



SUSTAINABLE OR GREEN COMMODITY PRODUCTS:

ARE THEY REAL OR A MISNOMER?

This paper looks at what a company may need to consider as part of its development of commodity products that benefit from certain attributes, whether environmental or impact-based and which are accordingly labelled as ‘sustainable’, ‘green’ or ‘carbon neutral’ etc.

We use a neutral term – ‘**Impact Attributed Products**’ to describe such a product. The development of an Impact Attributed Product is a multifaceted process. It requires a deep understanding of consumer/business dynamics (including supply and demand), operational and information/data limitations and the ever-shifting legal and regulatory landscape.

At a glance continued

For instance, even if a company is not selling directly to consumers, to the extent that its downstream customers use or are relying on the 'Impact Attribute' of the product, the downstream customer may place certain obligations on the company. This makes the development of such a product a challenging process. The awareness necessary to navigate the complex web of emerging policies, laws and governance issues that follow from developing Impact Attributed Products is key to avoiding damaging reputation and risking legal liability.

Introduction

In a world increasingly conscious of environmental impact, environmental adjectives or labels such as 'sustainable', 'carbon-neutral', 'low-carbon' or 'green' etc. have attracted a high degree of attention and critical discussion. There is also a growing recognition that it is imperative for the production of commodities and their supply chains (in particular those that are necessary for energy transition such as nickel and biomass¹) to be 'sustainable' or otherwise produced in a manner that is consistent with social, economic and ecological best practices. Commodity products that benefit from such characteristics will often be given an environmental or impact-attributed adjective or label for marketing purposes to distinguish

them from products that do not benefit from such attributes. In-house counsel and commercial teams who are considering the creation or marketing of Impact Attributed Products will need to navigate the legal and regulatory landscape and examine the reality behind this concept before attempting to sell or brand such products to the market.

This paper builds on our earlier paper (in which we discussed sustainable commodities and whether they can justify a 'green premium')² and looks at practical issues and tips that parties should now consider when structuring an Impact Attributed Product so that it is more likely to be considered as being 'real' than a 'misnomer'.

¹ For the purposes of biomass or activities such as BECCS.

² <https://www.hfw.com/in-the-era-of-sustainability-can-commodities-justify-a-green-premium>



What is an 'Impact Attributed Product'?

Before we proceed further, it is important to explain why we have adopted the neutral term 'Impact Attributed' instead of 'sustainable' or 'green' commodity. A particular commodity product may have one or more attendant attributes. Such an attribute may be environmental (e.g., carbon, water consumption, pollution or biodiversity-related) or social (e.g., livelihood-related). The attribute can arise in a number of contexts, including:

- Does having one element or attribute from the list above justify attaching a label to that product?
- If one is not enough, then how many would justify doing so?

Generic terms, used for marketing purposes, such as 'green' or 'sustainable' never used to be regulated because there has not been a universally accepted position that determines whether a particular product's attributes must meet a common standard or minimum criteria (e.g., a minimum threshold of water remediation that has to be done before a producer can defend the product when it asserts that the product has the 'water remediation' attribute). However, that is now changing.

Why Develop an Impact Attributed Product?

In an age when environmental consciousness is high and there is an increasing push for sustainable practices, creating commodity products with environmental or impact attributes has become a growing imperative for businesses. For instance, academics and writers have asserted that incorporating sustainability practices improves a company's brand image and business reputation.⁴ Further, businesses that dedicate themselves to the production or development of sustainable commodities may stand

Element	Comment
Inputs	<p>The attributes of the inputs that go into the production of the product, e.g.:</p> <ul style="list-style-type: none"> • in the context of biofuels, the attributes of the feedstock (such as soy),³ including where it was grown, the GHG emissions of the feedstock and pesticides used etc. • in the context of steel, the attributes of the iron ore, limestone, coal or natural gas/biogas used as part of production.
Source	<p>Where the product is extracted or produced, e.g.:</p> <ul style="list-style-type: none"> • not in a conflict-affected or high-risk areas • from lands that do not involve the destruction of natural habitats or those of cultural importance
Production Process	<p>How the product is extracted or produced, e.g.:</p> <ul style="list-style-type: none"> • in the context of extracting nickel: <ul style="list-style-type: none"> – use of renewable energy – water remediation • in the context of growing soybeans: <ul style="list-style-type: none"> – level of associated deforestation – labour conditions – community relations
Post-Use Recoverability and Reusability	<ul style="list-style-type: none"> • How the product can be re-used, recovered or recycled • Is it part of a circular economy?

