



# BIOFUELS CERTIFICATION AND THE LAW OF THE WORLD TRADE ORGANIZATION

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## EXECUTIVE SUMMARY

The goals of achieving energy security and of attenuating climate change are policy ends that propel biofuels policies in many countries. As part of such policies, a biofuels certification program is often used to require proof of foreign producers that the social goal aimed at is attained. If the supplier cannot prove compliance, then the importing government could refuse to issue a certification and prohibit the biofuels imports, impose higher tariffs or taxes, restrict distribution or require special labeling. On the other hand, the successful applicant for certification would receive some reward. As such, these certifications have consequences for trade and, if implemented by Members, should comply with the law of the World Trade Organization (WTO). This report discusses biofuels certification program and assesses under what circumstances they might be WTO-compatible.

Under WTO-law, the certification process would have to be judged at least according to Articles I, III and XX of the General Agreement on Tariffs and Trade (GATT), as well as to the provisions of the Agreement on Technical Barriers to Trade (TBT). If the certification process is used to determine

or indicate conformity with criteria relating to an approved production method or an approved source, it is a “conformity assessment procedure” for purposes of the TBT Agreement. Under the GATT, it will have to be determined whether process violates the nondiscrimination rules of Articles I and III, and if discrimination is found, whether it is justified by the health or environmental carve-outs of Article XX. In addition, the substantive and procedural rules on the following topics, included in other WTO agreements, could apply:

- Non-tariff measures (TBT Agreement),
- Health and safety measures (Agreement on the Application of Sanitary and Phytosanitary Measures (SPS),
- Subsidies (Agreement on Agriculture (AoA) and Agreement on Subsidies and Countervailing Measures (SCM),
- Government procurement (Plurilateral Agreement on Government Procurement), and/or,
- Tariff rates (GATT Article II and the national schedules).

In addition, the certification process must be implemented consistently with a growing body of directly or indirectly applicable WTO case law, including asbestos, beef hormones, geographical indications, and tires.

If the certification is used to determine conformity with a process or production method (PPM), the tendency is to judge

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the process very carefully; PPMs are often considered shields for protectionism. Usually, regulators must try to justify the measures under a GATT Article XX exception. This has occurred in several environmental disputes such as Beef Hormones, Gasoline, Shrimp/Turtles and Tuna/Dolphin. Success has been mixed.

Under the TBT Agreement, if a local government is considering biofuels certification, there are some different (not fully clarified) rules. It is unlikely that these trade rules would constrain local governments, although the result may vary somewhat under the various WTO agreements.

Finally, when a measure or its application is incompatible with a WTO rule, a government might be able to benefit from an exception. Of course, given that a main reason for the focus on biofuels is the desire to limit global warming and climate change, the possible exceptions under GATT Article XX of are relevant, in particular those concerning the protection of the environment and public health. In addition to the Article XX health and environment exceptions, there might be other avenues for justifying certification programs that would otherwise be WTO-incompatible, such as GATT Article XX(h) agreements, GATT Article XXV waivers, international harmonization under the TBT or SPS agreements, generalized systems of preferences and bilateral or regional agreements. A more difficult approach could be to equate energy security with GATT Article XXI national security.

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