WTO and Direct Taxation in Denmark

by

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1. Overview

1.1. Legal Status and Domestic Law

The Danish Parliament ratified the WTO Agreement on December 16, 1994, and has been a WTO Member since January 1, 1995.

Only few authors have dealt with the relationship between WTO and direct taxation in Denmark. Therefore relevant literature on the subject seems rare. This lack of attention directed towards the WTO impact on direct taxes should not be regarded as a disrespect of the legal status of WTO Agreements, which should be followed ("pacta sunt servanda"). Rather, it is more likely that this is due to the absence of WTO issues in national courts. Furthermore the absence of Dispute Settlement Procedures regarding national taxes in Denmark is also a relevant consideration.

One question which has been raised by the Danish professor Karsten Engsig Sørensen is whether the WTO impact on direct taxation can be character-
ized as the fourth string in Danish international taxation where the initial strings are:

1. Internal domestic tax legislation,
2. Double Taxation Conventions,
3. EU legislation,
4. (WTO Agreements?)

The question has not been confirmed by legal scholars. This unfortunately illustrates the overall conclusion, drawn by several Danish authors, that the impact of WTO on direct taxation in Denmark is of limited relevance. However, from my point of view, the influence is increasing, and the WTO impact seems more relevant than ever. This conclusion will be substantiated in the final chapter of this national report.

1.2. WTO and EU Law

Denmark has been a Member of the European Community since January 1, 1973, and is (besides its own WTO Membership) a part of the EU Membership of WTO.

From an EU treaty point of view, attention should be paid to Article 300 EC, paragraph 7, since WTO Agreements are binding EU:

»Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.«.

Based on this binding effect it could be argued that if primary EC law and its consistency with WTO law is tested, even a national judge in a Member State could validate the consistency, if the contested community act is meant to implement a WTO measure. However, in an EU law perspective, the legal status of the WTO Agreements has been interpreted by the European Court of Justice (ECJ) in several cases. For instance, in joined cases C-21-23/72, *International Fruit Company III* the ECJ concluded, that GATT should not have any direct effect on neither Member States nor private parties in the Member States.

In case C-181/73, *Haegeman* the ECJ accepted the WTO Agreements as part of the legal order in the EC, and in case C-61/94, *IDA* and case C-17/98, *Sugar* the ECJ found that GATT (1947) is hierarchically superior to secondary EC legislation. However, it should be noticed that none of the EC directives concerning direct taxation seems to implement or refer to WTO obligations.
As a conclusive remark, since WTO Agreements are both part of domestic law and part of EC law, Denmark could as a WTO Member and as a part of the EU member group potentially be responsible for national infringements of the WTO obligations.

2. The most favoured nation clause

It has been argued\(^3\) that Community law prescribes intra-community most favoured nation treatment in the field of direct taxation because of its wording, the general objectives and the scheme of the Treaty.

Two cases are pending before the European Court of Justice (case C-376/03, \textit{D} and case C-8/04, \textit{Bujara}), and an argument in favour of reading a most favoured nation obligation in the EC Treaty could be supported by the fact that both GATT and GATS explicitly provide for most favoured nation treatment.

In the following the impact of the MFN Clause on both WTO Agreements will be substantiated.

2.1. GATT

2.1.1. The Impact of Art I GATT

Art I (1) GATT states, that »…any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties«.

Wordings like »products« and »like products« in the Most – Favoured Nation (MFN) Clause have not been defined separately in Denmark. However, from a Danish point of view, not only Appellate Body interpretations but also panel reports and other sources of law interpreting the national treatment obligation can be used for a definition of the two wordings in concreto.

In reference to the Appellate Body Report (ABR) on Canada-Autos, paragraph 84, it should be noticed that the object and purpose of Art. I (1) is »…to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I (1) also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis«. Combined with the statement in the panel report on case EC-Bananas III, paragraph 7.322 regarding GATS Art

XVII, it can be concluded that the prohibition of discrimination includes both a de jure and a de facto discrimination on »...any advantage ... granted by any party to any product«, cf. Art I (1).

This view is supported by the Appellate Body who dealt with the term »like products« in Canada-Autos, paragraph 79, concluding that »...the words of Article I:1 refer not to some advantages granted ‘with respect to’ the subjects that fall within the defined scope of the Article, but to ‘any advantage’; not to some products, but to ‘any product’; and not to like products from some other Members, but to like products originating in or destined for ‘all other’ Members«.