out favourably in a market which increasingly prioritises products that are environmentally and socially responsible.⁵ This, in turn, fosters customer loyalty and trust, creating a competitive advantage in an ever-evolving business landscape.⁶

In addition, the production or development of commodity products with impact attributes aligns with regulatory trends and evolving consumer expectations. Governments worldwide are enacting stricter environmental regulations, and consumers are demanding both ethical practices and transparency

throughout the supply chain. By proactively adopting sustainable practices, companies are aiming to position themselves as responsible corporate citizens thereby aligning themselves with these trends and expectations. Further, sustainable commodity production may lead to operational efficiencies, cost savings, and resilience in the face of future regulatory changes. Companies that invest in sustainable practices today not only contribute to environmental and social well-being but may also future proof their businesses in a rapidly changing and environmentally conscious market.

³ For the purposes of biomass or activities such as BECCS.

⁴ See e.g., Lucia Sujanska & Margareta Nadanyiova, "Sustainable Marketing and its Impact on the Image of the Company" (2023) 2 Marketing and Management of Innovations 51: https://mmi.sumdu.edu.ua/wp-content/uploads/2023/07/A689-2023_06_Sujanska-et-al-3.pdf

⁵ See e.g., Mia Pei "Apac consumers willing to pay more for sustainable products, but large-scale solutions still lacking: Deloitte" (11 September 2023) The Business Times: <https://www.businesstimes.com.sg/esg/apac-consumers-willing-pay-more-sustainable-products-large-scale-solutions-still-lacking>

⁶ See e.g., Katharina Biely & Steven van Passel "Market power and sustainability: a new research agenda" (2022) 3 Discover Sustainability 5 at 4.1: <https://doi.org/10.1007/s43621-022-00073-y>; in the context of the electric vehicle sector in China, see Yanping Gong, Jun Xiao, Xiuyuan Tang & Jinglu Li "How sustainable marketing influences the customer engagement and sustainable purchase intention? The moderating role of corporate social responsibility" (2023) 14 Frontiers in Psychology 1128686. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10053499/>

How NOT to Develop an Impact Attributed Product

That said, creating an ‘Impact Attributed Product’ that is ‘real’ and not a ‘misnomer’ requires a person to potentially act consciously or with awareness, i.e. so as to be able to deflect any potential allegations of greenwashing, misrepresentation, misstatement or even fraud.

The producer or developer of an Impact Attributed Product must watch out for the potential litigant at the door. Companies are increasingly being accused of greenwashing (often associated with deceptive marketing practices

or exaggerating or falsely claiming environmental benefits). The producer or developer of the Impact Attributed Product may face legal or regulatory challenges related to false advertising, breach of contract, or regulatory non-compliance.

A well-designed Impact Attributed Product would employ strategies, including risk assessments, contractual safeguards, and compliance audits, to mitigate against risks and safeguard the reputation and financial interests of the producer or developer of a product. The biggest challenge is often not knowing what you do not know. This is because, business are

operating in an ever-evolving and ever-changing landscape where new terms like ‘greenwashing’, ‘CSRwashing’, ‘bluewashing’, ‘carewashing’ and ‘greenhushing’⁷ are invented every other day. It is difficult for companies (including their legal practitioners) to distinguish between the latest trend, a real threat or just a lot of noise!

