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Biofuels assurance schemes and their compatibility with trade law

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- **UK Government intends to implement a renewable fuels transport obligation in April 2008**
- **Under the scheme, supplier of fuels may choose to:**
 - supply eligible renewable fuel to customers and be issued with a renewable transport fuel obligation certificate ("**RTFC**") for each unit of fuel
 - buy RTFCs from another supplier
 - pay a buy-out price
- **The intention is that there will be a reporting requirement on GHG savings and sustainability of biofuels**

- **Purpose of implementing RFTO is to reduce GHG emissions**
- **Increased production of crops could have significant environmental impacts**
- **Need a means of quantifying reduction of GHGs due to specific biofuels**
- **Currently no way of ensuring that the increased production of biofuels does not have an impact on biodiversity in the UK and in developing countries**
- **Developing a mandatory assurance scheme linked to the RTFO one way of reducing risk of negative impacts**

What is an assurance scheme?

- **Assurance schemes have tended to be voluntary schemes which verify through independent auditing processes, whether a farmer is complying with the standards set by the scheme**
- **Large number developed in the UK as a result of customer concerns about quality of food**
- **Members of a scheme can use the scheme's logo or state that the product is produced to certain standards**

- **Any assurance scheme for biofuels would need to have a GHG requirement and also set sustainability standards**
- **Possible GHG requirements that could be implemented are:**
 - a threshold eligibility requirement for the carbon intensity of a fuel
 - issuing of RTFCs to fuel suppliers in proportion to the carbon intensity of the biofuel
 - issuing of "carbon offsets" for any reduction of GHGs
- **All of these require a life-cycle analysis of GHGs reduced compared with a baseline**

Sustainability requirements

- **Possible sustainability requirements could include:**
 - compliance with all laws
 - conserving biodiversity
 - prevention of pollution
 - monitoring and reducing fertiliser and pesticide use
 - management and protection of resources including water and soil conservation/erosion
- **Need an initial baseline audit of current uses of land and identification of species present**
- **Develop a means of measuring improvement against baseline**

Trade law objections

- **Main objections raised to date by the Government is that the implementation of a mandatory assurance scheme would contravene trade rules**
- **Any UK assurance scheme (whether mandatory or voluntary) will need to be designed so that it does not infringe trade law rules or otherwise act as a barrier to trade**

Trade and Environment

- **WTO members agree that protection of health and environment are legitimate policy objectives**
- **Multilateral cooperation through the negotiation of multilateral environmental agreements is seen as the best way for resolving global environmental issues**
- **Environmental measures should be designed in a manner that:**
 - is consistent with WTO rules
 - inclusive
 - takes into account the capabilities of developing countries
 - meets the legitimate objectives of the importing country

Trade law rules

- **Main principles set out in General Agreement on Trade and Tariffs ("GATT")**
- **WTO members are free to adopt national measures provided that they do not discriminate between:**
 - imported and domestically produced like products
 - like products imported from different trading partners
- **Wide consultation in relation to implementation of measures is required**
- **Flexibility in relation to the way producers can comply with any measure is advised**

Trade law rules

- **No extra jurisdictional application of rules or measures – a unilateral measure imposing obligations outside a country's boundary is often found to be discriminatory**
- **Accepted that there is a need to assist developing countries in their process of economic growth through increased market access**

Exceptions

- **If a measure contravenes GATT there are exceptions under Article XX**
- **Article XX(b) deals with measures necessary to protect human, animal or plant life or health**
- **Article XX(g) relates to the conservation of exhaustible natural resources**
- **Even if a measure succeeds under the exceptions it still has to go through the Chapeau tests**
- **Most trade cases relating to environmental issues have not succeeded under the exceptions**

XX(b) test

- **Must meet necessity test:**
 - a causal link between measure and objective pursued
 - no reasonably available less trade restrictive measure exists
- **US-Tuna also found that measures necessary to protect life or health did not include measure taken to force other countries to change policies within their jurisdiction**