2.1.2. Art I GATT and Most - Favoured - Nation Treatment
Based on the arguments above, it seems reasonable to conclude that the wording »like products« refers to all similar products of all WTO Members. This means that in order to establish a violation of Art I, there must be an advantage which is not accorded unconditionally.

Since the paragraph does not exempt direct/indirect taxes as violations of discrimination, both kinds of taxation can potentially infringe Art I, if they are not applied uniformly to all taxpayers and are transparent. For instance, if a tax benefit essentially relates to exports, this could be an illegal export subsidy, cf. case US-FSC, which is analysed below.

2.2. GATS
2.2.1. The impact of Art II GATS
Art II GATS contains provisions regarding MFN treatment in the field of services. The wordings »like« and »services« and the phrases »like services« and »treatment no less favourable« have not been separately defined in Denmark. However, as mentioned above, not only Appellate Body interpretations but also panel reports and other sources of law interpreting the national treatment obligation can be used for a definition of WTO wordings in Denmark.

Regarding the scope of all articles in the GATS, it can be concluded that these do not apply to measures relating to judicial and administrative assistance, i.e. the terms do not contain such measures. Rather, a common classification scheme seems to include the following sectors as services: 1) whole-

4 See the conclusion of the Sub-Committee on Services at its meeting of March 1, 1995: MTN.GNS/W/177/Rev.1/Add.1.
sale and retail trade, hotels and restaurants, 2) transport and communications, 3) finance, insurance, real estate and business services and 4) community, social, and personal services.

Regarding the discrimination test, the MFN Clause in Art II (1) requires that treatment by one State must be compared with treatment of »like services« and »service suppliers« of any other country. The scope of these two wordings are not defined in the GATS, but the panel report in *Canada-Autos* addressed the issue of likeness in paragraph 10.248. The conclusion is »...to the extent that the service suppliers concerned supply the same services, they should be considered 'like'...«.

The wording »treatment no less favourable« is analysed and defined by the Appellate Body in the case EC-Bananas III, and the conclusion is »...that ‘treatment no less favourable’ in Article II:1 of the GATS should be interpreted to include de facto, as well as de jure, discrimination«. On this background it could be argued that the impact of the MFN Clause in Art. I GATT and Art II GATS has a similar scope.

However, the Appellate Body decision in *Canada-Autos* is interesting in regards to understanding the individual impact of Art II GATS and the standard of comparison. In paragraph 170-171, it is stated that an analysis of the consistency of a measure shall proceed in two steps:

1. First, a threshold determination must be made under Article I (1) to ensure, that a measure is covered by the GATS. This determination requires that there is a ‘trade in services’, and that there is a measure, which »affects« this trade.
2. Next, the consistency of the measure with the requirements of Article II (1) must be proven.

*2.2.2. The Impact of Art XIV GATS for Tax Treaties*

Denmark has applicable tax treaties with approximately 80 foreign countries, including all Member States of the EU and the European Economic Area. Basically, most of the 80 tax treaties are made with reference to the OECD MC.

Art XIV GATS contains some general exceptions to the GATS. The purpose seems to avoid that justified measures are applied in a manner which otherwise would constitute an arbitrary or unjustifiable discrimination between countries or a disguised restriction on trade in services. Therefore, the exceptions cover provisions regarding a) public order, b) health protection, c) legal compliance, d) the imposition or collection of direct taxes and e) tax treaties.

In this context item d) and item e) seem especially interesting. Tax provisions that could be seen as »arbitrary or unjustifiable discrimination« and/or
»disguised restriction« could for instance be source based taxation, where the service provider is non-resident, and where the taxation is more burdensome than if the service provider was resident. If the service provider is not covered by a tax treaty, and the tax paid is not offset by the residence country by means of a tax credit or an exemption, the source based taxation could serve as a fiscal barrier to the free trade of this service.

However, as stated above the MFN Clause in Art II GATS can be challenged by the impact of Art XIV GATS, i.e. a MFN Clause seems only applicable if it is explicitly laid down in a bilateral tax treaty. This conclusion will be substantiated in the following.

2.3. Conclusive Remarks
Regarding trade provisions it could be contrary to Art I GATT if Denmark made a beneficial tax exemption that essentially was related to exports of domestic products, cf. case US-FSC. Likewise, if Denmark levied a source based taxation on imports of services, and this taxation was more burdensome than if the service provider was resident, this could potentially infringe Art II GATS.