How to Develop an Impact Attributed Product⁸

Bearing the above in mind, as a first step, the following should be considered when developing or designing an Impact Attributed Product:

Concept	Comment
Impact Attribute	<ul style="list-style-type: none">What is the ‘impact’ attribute(s) associated with the product?Is it one or more of carbon, waste, water consumption, biodiversity, pollution, SDG⁹ or social characteristic-related, or some other metric or attribute?Is the ‘impact’ attribute dependent on externalities to the supply chain, e.g., through the use of carbon offsets or plastic credits?
Additionality	<ul style="list-style-type: none">Is this part of ‘business-as-usual’ activities (e.g., as a result of mandatory legal obligations) or as a result of additional activities to be undertaken by you?
Quantification and Verification	<ul style="list-style-type: none">How do you intend to quantify and substantiate the ‘impact’ attribute, e.g., what data will you have for this, and is this traceable internally and to third parties?Is it easy to understand?Is there a third-party verifier or labelling scheme which will certify the quantification or the attribute?Is it mandatory to use such a third-party verifier or labelling scheme?
Target Audience	<ul style="list-style-type: none">Who is the target audience or user of your product?Are you targeting consumers, your upstream or downstream partners, your financiers, parties unrelated to your supply chain, or any other parties?

7 See e.g., Joe Williams “Greenwashing: Appearance, illusion and the future of ‘green’ capitalism” (2024) Geography Compass e12736 at 1.1: <https://compass.onlinelibrary.wiley.com/doi/pdf/10.1111/gec3.12736>, “‘Washing’ refers to exteriority, appearance and superficiality. It is about covering or obscuring the true character of a thing, to hide it behind a mirage or veneer of acceptability... The synonyms of washing include to condone, discount, excuse, disregard, forgive, gloss-over, ignore and overlook. In addition to whitewashing (in its original sense) and greenwashing, a host of other prefixes have emerged to describe similar or analogous processes”

8 The principles here will generally be applicable even for services in other contexts.

9 Being the UN’s Sustainable Development Goals (SDG).

Representations (Including Marketing, Publicity and Advertising)	<ul style="list-style-type: none"> • How do you intend to state the impact of the ‘impact’ attribute to the target audience or users of your product? • Is there a potential for exaggeration or misstatement of the ‘impact’ attribute? • Are you comparing yourself or the ‘Impact Attributed’ product to a competitor or a competitor’s products (respectively)? • Are there any restrictions on the reference to or publication of the engagement or use of third-party verifier or labelling scheme (e.g., under their terms of engagement or use)?
Needs of Audience	<ul style="list-style-type: none"> • Use: What does your target audience intend to do with or use the product for? For example: <ul style="list-style-type: none"> – Do they want to make certain claims associated with the purchase or use of the product? – Do they need a transfer of the ‘impact’ attribute to them (e.g., to create exclusivity)? – Are there any restrictions on the claims that you can make because of the claims being made by the audience? • Information: What information would the target audience need in relation to the product or the ‘impact’ attribute for their purposes? <ul style="list-style-type: none"> – For example, do they require information for their own reporting purposes or to procure better financing associated with the purpose or use of the product? – Are you able to support this from your internal resources or do you need to outsource this?
Internal and External Restraints (Including Legal and Regulatory Issues)	<ul style="list-style-type: none"> • Are there any internal frameworks or restraints (e.g., ESG and CSR policies) which may affect the product (including any sale or publication on it)? • Are there restrictions on how and where publicity can be done and what must accompany such publicity? • Are there any other legal, regulatory, contractual or other frameworks (whether mandatory or otherwise) which may be applicable, e.g., in respect of: <ul style="list-style-type: none"> – you (the company) – the product – the ‘impact’ attribute – the publication of the impact of the ‘impact’ attribute to the target audience (e.g., advertising rules) – the verifier or verification standard for the ‘impact’ attribute – the target audience? • Are there any trends in the market (policy, social etc.) which may be relevant?
Cost	<ul style="list-style-type: none"> • What is the incremental cost on you associated with the ‘impact’ attribute to develop or produce such a product? • What are the applicable costs of the ‘higher’-grade raw material from your suppliers, and monitoring, verifying, and providing ongoing support in relation to the necessary data/information?

