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WHEN GLOBAL TAX REFORM MEETS INTERNATIONAL TRADE RULES:

AN INQUIRY INTO THE INTERSECTION OF THE GATS AND THE BEPS PACKAGE[1]

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Abstract

This article explores the intersections between the global tax reform launched by the Organization for Economic Co-operation and Development (OECD) and the Group of 20 (G20) to tackle base erosion and profit shifting (BEPS) on the one hand, and international rules on trade in services, mostly – the General Agreement on Trade in Services (GATS) under the World Trade Organization (WTO) on the other hand. The GATS entered into force in 1995 to expand trade in services. It covers all measures affecting trade in services, including direct taxation. While the GATS leaves policy space for WTO Members to adopt measures to ensure the effective imposition of direct taxes and to conclude agreements among themselves to avoid double taxation, its negotiators could hardly have envisaged the depth and breadth of the current BEPS reform package, as shown by a recent WTO dispute. This paper provides a systematic analysis of concurrent application of the GATS and the BEPS Package and recommends that WTO Members take actions to avoid potential conflict in applying both sets of rules.

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1. Introduction

Panama launched a dispute at the World Trade Organization (WTO) in 2012 against Argentina concerning various measures that Argentina imposed on services and service suppliers from jurisdictions allegedly not cooperating with Argentina for tax transparency purposes. An essential question of the dispute is whether Argentina can defend the distinct treatment based on the need to combat tax frauds.

The legal basis of that dispute is the WTO's General Agreement on Trade in Services (GATS). The GATS, concluded in 1994, is a multilateral framework of principles and rules governing all measures affecting trade in services. In fact, the negotiators of the GATS had envisaged some potential conflicts between the principle of non-discrimination underlying the GATS and taxation policies. For example, the GATS permits WTO Members to take certain discriminatory measures to ensure the effective imposition of direct taxes.[3] WTO Members are also free to conclude agreements amongst themselves to avoid double taxation.[4] However, the depth and breadth of the current global tax reform under the auspices of the Organization for Economic Co-operation and Development (OECD) and the Group of 20 (G20) to address base erosion and profit shifting (BEPS) goes beyond what could have been envisaged by the negotiators back in the early 1990s. The dispute between Panama and Argentina only touches upon one aspect of the reform to tackle BEPS in its early stage. As the BEPS Package develops, the intersections between international rules governing trade in services on the one hand, and the global tax reform on the other hand become more present and complicated.

This article identifies in a systematic manner the intersections of the two regimes. Section 2 inquires the genesis of the BEPS (Section 2.1) and the origin of its intersections with the GATS (Section 2.2). Section 3 examines whether the implementation of the BEPS Package by participating countries may cause trade concerns under the GATS – and if so whether the policy space provided by the GATS is sufficient to accommodate the efforts to address the BEPS concerns. In doing so, it distinguishes three categories of measures relevant in implementing the BEPS Package – measures specifically recommended by the BEPS Package (Section 3.1); measures designed domestically, but under the guidance of the BEPS Package (Section 3.2); and measures countries may unilaterally adopt to counteract non-compliance or to induce compliance of BEPS Package recommendations by other countries (Section 3.3).

Finally, considering the overlap of the membership of the WTO and the OECD/G20 Inclusive Framework on BEPS, this article recommends that WTO Members take appropriate actions to avoid confusion when concurrently applying the rules under both regimes.

2. The BEPS and the GATS: an introduction

2.1The genesis of the current global tax reform

A tax is a financial charge imposed upon a taxpayer (an individual or legal entity) by a state to fund various public expenditures. If we were living in a global village with one central government implementing homogenous taxation measures on everyone, there would be no need to have professionals specializing in tax planning. Nor would there be any need to conclude tax treaties. Yet we live in a heterogeneous world. Heterogeneity exists at two levels. First, at national level, all jurisdictions have different taxation policies to pursue different needs for

[3] Paragraph (d) Article XIV General Agreement on Trade in Services (GATS).
[4] Paragraph (e) Article XIV GATS.

