THE ENFORCEMENT OF INTERNATIONAL TAXATION RE GIME BY THE WORLD TRADE ORGANIZATION'S RULE OF LAW

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ABSTRACT

This article ***"rationae materiae"*** focuses on role played by World Trade Organization (WTO) through it rules to check the conformity of host states' tax policies on imported services, goods and capitals vis-à-vis their engagements. In this age of globalization, world trading order is based on the World Trade Organization's (WTO) ***"rule of law"*** through bilateral, multilateral, or Regional Agreements to protect extra territorial investments of its members through effective tax control as enshrined in its principle of "***Non Discrimination"*** (Most Favored Nation and National Treatment Principle). It has beyond doubt proven as exemplified through some casuistic analyses that WTO's Rule of law has incontestably stepped up the liberalized international trade in the last two decades through a more effective anti-tax evasion measures by restraining members from putting in abusive tax measures different from the defunct GATT 1947.However, WTO rule of law still grappling with some difficulties as far as effective control and enforcement of International Tax System is concerned.

Keywords: World Trade Organization, Most Favored Nation Principle ,National Treatment Principle, Rule of Law, Regulatory Framework, Anti-Tax Evasion, International Tax Regime, WTO member countries. Tax Policies of member countries and Trans-border trade.

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INTRODUCTION

International Tax Regime is a legal theory designed by national laws (legislations), international laws (Treaties), soft or hard laws including customary laws[i] . It is a body of rules of conduct, of binding legal force and effect, prescribed, recognized, and enforced by controlling authority. Having affirmed the thesis that *"**rule of law**"* is an expression of state to restraint its authority by surrendering part of its right to an international law through the signing of treaty, we therefore move ahead to state that WTO uses this legal instrument ("*Rule of Law*") to coordinate and regulate trade relations between its members. Major sources of rules for international taxation of commercial transactions include amongst others; the OECD Model[ii], the UN Model, EU direct tax law and their interaction with domestic tax rules[iii]. This consideration includes the coverage of tax treaties, their status, whether a dualist or monist approach including the interpretation of treaty "***over-ride and treaty under-ride***" in tax treaties by states. The Vienna convention in its Articles 26, 27 and 31 holds that *"**Treaty Override**"* is a violation[iv]. Tax scholars have argued that consensus views on certain practices in international tax constitute customary law; that guidance issued by some international organizations and that "***hard law***" approaches should be applied to advance certain tax policy goal rather than "*soft Law"*[v].On the contrary other scholars are of the opinion that hard law institutions cannot achieve cooperation with soft law institutions like OECD. Notwithstanding the considerable progress made in dismantling barriers to trade and investment as a result of multilateral negotiations under the auspices of the GATT/WTO, protectionist policy measures are still widely used by WTO Members although for various reasons. Some protectionist policies may include; shifting the terms-of-trade in a country's favor; protection of specific domestic *"**infant**"* industries; correction of "market failure"; conservation of natural resources; assistance to downstream processing of such resources; food security; or as a counterbalance to domestic or other countries' trade distortions (in accordance with the theory of Second Best)[vi].Perhaps the greatest challenge regarding the design of multilateral trade rules is the concern that trade liberalization commitments with respect to one policy instrument, such as tariffs, may be vitiated by other protectionist instruments unconstrained by such rules[vii]. Inconsistencies in the tax regime are at the root cause of improper interpretation of the WTO agreements by its Dispute Settlement Body and the latter's rulings in connection with several disputes over taxes affecting trade[viii]. This paper *ipso facto* examines the extent to which World

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Trade Organization (WTO) through its rules impinge on policymakers' freedoms formulating tax policies with tax abuses through main WTO agreements concerning border and internal taxes (direct as well as indirect)[ix], followed with some recommendations.

WORLD TRADE ORGANIZATION'S RULES ON INTERNATIONAL TAXATION REGIME

After establishing the Legal and Constitutional foundation of WTO on the 15 of April 1994 was followed by lengthy annexes. For example, the General Agreement on Tariffs and Trade (GATT), The General Agreement on Trade in Services (GATS), which covers services including health, services, water and other utilities, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which covers patent, copyright and trademarks on a wide assortment of products from software to medicines, the Agreement on Agriculture. The Agreement on the Application of Sanitary and Phytosanitary Measures. The Agreement on Technical Barriers to Trade and the Agreement on Trade-Related Investment Measures (TRIMS) which covers the rules and practices those countries must adhere to and how to treat treatment of foreign investors in private health delivery and medicine production. Other important instruments are rules on Subsidies which typically constitute direct or indirect economic benefits granted by governments to an industry or group of industries. it is It is *Ipso facto* a non-tariff measure utilized by governments either to inhibit imports ("*domestic subsidies*") or to enhance exports ("*export subsidies*")[x].WTO rules on subsidies that affect trade in goods are contained in the Agreement on Subsidies and Countervailing Measures of 1994 ("SCM Agreement")[xi].

A- Internal Taxation and Regulation under National Treatment Principle

It stipulates that Members must not apply internal taxes or other internal charges, laws, regulations, and requirement affecting imported or domestic products so as to afford protection to domestic production.

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1-Interpretative Note of Article III under National Treatment on Internal Taxation and Regulation

a- Interpretative Note Ad Article III from Annex I

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product, collected or enforced on imported product or at the time or point of importation is nevertheless regarded as an **internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1**, and is accordingly subject to the provisions of Article III. The application of paragraph 1 to internal taxes imposed by local governments and authorities within the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The term **"*reasonable measures*"** in the last-mentioned paragraph would not require, for example, the repeal of existing national legislation authorizing local governments to impose internal taxes. Although technically inconsistent with the letter of Article III, are not *de jure* inconsistent with its spirit, if such repeal would result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term "***reasonable measures***" would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties[xii].

b-Purpose of Article III

*i-**The 1958 Panel Report on Italian Discrimination against Imported Agricultural Machinery.***

It was considered that the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs". Otherwise indirect protection could be given[xiii].

*ii -**The Panel Report on United States - Section 337 of the Tariff Act of 1930***

It noted that the purpose of Article III is to ensure that internal measures should not be applied to imported or domestic products so as to afford protection to domestic production (Article

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III:1)[xiv]. The same Panel rejected any notion of balancing more favorable treatment of some imported products against less favorable treatment of other imported products. The 1987 Panel Report on "***United States - Taxes on Petroleum and Certain Imported Substances***" notes that "Article III:2, first sentence, obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products[xv]. Unlike other provisions in the General Agreement, it does not refer to trade effects.

iii-Concerning another issue examined by the panel, the same panel report provides:

The General Prohibition of Quantitative Restrictions under Article XI and the national treatment obligation of Article III have essentially the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. Both articles are not only to protect current trade but also to create the predictability needed to plan future trade. For example the 1991 Panel Report on "*United States - Restrictions on Imports of Tuna*," which has not been adopted, notes with regard to Article III[xvi]:

"While restrictions on importation are prohibited by Article XI:1, contracting parties are permitted by Article III:4 and the Note Ad Article III to impose an internal regulation on products imported from other contracting parties provided that it: does not discriminate between products of other countries in violation of the most-favored-nation principle of Article I:1; is not applied so as to afford protection to domestic production, in violation of the national treatment principle of Article III:1; and accords to imported products treatment no less favorable than that accorded to like products of national origin, consistent with Article III".