Competitor Analysis	<ul style="list-style-type: none">• Are there any similar products out there in the market?• What is the supply like for such similar products?• If there are comparable products, is the price of such product being sold at a premium to a 'standard' product?
Supply	<ul style="list-style-type: none">• What is the supply like for the inputs (materials or services) needed to develop or produce such a product?• Is this a material that can be procured within your existing supply chain?• Are there any restrictions or requirements on inputs to produce the product?
Demand and Pricing	<ul style="list-style-type: none">• Is there demand for the product?• What is the price that the audience is willing to pay for this product (including by reference to comparable product price)?• Does it justify a 'premium'?
Risk Mitigants	<ul style="list-style-type: none">• Are there any risk mitigants or protection products that can be employed to address any risks identified above, e.g.:<ul style="list-style-type: none">– Insurance (e.g., where impact relates to equitable distributions or the social/economic development of smallholder farmers, providing access to weather index-based insurance allows for such smallholders to increase invest in their productive assets and helps to maintain production sustainability and address production risk¹⁰)– Hedging against supply or price/demand risk (e.g., cost fluctuations associated with the potentially rarer or less available inputs needed for the product)

In essence, the design phase is a comprehensive risk analysis comprising commercial, operational, credit, legal and regulatory considerations.

10 See e.g., Pasaribu, S.M., Shofiyati, R., Hestina, J., Estiningtyas, W., "Climate Policies for Climate-Smart Approach" in Kumar, P., Aishwarya (eds) (2024) Technological Approaches for Climate Smart Agriculture: https://doi.org/10.1007/978-3-031-52708-1_16; Report by the UNCTAD secretariat "The role of smallholder farmers in sustainable commodities production and trade" (30 July 2015): https://unctad.org/system/files/official-document/tdb62d9_en.pdf



Case Study

How would one apply this in ‘real-life’? Assuming a company wishes to develop ‘green steel’¹¹ or is considering selling ‘carbon neutral’ LNG,¹² what should they consider as part of this process? We apply selected elements of the framework discussed above as an illustration of this multifaceted process:

Concept	Green Steel	Carbon Neutral LNG
Impact Attribute	<ul style="list-style-type: none">At first glance, the Impact Attribute being considered for green steel is typically the GHG emissions associated with such steel.However, if one ascribes to the ResponsibleSteel International Standard 2.1 (RIS), a ‘Certified Steel’ steel product needs to adhere to 13 principles, i.e. additional ‘Impact Attributes’ on top of just GHG emissions. These include:¹³<ul style="list-style-type: none">Labour and human rightsResponsible sourcingWater stewardship	<ul style="list-style-type: none">In the context of ‘GHG neutral’ LNG, again, the Impact Attribute being considered would typically be certain GHG emissions associated with such LNG cargo being offset.Looking at the International Group of Liquefied Natural Gas Importers’ (GIIGNL) view on this, this means that the GHG emissions associated with a full or partial life cycle stage for such LNG have been offset with carbon credits.¹⁴
Needs of Audience	<ul style="list-style-type: none">The potential target audience may be companies who import steel from outside the EU to on-sell in the EU.The importer will need to calculate and report the embedded emissions of their steel imports pursuant to the European Commission’s Carbon Border Adjustment Mechanism.The seller of such green steel will need to ensure that it has the data and information to support such an importer.	<ul style="list-style-type: none">The potential target audience may be purchasers who are seeking to rely on GHG neutral products as part of their decarbonisation strategy and/or for on-selling or use by their downstream customers for their own decarbonisation strategy.Where applicable, the importer, operator or undertaking may need to consider potential obligations under the EU Methane Regulations.¹⁵To the extent that such purchasers intend to make claims which are aligned to certain standards (e.g., VCMi) then the types of credits which can be used for such purposes may be constrained.

11 For our example, we will consider the ResponsibleSteel International Standard. There are other green steel products, e.g., the XCarb green steel certificate programme developed by ArcelorMittal but this is an in-house product created by ArcelorMittal. Such certificates can be purchased as part of a steel purchase and are intended to allow the customer to make a Scope 3 claim.

12 Bearing in mind, however, the criticisms levelled at such products as we discuss below. For our example, we will consider GIIGNL’s view on such matters though bearing in mind that the SGE Methodology considers the possibility of parties using offsets in LNG transactions and reporting these separately from the Statement of Greenhouse Gas Emissions.