revenue to fund government expenditures. Such needs vary depending on the terms of reference that the government has agreed with their respective constituents. For example, a government pursuing higher level of social welfare may reasonably be expected to require higher contributions from tax payers. At the same time, governments with the capacity to generate other revenues (e.g. from oil production) may need less tax contribution. Second, within each jurisdiction the distribution of the tax burden on individuals or classes of populations may not be equal. Some sectors may carry heavier tax burdens than the others, depending on how the government uses fiscal measures to encourage or discourage the development of certain economic sectors or certain groups of individuals. Since these heterogeneities arise from the fundamental differences in each government's financial needs and their terms of reference, countries often do not wish their taxation autonomy be lightly interfered at international level. For this reason, tax treaties or tax-related initiatives at inter-governmental level take these heterogeneities as a given parameter and do not interfere lightly. For example, the OECD states that their work on taxation "is not primarily about collecting taxes and is not intended to promote the harmonization of income taxes or tax structures generally within or outside the OECD, nor is it about dictating to any country what should be the appropriate level of tax rates".[5] Meanwhile, as private enterprises increasingly operate globally, countries do seek cooperation from the other jurisdictions on matters relating to taxation.

Multinational enterprises (MNEs) comprise companies or other entities established in more than one country.[6] Taxation of MNEs in different jurisdictions can have two problems. One is double taxation, generally defined as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods.[7] Double taxation became a concern, as it can impede cross-border flow of trade and investment. Since the 1920s, countries started signing bilateral tax agreements to mitigate the effect of double taxation and more importantly, to allocate tax revenue between the source and the residence country.[8] So far there are over 3000 tax treaties worldwide. Companies are profit-driven in nature and it is only natural that they plan their businesses with the international taxation regime in mind. This consideration leads to the second concern arising from MNEs exploiting the heterogeneities in taxation system in different jurisdictions or utilizing tax treaties to minimize tax base or shift their profits to low tax jurisdictions in which they have little or no economic activity at all. Tax planning by private economic operators is nothing new or *per se* unlawful. For a long time the debate on tax planning was mostly conducted by policy and academic experts in the field of international tax law. It became a hot topic when the recent financial crisis hit and governments struggled in dealing with decreasing revenue. Additionally, globalization and digitalization provided more opportunities for multinationals to engage in tax planning. According to the OECD, the annual revenue loss due to BEPS is conservatively estimated at 100 to 240 billion US dollars.[9] For these reasons, in September 2013 G20 leaders endorsed the OECD-originated Action Plan on BEPS[10] and established the G20/OECD BEPS project.[11] In 2016, an OECD/G20 Inclusive Framework on BEPS was established to involve

[5] OECD (2000), *Towards Global Tax Co-operation: Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs*, OECD Publishing.
6 OECD (2011), *OECD Guidelines for Multinational Enterprises*, p 17.
7 OECD. (2015), Model Tax Convention on Income and on Capital 2014, OECD Publishing, p I-1.
8 OECD. (2015), Model Tax Convention on Income and on Capital 2014, OECD Publishing, p I-1.
[9] OECD (2015), *Explanatory Statement*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, para 2.
[10] OECD (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing.
[11] G20 Leader's Declaration, September 2013, paras 50-52.

developing countries. As of August 2019 the Inclusive Framework has over 130 members and 14 observer organizations.[12]

BEPS refers to tax planning strategies that exploit the gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where they conduct little or no economic activities, resulting in little or no overall corporate tax being paid.[13] The BEPS Project aims to tackle the BEPS structures by "comprehensively addressing their root causes".[14] In particular, the 2013 OECD report found the following "root causes" of BEPS: domestic laws and regulations were not coordinated across the borders; international tax standards had not always kept pace with the changing global business environment; and there was a pervasive lack of relevant information at the level of tax administrations and policy makers.[15] In 2015 participating countries agreed a comprehensive BEPS Package consisting of reports on 15 actions to tackle the root causes of BEPS. As illustrated in Figure 1, Actions 2, 3, 4 and 5 aim to address the first cause – the lack of coherence of domestic laws and regulations; Actions 6 to 10 focus on the second cause to make international tax standards up to date; and Actions 11 to 14 try to enhance transparency. Action 1 and 15 are horizontal issues. Action 1 addresses tax challenges raised by digitalisation, which the G20 agreed to develop a consensus-based solution by the end of 2020. Action 15 develops a multilateral legal instrument to facilitate the implementation of the tax treaty measures developed during the BEPS Project.