The text of Article III: 1 refers to the application to imported or domestic products of 'laws, regulations and requirements affecting the internal sale of products and internal quantitative regulations requiring the **mixture, processing or use of products**; it sets forth the principle that such regulations on products are not be applied so as to afford protection of domestic production.

The Panel therefore considered that the limited purpose of Article III has to be taken into account in interpreting the term '*like products'* in this Article. Consequently, in determining whether two products subject to different treatment are like products, it is necessary to consider

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whether such product differentiation is being made so as to afford protection to domestic production. While the analysis of *'like products'* in terms of Article III:2 must take into consideration this objective of Article III, the Panel wished to emphasize that such an analysis would be without prejudice to the *'like product'* concepts in other provisions of the General Agreement, which might have different objectives which might require different interpretations.

2-Application of Article III on National Treatment on Internal Taxation and Regulation

a -Application of paragraph 1 to internal taxes imposed by local governments and authorities

The Panel Report on "*Canada - Measures Affecting the Sale of Gold Coins,"* which has not been adopted, examined the application of a retail sales tax on gold coins by the Province of Ontario, and the question of whether the Canadian federal government had, as required by Article XXIV: 12, taken "*such reasonable measures as may be available to it to ensure observance of the provisions of the General Agreement*" by Ontario. The Panel examined what meaning should be given to the term *"reasonable*"[xvii].

The Panel noted that the only indication in the General Agreement of what was meant by *'reasonable'* was contained in the interpretative note to Article III: 1, which defined the term *"reasonable measures"* as national legislation authorizing local governments to impose taxes. According to this note, **the question of whether the repeal of such enabling legislation would be a reasonable measure as required by Article XXIV 12 should be answered by taking into account the spirit of the inconsistent local tax laws on the one hand, and the administrative or financial difficulties to which the repeal of the enabling legislation would give rise to on the other.** The basic principle embodied in this note is, in the view of the Panel, that in determining which measures to secure the observance of the provisions of the General Agreement are "*reasonable"* within the meaning of Article XXIV:12. The consequences of their non-observance by the local government for trade relations with other contracting parties are to be weighed against the domestic difficulties of securing observance. While recognizing that this note refers to the case of national enabling legislation, the Panel considered that the basic principle embodied therein was applicable to the present case.

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b - Paragraph 2: Internal taxes or other internal charges of any kind

ii -*"Directly or Indirectly*" In initial discussions at the London session of the Preparatory Committee, it was suggested that while this phrase in the US Draft Charter referred to *"taxes and other internal charges imposed on or in connection with like products*", the rapporteurs in the Working Party on Technical Articles had used the phrase "*directly or indirectly*" instead owing to the difficulty of obtaining the exact equivalent in the French text 73. In later discussions in Commission A at the London session of the Preparatory Committee, it was stated that the word "*indirectly"* would cover even a tax not on a product as such but on the processing of the product[xviii].

ii--"Internal Taxes" (a) Excise taxes, indirect taxes and consumption taxes. It was stated during discussions in the Third Committee at the Havana Conference that the provisions relating to internal taxes were not designed to limit the degree of protection, but merely to determine the form which that protection should take. Any country was free to replace internal taxes by import tariffs which were subject to the negotiations referred to in Article 17. There was no general binding or limitations on tariffs as such[xix]. The 1987 Panel Report on "*United States - Taxes* on Petroleum and Certain Imported Substances" examined excise taxes on imported petroleum and certain imported chemical substances *"Superfund taxes",* which had been enacted as a revenue source for the US "*Superfund*" hazardous-waste cleanup program. "

The Panel examined the tax on petroleum in the light of the obligations the United States assumed under the General Agreement and found the following: The tax on petroleum is an excise tax levied on imported and domestic goods. Such taxes are subject to the national treatment requirement of Article III:2, first sentence, which reads: '*The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products"*[xx].

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c-Agreement on Export Subsidies and Countervailing Measures (SCM) under GATT Article I and GATS Article II [xxi].

i- Anti –dumping and countervailing measures on trade in goods on GATT 1994.

Members of the WTO Anti-subsidy and Countervailing Measures Agreement sets out the steps members can take against other states if they believe subsidies have harmed competition. That are subsidies offered to firms on condition they increase their exports or policies that provide financial incentives to buy domestically produced goods rather than imports termed *"**prohibited subsidies***" by the WTO meaning; **subsidies whose explicit purpose is to distort international trade such as grants, loans, loan guarantees or tax breaks**[xxii].**If one member suspects another member is offering harmful subsidies, it can raise a dispute at the WTO and once a dispute has been raised, the two governments' party to the dispute enter a consultation process to try to establish the facts. The case is then referred to an expert panel (appointed by WTO members) to make a ruling**. If a breach is found, the offending government is usually given at least 15 months to adjust their policies to conform to the rules. This is different from ***"prohibited subsidies***" where a faster ruling is provided and if a subsidy is in breach it must be removed immediately[xxiii]. If the offending government fails to act within the allotted time, the WTO panel can authorize the affected member to impose retaliatory duties.

However this rule is hindered by Article XX on Specific Exception to the General Principle of Non Discrimination (Chapeau) permitting members to sway away from their substantive obligations.

ii-Article XX(b) permitting members to take measures deemed necessary to solve public health and environmental issues. For example, the Philippines requested consultations with Thailand on the 7th of February 2008 concerning a number of Thai fiscal and custom measures which affected cigarettes from the Philistine.

Such measures included Thailand's Customs Valuation practice, excise tax, health tax, TV Tax, VAT Regime, retail licensing requirements and import guarantees imposed upon cigarette importers. Although Philippines claimed that Thailand violated Article X: 3(a) of GATT 1994, Thailand contended that she acted under custom evaluation obligation[xxiv].

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***iii-National Regulation and Public Policy objectives of member states Article XX**. An example was the **case between Thailand and the United States over cigarette and other tobacco**. **Under Section 27 of the 1996 Tobacco Act, Thailand prohibited the imposition of cigarettes and other tobacco preparation but authorized the sale of domestic cigarettes; moreover, cigarettes were subject to an excise tax, a business tax and municipal tax**[xxv].*

The United States complained that the import restrictions were inconsistent with Article X1:1 and considered that they were not justified by Article X1:2(c)(G),nor by Article XX(b).Thailand contended that the Acts were justified under Article XX(b) because the government had adopted measures which could only be effective if cigarettes imported were prohibited given that these cigarettes presumably carried with it chemicals and other additive harmful to its population. Thailand went as far as requesting the Panel to consult expert Organization (World Health Organization) WHO[xxvi].

