

# BTAs in the Ring

Henrik Horn & Petros C. Mavroidis

**ENTWINED Policy Seminar 20<sup>th</sup> October**

# Is the WTO a Hindrance?

**Compl. Prevails**

**Resp. Prevails**

**Production Externalities**

US-Shrimp

US-Gasoline

**Consumption Externalities**

EC-Biotech

EC-Asbestos

# What Explains this Outcome?

- The original contract as completed through case law
  - Does not question the right of Members to pursue unilaterally defined environmental policies (negative integration)
  - If at all, has favourable stance towards indirect taxes (hence, the WP on BTAs)

# A Case to Walk Through GATT Law

- Home adopts tax to promote climate change
- Foreign objects
- What does Foreign need to do to prevail in case of litigation?

# 1. Products are Like / DCS

- Likeness/DCS in the eyes of the beholder (EC-Asbestos)
- Narrow reading of EC-Asbestos (confined to protection of private health only) would favour Foreign
  - Caveat: cannot exclude the opposite in the absence of case law

## 2. The Measure is ASATAP

- If it prevails, Foreign will have to show that the challenged measure is ASATAP: design, architecture, objective intent of the measure matter
  - **inconsistencies** in Home's policies across sectors are irrelevant;
  - **excessively demanding legislation** (assuming it can overcome measurement difficulties) is irrelevant;
  - **relative effort** made by domestic and foreign producers to reach the statutory objective is irrelevant;
  - **trade effects** if unrelated to origin are irrelevant (Dominican Republic-Import and Sale of Cigarettes, AB; US-Clove Cigarettes, P; US-Tuna II (Mexico), P)

# Not Over Yet

- If Foreign prevails, Home can always invoke Art. XX(g)
  - rational connection between its adopted measure and the objective pursued (US-Shrimp, AB)
- AB: standard of review is more deferential when public health is an issue

# Conclusion

- Never a better time to advance environmental concerns before a WTO Panel