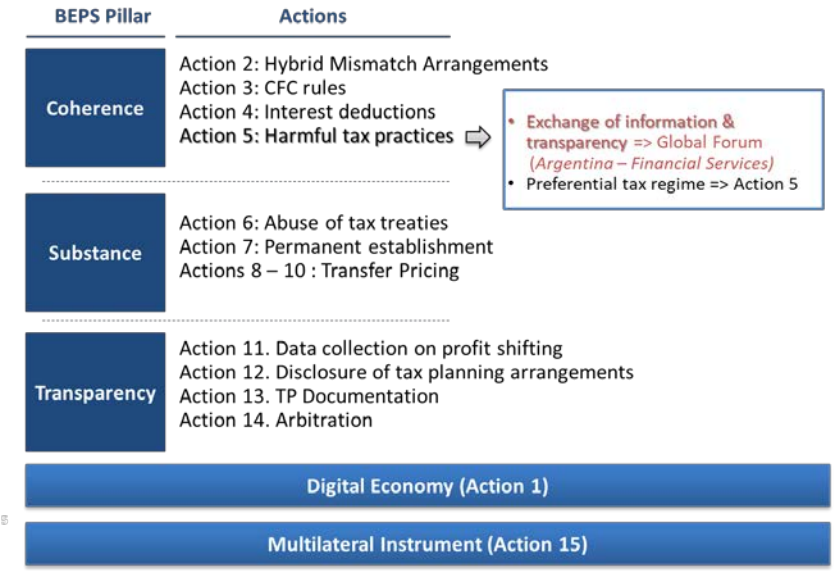

Figure 1: Overview of the BEPS Package

The issue touched upon by the WTO dispute *Argentina – Financial Services* relates to the need to exchange information and enhance transparency to fight against tax havens. This work, originally under Action 5, is now handled by the Global Forum on Transparency and Exchange

[12] OECD, Members of the OECD/G20 Inclusive Framework on BEPS (updated: August 2019), available at: https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf (last accessed 16 October 2019).
[13] OECD, "About Base Erosion and Profit Shifting (BEPS)". See http://www.oecd.org/ctp/beps-about.htm (last accessed 16 October 2019)
[14] OECD (2015), Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, para 6.
[15] OECD (2015), Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, para 5.

of Information for Tax Purposes. The report on Action 5 now focuses on preferential tax regimes.[16] For this reason, *Argentina – Financial Services* only touched upon an issue in the global tax reform at its early stage. It only reveals a tip of the iceberg of the potential intersection of the two regimes.

Regarding specific recommendations, the BEPS Package provides solutions depending on the nature of the cause to BEPS.[17] First, minimum standards are developed to tackle issues in case where no action by some countries would create negative spill overs on other countries. Specifically, minimum standards are set for model provisions to prevent treaty abuse (Action 6), standardized country-by-country reporting to improve transparency (Action 13), a peer review process to address harmful tax practices (Action 5) and an agreement to secure effective dispute resolution (Action 14).[18] The implementation of the minimum standards is monitored by a peer review process, which evaluates the implementation by each member of each minimum standard and provides clear recommendations for improvement.[19]

Second, common approaches for domestic law measures are developed with a view to converging countries' different approaches over time and thus enabling consideration if such measures should become minimum standards. Common approaches are proposed for neutralising hybrid mismatches (Action 2) and limiting excessive interest deductions (Action 4). Although common approaches are not minimum standards, they have been adopted by many countries.[20]

Third, the BEPS Package revisits the existing international tax standards to eliminate double taxation, in order to stop abuses and close BEPS opportunities. This exercise relates to transfer pricing guidelines under Actions 8 to 10 and the changes recommended under Action 7 relating to permanent establishment status.[21]

Last but not least, the BEPS Package provides guidance drawing on best practices, *e.g.* in the design of effective controlled foreign company (CFC) rules.

To summarize, the BEPS Package aims to equip governments with domestic and international instruments to address tax avoidance and ensure that profits are taxed where economic activities generating the profits are performed and where value is created.

2.2The expanding concept of trade: the origin of intersections

In the context of trade in goods, WTO rules do not interfere lightly with *domestic direct* taxation, *i.e.*, a tax imposed on a person or company rather than on goods or services. The General Agreement on Tariffs and Trade (GATT) is concerned with domestic measures applied

[16] OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p 11. See also OECD (2017), *Harmful Tax Practices - 2017 Progress Report on Preferential Regimes: Inclusive Framework on BEPS: Action 5*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris; OECD (2019), *Harmful Tax Practices - 2018 Progress Report on Preferential Regimes: Inclusive Framework on BEPS: Action 5*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.

[17] OECD (2015), *Explanatory Statement*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing.