***iv-Still under Policy Objective under Article XX sub Paragraph(b)**.*

This requires that that the measure concerned are intended to secure compliance with laws and Regulations understood only to include domestic laws and regulations ,not including international agreements "***That is, certain complex public health problems may be tackled only with a comprehensive policy comprising a multiplicity of interesting measures but it may prove difficult to isolate the contributions to public health objectives of one specific measures from those attributable to the other measures that are part of the same comprehensive policy***" Moreover, some thinkers have taught that this preventive actions have brought a good result; that it has reduced the incidence of disease that may manifest themselves only after a certain period of time and can only be evaluated with benefit of time[xxvii].

***v-Many countries have argued that the definition of* 'subsidy' *is too narrow to fully establish the two test;* "subsidies existence" *and* "Specificity"** .

As an illustration, China in particular provides subsidies to businesses. For example, a recent OECD study (which used aluminum production as an example) illustrated how Chinese state-owned enterprise such as energy companies and banks provide cheap inputs and credit to private sector firms, allowing those firms to produce output more cheaply than international rivals[xxviii]. This gives those Chinese companies a clear advantage, but the practice is not

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currently captured by the WTO's anti-subsidy agreement. China is not the only WTO member to use state-owned enterprises but there is no clear distinction between private and state involvement in the Chinese economy leading to difficulties in using the existing WTO anti-subsidy system for tackling instances of harmful subsidies. It is the fall out of this that pushed US and Japan in 2017 to propose some measures; "*a trilateral cooperation*" to address state owned enterprises and other forms of subsidy currently not identified by WTO Rule of Law like reversing the burden of proof for certain subsidies for example ; it will be incumbent on the party accused to prove that it did not harm trade rather than the contrary. Secondly the group also wished that prohibited subsidies be expanded including unlimited financial loan guarantee[xxix].

d-Agreement on Subsidies and Countervailing Measures under GATS (ASCM).

Subsidy under ASCM means financial contribution by the government leading to conferral of benefit. Unlike goods case where trade takes place only through cross border movement (i.e., Mode 1), trade in services can additionally take place when consumers move abroad (Mode 2) or when service supplier sets up a base in foreign market (Mode 3) or when labor, both skilled and semi-skilled, temporarily move abroad (Mode 4). Under Article XV, it also makes it incumbent upon members to share information on the subsidies that are being given to services sectors. If a subsidy practice of any member country adversely affects any other member, the affected member can seek consultation under Article XV[xxx]. Apart from this there are other GATS articles that have a bearing on subsidy practices : the MFN clause (Article II), the NT clause (Article XVII), market access (Article XVI), additional commitments (Article XVIII), consultations on subsidies (Article XV (2)), and non-violation nullification or impairment (Article XXIII (3)). Article XXIII (3) of GATS stipulates that if a member considers that any benefit it could reasonably expect to accrue (from specific commitment of another member) is being nullified or impaired as a result, for example, of a particular subsidy, it may have recourse to the dispute settlement process[xxxi].

However, subsidy is not the only source of distortion as can be witnessed in the practice of some big economies through their Domestic regulatory policies meaning that practices of monopolies and exclusive service providers can have subsidy-like effect;

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i- Chinese support for domestic manufacturers show that income taxes may have a high impact on the competitiveness of manufacturers[xxxii].

If part of the investment for machinery can be deducted only if the machinery was made domestically, foreign manufacturers can compete only in exceptional cases[xxxiii]. In the Chinese example, foreign producers had to be 40% more efficient, and thus had to offer 40% lower prices, just to be on par with Chinese producers. Such a tax incentive is not only incompatible with a common set of rules for domestic and foreign companies and therefore with the NT principle[xxxiv]. Secondly, Double Taxation does not necessarily involve laws even recognizing cross-border trade; rather it can be the result of tax rules aimed exclusively at domestic economic actions. Yet, as shown above, these policies may have a prohibiting effect on cross-border investments. Tax holidays, on the other hand, attract foreign investment. Both effectively lead to a different treatment between the countries' own residents and those of other states. From the abovementioned reasons, the WTO cannot effectively advance its goals. So, whether a WTO member prevents imports through tariffs or by collecting higher taxes from a Foreign Investment Enterprise (FIE) the Tariffs has a distorting effect on cross-border trade.

ii- The US exemption of income generated by sale and lease of* "export property" *from taxation if significant parts of the transaction happened outside of the United States[xxxv]. *For example,* ***the disputes between the US and the EC regarding the FSC and Extraterritorial Income (ETI) schemes*** .

The legal basis was the "***Deficit Reduction Act***", which set the rules for FSCs. "Export property" comprised products that an FSC held for sale or lease, that were produced in the US by a company other than the FSC, that were intended to be used or re-sold outside of the US, and that did not consist of more than 50% "*foreign content*"[xxxvi].In combination with specific pricing rules regarding FSCs, the exemptions lead *to a tax reduction of 15–30%.*According to the US government this tax advantage was necessary for two reasons: First, unlike the European "***territorial"*** system, under the American **"*world-wide*"** system, the residents' world-wide income is taxed. Second, unlike the EC, the US did not levy a value-added tax (VAT) on imports[xxxvii]. From the US's point of view, the rules regarding FSCs were only meant to exclude (some) foreign economic activities and to compensate for these disadvantages. The WTO agreed that the US does not have to tax world-wide income. Yet, doing so in general, while

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excluding some economic activity, effectively creates a subsidy for that activity. Subsequently, US enacted the "***FSC Repeal and Extraterritorial Income Exclusion Act of 2000***" (ETI Act). However, the WTO found the ETI Act still having violations; First, the ETI Act still constituted a specific exception from the US's tax system and thus a subsidy. Second, those exceptions were "***dependent or contingent upon export***" according to Article 3.1 (a) of the SCM Agreement. Third, the scope of the ETI Act was too broad to merely prevent double-taxation. Fourth, the limitation of imported parts to 50% discriminated against foreign goods[xxxviii].Consequently; the US was obliged to repeal the ETI Act by enacting the "***American Jobs Creation Act of 2004***". Before the latter act was put into place, US had requested consultation with countries like Belgium, Netherland, Greece, Ireland and France[xxxix], but no Panel was established.

4-Border Adjustable tax discipline under WTO Agreement

A *"border adjustable"* tax as understood under WTO rules is a domestic (internal) tax on the sale of a product that may be adjusted at the border by levying the tax on imports and exempting it on exports[xl]. Border adjustable taxes are sometimes equated with "*indirect*" taxes, *i.e.,* taxes borne directly by a product. Indirect taxes are to be distinguished, and treated differently under WTO rules, from "direct" taxes like income or profit taxes. The general rule of GATT Article II:1(b) is that, other than customs duties, imports must "*be exempt from all other duties or charges of any kind*."

