“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

- 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 (BERS) 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?