[18] For the implementation of the minimum standards, see OECD, *OECD/G20 Inclusive Framework on BEPS: Progress report July 2018 – May 2019*, pp 8 – 19.

[19] OECD, Background Brief: Inclusive Framework on BEPS, January 2017, Section 3.2.

[20] OECD, *OECD/G20 Inclusive Framework on BEPS: Progress report July 2018 – May 2019*, Section 3.1.1.

[21] OECD, *OECD/G20 Inclusive Framework on BEPS: Progress report July 2018 – May 2019*, Sections 3.1.2 and 3.1.3.

to products entering across borders.[22] In the market where domestic and foreign products compete, fiscal policies, including those relating to direct taxation, are only relevant if they were used to provide subsidies, thus falling under the ambit of the Agreement on Subsidies and Countervailing Measures (SCM).[23]

The concept of trade was expanded in the Uruguay Round of the multilateral trade negotiations to embrace trade in services. Since then the intersection of domestic direct taxation measures and trade disciplines became inevitable. Unlike trade in goods, the delivery of services often requires the presence of service suppliers. Thus, in addition to cross-border trade (mode 1), the GATS also covers three other modes of supply, namely consumption abroad (mode 2), commercial presence (mode 3) and the presence of natural persons (mode 4).[24] Under mode 3 and mode 4 service suppliers move across border. As countries mostly impose taxes on income from sources inside the country, service suppliers under mode 3 and mode 4 are often taxed in the services importing country, *i.e.* the country where they provide services. Thus, a direct tax imposed on service suppliers under mode 3 and 4 constitutes a measure "affecting trade in services" within the meaning of Article I:1 of the GATS.[25]

An underlying principle of the GATS is non-discrimination, as enshrined in Article II and XVII of the GATS. Specifically, Article II, titled "Most-Favoured-Nation (MFN) Treatment", prevents WTO Members from discriminating amongst foreign services and service suppliers. In other words, if a WTO Member accords favorable treatment to a service or service supplier from one country, it must accord "immediately and unconditionally" to services and service suppliers from all the other WTO Members "no less favorable" treatment. In a similar manner, Article XVII, titled "National Treatment", prevents WTO Members from discriminating between foreign and domestic services and service suppliers. While the MFN obligation under Article II applies to "any measures" affecting trade in services,[26] the national treatment obligation under Article XVII only applies to sectors in which the WTO Member has made specific commitments and subject to the conditions that the Member inscribed in its Schedule of Specific Commitments.

The negotiators of the GATS indeed considered the applicability of the GATS to tax measures.[27] As noted by a Secretariat note in 1993, Article II and Article XVII are the most relevant provisions. [28] The note concluded at that time that "relatively few tax measures affecting service suppliers" would violate Article II and Article XVII, because "[m]ost tax measures providing distinct treatment to different categories of service supplier appear to deal

[22] For example, Article III:8(b) carves out subsidies to domestic producers from the national treatment obligation. The concept of "border tax adjustment" is relevant in discussing the relation between the GATT and direct taxation, which has been addressed by existing literature. Since the focus of this paper is on the relation between the GATS and direct taxation, border tax adjustment will only be mentioned in passing.

[23] The concept of "subsidies" is narrowly defined under the SCM Agreement compared with the definition generally used by economists. Horizontally applied taxation policy could fall under the SCM Agreement under limited circumstances. For further discussion, see Michael Daly The WTO and Direct Taxation. WTO Discussion Paper No 9, June 2005.

[24] Article I:2 GATS.

[25] As noted by a WTO Dispute Settlement panel, a direct income tax measure would generally be covered by the GATS. Otherwise, the Uruguay Round negotiators would not have deemed it necessary to create an explicit exception for such measures under Article XIV(d) of the GATS. See Panel Report, *US – FSC*, para 8.143; Appellate Body Report, *Argentina – Financial Services*, para 6.113.

[26] There are a few exceptions, including those singled out by the WTO Members in their lists of MFN exceptions upon entering into the WTO.

[27] See GATT document MTN.GNS/W/178, MTN.GNS/W/210, MTN.GNS/49.