However, GATT Article II:2(a) allows a government to impose at the time a product crosses its border ;a charge equivalent to an internal tax imposed on a like domestic product, as long as the internal charge is imposed consistently with the *"national treatment*" principle of GATT Article III[xli].WTO rules allow for the adjustment of certain types of internal taxes at the border under certain conditions; the tax must be applied equally to imports and *"like" domestic* products. This rule has some loopholes;

a- Nothing in the plain language of Article III:4 specifically excludes requirements conditioning access to income tax measures from the scope of application of Article III, so that Article III:4 of the GATT 1994 applies to measures conditioning access to income tax advantages in respect of certain products[xlii]. The WTO Panel in US – FSC (Article 21.5 – EC) clarified that the national treatment disciplines for internal taxes apply not only to *"indirect*

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taxes" like VATs but also to "direct taxes" like corporate income taxes. Again, WTO rules are based on the *"destination*" principle; taxes on products should be levied at their point of sale so as to align the tax treatment and conditions of competition of imported and domestic products in the marketplace.

b-This principle has some consequences for the permissibility of border tax adjustments under WTO rules; the permissibility of border tax adjustments was first addressed by the 1970 GATT Working Party on Border Tax Adjustments, which concluded that there was a convergence of views to the effect that taxes directly levied on products were eligible for tax adjustment and that certain taxes that were not directly levied on products were not eligible for tax adjustment, citing social security charges and payroll taxes as examples of the latter[xliii].

f-Trade Agreement on Trade Related Intellectual Property Right (TRIPS) Article 4.

Trade agreements are generally aimed at ensuring minimum standards of protection for intellectual property rights. Article 63.2 of the TRIPS Agreement requires Members to notify the laws and regulations made effective by that Member pertaining to the subject-matter of the Agreement to the Council for TRIPS in order to assist the Council in its review of the operation of the Agreement[xliv]. These agreements restrict protectionism, and are based to some extent on the idea that free trade results in net economic gains. For example, the General Agreement on Tariffs and Trade (GATT 1994) obliges WTO Members to place upper limits on tariffs / customs duties. This, along with the fact that tariffs / customs duties only apply to imported goods, makes non-discriminatory excise taxes the preferred approach to health taxes. WTO law also disciplines non-tariff measures, such as regulation and taxation. In this respect, non-discrimination is a basic principle of WTO law prohibiting WTO Members from discriminate between goods from their trading partners or between imported and locally-produced goods.

But the linkage between trade and health, and the question of to what extent trade agreements restrict the right to regulate or tax, has been the focus of much debate including the present Article.

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B-Taxation across borders

1-Regional integration tax regime

The World Trade Organization (WTO) is responsible for the multilateral trading system[xlv]. All contracting parties to the Marrakesh Agreement Establishing the WTO are engaged in one or many regional trade economic agreements (212 have been notified to the WTO, but some have not been notified, while some of the notified ones do not work). The last WTO publication point out that, political and economic cooperation relies on regional integration agreements and the WTO bodies remain an important forum for discussion and for promoting new ideas[xlvi].All WTO members are engaged in Preferential Trade Agreements but the formula differs from region to region; from the simplest Preferential Trade Agreement (1), through to a real Free Trade Agreement (2), Customs Union (comprehensive12) (3), Comprehensive Economic and Trade Agreement (CETA) (4), Deep and Comprehensive Free Trade Agreement (DCFTA) (5), Association Agreement, Common Market (6), Economic and Political Union (7), Economic (8), Monetary (9), Fiscal (10) and Political Union (11)[xlvii] .Proliferation of Regional grouping is fact of life nevertheless WTO is grappling with difficulties to handle;

a-Mexico – Tax Measures on Soft Drinks and Other Beverages[xlviii].

Mexico said that its measures were justified under the NAFTA[xlix]. Further, in its closing statements, Mexico argued that a NAFTA panel could find that the tax measures imposed by Mexico were acceptable countermeasures. United States stated, whether Mexico's tax measures are inconsistent with the NAFTA is not relevant to resolution of this dispute, which concerns the consistency of Mexico's tax measures with its obligations under the WTO Agreement.

Mexico's response to panel question made it clear that the panel was not in position to determine the inconsistency of its measures and that the determination of the rights and obligations of parties to the NAFTA is beyond the terms of reference of this Panel[l].Mexico's response to the Panel's question does, did not, highlight the complexity of any **"*defense*"** indicating Mexico's inclination under NAFTA and why the Panel could not have questioned Mexico's contending that its tax measures were consistent with the NAFTA in making

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findings. In this dispute, whether Mexico's tax measures were inconsistent with the NAFTA or not is was a complex legal issue and determination that the Panel was not in a position to make a decision[li].Questioning to know if the NAFTA Agreement was part of the United States' domestic laws or regulations and what that fact have for the expression "***laws or regulations***" as used in paragraph (d) of Article XX of the GATT in this dispute. Mexico states that "***although NAFTA is an international treaty, it plainly has effects in the domestic legal orders of all three NAFTA parties that go beyond implementing action taken by any particular signatory***"[lii].

Contrary to Mexico's assertion, whether there is a strict dualist separation between international obligations and domestic law was not the point ,the U.S. submissions and statements explained the ordinary meaning of the phrase interpreted in its context and in light of agreement's object and purpose meaning the domestic laws or regulations of the Member claiming the Article XX(d).On December 2, 1996, the first dispute-settlement panel established under the provisions of the North American Free Trade Agreement' (NAFTA) issued its final report on the U.S. challenge to Canada's application of tariff-rate quotas to imports of U.S.-origin agricultural products. The panel unanimously concluded that Canada could apply tariffs in excess of its NAFTA tariff commitments pursuant to annex 702.1 of the NAFTA. 3 This provision, incorporated into the NAFTA from the United States-Canada Free Trade Agreement (FTA), retained the rights and obligations of the parties under the provisions of the General Agreement on Tariffs and Trade 5 (GATT) and agreements negotiated under the GATT. In making its determination, the panel thus faced the difficult task of analysing the negotiating history of both the FTA and the GATT and interpreting the apparently conflicting requirements of the World Trade Organization (WTO) and the NAFTA. The panel concluded that Canada's actions were justified. In reaching its conclusion, the panel, instead of analysing and applying the relevant legal principles, read into the texts an implied bargain among the negotiators.

b-NAFTA/WTO Conflict in Agricultural Trade[liii]; the dispute U.S. and Canadian positions on agricultural trade.

