

A note summarising expert legal opinion received by Oxfam pertaining to EU biofuel policy on social standards and WTO compliance

Executive Summary

It has been argued that the inclusion of social criteria within the EU's biofuel sustainability scheme is incompatible with WTO law. This note questions that view and provides details on how measures to protect human and labour rights in the production of biofuels may be justified.

Both the GATT and the TBT Agreement offer a number of possibilities for the EU to implement social PPM-based measures such as product standards based on existing human and labour rights.

It has also been argued that incorporating social criteria into a certification scheme will present too great an administrative burden. This is however not borne out by the experience of other sustainability schemes.

Introduction

The Council of the European Union as stipulated that the target of replacing 10% of transport energy with biofuels by 2020 must be reached sustainably. In its legislative proposal for the Renewable Energy Directive, the Commission interpreted this as including only environmental sustainability, however, this contradicts the more widely accepted definition of sustainability derived from the Brundtland Commission as encompassing social, economic and environmental pillars.

The Commission has argued that the inclusion of social sustainability criteria is impossible because a) it is incompatible with WTO law. This note explores this argument, and concludes that although there has been no specific jurisprudence on WTO members' ability to enact trade measures aimed at regulating labour or human rights standards associated with production of a particular product ("social PPM-based measures"), several WTO panel and Appellate Body decisions interpreting relevant WTO texts do indicate that countries may enact social PPM-based measures without violating WTO law.

Two WTO agreements are particularly relevant to the issue of social PPM-based measures:

1. the General Agreement on Tariffs and Trade ("GATT")
2. the Agreement on Technical Barriers to Trade ("TBT Agreement")

We consider each below.

"Like products" and non-discrimination under the GATT

Under the GATT, members have non-discrimination obligations which prevent them from treating products of foreign members less favourably than "like products" produced domestically or imported from other foreign members. It is often argued that all biofuels would likely be determined as "like" – given that they compete in

purely economic terms -- therefore making any difference in treatment between them illegal. Yet, the Appellate Body has conceded that consumer preferences can make products “unlike”. Hence, if European consumers make a distinction between sustainable and non-sustainable biofuels, these biofuels could be seen as “unlike”, thereby making any distinction between types of biofuels in an EC directive non-discriminatory (since differentiating between products that are not “like” in the first place). Moreover, even if all biofuels are considered “like”, that does not mean that a social PPM-based measure discriminating between biofuels will violate a member’s non-discrimination obligations: several WTO decisions have made clear that *different* treatment of “like products” does not necessarily constitute *nationality-based discrimination that is prohibited* under the GATT. Importantly, especially where “the differences in treatment derive from norms, criteria and methods widely accepted in the international community and which have been developed through broad consultation among diverse states, and take into account the variety of conditions in different countries, it should be considerably more difficult for the complainant to establish that there is an overall bias against imports as a group” in violation of the GATT.ⁱ Thus, if a social PPM-based measure is based on standards such as those developed by the International Labour Organization – an organization with nearly 180 developed and developing country members – and applied uniformly to domestic and foreign biofuel products, the argument could be made that such measure will not be found to violate the GATT’s non-discrimination obligations. Finally, even if a measure is found to be discriminatory in violation of the GATT, the measure might be justified under the GATT’s exceptions clauses.

The GATT and exception clauses

WTO case law holds that measures that differentiate products based on how they were produced are not *per se* prohibited under the GATT. This was made clear in the *US-Shrimp Turtle* case where the Appellate Body ultimately upheld a measure that banned the import of shrimp caught in a way that harmed sea turtlesⁱⁱ. The measure in question was ultimately justified under the GATT’s general exceptions clauses.

These clauses are set out in Article XX of the GATT, under which it is possible for members to implement measures that, among other things, discriminate between “like products”.

Article XX(a)

This clause permits measures “necessary to protect public morals”. The EU could argue that social standards are necessary to protect the “public morals” of its population by preventing the violation of human rights and labour rights offensive to its morality. A recent WTO decision in *US – Gambling*ⁱⁱⁱ interpreted the “public morals” exception broadly, and instructed that when assessing whether that exception will cover a particular measure, panels should be (1) sensitive to restricting members’ policy space and discretion to develop their own concepts of “public morals,” and (2) recognize that concepts of “public morals” are varied and evolving. The decision also notes that practices of other countries can be used to evidence what properly falls within the concept of “public morals”. Given the apparent flexibility of the “public morals” exception, and the universal recognition of certain human rights and labour rights that would be relevant to analysis of other countries’ practices, a country could

quite possibly defend its social PPM-based measures under Article XX(a) of the GATT.

Indeed, the Commission appears to be well aware of this exception and is using it to justify its measures regarding biodiversity. Paragraph 39 of the preamble to the Renewable Energy Directive states that “the consumers in the Community would find it morally unacceptable that their increased use of biofuels could have the effect of destroying biodiverse lands.” There is an even stronger argument that their increased use of biofuels could result in slave or child labour for example.

