this paper we argue that WTO rules apply to biofuels as to any traded commodity, with a number of important policy relevant conclusions as a corollary.

First, we consider it highly unlikely that biofuels can be declared ‘unlike’, depending on whether they were produced sustainably or not. This means that ESC are subject to GATT Article III. Thus a product’s Processing and Production Methods (PPMs) are unlikely to be considered relevant for defining product likeness; a conclusion which applies, *a fortiori*, to non-product related PPMs.

Second, if Article III applies, a WTO Member seeking to treat traded biofuels differently based on the sustainability of production, Article XXg would be the key reference-point for a General Exemption, subject to conformity with the principles of national treatment and non-discrimination. Furthermore, under Article XX no measure could represent “arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on trade”.

Third, whilst the GATT sets out what can and cannot be done, the TBTA offers clear guidance on how to do it. Specifically, the TBTA provides guidance about how to avoid measures which are, or could be deemed, arbitrary and unjustifiable. Key features of the TBTA are that imports and domestic production must be treated in an equivalent fashion (but not necessarily in an identical manner); that the process of drawing up standards should, where possible, draw on existing international standards and agreements or, if that is not possible or appropriate, involve other countries openly and actively in drawing up and implementing new standards. Not only does this approach respect explicit TBTA provisions; in practical terms it makes it less

likely one of those participating Members will subsequently bring an action against those sustainability criteria.

We have argued that EU standards have been drawn up with WTO rules in mind. Furthermore, there is clear evidence that multilateral bodies such as the RSPO and BSI, have prepared producer certification systems to comply with importing countries' sustainability criteria, with the latter's "BSI EU" standard being considered by the European Commission for its compatibility with EU ESC. In the case of the RSPO, a further boost has come, first, from Unilever pursuing a goal of purchasing only RSPO-certified palm oil; and, second, a goal coordinated by the Dutch government to make all palm oil and related products on the Dutch market from RSPO-certified sources, both by 2015. That said, some exporting countries continue to monitor closely the implementation of sustainability criteria by importing countries, to ensure continued conformity with WTO rules.

Appropriate to the dynamic nature of the biofuels market, the TBTA recognises the non-stationary nature of policy when it makes clear that standard-setting must (but also can only) take account of *available* scientific and technical information (Article 2.2, emphasis added). This also requires a dynamic approach be taken to the interpretation and monitoring of ESC in the context of WTO compliance. In a recent speech to the 2010 World Energy Congress, Pascal Lamy (Lamy, 2010) picked up the Congress's theme of the Three A's – Access, Availability and *Acceptability* (emphasis added). He also spoke of a "more sophisticated WTO rule-book". In the context of a successful conclusion to the Doha Development Agenda, the draft text of which includes a call for the liberalisation of environmental goods and services (EGS), Lamy's speech reflects a pattern discernible in some of the cases discussed. There are ongoing efforts to incorporate environmental goods and environmental concerns more fully and explicitly into the WTO Agreements. It is important to recognise that the general rules and precepts of the WTO apply to such goods as biofuels; but also recognise that those rules tell policy-makers what to do and how to seek to ensure such policies are WTO-consistent.

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