Agricultural Protectionism in Canada and the United States Canada's "***supply-management***" measures for milk, eggs, chicken, turkey, and broiler hatching eggs predate the FTA[liv]. To implement these measures ; joint federal/provincial agencies administer marketing plans that

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regulate production and pricing and provided for orderly marketing, levies, research and promotion, licensing, and the acquisition and disposal of products[lv]. In conjunction with its supply-management measures, Canada adopted import controls, including import permits and absolute quotas, to prevent imports from **disrupting national supply control and pricing goals**[lvi].Canada required permits for imports of wheat, oats, and barley' and banned the importation of margarine. In May 1986, a few months before the Uruguay Round negotiations got underway, the United States and Canada negotiated and signed a bilateral free-trade agreement in 1987[lvii].They inter alia agreed that each party would progressively eliminate all of its customs duties on goods originating in the other nation[lviii]. The parties could not agree, however, on the elimination of import quotas on agricultural products.

While the FTA did not expressly authorize the use of quantitative restrictions, many of the provisions of chapter seven acknowledge the applicability of absolute quotas[lix]. In particular, article 710 of the FTA, by affirming the parties' respective rights and obligations under the GATT, implicitly allows the use of quantitative import restrictions that are GATT consistent. This provision thus permits the use of import quotas consistent with article XI:2(c)(i) of the GATT, the GATT Protocol of Provisional Application, or the section 22 waiver granted to the United States[lx]. Article 710 of the FTA, subsequently incorporated into the NAFTA, and was to become the basis of Canada's defence in the dispute with the United States.

c-*Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items.*

This case was about Minimum specific duties imposed by the government of Argentina on the above mentioned goods. Import duties of these goods exceeded bound rate of ad valorem 35 % contrary to Argentina's schedule of LXIV. On the 4th of October 1996 the United States requested consultations with Argentina pursuant to Article 7 on Agreement on clothing and textiles; a statistical tax of three per cent ad valorem on import of all sources other than MERCOSUR countries[lxi].United States claimed that the measures violated article II of GATT. Consequently, the Panel met on the 17th and 18th of July 1997 and issued interim report to the parties. Argentina on the eve of Panel ruling through its Ministry of Economy and Public Works and service adopted resolution revoking all the minimum specific import duties on food wear there by arguing that the measures were put in place to revamp taxation sector due to injury that was identified in the sector. She went further to commend that the DSB was not

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supposed to consider the measure a violation given that the measure ceased to exist before the Panel was establish. United States with other interested parties like European Union insisted that the measure be considered violation because there was strong indication that Argentina could reinstate the measure in due course.The Panel concluded by asking Argentina to revisit the measure and bring it to conformity as entered into in the accession schedule[lxii].

e- European Communities — Regime for the Importation, Sale and Distribution of Bananas [lxiii].

This was a regime put in place by European Commission on Import, **sales and distribution of bananas duty free in favour of 71 African countries**, **Caribbean and Pacific countries (ACP) excluding other developing countries**. Although this was in line with the Lome Convention aimed at developing the economy of developing countries through preferential treatment, Ecuador, Guatemala, Mexico and USA considering it as discriminatory against other colonies and that it violated Art I, II, II, X, XI, and XIII of GATT 1994, filed a complaint in 1996. Panel and Appellate Body brought out the various elements as justification for EC inconsistency in its WTO obligation[lxiv]; first that the annual duty free tariff quota of 775,000 mt of imported bananas from ACP countries leaving out other non ACP WTO members violated Art. I of GATT 1994. Secondly, that with the expiration of the Doha Waiver in I of January 1996 on bananas and with the establishment of panel right to when the report will be issued, there is no evidence that there will exist any Art I (I) of the GATT 1994 to cover the preference granted by EC to duty free tariff quota of Import bananas from ACP countries. That EC current bananas Import regime, its tariff quota reserved for ACP countries was inconsistent with Art XIII(I) and Art XIII (2) of the GATT.

2- The binding nature of GATT Direct effect in national courts.

a-International Fruit Company Case. The ECJ stated that before invalidity of direct effect of international Agreements can be relied upon before a national court that provision of international law must be also capable of conferring right on citizens of the community which they can invoke before the courts. The ECJ merely establish a link between the possibility of invoking an international agreement for the review of the validity of a community act and the fact that certain provision of this agreement may be relied upon by individuals before national

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courts[lxv].Consequently, the ECJ is not prepared to review the validity of such an act unless the agreement is capable of conferring rights on individuals as **Beb pointed out** "***the lacing direct effect of an agreement protects community act"*** **[lxvi].**

b- Polydor Ltd vs Harlequin case. Article 228(8) EC Treaty it states that agreements concluded under the procedure provided therein *"**shall be binding on the institutions of the Community and on member states".*** Such agreements are concluded by the Council but the EC does not determine the legal instrument to be used by the Council for such approval. Whereas in the past the Council approved such agreements by way of **a *decision***, it latter changed the form by using instead ***regulation***. This practice lead to confusion between ***direct effect in the wider and the narrower sense*** as seen above.

However, the fact that regulation are directly applicable by virtue of **Article 189 EC Treaty** might induce courts to draw erroneous consequences as to the direct effect (in narrow or wider sense) of such agreement. This was referred to in the preliminary ruling in **Polydor case** where the English Court of Appeal asked whether a provision of the EEC-Portugal Free trade agreements could be invoked by individuals before a national court having full regard in particular to the said EEC Council Regulation[lxvii].This was similar case in German court when dealing with association agreements concluded by the EC with Portugal and Spain ;both agreements were transformed into community law by means of regulation[lxviii].

c-Direct effect in a narrow sense.

The ECJ has on many occasion states clear what the notion of direct effect is. **If a provision of EC Law is held to be directly applicable, it grants individuals right which the national courts must protect.** In the case of **"*Van Gen and Loos"*** it was stated that the provisions must be **clear, unambiguous, and unconditional and its "*modus operandis*" must not be dependent on further action to be taken by EC or national authorities**[lxix].

On the other hand ,it remains doubtful that this fundamental principle which was developed within the genuine legal order of the EC for the purpose of its unprecedented objectives could effectively be transported as such into a more flexible international legal system[lxx].Advocate General Trabucci expressed similar doubts in his opinion in ***Bresciani case*** when he stated that

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" it might seem contradictory and perhaps in practice also counterproductive simply to apply the law of international agreements on the Community concept of direct applicable law"[lxxi].

d-Double taxation Agreements (DTAs) in WTO.

According to some experts, expansion of membership in WTO possesses a great challenge to the operation of double taxation. This dispute resolution System of WTO has found it difficult to handle DTAs issues, at times signatory states are faced with the problem of choosing competent arbitral system to settle the problem .DTA dispute settlement on the contrary often base on political negotiation and by so doing the latter is politically inclined rather than the former. Politically a stronger party will definitely opt for DTS which is with the hope to crush her opponent (weaker party).Another preoccupation according to this finding is the overlapping of International Tax Regime. As an example, two parties under DTA and WTO may each have right to choose amongst the two the one that pleases it ,the logical quest is to know then which of the two has an edge over the other or standing to handle the matter. This without doubt brings to light conflict of jurisdiction in dispute settlement under DTAs[lxxii].