The question whether different wording of single provisions in various tax treaties could constitute an infringement of Art I GATT or Art II GATS seems more unclear.

It could be argued that the prohibition of discrimination in both GATT and GATS includes both a de jure and a de facto discrimination and explicitly provides for a most favoured nation treatment. Strong arguments can be derived from the wording, the general objectives and the scheme of the treaties. The wording »treatment no less favourable« seems sufficiently broad to allow such an interpretation, which could be supported by a teleological interpretation of the treaties.

However, Art XIV GATS values the principles of international tax law and does not violate the principle of reciprocity. Therefore differences in the wordings seem to be justifiable results of bilateral negotiations between Denmark and various contracting states, i.e. a MFN-interpretation of tax treaties could disturb the carefully crafted balance realized through bilateral tax treaties. In this respect it should be noticed that neither the OECD MC nor the UN MC provide for MFN-treatment. It seems obvious that if a MFN-clause could be invoked in the area of international taxation because of the WTO Agreements, this could create an enormous chaos and for instance cut off developing countries from future beneficial negotiations, i.e. when negotiating tax treaties different approaches can be taken by different parties.
As a practical example, Art 5 (3) of the OECD MC could be mentioned. The OECD MC wording has a 12 month PE-period, but in several Danish tax treaties this period is negotiated down to a shorter period. Furthermore, tax treaties with developing countries often depart from the OECD PE-principle, and thus profits may be allocated differently in relation to other tax treaties concluded by Denmark.

Another example of different approaches by different parties can be found in the DTC between Denmark and the US which contains the following wording in Art 1:3 item b:

»Unless the competent authorities determine that a taxation measure is not within the scope of this Convention, the non-discrimination obligations of this Convention exclusively shall apply with respect to that measure, except for such national treatment or most-favored-nation obligations as may apply to trade in goods under the General Agreement on Tariffs and Trade. No national treatment or most-favoured-nation obligation under any other agreement shall apply with respect to that measure«.

The wording is similar to the wording of US MC Art 1:3 item b and provides that if a taxation measure is within the scope of the convention, the non-discrimination obligations of the convention shall exclusively apply with respect to that measure, except for such national treatment or MFN-obligations that may apply under GATT. Thus, with the exception of GATT as applicable, no national treatment or MFN obligation under any other agreement than the US MC shall apply with respect to that measure, unless the competent authorities agree otherwise.

3. National Treatment

3.1. GATT

3.1.1. The impact of Art III GATT

Art III GATT contains provisions regarding national treatment on international taxation and regulation.

A tax »...which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation...«6 is subject to the provisions of Article III. To the extent that direct taxes are discriminating, these fall within the scope of the article.

In Denmark it seems as though court decisions within which the article has been analysed in regards of direct taxation are more or less non existing.

6 See text of ad Art III GATT.
However, some guidance on the impact of the article can be found in several Appellate Body statements interpreting the national treatment.

As a result of the case Japan – Alcoholic Beverages II it can be concluded that the purpose of Art III GATT is to avoid protectionism in the application of internal measures.

In paragraph 16, it is stated that »...the purpose of Article III 'is to ensure that internal measures’ not be applied to imported or domestic products so as to afford protection to domestic production...«. In the case Canada-Periodicals, the Appellate Body adds in paragraph 18 that »...the fundamental purpose of Article III of the GATT 1994 is to ensure equality of competitive conditions between imported and like domestic products«.

Actually, the impact of the article is broad, which is illustrated by the Appellate Body in paragraph 17. Paragraph 17 says »...the Article III national treatment obligation is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production. This obligation clearly extends also to products not bound under Article II«.

In the case Canada-Periodicals the relevance of a proven trade effect was addressed. Here it was stated in paragraph 18 that »...it is a well-established principle that the trade effects of a difference in tax treatment between imported and domestic products do not have to be demonstrated for a measure to be found to be inconsistent with Article III«, i.e. Art III GATT does also protect potential discrimination.

3.1.2. Art II (2) first sentence GATT

Art II (2) first sentence GATT covers situations in the field of taxation where taxes are added to imported products »in excess of those applied, directly or indirectly, to like domestic products«.

In the additional remarks to the article it is stated that »a tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed«.