Article XX(b)

This clause permits measures necessary to “protect human, animal or plant life or health.” The EU could therefore seek to justify a social PPM-based measure by arguing that it is in order to protect human life or health. Standards relating to health and safety are obvious candidates here, but it could also be possible to argue that more universal human rights, such as the right to organise and bargain collectively, are also related to improvements in working conditions, health and safety.

There is no language in the text of Article XX(b) limiting it to measures protecting domestic life or health. Moreover, it could be argued that a country is responsible for the impacts upon human and labour rights as a result of its domestic measures outside of its own territory. Although there may be territorial limits linked to the Article XX(b) health exception, a strong argument can be made that when the health and safety conditions reflect globally accepted standards (such as core labour standards), the concern becomes a global commons that affects all countries, including the importing country, thereby giving it the right to regulate at least imports produced in violation of such global standards. By implementing mandatory biofuel targets and necessitating the import of biofuels and biofuel feedstocks from overseas, the EU’s domestic policy impacts upon universal human rights and labour rights outside of its own borders, for which it should take responsibility.

Article XX(d)

This clause permits measures necessary to “secure compliance with laws or regulations...not inconsistent with some provision of the GATT 1994.”^{iv} The preamble to the WTO, of which the GATT is a part, explicitly states that trade should be conducted “in accordance with the objective of sustainable development”, so presumably making social sustainability consistent with the GATT. Therefore the EU could argue that it was implementing a social PPM-based measure to secure compliance with EU legislation on sustainability which is not, as such, in violation of GATT but rather the implementation of EU obligations under existing international human and labour rights conventions.

Furthermore, Article XX(d) allows members to take measures to protect against “deceptive practices”. Because the EU will be labelling relevant biofuels as “sustainable”, which is widely accepted to include social factors, it must apply social PPM-based measures in order to distinguish between sustainable and unsustainable biofuels so as not to deceive European consumers.

Article XX(e)

This clause permits restrictions “relating to the products of prison labour”. When interpreting “prison labour” with reference to core ILO labour standards on, especially, forced labour, this exception would seem to allow the EU to disregard biofuels as non-sustainable when these biofuels were produced under the worst forms of labour conditions.

Justifying a social PPM-based measure under Article XX

The Necessity Test

To satisfy any of those Article XX exceptions discussed above, a country seeking to justify a social PPM-based measure will also have to demonstrate that the measure is “necessary to” achieve the policy objective listed in those exceptions (the one exception being products of prison labor where the nexus is weaker, namely “related to” instead of “necessity”). In order to determine whether a measure is “necessary” to achieving its policy objective, WTO panels examine whether a less trade restrictive measure would also be reasonably available that could achieve the same level of protection. When examining this, WTO panels would likely consider the internationally recognised importance of human rights and labour rights, and thus the importance of the objective. Moreover, as the measure in question will set standards only for those biofuels that will count towards the 10% target through mandatory blending or that may benefit from a national support system, a panel would likely recognise the more limited trade-restrictiveness of the measure and the lesser impact on trade, making it more likely to fulfill the necessity test.

More recently, the Appellate Body in *Brazil – Retreaded Tyres* introduced a new “material contribution” test to determine when a measure will be considered “necessary” under Article XX(b), stating that the “contribution [of the measure] to the achievement of the objective must be material, not merely marginal or insignificant”^v The Appellate Body appears to have left enacting countries significant flexibility to meet this requirement, however, establishing that the “material contribution” did not require that the contribution of the measure to the objective be quantified, but that either a qualitative or quantitative analysis would be acceptable. Thus, this makes it easier for a government to establish, for example (in a qualitative or quantitative manner) that their social PPM-based measures are necessary to protect the social and human rights objectives relating to the protection of workers and other affected communities, to secure compliance with human rights obligations enshrined in its laws and regulations, including in treaties, and the protection of public morals.

In determining the necessity of a PPM-based measure on biofuels, WTO panels might also consider the fact that the setting of biofuels targets will increase trade in biofuels and that any trade restriction through standard-setting must be seen as part of the overall measure to promote the use of biofuels.

Discrimination

Further to the necessity test, any measure must also comply with the introductory clause of Article XX (“the chapeau”). This states that measures may not be applied in a manner that would constitute arbitrary or unjustifiable discrimination or a disguised

restriction on international trade. This suggests that the use of social PPM-based measures which distinguish between biofuels based upon the country of origin, rather than the product, are likely to be highly problematic. WTO case law instructs that a measure will be more likely to satisfy the chapeau if it is enacted in good faith and in conjunction with, or after coordination and/or cooperation efforts. Case law also indicates that measures should be applied in a sufficiently flexible manner to take account of different situations in different exporting countries, and be transparent and procedurally fair.