This research addresses the present the situation in a case study of the World Trade Organization trade dispute body in **EC-Hormones case, with complainant the United States of America.** The first chapter provides a historical background of the World Trade Organization and presents the significant of this case as the initial cases of the WTO (DSB) setting crucial precedents. Chapter two describes in detail the Dispute Settlement process and presents a case study of international trade including an interview of a representative of the United States Trade Representative (USTR)[lxxiii].

e-Fiscal autonomy of States. Catherine Bernard writings on the substantive obstacles in the application of WTO rule of law (The autonomy of member states to determine its own taxation policies).

For example, Resolution 98/34 has been reduced further by the Mutual Recognition of Regulation 764/2008. Article 30 of Treaty on the Functioning of the European Union (TFEU)deals with fiscal barriers applying at the frontier of a Member state[lxxiv].The Article 110 TFEU gives a member considerable discretion to determine the content of their own taxation policy for example on which products to tax, on what basis and at what level ; this is known

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as the principle of fiscal autonomy or fiscal sovereignty like in "***Jonie Walker case***" where a question was raised as knowing whether Denmark could tax whisky at a higher rate than fruit wine[lxxv].

The Court held that the Union did not lay down any rules restricting a member from putting in place tax arrangement to differentiate between certain products on basis of objective criteria such as nature of raw materials used or the production process employed. In **Bergandi v. Directeurs General des Impôts case**, The court continued that the decision was legitimate under law to pursue economic objectives policy[lxxvi].

The first bone of contention is the scope of application of Article 110 TFEU. Much importance has been accorded to single market by widely interpreting Article 110 in a way to directly or indirectly undermine the equal treatment of domestic products**[lxxvii].**In the **case of Bergandi** the court said that Article 110 TFEU will apply whenever a fiscal levy to discourage imports of goods originating in another member states to the benefit of domestic production. Therefore Article 110 TFEU applies to tax imposed on imported products as well as taxes impose on the use of those products including charges like heath inspection (it is calculated from the weight of the products)[lxxviii].The prohibition in Article 110 TFEU is accompanied by Article 113 TFEU to harmonize legislation concerning turn over tax, excise duties tax to regulate the function of internal market of state in the community as a result of unanimous decision from the European Parliament.

Finally, the issue of indistinctly applicable measures in Article 3 of Directive 70/50 dealing with size, shape, weight, composition presentation, identification applicable to both imported and home made goods. The problem comes in where the home product has to satisfy only one regulator (home state) meanwhile the imported good has to satisfy dual regulatory burden; home state and host state regulation which implies additional cost[lxxix].

3- *Dispute at the WTO born from Direct Taxation*

The WTO rules concerning international trade and investment has increased the potential for conflicts between these rules and members, tax law laws for members thus creating more disputes between members. Dispute at WTO are mostly inconsistency between domestic rules

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WTO as well as tax international tax laws. Statistically out of 330 cases initiated at DSB with request for consultation, 34 have been over taxation meanwhile 24 are from indirect taxes and other 10 direct taxes. Inter alia, dispute over indirect tax involve alleged differential treatment on import products (Beverages, Periodicals, cigarettes, Automobiles, integrated circuit) in relation to domestic products thus violation of GATT Article III(National Treatment on taxation and regulation).Our focus here is on dispute on Foreign Sales Corporation (FSC) and Extra Territorial Income (ETI);

i-Turkey's Taxation on Foreign Film.

On the 6th of June 1996, United State requested consultation from Turkey concerning the latter's taxation on revenues generated from the showing of foreign films which it alleged violated GATT Article III concerning NT. The Dispute Settlement Body (DSB) established a panel in February 1997 to hear the case. In July 1997 both parties notified the Panel of a mutually agreed solution.

ii-United States Foreign Sales Corporation(FSC)and Extra Territorial Income(ETI) Scheme.

The dispute between United States and the European Community that resulted in 1981 ***"Understanding"*** *resurface again in 1997 when the EC formally challenge the US over the DICS's successor, the FSC Scheme which was enacted in 1984.The FSC and the DISC's subsequently the ETI was intended to offset perceived tax disadvantage encountered by US producers in respect of their export*[lxxx]*.When consultation failed EC requested the establishment of Dispute Settlement Panel and it was formed in 1998.*

RECOMMENDATOINS

A-The review Treaty over-ride.

Treaty override itself is a violation to the principle of ***"pacta sunt servanda***". Each time a country enacts a legislative override, it amounts to violation of international law, which damages the reputation of the State as a member of the international community, as well as the international legal order itself[lxxxi].Second, because treaties are really no more than contracts

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between sovereign nations, legislative overrides erode the trust of treaty partners undermining that the state will remain faithful to its obligations[lxxxii].Meanwhile the Vienna convention regards treaty over-ride as violation in it articles 26, 27, 31 some states consider treaty over-ride as a necessary tool to over-rule the international tax treaties;

1-***The* case of *Arabian Express Line Limited v. Union of India*[lxxxiii].** In this case the petitioner, M/s. Arabian Express Line Limited, United Kingdom, was a resident of the United Kingdom, who had pleaded that in accordance with Article 9(1) of the Agreement for the Avoidance of Double Taxation between the Government of India and the Government of the United Kingdom, the entire shipping income of the United Kingdom company be exempted from tax in India. The petitioner equally presented a certificate issued by the Assistant Commissioner of Income-tax, Company Circle, Calcutta, which affirmed that they were so exempted from the tax with effect from April 1, 1992. Despite this documentary evidence, the Income Tax Officer, Gandhidham went ahead to passed an order, which levied taxes and imposed penalties. The order was found illegal by the Supreme Court and contrary to the Circular issued by the Central Board of Direct Taxes and the convention between the Government of India and the United Kingdom.

2- ***The 2009 amendment of the German Income Tax Act pursuant to Section 15(1) No. 2 ITA***; interest paid to a partner of a German business partnership is re-characterized as business income and taxed accordingly in the hands of the partner, which consequently denied Italy the right to tax the interest under Article 11 (1) of the Treaty[lxxxiv].The German Federal Fiscal Court (BFH) in its decision stated that this unilateral reclassification of remunerations, which generally falls under a (specialty) article of a treaty, is an override of those provisions and hence commits an unconstitutional breach of international law.

In conclusion it is worth mentioning here that treaty overriding should come as a last resort and tha other alternative like retaliatory measures should be encouraged.

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LIST OF ABREVIATION

- GATS: General Agreement on Trade in Services
- GATT: General Agreement on Trade in Services
- IMF: International Monetary Fund
- WHO: World Health Organization
- WTO: World Trade Organization
- WCU: World Custom Union
- OECD: Organization of European Cooperation and Development
- DSB: Dispute Settlement Body
- SCM: Subsidies and Countervailing Agreement
- FSC: Foreign Sales Corporation
- ETI: Extra Territorial Income
- DISC: Domestic International Sales Corporation

ENDNOTES

[i] Alison Christian "*Hard law and Soft law in international taxation*" Published by University of Wisconsin Law School Paper No. 1049 2017.

