

# Biofuels Reform in the EU and the World Trade Organisation

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Fredrik Erixon



# Takeaway points

- ILUC is "a riddle inside a mystery wrapped in an enigma": should not form the basis of policy
- Reform starts from Renewable Energy Directive, a directive that most likely is incompatible with WTO rules
- ILUC will change the character of RED and discrimination of the basis of RED

# RED and WTO

- RED most likely inconsistent with:
- *GATT Article I*: "Any advantage...shall be accorded immediately and unconditionally to the like product..."
- *GATT Article III*: "products...shall be accorded treatment no less favourable than accorded to like products..."
- GATT Article XI and TBT agreement

# GATT Article XX

- Can authorise discriminatory measures: but conditional departure (arbitrary and unjustifiable discrimination, least trade restrictive approach)
- *"Revealing architecture", "Rational connection"*
- Discrimination between like products that according to RED promotes an environmental objective
- Establishing a preference hierarchy or promoting an environmental objective?

# The new proposal: the cap

- Cap on conventional biofuels in national target: *which entities of biofuels part of the target and which are not?*
- If such discrimination happens, it could be discrimination between biofuels that achieve exactly the same amount of GHG savings
- Implementation in member states: will they really implement the cap in a way that do not discriminate?

# The new proposal: ILUC

- Two proposals: Commission and ENVI/  
Rapporteur
- Parliament version: obviously inconsistent  
with TBT & GATT Art. I, III, XI AND XX
- ILUC distant from "like" products: is regulation  
of another product
- ILUC factors are uncertain and arbitrary

# ILUC: "A riddle wrapped in a mystery inside an enigma"

- No actual records of ILUC
- ILUC is estimated, not observed
- Models to estimate come to profoundly different results
- We cannot say which model is most accurate
- Big debate about what factors that determine ILUC
- "ILUC for all or ILUC for none"

# ILUC and WTO: Commission's proposal

- Commission's proposal is different from the Parliament's: reporting requirement, ILUC estimates supplied by proposal
- So no discrimination on the basis of ILUC
- But what about discrimination on the basis of RED when ILUC exists in the same regulation?



# ILUC, RED and WTO

- ILUC complicate RED discrimination:  
*changes the character of RED in Art XX*
- ILUC is an acknowledgement that RED criteria are incomplete: discrimination on selected aspects when you know other aspects exist
- Preference hierarchy may change with ILUC
  - depending on choice of model

# Conclusion

- Parliament proposal be ruled against lock, stock and barrel
- Commission's proposal unlikely to be challenged only because of ILUC
- Commission proposal change the character of RED under Art XX and will be invoked in a case against RED-discrimination