In Denmark there do not seem to be any decisions in which the first sentence of paragraph 2, - and especially the wording »like«, - is analysed in the context of direct taxation. However, some guidance on the impact of the article can be found in the Panel reports regarding the case Argentina – Hides and Leather and case Japan – Alcoholic Beverages I.
In *Argentina – Hides and Leather* paragraph 11.182 the Panel states that »Article III:2, first sentence, is not concerned with taxes or changes as such or the policy purposes Members pursue with them, but with their economic impact on the competitive opportunities of imported and like domestic product”.

Moreover, the Panel in paragraph 11.182-11.184 explains the method of comparing tax burdens. The conclusion seems to be that Article III (2), first sentence, requires a comparison of actual tax burdens rather than merely just nominal tax burdens.

In *Japan – Alcoholic Beverages I*, paragraph 5.8, the Panel states that »... in assessing whether there is tax discrimination, account is to be taken not only of the rate of the applicable internal tax but also of the taxation methods (e.g. different kinds of internal taxes, direct taxation of the finished product or indirect taxation by taxing the raw materials used in the product during the various stages of its production) and of the rules for the tax collection (e.g. basis of assessment)«.

3.1.3. *Art III (2) second sentence GATT*

Art III (2) second sentence must be read and interpreted together with the accompanying *Ad Article*, since both articles have equivalent legal status, cf. the Appellate Body in *Japan – Alcoholic Beverages II*, paragraph 24. In this case the Appellate Body held that the note must be read together with Article III.

When defining products »not alike«, it is therefore argued that an appropriate interpretation of the wording has got to be carried out in the light of how the essence of »like products« has been defined. (According to Art II:2 sentence 2, this therefore creates a »power-conflict« between the two articles.)

In the field of taxation the definition seems relevant in situations where different kinds of products are subject to same taxation or where the same kinds of products are subject to different taxation.

3.1.4. *Art III GATT and the Allocation Rules of DTCs*

Situations occur where different kinds of products are subject to the same taxation or where the same kinds of products are subject to different taxation.

For instance, if income from royalties can be allocated to a Permanent Establishment in the source country, the income will not be subject to withholding tax on royalties, cf. Art 12 in OECD MC, but subject to taxation as business profits, cf. Art 9 in OECD MC.

It seems not clear whether such examples of different treatment are contrary to Art III.
3.2. GATS

Article XXII GATS raises particular concerns in relation to the mutual agreement procedure in OECD MC Art 25. Due to Article XXII (3) GATS, disputes regarding agreements on the avoidance of double taxation may be brought before the Council for Trade in Services. A footnote to paragraph 3 contains the important exception that if the dispute relates to international agreements »which exist at the time of the entry into force« of the Agreement, the matter may not be brought to the Council on Trade in Services unless both States agree.

In this respect the commentaries to Art 25 OECD-MC regarding the Mutual Agreement Procedure should be noticed. The commentaries recommend that the Contracting States' obligations under the GATS could be incorporated in DTC’s by the addition of the following provision:

»For purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that, notwithstanding that paragraph, any dispute between them as to whether a measure falls within the scope of this Convention may be brought before the Council for Trade in Services, as provided by that paragraph, only with the consent of both Contracting States. Any doubt as to the interpretation of this paragraph shall be resolved under paragraph 3 of Article 25 or, failing agreement under that procedure, pursuant to any other procedure agreed to by both Contracting States.«

From a Danish point of view, this recommendation has been followed in the DTC between Denmark and Canada (Art 30 paragraph 5)7. There do not seem to be any other DTC’s with Denmark as party with the same provision.

3.3. TRIPS

Art 3 and 4 TRIPS contain provisions regarding national treatment of intellectual property. From their wordings it can be concluded that treatment of foreign intellectual property must be no less favourable than national treatment.

From a tax point of view it can be argued that the provision has relevance for royalties paid to non-residents, since royalty payments are most likely to be subject to withholding taxation. If the withholding taxation is more burdensome than if the royalty is paid to a domestic receiver, this could be a discriminating measure.

7 For Danish literature on this subject, please refer to Michelsen, Aage, International Skatteret (2003), Forlaget Thomson, p 20, 444 and Michelsen, Aage, SR-Skat (1998), p 178.
However, there does not seem to be relevant statements from the Appellate Body regarding the impact of TRIPS on direct tax law. This could be explained by the fact that the scope of the articles is limited to the protection of intellectual property, and that this expression is interpreted narrowly, cf. Indonesia – Auto.

