

**Summary of rationale and main legal points raised in  
October 2006 IPC Discussion Paper,  
“WTO Disciplines and Biofuels: Opportunities and Constraints in the  
Creation of a Global Marketplace”**

Although biofuels are not a new technology, their production has increased significantly over the last few years commensurate with greater interest in renewable energy. For the most part, to date countries have met their demand for biofuels through domestic production, and, in fact, many drivers of biofuels production are focused on domestic production, i.e. the desire for greater energy security and the interest in finding new outlets for agricultural commodities. Trade of biofuels may increase, however, given the ambitious mandates set in some OECD countries, many of which will not be able to meet their mandates with domestic production because of limited land availability. To the extent that tropical and moderate climate developing nations may have a comparative advantage in producing biofuels due to their longer or year-round growing seasons, larger areas of available land, and lower labor costs, the export of feedstocks or biofuels could be a potential major production opportunity.

It is therefore timely to examine how government policies in OECD countries to support biofuel production may impact potential trade flows. The broad range of government measures to promote domestic biofuel production, such as tax incentives and high tariffs, risks stunting growth in trade even as the global demand for biofuels is rising. A web of separate technical and environmental standards also risks interfering with the potential for greater trade in biofuels. A debate on how international trade rules apply to the biofuels sector is recommended.

How do the international trading rules apply to the biofuels sector? There are three key areas to examine: 1. the classification of biofuels; 2. the treatment of subsidies to feedstock and biofuel production; and 3. the treatment of domestic regulations and standards for biofuels.

### **Classification of biofuels**

WTO members negotiate their tariff bindings on products using product classifications from the Harmonized Commodity Description Coding System (“HS”) established by the World Customs Organization. The WTO Agreement on Agriculture applies to a set number of product classifications of the HS (Ch 1-24) and a few additional product classifications. Presently, ethanol is considered an agricultural good and biodiesel an industrial good; as WTO rules differ for agricultural and industrial goods, trade rules might very well apply differently to the two fuels.

Moreover, biofuels could be classified as an environmental good in the ongoing negotiations on Environmental Goods and Services, in which case they would be subject to faster liberalization.

## **Subsidies**

Government subsidization, most common in OECD countries, has been crucial to the economic viability of the biofuels industry. WTO rules on subsidies differ for agricultural and industrial goods. While both are subject to the Subsidies and Countervailing Measures Agreement (SCM), agricultural products are also subject to additional rules under the Agreement on Agriculture (AoA).

The SCM prohibits export subsidies and subsidies contingent on the use of domestic products over imported products. Other subsidies, if found to be actionable, can be challenged by another WTO member. To be actionable, subsidies must be a financial contribution (i.e. payments or tax breaks) provided by a government and confer a competitive advantage on the recipient; they must be specific; and adverse effects must be shown by the complainant.

Under the AoA, WTO members commit to reducing their agricultural subsidies but can keep unlimited non- or minimally trade-distorting support. It is worth exploring how biofuel subsidies are to be treated and properly notified. Important questions to also be addressed are whether subsidies directed to the biofuels industry could be viewed as providing downstream subsidization to agricultural feedstocks and vice versa, and whether biofuel subsidies in essence serve as cross-subsidies for biofuel by-products.

## **Domestic Regulations and Standards**

The biofuels sector is replete with internal regulations and standards, i.e. mandates, blending limits or restrictions, technical specifications, environmental sustainability criteria. Non-discrimination and national treatment obligations are very important in the area of regulations and standards; the determination of “like products” has not always been straightforward and may also be complex in the biofuel realm. The Technical Barriers to Trade Agreement could also be relevant for biofuel standards: it calls for the use of international standards, when possible, and requires that regulations be the least trade restrictive to achieve their legitimate objectives.