[ii] OECD's definition of treaty override: "*The term Treaty Override refers to a situation where the domestic legislation of a State overrules provisions of either a single treaty or all treaties hitherto having had effect in that state*."

[iii] I introduce this initiative as one relatively recent example of the formulation of international tax norms. Another OECD-related example is currently at issue in a recent dialogue among international tax experts regarding the binding nature of OECD treaty-related guidance. See supra note 2. International tax initiatives of other bodies such as the United Nations and the European Union are additional examples that are worth exploring, perhaps especially in cases of overlap with OECD efforts (such as in the area of tax treaty negotiation and interpretation, tax treaty arbitration, and best practices for corporate governance).

[iv]Vienna Convention – Articles 26 & 31 provide that a Double Tax Avoidance Treaty (Treaty) should be implemented in good faith. Article 27 provides that a Government may not invoke its internal law as justification for its failure to perform a treaty. With all these provisions, how can a Government override a treaty!

[v]Nov, Avi, The "*Bidding War*" To Attract Foreign Direct Investment: The Need for a Global Solution, 25 Va. Tax Rev. 835 (2006) (arguing that a hard law solution in the form of a multilateral agreement is needed to combat the negative effects of international tax competition). Contrast Oakfield's perspective that hard law institutions are not needed to the extent cooperation can be achieved through the OECD as a soft institution. The Rise of the OECD, supra note 2.

[vi] Developing and especially least-developed countries, where capital markets are also inevitably under-developed, are arguably more susceptible to "market failure", which raises domestic firms' costs of doing business. While there is some doubt as to whether the government can allocate resources better than even imperfect markets, some form of temporary assistance may nonetheless be considered necessary to enable domestic "infant" industries to

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expand sufficiently to achieve cost reductions associated with economies of scale as well to learning-by-doing and technological progress, which are among the major determinants of growth in total factor productivity (TFP). Tariffs and other forms of protection may also be used in instances where it is felt that some firms in the process of restructuring need temporary protection to enable them to adjust in order to increase their productivity and thus become viable in the longer term. Under these circumstances, the optimum tariff structure would not necessarily be uniform. Protection would be accorded only to specific "infant" or restructuring industries affected by scale economies, market failure (or externalities), but not other industries. But identifying such specific industries is usually very difficult. Besides, import tariffs are not necessarily the best instrument to address market failure. Indeed, protection runs the risk of hampering the re-allocation of domestic resources in accordance with the economy's comparative advantage. Since 1990, one of the main sources of productivity growth, and thus development, in Asia has been structural change involving the movement of labor from low- to high productivity sectors. The poorer productivity performance of Africa and Latin America is apparently due largely to the movement of labor in the opposite direction, from high- to low-productivity sectors (McMillan and Rodrik, 2011).

[vii] See For example, an import tariff is equivalent to a tax on domestic consumption combined with a subsidy for domestic production.

[viii]See other major protectionist measures like local content requirements, state trading monopolies, and discriminatory government procurement practices.

[ix] Keen M. *"Is the WTO a World Tax Organization? a primer on WTO Rules for tax policymakers"* International Monetary Fund Fiscal Affairs Department March 2016.

[x] John Jackson H. *"The World Trade System* " Export subsidies are specifically linked with exports whereas domestic subsidies are granted to industries regardless of whether those products are exported or not 249-250 (1989).

[xi] See JOHN H. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 440-441 (1977).

[xii]Article III - National Treatment on internal Taxation and Regulation

[xiii] 4L/833, adopted on 23 October 1958, 7S/60, 63-64, para. 11.

[xiv]L/6439, adopted on 7 November 1989, 36S/345, 385, para. 5.10.

[xv]A footnote to this paragraph refers to the Panel Report on "United States - Taxes on Petroleum and Certain Imported Substances", adopted 17 June 1987, BISD 34S/136, 158, para. 5.1.9.

[xvii] 2L/5863, para. 69.

[xviii] 4EPCT/A/PV/9 p. 19; EPCT/W/181, p. 3.

[xix] E/CONF.2/C.3/SR.11, p. 3; Article 17 was the Charter article on multilateral trade negotiations, some elements of which were incorporated into Article XXVIIIbis.

[xx] L/6175, adopted on 17 June 1987, 34S/136, 154, para. 5.1.1

[xxi] Thomas Ecker & Franz Koppensteiner, *Anwendbarkeit der WTO-Abkommen auf direkte und indirekte Steuern* [*Applicability of the WTO Treaties to Direct and Indirect Taxation*], 3 Steuer und Wirtschaft Int'l Tax and Bus. Rev. 142, 142 (2009).

[xxii] WTO Anti-subsidy and Countervailing Measures Agreement (1994).

[xxiii] See WTO Subsidies and Countervailing Agreement (SCM).

[xxiv] WTO/DS371/323

[xxv] Thailand –Restriction on importation of and internal tax on Cigarettes adopted on 7 November 1990 BISD 37S/200.

[xxvi] WTO "*Framework Convention on Tobacco Control"* Center for Law and Cancer 2017.

[xxvii] *Ibid.*

[xxviii] Sauvage, Jehan, *Measuring Distortions in International Markets: "The aluminium value chain"*, OECD, January 2019.

[xxix] Gerstal D. "*Trade Trilateral Target"* China's Industrial Subsidies, Center for Strategic and International Studies, January 2020.

[xxx] For these GATS Articles refer Benitah (2004) from which we have drawn heavily.

[xxxi] See Benitah 20 04

[xxxii] Przemyslaw Kowalski, *Impact of Changes in Tariffs on Developing Countries' Government Revenue*, 18 OECD Working Paper Series, May 2006, at 109, 110.

[xxxiii]Luosha Du, Ann Harrison & Gary Jefferson, *FDI Spillovers and Industrial Policy: The Role of Tariffs and Tax Holidays*, 64 World Dev. at 366 (2014); see also Kenji Fujiwara, *Tax Principles and Tariff-Tax Reforms*, 71 Finanzarchiv/Pub. Fin. Analysais 360 (2015).