3.4. Conclusive Remarks

3.4.1. The Relationship between Art III GATT, Art XVII GATS and Art 24 OECD MC

Non-discrimination in the field of direct taxation can be claimed with reference to both Art II GATT, Art XVII GATS and Art 24 OECD MC. However, the wordings of the articles are not similar to each other, and the impact of the articles is different.

For instance, the protection against discrimination in both GATT and GATS contain a MFN-clause, which is not found in the OECD MC. Moreover, articles in both GATT and GATS prescribe national treatment on Internal Taxation.

In contrast, due to Art. 24 OECD MC, residents and non-residents are generally not considered to be in a similar situation. Therefore a source country may tax a non-resident in a different way than a resident taxpayer, even if this results in a heavier tax burden. Such a treatment, which is in accordance with the OECD non-discrimination principle, would potentially infringe Art II GATT and Art XVII GATS, since those articles prescribe a treatment no less favourable in the territory of a contracting party.

3.4.2. The Relationship with the US Model Convention

The tax treaty between Denmark and The US Art 1 paragraph 3 specifically relates to non-discrimination obligations under other agreements. The purpose of paragraph 3 is to make an exception to the rule provided in Art 1 paragraph 2, under which the tax treaty does not restrict any benefit accorded by any other agreement between Denmark and the US.

Paragraph 3 contains the following wording in item a:

>the provisions of Article 25 (Mutual agreement procedure) of this Convention exclusively shall apply to any dispute concerning whether a measure is within the scope of this Convention, and the procedures under this Convention exclusively shall apply to that dispute«.

The subparagraph provides that, notwithstanding any other agreement to which Denmark and the US may be parties (for instance: GATT and/or GATS), a dispute concerning whether a measure is within the scope of the tax treaty shall only be considered by the competent authorities of Denmark and
the US. Thus, procedures for dealing with disputes that may be incorporated into trade, investment, or other agreements between the Contracting States shall not apply for the purpose of determining the scope of the Convention.

4. Export Subsidies
According to the Agreement on Subsidies and Countervailing Measures (in the following: SCM), every WTO Member country has to prepare a list of subsidies on an annual basis. From a Danish point of view, there do not seem to be any direct tax provisions in contradiction with WTO law. However, as mentioned in chapter 1, WTO Agreements are binding from an international point of view (»pacta sunt servanda«) but do not have direct effect on individuals in Denmark.

If a Danish tax incentive is identified as a prohibited type of subsidy according to WTO law, there is no domestic law that forces a subsidised taxpayer to pay back his advantage. However, it could be argued that if the same identified subsidy infringes domestic competition law, a repayment could be forced.

4.1. Subsidies according to Art XVI GATT, SCM-Agreement and Art XV GATS
Due to Art 1 in the SCM a subsidy is deemed to exist if there is
1. a financial contribution
2. by a government or any public body
3. within the territory of a Member
4. and there is any form of income or price support in the sense of Art XVI GATT
5. and a benefit is conferred

According to Art 1.1 (a) (1) (ii) SCM, a subsidy shall be deemed to exist where government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits).

As seen in point 4), the definition of a subsidy in the SCM-Agreement depends on an »income or price support« in the sense of Art XVI GATT. Moreover, the definition of subsidies in the SCM-Agreement covers subsidies in the sense of Art XV GATS.

Generally, a distinction should be made between

- prohibited export subsidies, cf. Art 3.1 (a) SCM
- subsidies with adverse effects, cf. Art 5 SCM
- non-actionable subsidies, cf. Art 8 SCM
4.2. The Impact of Export Subsidies

Due to footnote 5 SCM, measures referred to in Annex I SCM are not prohibited, i.e. under certain conditions are subsidies in fact contingent on export performance. Attention should therefore be paid to Appendix 1 of the SCM-agreement for an illustrative list of export subsidies. Item e) and f) concerns direct taxation, and have the following content:

»The full or partial exemption remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises; The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged«.

Due to footnote 58 in Annex I SCM, the term »direct taxes« shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property.

Due to footnote 59 in Annex I SCM, arm’s length corrections can be made by a Member under certain conditions without interfering with the WTO obligations. Thereby footnote 59 seems to have a potential huge impact on future developments in the area of tax avoidance rules, such as transfer pricing. In case \textit{US – FSC}, the Appellate Body addressed the United States’ claim that footnote 59 exempts a measure from being a prohibited export subsidy within the meaning of Article 3.1 (a) SCM. In rejecting this argument, the Appellate Body proceeded to examine footnote 59 sentence by sentence. This examination is illustrated in the following.