13 Other factors include: Corporate leadership, ESG management systems, Responsible sourcing of input materials, Decommissioning and closure, Occupational health and safety, Stakeholder engagement and communication, Climate change and GHG emissions, Noise, emissions, effluents and waste, Local communities and Biodiversity

14 Using the GIIGNL Framework (2021) concept of a “GIIGNL Framework Aligned GHG Offset LNG Cargo”. See also ISO 14068-1:2023(E) (2023) which was published after the GIIGNL Framework was published, where carbon neutrality in the context of products refers to the “condition in which, during a specified period of time [(for a product, its full or partial life cycle)], the carbon footprint has been reduced as a result of greenhouse gas (GHG) emission reductions or GHG removal enhancements and, if greater than zero, is then counterbalanced by offsetting.”

15 <https://www.hfw.com/insights/lng-bulletin-july-2024>

Internal and External Restraints (Including Legal and Regulatory Issues)

- The types of claims which may be made by the company or their counterparties may be constrained.
- For both 'green steel' and 'carbon neutral LNG', depending on the jurisdiction where products are sold, the following may apply:
 - where publications are made in the UK, the positions set out by the Advertising Standards Authority under the Advertising Codes and the Competition Markets Authority (CMA); and
 - where the products are sold in the EU in a 'business-to-consumer' context, under the proposed Green Claims Directive, companies seeking to apply an environmental label will need to consider whether such environmental label meets the requirements set out in the Green Claims Directive. Even when not sold in the EU, the extraterritorial nature of many legislative instruments or similar legal frameworks in the country of origin or the country of destination will need to be considered.
- Further, companies should consider whether there are social trends which while not yet legislated, may affect the product. For instance, in the context of carbon neutral LNG, there is increasing scrutiny of it¹⁶ – e.g., over the normative concept of carbon neutral LNG¹⁷ and the types of carbon offsets being used in the creation of such product.¹⁸ Companies may then consider weighing up the potential benefits from the sale of its Impact Attributed Product against the potential reputational backlash that may arise from activist and NGOs¹⁹.

What happens after developing an 'Impact Attributed Product'?

Once a producer/developer has undertaken the process and designs a product that is satisfactory to it,²⁰ the next stage is marketing the product, operationalising the production plan and selling the product.

- As we note in the questions above, marketing the product (including any claims associated with it) may be subject to restrictions, including legal and regulatory prohibitions or limitations.
- There will be ongoing monitoring, reporting and verification obligations – whether as a

result of external certification processes or due to contractual obligations with downstream purchasers. The producer needs to consider whether its existing infrastructure or data is able to support this. For instance, if an 'Impact Attributed' Product focuses on GHG metrics, it would then require the producer/developer to have existing GHG information and reporting/monitoring infrastructure. This may need to occur many months ahead of the launch of an 'Impact Attributed' Product.

Conclusion

The development of an Impact Attributed Product is a multifaceted process – it requires a deep understanding of consumer/business dynamics (including supply and demand, and operational requirements) but also the legal and regulatory landscape. This makes the development of such a product a challenging process. However, once a product has been developed to consciously address and mitigate the potential risks (commercial and legal), it may enhance a company's credentials and give it a competitive advantage in a rapidly changing and increasingly environmentally conscious market.

¹⁶ See e.g., <https://www.hartenergy.com/exclusives/how-carbon-neutral-lng-descended-shadow-market-206537>

¹⁷ See e.g., <https://www.csis.org/analysis/credibility-gap-carbon-neutral-lng>

¹⁸ See e.g., <https://www.scmp.com/business/companies/article/3242907/greenpeace-accuses-chinese-oil-and-gas-firms-petrochina-and-cnnooc-greenwashing-lng-purchases>

¹⁹ See e.g., <https://www.qcintel.com/carbon/article/tokyo-gas-vertree-partner-on-nature-based-projects-in-asia-22614.html> and <https://globalnighub.com/report-presentation/carbon-neutral-lng-in-japan-drivers-and-perspectives>

²⁰ Based on the risk assessment above and understands the risks that it is taking.

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