

Border Tax Adjustments What is at Stake?

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The Original Dispute

Matter: Income-based vs. product-based taxation

- US argues GATT favours product-based
 - EC exempts high tax from EC exported goods
 - EC imposes higher tax on US imported goods
- EC argues GATT is neutral vis-à-vis fiscal régimes
 - The negative integration character of the GATT

Working Party on Border Tax Adjustments (BTA WP)

- Forum for discussion of dispute, but not a panel

The BTA WP Background

- The GATT relevant provisions:
 - Art. II.2/3 GATT (taxes on imports)
 - Art. III.2 GATT (taxes on exports)
 - Int. Note ad Art. XVI GATT (exemption from taxes for exports)
- No common fiscal policy for the EC
 - But basically product-based taxation
- One fiscal policy for the US
 - Basically income-based taxation

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The BTA WP Scope

What is a **BTA** (§ 4)? Any fiscal measures which put into effect, in whole or in part, the **destination principle**

Destination principle: Exported products relieved of taxes charged in the exporting country in respect of similar products sold in the home market, and charged with taxes charged in the importing country in respect of similar products

Both **impositions** and **exemptions** came under WP purview

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The BTA WP Output

The agreement in the Working Party (§ 14):

...[T]axes **directly** levied on products were eligible for tax adjustment.
[The complete list of] examples:

- specific excise duties
- sales taxes and cascade taxes
- the tax on value added...

[T]here was convergence of views to the effect that certain taxes that were **not directly** levied on products were not eligible for tax adjustment. Examples:

- social security charges whether on employers or employees
- payroll taxes

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The BTA WP Achievements (?)

- Partial agreement on rather un-contested issues
- Significant disagreement on central issues

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Direct Limitations on BTAs in Some Disputes

As a result of absence of total agreement, important litigation subsequently took place between US/EC

- *US - DISC* (1970s)
- *US - FSC* (1990s)

The US lost both disputes: exempting tax income due for companies that export goods was judged to be an impermissible export subsidy

This BTA is an export subsidy, hence not permissible

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Acceptance of Right to Regulate (and hence indirectly of BTAs) in Other Disputes

- *US - Superfund* (1979); concerned excise and corporate income taxes to pay for the cost of programmes to clean up hazardous waste sites
- *US - Shrimp* (1998); concerned E policy
- *EC - Tariff Preferences* (2003); concerned other domestic instruments

Summarizing the current state-of-the-art in WTO case-law:

- In principle, all laws that are applied to domestic products can be applied to like imported products
- Destination principle unlimited – **anything goes**

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Should Anything Go?

No. As argued in Horn and Mavroidis (2008):

- If the importer applies all its laws to all imports, then the GATT becomes an agreement harmonizing conditions of competition **across** and not **within** markets: this is not its intended function
- To achieve **legal consistency**, the *default rules* of PIL should be used to allocate J
 - J allocated to the importing state in presence of **physical hazard in the importing market**, or with **trans-boundary externalities**. Unclear I case of **moral** externalities.
- If BTA for E, then also for **all** domestic policies since all come under Art. III GATT. Would open a Pandora's box for offsetting any kind of difference between countries
- The economic consequences of letting countries compete in setting BTAs unclear (at least to us)