1. »The Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected.
2. The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm’s length.
3. Any Member may draw the attention of another Member to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions.
4. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.
5. Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member.


Regarding the first sentence of footnote 59, the Appellate Body points out, that »(s)ince the FSC measure does not involve the deferral of direct taxes, we do not believe that this sentence of footnote 59 bears upon the characterization of the FSC measure as constituting, or not, an ‘export subsidy’«. The first sentence seems specifically related to the statement in item (e) above regarding export subsidies.

Regarding the second sentence of footnote 59, the Appellate Body reaffirms that Members of the WTO are »…obliged, by WTO rules, to tax any categories of income, whether foreign- or domestic-source income«. This reaffirmation is consistent with the »golden rule« in the OECD MC, that a tax treaty in itself never can be the eligible provision to taxation.

Instead, the Appellate Body concludes that »…the operation of the arm’s length principle is unaffected by the choice a Member makes as to which categories of foreign-source income, if any, it will not tax, or will tax less. Likewise, the operation of the arm’s length principle is unaffected by the choice a Member might make to grant exemptions from the generally applicable rules of taxation of foreign-source income that it has selected for itself. In short, the requirement to use the arm’s length principle does not address the issue that arises here, nor does it authorize the type of export contingent tax exemption that we have just described. Thus, this sentence of footnote 59 does not mean that the FSC subsidies are not export subsidies within the meaning of Article 3.1(a) of the SCM Agreement«.

Regarding the third and fourth sentences of footnote 59, the Appellate Body concludes that »...these rules have no bearing on the substantive obligations of Members under Articles 1.1 and 3.1 of the SCM Agreement«, i.e. footnote 59 sets forth rules that relate to remedies.

Regarding the fifth sentence of footnote 59, it was discussed whether the FSC could be a measure to avoid double taxation. The Appellate Body declined to examine this substantive issue, since this would be outside the scope

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8 See Vogel, Klaus, Doppelbesteuerungsabkommen Kommentar (1996), München, Einleitung, margin no 46.
of their mandate with reference to the fact that the argument was new and only brought before the Appellate Body and not before the Panel, cf. paragraph 101. However, if the Appellate Body had found that the FSC could be a measure to avoid double taxation, this would exclude the FSC measure from the prohibition in Art 3.1 (a) SCM against export subsidies.

4.3. Subsidies and Fiscal Incentives
Fiscal incentives in the sense of Art 1.1 (a) (1) (ii) SCM was also analysed by the Appellate Body in the case US-FSC.

In paragraph 90 the phrase »‘foregoing’ of revenue ‘otherwise due’« is interpreted, and the Appellate Body concludes that the term »otherwise« refers to a »normative benchmark« as established by the tax rules applied by the WTO Member in question. The Appellate Body rejects the use of a benchmark other than the tax rules of the Member in question, holding that to do otherwise is contrary to a Member’s sovereignty of taxation.

However, it should be noticed that the Appellate Body expresses some reservations about the Panel’s »but for« test in paragraph 91. The Panel had held that it would examine the situation »that would exist but for the measure in question«. The Appellate Body notes that this »but for« test is not actual treaty language and finds that the test may »not work in other cases«, i.e. the Appellate Body tried to find a common interpretation of the articles in question in the case US-FSC.

In this respect it could be discussed whether exemption methods, with and without subject-to-tax-provisions, could constitute a subsidy. In order to judge a controversial measure, the question does not only seem to be whether the overall tax burden or only the territorial tax burden is the benchmark. With reference to the argumentation by the Appellate Body in US-FSC, it can be argued that a subsidy can be a departure from the rules of taxation that would »otherwise« apply, cf. paragraph 95.

Therefore it seems reasonable to conclude that fiscal incentives such as exemption methods, with and without subject-to-tax-provisions, could constitute a subsidy, if they are provided in a way that would be different if the contested transaction was domestic. For instance, if profits from exports are exempt from taxation, and profits from domestic sales are not, this could be a prohibited export subsidy in the sense of Art 3.1 (a). This conclusion would be even stronger, if losses from exempted export activities could be deducted in other taxable income.
4.4. WTO Subsidies and EC State Aid Provisions

The EC state aid provisions are stated in the EC Treaty section 2.