XX(g) test

- **"Relating to" requires a national nexus between the measure and its objective – must be real and not remote**
- **Measures must be even-handed – trade measures must be implemented in tandem with comparable measures for the domestic market**
- **The term "natural resources" is not static but evolutionary and can be interpreted to include exhaustible living natural resources**

Preamble/Chapeau test

- **Measures must not be applied in a manner which constitutes:**
 - arbitrary discrimination
 - unjustifiable discrimination or
 - disguised restriction on trade

Other trade law agreements

- **Even if a measure passes GATT tests it may still be caught by other trade agreements such as Technical Barriers to Trade Agreement ("TBT")**
- **TBT seeks to ensure that product specifications whether voluntary or mandatory and any associated assessment procedures do not create unnecessary obstacles to trade**
- **TBT code of good practice for the preparation, adoption and application of standards should be adhered to**

Principles derived from case law

- **US-Shrimp** – a measure which would otherwise contravene trade law may be considered legal where a party is actively involved in ongoing multilateral negotiations ("good faith" exception)
- **Tuna-Dolphin** – a country is only entitled to control production or consumption of exhaustible natural resources to the extent it is within its jurisdiction
- **EC-Asbestos** – scientific evidence was used to show that a particular threshold was more effective

Summary of trade law issues

- **There is no guarantee that an assurance scheme will not be challenged under trade law**
- **Challenges are likely to arise if:**
 - measures do not take into consideration methodologies or standards developed under international regulatory frameworks
 - there is an imposition of standards or requirements on products from other countries unilaterally and without consultation
 - different standards are imposed on "like" products
 - any measures have the effect of creating a barrier to imports

Summary of trade law issues

- measures are inflexible in relation to the means of compliance
- scientific evidence is not available to demonstrate that there is a significant threat to health or life

Application of principles to a GHG and sustainability requirement

- **Any measure to quantify GHG reductions should use methodologies developed under an international regime such as the UNFCCC/Kyoto Protocol**
- **Where possible use sustainability tools developed under international agreements**
- **Consultation should take place with producers at a national level as well as with countries that intend to export biofuels to the UK**
- **Any requirements should essentially be the same for producers outside and within the UK**

Application of principles to a GHG and sustainability requirement

- **However, avoid imposing standards that are UK specific and do not take into account the conditions of countries outside the UK**
- **There should be some flexibility in compliance such as allowing equivalent schemes from other countries to be certified as equivalent to UK standards**
- **Strong scientific evidence should be available that demonstrates that measures of this sort need to be taken to protect life or health – clear for GHG requirement but may be more difficult to prove for other sustainability requirements**

Recommendations for UK assurance scheme

- **In relation to an assurance scheme within the UK we suggest the following possible options:**
 - some mandatory sustainability criteria (that are closely linked to current international regimes) imposed on suppliers of fuels, with the option of extra certificates for suppliers that meet further voluntary requirements
 - fuel suppliers are issued RTFO certificates in proportion to the carbon intensity of the fuel and are also required to produce certificates from the producer and growers of the biofuel that certain sustainability criteria have been met

Recommendations for UK assurance scheme

- design a "carbon offset" project where a "certificate" is issued for every tonne of GHG reduced when compared with an agreed baseline. Other mandatory sustainability requirements could be imposed as part of the scheme. However, double counting would need to be avoided
- could only be implemented as an amendment to the EU emissions trading scheme

Biofuels imported from outside the UK

- **In relation to biofuel imported from outside the UK they could be:**
 - sourced from the clean development mechanism
 - certified under the UK assurance scheme
 - certified to a standard equivalent to the UK scheme
- **An assurance scheme is less likely to be challenged if it can be brought under the EU ETS as a linked standard to an offset project or implemented as a renewable fuel obligation under the Biofuels Directive at the EU level**

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schemes.ppt**



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