

# THE RISE OF GREEN PROTECTIONISM

Presentation, ECIPE, March 27, 2012

Fredrik Erixon



# Green protectionism

- Heated debate: ETS, aviation carbon fees, REACH, oil sands
- Pursuing an environmental goal is not protectionism
- Generally, not many conflicts between environmental and open trade objectives

# So what is the problem?

- Externalising the welfare cost of environmental policy (or other policies)
- Measure with the intent or the effect of changing the competitive relation between domestic and foreign production
- Discrimination and WTO law

# Europe's biofuels policy

- Contextualizing Europe's biofuels policy
  - Part of the Common Agricultural Policy
  - Part of climate change policy
- Conflicting ambitions: industrial policy vs. substitution of fossil fuels

# Biodiesel

- Dominating form of biofuels produced in Europe
- Big market share – yet comparatively expensive
- Low utilization ratio of installed capacity: growth in demand declining

# Tariffs, subsidies – *and now standards*

- The Renewable Energy Directive
  - Increase the use of renewable energy sources to 20 percent by 2020
  - Share of biofuels in transport (equal for all countries) 10 percent by 2020
  - Introduction of sustainability criteria

# Sustainability criteria

- *Emissions-related criteria*: greenhouse gas emission savings at least 35%; 50% from 2017; 60% for new production after 2016.
- *Land-related sustainability criteria*: biofuels must not have been made from raw materials obtained from 1) *land with high biodiversity value*; 2) *land with high carbon stock*; 3) *peatland*
- Main effect is that principal competitors to rapeseed biodiesel would disqualify for favourable treatment

# Is this directive WTO consistent?

- What is important to consider?
  - The process, the directive, policy – ”a revealing structure”
  - PPMs: non-product related process and production methods
  - GATT articles: I, III and XI
  - TBT agreement



# Inconsistencies with GATT

- GATT Article I:1 – “like products”
  - Emission-related criteria might be considered as different product (physical characteristics), but not land-related criteria: it is inconsistent
- GATT Article III:4 – “no-less favourable treatment”
  - Applicability debatable
  - Two unadopted panels (*US-Tuna*) on coverage of this article for PPMs

# Inconsistencies with GATT

- GATT Article XI:1 – “no prohibition or restriction”
  - “De facto restriction” (Brazil-Tyres)
  - Both criteria flaunt Article XI
- GATT Article XX
  - (b) “necessary”: might be OK
  - (g) “relating to”: might be OK
  - Chapeau requirements the difficult part.  
“design, architecture and revealing structure”

# Inconsistencies with GATT

- TBT agreement: debatable if it applies to PPMs?
  - Annex I points to PPM, but in a special way
- Emission-related sustainability criteria will however be covered
- Stronger motivation needed for conditional departure than under Article XX
- Nullification

# Conclusion (1)

- Discrimination under the Renewable Energy Directive unlikely to be found consistent with WTO rules
- The case ILUC