Art 87 (1) EC states, that »...any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market«.

From the wording of Art 87 (1) EC, it can be concluded that the provision can be applied to aid granted »in any form whatsoever«, i.e. a direct tax measure can in principle be in contradiction with the provision. In this respect is should be noticed that on December 10, 1998, the European Commission published the »Notice on the application of the State-aid rules to measures relating to direct business taxation«. Notwithstanding the fact that the notice from the European Commission does not have the status as primary law (and therefore only gives an informal interpretation of Art 87 EC), its conclusion should be noticed. In paragraph 8-12, the European Commission identifies four cumulative criteria to identify State Aid contained in national tax measures:

1. the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets,
2. the advantage must be granted by the State or through State resources. For example, the Commission mentions that a loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure,
3. the measure must affect competition and trade between Member States, i.e. state aid is not in general abolished,
4. the measure must be specific or selective in that it favours »certain undertakings or the production of certain goods«, cf. Art. 87(1) EC.

However, due to the European Commission, a distinction must be made between state aid measures and general measures. Provided that a measure can be applied without distinction to all firms and to the production of all goods, the following tax measures do not constitute State aid:

1. Tax measures of a purely technical nature
2. Measures pursuing general economic policy objectives through a reduction of the tax burden related to certain production costs

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9 See OJ December 10, 1998 C 384/3 and IP/98/983.
10 For instance: Setting the rate of taxation, depreciation rules and rules on loss carry-overs, provisions to prevent double taxation or tax avoidance etc.
Finally, it should be noticed that when comparing subsidies according to WTO law and EC state aid provisions, the big difference seems to be the range of application. Firstly, due to Art 87 EC, only state aid that potentially infringes the internal market is prohibited. Secondly, due to community law, a state aid measure may be justified if it is notified to the Commission, cf. Art 87(3). Therefore subsidies which are not state aids in the meaning of Art 87 EC can fall within the scope of WTO law.

5. Final Conclusions

In general it can be argued that trade and tax regimes have evolved separately. WTO is encroaching on Members’ tax policies, and the impact of this influence is increasing. Since direct taxation is an instrument, and free trade within WTO is a goal, it seems difficult – but not impossible – to find comparable measures within these two concepts.

Many international tax principles can be found in underlying WTO rules. For instance, Art XIV GATS values the bilateral network of DTC’s and does not violate the principle of reciprocity. As mentioned above, also the principle of non-discrimination, the principle of efficiency and a concern over »harmful« tax competition can be found in the WTO Agreements.

This leads to the final answer regarding the question raised above in chapter 1, whether the WTO impact on direct taxation can be characterized as the fourth string in Danish international taxation. From my point of view, the question should be answered with a YES. There seems to be no doubt that the impact of the WTO Agreements on direct taxation seems more relevant than ever, and that WTO Agreements could have a potential impact on both domestic tax legislation, double tax conventions and secondary EU legislation in the field of direct taxation.

For instance: R&D, the environment, training, employment etc.
Taxation in Denmark consists of a comprehensive system of direct and indirect taxes. Ever since the income tax was introduced in Denmark via a fundamental tax reform in 1903, it has been a fundamental pillar in the Danish tax system. Today various personal and corporate income taxes yield around two thirds of the total Danish tax revenues, indirect taxes being responsible for the last third. The state personal income tax is a progressive tax while the trade is also governed by the rules of the WTO. Denmark cooperates closely in many ways with other Nordic countries (i.e. Aland, Finland, Iceland, Norway and Sweden) through the Nordic Council. OECD member countries. The Ministry of Taxation is responsible for the administration and collection of direct and indirect tax. The main sources of income that are taxable are identified in the Income Tax Law, which has been supplemented by other statutes. Laws are interpreted by reference to comments on the law and case law established by the national courts and the Court of Justice of the European Union, as well as by the National Tax Tribunal, the Tax Department, the tax authorities and the Tax Board. Denmark's taxes are among the highest in the world. Danish residents are liable for tax on global income and net wealth. Nonresidents are liable only for tax on certain types of income from Danish sources. In 1999, the total collected taxes amounted to 51% of the GDP. The corporate income tax in Denmark is 30%, which must be prepaid during the income tax year to avoid a surcharge. Personal income tax is collected at state, county and local levels. A tax ceiling ensures that combined income taxes do not exceed 59% of income. Income tax rates are progressive: 39% on income up to €22,118; 45\ldots