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[xxxiv]Junxue Jia & Guangrong Ma, *Do R&D Tax Incentives Work? Firm-Level Evidence from China*, 46 China Econ. Rev. at 50, 50-51 (2017); Boris Lokshin & Pierre Mohnen, *Do R&D Tax Incentives Lead to Higher Wages for R&D Workers? Evidence from the Netherlands*, 42 Res. Pol'y at 823, 823 (2013).
[xxxv] Johann Wagner*, "Direkte Steuern und Welthandselrecht: Das Verbot Ertragsteuerlicher Export subventionen im Recht der WTO [Direct Taxes and World Trade Law: The Prohibition of Corporate Tax Related Export Subsidies in WTO Rules]" 77 (2006).*
[xxxvi] *See* 26 U.S.C.S § 927(a) – Repealed.
[xxxvii] Daly, Primer, *supra* note 8, at 36.
[xxxviii] Daly, Primer, *supra* note 8, at 37.
[xxxviii] The WTO and Direct Taxation: Direct Tax Measures and Free Trade
[xxxix] Request for Consultations by the United States, *France – Certain Income Tax Measures Constituting Subsidies*, WTO Doc. WT/DS131/1 (May 5, 1998).
[xl] Ingin Richard *"Border -Adjustable Tax under the WTOAgreement"*Publication and Event Journal 2017.
[xli] This rule is confirmed by the Ad Note to GATT Article III, which states that "any internal tax or other internal charge, … which applies to an imported product and to the like domestic product and is collected… in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge… and is accordingly subject to the provisions of Article III."
[xlii] Panel Report, *US – FSC (Article 21.5 – EC)*, paras 8.142 and 8.144.
[xliii]GATT(1970) *ReportoftheWorkingPartyonBorderTaxAdjustments,adoptedon2December* (L/3464),paragraph1 4, *availableat* https://www.wto.org/gatt_docs/English/SULPDF/90840088.pdf ("1970 WPR").
[xliv]Article 63.2 of the Agreement on TRIPS: Review of the Implementing Legislation.
[xlv] Mission and all following Ministerial Decisions and Agreements
[xlvi]Explicitly discussed are: market access, rules of origin, trade facilitation, antidumping regimes, safeguard provisions, sanitary and phytosanitary measures, technical barriers to trade, intellectual property provisions and ev
[xlvii] This typology differs substantially from the classics (e.g. Balassa, 1961).
[xlviii]WT/DS308 March 22, (2005) .
[xlix]Paragraph 33 of written version.
[l]See, e.g., Mexico Responses to Questions of the Panel After the Second Meeting, p. 17 (revised courtesy24 translation).
[li] The United States does not share Mexico's view that a NAFTA Chapter 20 panel would find its tax23 measures consistent with the NAFTA, nor does it share Mexico's interpretation of the NAFTA in this regard. In addition, with all respect to the experience that the members of Mexico's delegation have with proceedings under Chapter 11 of the NAFTA, that chapter is simply not relevant to this dispute. It is not part of the WTO Agreement; its provisions are different from those at issue here; and it applies in investor-to-state investment disputes (not stateto-state trade disputes, such as, for instance, a hypothetical dispute between Mexico and the United States regarding Article 301 of the NAFTA).
[lii]Mexico Closing Statement at the Second Meeting, paras. 8-16.
[liii]McNiel D. E. 3 «*NAFTA Panel Decision on Canadian Tariff Quotas : Imagining bargaining* »Yale Journal of International Law Dec 1997.
[liv]See In re Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products, Annexes to Counter-Submission of Canada 5-6 (Feb. 19, 1996) (on file with author). The current programs began with the introduction of the National Milk Marketing Plan by the Canadian Dairy Commission in 1970 and continued with the creation of the Canadian Egg Marketing Agency in 1972, the Canadian Turkey Marketing Agency in 1973, the Canadian Chicken Marketing Agency in 1978, and the Canadian Broiler Hatching Egg Marketing Agency in 1986. See id. at 6.
[lv]See Id.
[lvi]See id. This was accomplished by listing products on an Import Control List administered by the Department of Foreign Affairs and International Trade.
[lvii]The Agreement was signed by President Ronald Reagan and Prime Minister Brian Mulroney on January 2, 1988. See Ronald Reagan, Communication from the President of the United States, Lm-E OF TRAsNrrrAL, H.R. Doc. No. 100-216, at iii (2d Sess. 1988).
[lviii] See FTA, supra note 4, art. 401, paras. 1-2.
[lix]FTA, supra note 4, arts. 704 (meat), 705 (grains), 706 (poultry and eggs), 707 (sugar-containing products).
[lx]This interpretation of article 710 was confirmed, in part, by paragraph 4 of annex 702.1 of the NAFTA, which states: The Parties understand that Article 710 of the [FDA] incorporates the GATT rights and obligations of Canada and the United States with respect to agricultural, food, beverage and certain related goods, including

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exemptions by virtue of paragraph (1)(b) of the Protocol of Provisional Application of the GATT and waivers granted under Article XXV of the GATT. NAFTA, supra note 1, Annex 702.1, para.4.
[lxi]WT/DS56/R25 November 1997.
[lxii]*Ibid*
[lxiii] WTO Dispute Settlement DS27.
[lxiv]Article 21.5 Appellate Body Report (United States)
[lxv]Joined Cases 21-24/72(n10)at par 8 of the judgment.
[lxvi]Bebr G. "*Agreements Concluded by the community and their Possible Direct Effect: From International Fruit Company to Kupferberg"* CML, at 46 (1983).
[lxvii] Case 270/80Polydor Ltd v Harlequin Case Record Shop Ltd ECJ 329par 10 of the jugdgment (1992).
[lxviii]Budesfinanzh of (FinanceCourt), Judgment of 5 August RIW 786 (1990).
[lxix] See eg TC Hartley (n3) at 188
[lxx] Bebr G.(n13) at 72
[lxxi]Opinion of 14January in Case 87/75 (n18) at 148 (1976).
[lxxii] Thesis of Salihifa « Double Taxation »
[lxxiii] Cuppett B.S.Thesis EU Hormones case January 31 2000
[lxxiv]See Case 193/85 Cooperative Co-Fruita Srl v . Amministrazione delle Finanz dello stato(1987)
[lxxv] See case 243/84 Jonie Walker ECR875 (1986).
[lxxvi] See Case 25/86 ECR 134 para.29 « The court talks of legitimate economic or social purposes »(1988).
[lxxvii] Case C-22/O6 Stadtgeneinde FrohnleitenECR-2613, para.40(2007).
[lxxviii] Case C-221/06 Stadtgemeinde Frolileiten ECR I-2613 para.43(2007).
[lxxix] See case C-239/90 Bosher v.SA British Motor Wright(1991)ECR para 15 .
[lxxx] A more detailed history and description of DISC/FSC/ETI measures and resulting dispute between EC And US can be found in Brumbaugh 2004.
[lxxxi] Anthony C Infanti, *Curtailing Tax Treaty Overrides: A Call To Action,* University of Pittsburg Law Review (2000-2001). P. 688. (In reference to impact of override on United States.

[lxxxiii] INTM355225 – Double Taxation Agreements: Jersey: Income from a UK source paid to a resident of Jersey – Industrial or commercial profits paragraph.
[lxxxiv] Convention Concerning Double Taxation Agreement, 1993, Germany-Italy.

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