



“Untying the Gordian
knot”

The settlement of tax
disputes by WTO

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Goal of the paper

- To investigate the relationship between tax law, normally a domestic prerogative, and international trade laws, especially WTO, through the case-law
- To enrich the context, a look will be given also to few topical issues not subject to litigation yet
- Broad notion of tax, including both border tax measures (such as tariffs and duties) and internal tax measures, direct and indirect taxation
- One recurring theme is the intersection between taxation and key economic and non-economic challenges – tax avoidance, level playing field, competitiveness and carbon leakage



Broad overview of tax rules in WTO

- Article I and MFN
 - Article II and negotiated tariff reductions
 - Article III:2 and domestic taxation
 - Article XX and general exceptions
 - Article VI – AD/CVD
 - Article XVI and XXIII
 - Article XIV - safeguards
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- ASCM
 - GATS

Tariffs and border taxes, national security and protection

- This is about tax as 'trade' or 'border' measures, i.e. when taxation of various forms is used to impact trade (by reducing imports or exports)
- I will quickly review the case-law on tariffs, trade remedies and export taxes
- This case-law shows an evolution in the use of tariffs as protectionist instruments, especially in recent years when national security and a variety of other public policy objectives has been (unsuccessfully) raised in DS (cases on *US – China* trade war; cases on Chinese export restraints on raw materials and rare earths)

Border tax adjustments

- Working Party on Border Tax Adjustments
- Illustrative list on Export Subsidies
 - Political and practical significance of distinctions
- Hypothetical case: carbon tax adjustments (US and EU proposal) to the test of the rules; difficult questions
- MFN, NT and GATT XX issues (waiting for *PPMs & Shrimps II*?)

National treatment cases

- Crucial provision – all domestic policies / best example of ‘negative integration’
- Overview of rich case-law on internal taxation and its various requirements
- Conclusion: practical difficulties to distinguish what is legitimate and what is protectionist

Subsidy litigation

- Tax incentives as one of most common subsidies
- Special focus on 1970s (*DISC*) and 1990s (*US – FSC*) (and also more recent) litigation
- Difficulties of ‘otherwise due’ language - Inherent difficulties in determining whether a differential tax treatment amounts to a subsidy
- Geology and structure of tax law
- Role of public policy objectives in the analysis
- Analysis will show the ‘formalism’ of legal analysis (vs ‘flexibility’ of economic analysis)
- Conclusion: as with NT, conclusion is one of sheer legal uncertainty

GATT Article III:8(b) carve- out (“beware of what you want!”)

- Important exception to NT, largely neglected till recently
- Focus on *Brazil – Taxation* litigation and various arguments of the parties
 - Key issue: does “payment of subsidies exclusively to domestic producers” cover also tax measures? And also any condition, such as LCR, attached to it?
 - Danger: tax discrimination/subsidy left without discipline:
 - any case of tax discrimination is a subsidy
 - subsidy laws are difficult, while NT complaints are comparatively more straightforward
 - **Importance of systemic considerations** (look at NT and subsidy disciplines **together**)
 - AB (majority) rightly concluded exception covers on ‘expenditure’ and not ‘tax’
- Case shows the continuing attempt to ‘retain’ sovereignty in tax matters

The frontier: tax avoidance

- Link with narratives on level-playing field and competitiveness
- Important to analyse tax avoidance from trade angle
 - Diversity of tax systems and exploitation of multinational groups
 - OECD Base Erosion and Profit Shifting (BEPS) action; Recent declaration at G7
 - EU tax rulings saga
 - Digital services taxes (US s. 301 vs France, and others)
 - Past: interesting link with *US DISC-FSC* litigation
- Hypothetical cases: EU tax rulings and digital services taxes under *trade law*

Few words of conclusion

- Inevitable uneasy relationship between tax and trade law
- Clash between broad recognition of state sovereignty and specificity of trade commitments taken
- Uncertainty of the law
- Legal formalism vs substantive assessment of economics
- Importance of systemic considerations
- Trade and tax (and national security, climate change)
- Is trade law the best tool to regulate tax distortions? Is some form of cooperative harmonisation needed?