The TBT Agreement

It is possible that also the TBT Agreement will apply to a social PPM-based measure. The TBT Agreement addresses mandatory and non-mandatory measures based on PPMs, such as standards, certification, labeling etc. In the event that a social PPM-based measure is enacted, challenged and determined to fall under the TBT Agreement, good arguments can be made that such a measure is consistent with that agreement.

To comply with the TBT Agreement, the three main requirements a PPM-based measure must satisfy are that the measure:

1. comply with the member's national treatment and MFN obligations;
2. not be prepared, adopted or applied with a view to or the effect of creating unnecessary obstacles to international trade, and not be more trade-restrictive than necessary to fulfill a legitimate objective; and
3. use relevant international standards where such standards exist or are about to be completed.

The TBT, in Article 2.2, sets out an *open list* of "legitimate objectives" which include the "protection of human health and safety" and "deceptive practices" the relevance of which has already been discussed. However, because the list is an open one, not exhaustive (as is the case with the GATT's Article XX exceptions), it can quite easily be argued that the objectives of protecting human rights and labour rights is a legitimate objective, particularly because the importance of promoting these objectives is recognised in a host of international and national legal texts, as well as the WTO preamble which explicitly refers to "sustainable development".

With respect to the MFN principle, similar issues arise as those described above in the context of GATT, although no WTO panel has interpreted "likeness" in the context of the TBT Agreement.

The requirement that measures not create "unnecessary obstacles to international trade" likely implicates the same considerations as those under the GATT's necessity test. However, unlike the GATT, the TBT Agreement provides that measures shall be presumed *not* to constitute unnecessary obstacles to international trade if they are in accordance with relevant international standards and "prepared, adopted or applied" for "legitimate objectives" explicitly listed in Article 2.2 which as we have argued, include the "protection of human health and safety" and "deceptive practices". According to the panel in EC – Sardines, "international standards" in the context of

the TBT Agreement are “standards that are developed by international bodies.” It can therefore be argued that standards such as those developed by the ILO or other international bodies “whose membership is open to the relevant bodies of at least all members” could be considered as international standards as defined under the TBT Agreement.

Therefore it is possible to argue that measures aimed at restricting imports of biofuels whose production involved the violation of basic and universal human rights and labour rights would presumptively be deemed not to constitute unnecessary obstacles to trade in violation of the TBT Agreement.

The administrative burden of social standards

Another argument offered against the inclusion of social criteria within a biofuel sustainability scheme is that it would represent too heavy an administrative burden. However, given that the Commission is already proposing a mass balance certification scheme for environmental criteria, the inclusion of social criteria alongside this should not be too onerous a requirement.

Experience with sustainability initiatives such as the Roundtable on Sustainable Palm Oil and Forest Stewardship Council demonstrate that social criteria can be translated into measurable and verifiable indicators at the plantation level, audited and allocated to commodities. Indeed, there is very little difference between the administrative burdens involved in having to report against social criteria, as it currently being considered by the Ad-Hoc Working Party on Sustainability Standards, and comply with them.

Conclusion

It has been argued that the inclusion of social criteria within the EU’s biofuel sustainability scheme is impossible because it is incompatible with WTO law.

In reality there is no jurisprudence on which to base this argument, and both the GATT and the TBT Agreement offer a number of possibilities for the EU to implement social PPM-based measures such as product standards based on existing human and labour rights. Ultimately, it is a matter of political will: the EU can choose to live up to its rhetoric on sustainability and the importance of international human rights and ILO conventions if it so wishes – the opportunities to do so within existing WTO architecture are set out here.

It has also been argued that incorporating social criteria into a certification scheme will present too great an administrative burden. This is however not borne out by the experience of other sustainability schemes.

ⁱ International Food & Agricultural Trade Policy Council, *WTO Disciplines and Biofuels: Opportunities and Constraints in the Creation of a Global Marketplace* (Oct. 2006), available at http://www.agritrade.org/Publications/DiscussionPapers/WTO_Disciplines_Biofuels.pdf.

ⁱⁱ Appellate Body Report, *United States – Import Prohibition of Shrimp and Shrimp Products*, WT/DS58/R/AB, and panel report as modified by Appellate Body Report, WT/DS58/R (Nov. 6, 1998); Appellate Body Report, *United States – Import Prohibition of Shrimp and Shrimp*

Products – Recourse to Article 21.5, WT/DS58/AB/RW and panel report as upheld by Appellate Body Report (Nov. 21, 2001)

ⁱⁱⁱ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004) (hereafter “*US Gambling*, Panel Report”).

^{iv} Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, ¶¶ 67, 68 (March 6, 2006) (hereafter “*Mexico – Soft Drinks*”) (quoting paragraph 157 of the Appellate Body report in *Korea – Various Measures on Beef*).

^v Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R, and panel report as modified by Appellate Body Report, WT/DS332/R (Dec. 17 2007).