

RESEARCH NOTE

de Beer, Jeremy & Smyth, Stuart. (2012). International Trade in Biofuels: Legal and Regulatory Issues. *The Estey Centre Journal of International Law and Trade Policy*, Vol. 13(1), 131-149.

1. POLICY IMPLICATIONS

The promotion of the biofuels industry has emerged as a significant part of many countries' efforts to address global problems ranging from environmental sustainability and climate change to economic growth and energy security. However, the adoption and proliferation of different technical standards, classification systems, and international regimes for biofuels governance may undermine the potential for international trade and development in the biofuels sector. Policymakers must ensure that national and sub-national rules governing biofuels are developed in view of the evolving (and often internally inconsistent) framework of international law. Overcoming current regulatory challenges to the economic viability of biofuels production and trade will require governments to engage in collaborative negotiations that recognize and validate the multi-level nature of biofuels governance.

2. RESEARCH QUESTION

This paper seeks to connect cross-disciplinary work on broad biofuels policy with discussion of particular examples of laws/regulations/standards that act formally or informally to support or constrain the development of biofuels. Acknowledging the diversity of actors implicated in biotechnological development, this research aims to generate a map of the emerging regulatory and governance framework for biofuels. It asks what implications this "multi-level" governance reality has for the international trade and production of biofuels.

To date, studies of the biofuels sector have tended either to critique specific instruments of governance or to survey policy issues on a geographical or jurisdictional basis. This study builds on such work by forming a view of the complete governance landscape, in which not only different governments and levels of government, but also non-government (NGOs, industry associations, independent standards associations) and private actors/firms make use of regulatory and quasi-regulatory powers to compete and collaborate.

3. METHODS

Beginning with an overview of the major regulations and policies applicable to biofuels under the authority of the World Trade Organization (WTO), the paper scans the current literature and notes ongoing issues in the international trade governance of biofuels. Following an examination of the role and impact of tariffs, subsidies, and technical standards, the article assesses prospects for the development of biofuel industries in light of overlapping and conflicting international regulatory regimes. The research proceeds on the basis that normative debate over the merits of different governance models for biofuels can occur only after a clear view is established of the diverse, decentralized regulatory and legal landscape affecting biofuels trade and production.

4. RESULTS & FINDINGS

The principal finding of the research is that the concept of multi-level governance is key to understanding, and thus managing, the international landscape of biofuels law, policy, and regulation. More particularly:

- The ongoing proliferation of variable technical standards (e.g. product specifications, labelling requirements, health and safety concerns) is arguably the most important factor currently inhibiting the liberalization of world biofuels trade. Two WTO treaties, the Technical Barriers to Trade (TBT) Agreement and the Sanitary and Phytosanitary Measures (SPS) Agreement, attempt to resolve the conflict between globalizing trade and ensuring governments' sovereign right to regulate internal affairs.
- Given the centrality of WTO agreements in establishing the body and practices of international trade law, ongoing ambiguities in classification—are biofuels industrial, agricultural, or environmental products?—have significant implications for biofuels' treatment in international markets. Despite potential difficulties in administration and enforcement, differentiation of products according to end use (e.g. fuels, beverages, medical supplies) rather than composition would allow for better alignments of tariffs with national biofuels objectives.
- Different jurisdictions have implemented differing standards enshrining environmental sustainability criteria such as life-cycle GhG emissions and land-use restrictions. Such standards have generated controversy as to whether or not they constitute illegal barriers to trade under WTO rules. As standards systems multiply, the chances for conflict and confusion will increase, while the hope any particular model will be able to withstand legal scrutiny diminishes. Defending the legality of sustainability standards means ensuring that the criteria used to differentiate products are “objectively verifiable, developed consultatively with the international community and validated by stakeholders” (141). The regional, even continental differences in approach to biotechnological innovation (e.g. genetic engineering of feedstocks) and biofuels development may undermine the potential for international trade in bio-industrial crops and biofuels. International governance of biotechnological products can be interpreted through two clearly conflicting international regimes: the WTO, with its mandate to promote trade through open markets, and the Cartagena Protocol on Biosafety (CPB), a treaty implemented to ensure the protection of biodiversity and the consideration of socio-economic factors in the trade and transboundary movement of biotechnological products. The European Union and the United Kingdom are parties to the CPB and have signalled their intent to resist the commercialization and trade of such products. Meanwhile, major exporters of genetically modified (GM) products and other biotechnologies, including Canada and the US, are not signatories to the Protocol.

4. POLICY LINKS

The promotion of the biofuels industry has emerged as a significant part of many countries' efforts to address global problems ranging from environmental sustainability and climate change to economic growth and energy security. However, the adoption and proliferation of different technical standards, classification systems, and international regimes for biofuels governance may undermine the potential for international trade and development in the biofuels sector. Policymakers must ensure that national and sub-national rules governing biofuels are developed in view of the evolving (and often internally inconsistent) framework of international law. Overcoming current regulatory challenges to the economic viability of biofuels production and trade will require governments to engage in collaborative negotiations that recognize and validate the multi-level nature of biofuels governance.