[28] GATT document MTN.GNS/W/210, Note by the Secretariat, 'The Applicability of the GATS to Tax Measures', 1 December 1993. See, also, MTN.GNS/49.

with unlike service suppliers, to be based on objective considerations, or not in fact to provide less favourable conditions of competition."[29]

Nevertheless, to be on the safe side, the GATS negotiators crafted two tax-specific exceptions. Paragraph (d) of Article XIV permits WTO Members to adopt measures inconsistent with the national treatment obligation under Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members. A footnote to Article XVII provides for an illustrative list of measures that are "aimed at ensuring the equitable or effective imposition or collection of direct taxes".[30] However, this exception does not apply to the MFN obligations under Article II of the GATS.

The other exception is contained in paragraph (e) of Article XIV of the GATS. It exempts measures that accord different treatment as a result of an agreement on the avoidance of double taxation. However, this exception only applies to WTO Members' MFN obligation under Article II of the GATS.

Additionally, according to Article XXII:3 of the GATS, Members cannot resort to the dispute settlement mechanism provided by the Dispute Settlement Understanding (DSU) to make a claim under Article XVII (national treatment) of the GATS concerning measures within the scope of an international agreement "relating to the avoidance of double taxation".

These exceptions and carve-outs were considered sufficient in view of the domestic and international tax regime existing at that time. However, the current BEPS Package represents the first substantial renovation of the international tax standards in almost a century. As further explained below, it calls for extensive amendments in domestic legislation and in international tax treaties to address BEPS concerns. New measures taken to implement the BEPS Package may go beyond the configuration of "tax measures" considered in 1993. The premise upon which the conclusion was made that "relatively few tax measures affecting service suppliers would violate Article II and Article XVII" may no longer hold. For this reason, it is imperative to assess if the implementation of the BEPS Package would lead to new intersections of the GATS and the international tax regime.

[29] GATT document MTN.GNS/W/210, Note by the Secretariat, 'The Applicability of the GATS to Tax Measures', 1 December 1993, last paragraph.

[30] The GATS, footnote 6. "Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which: (i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or (iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or (v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or (vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base. Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure."

3 Exploring the Intersections Between the GATS and the BEPS Package

3.1 *Argentina – Financial Services*: a teaser

In *Argentina – Financial Services,* Argentina, in its various financial, taxation, foreign exchange, and registration measures, made distinction between "countries cooperating for tax transparency purposes" (cooperative countries) and "countries not cooperating for tax transparency purposes" (non-cooperative countries).[31] Panama's principle claim is that these measures are inconsistent with Article II:1 of the GATS because these measures accord less favourable treatment to services and service suppliers of non-cooperative countries than that accorded to like services and service suppliers of cooperative countries.[32]

The panel hearing that dispute found that for purposes of Panama's claims under Article II:1 of the GATS, services and service suppliers of cooperative countries are "like" the services and service suppliers of non-cooperative countries,[33] and Argentina failed to accord immediately and unconditionally, to services and service suppliers of non-cooperative countries treatment no less favourable than that which they accord to like services and service suppliers of cooperative countries.[34] For this reason, the panel decided that Argentina's measures are inconsistent with Article II:1 of the GATS. [35] The Panel also dismissed Argentina's defences under Article XIV:(c) and the Annex on Financial services.[36]

The Panel's decision was appealed. The starting point of the appeal is the panel's findings on "likeness", *i.e.* the services and service suppliers from cooperative countries and non-cooperative countries are like because the difference in treatment is due to origin.[37] The Appellate Body found the panel's presumption of "likeness" is problematic, because the panel failed to make a finding on whether the difference in treatment between cooperative and non-cooperative countries was based "exclusively" on origin.[38] According to the Appellate Body, "likeness" cannot be presumed if the measure providing for a distinction is not based "exclusively" on origin.[39] The Appellate Body opined that the concept of "likeness" of services and service suppliers is concerned with the competitive relationship of services and service suppliers.[40] However, the panel did not undertake an analysis of "likeness", considering various criteria relevant for an assessment of the competitive relationship of the services and service suppliers of cooperative and non-cooperative countries.[41] Thus, the Appellate Body reversed the panel's finding on "likeness".[42] Because the panel's finding on Article II of the GATS was based on the finding of "likeness", the Appellate Body also reversed the panel's finding of inconsistency under Article II of the GATS.[43]

It is interesting to note that the GATT Secretariat, back in 1993, considered a similar situation in which a list would be maintained either of "qualifying" or "excluded" countries. The Secretariat noted that "the maintenance of such a list would not in itself be inconsistent with

[31] Appellate Body Report, *Argentina – Financial Services*, para 1.1.
[32] Appellate Body Report, *Argentina – Financial Services*, para 1.2. Panama also challenged a few measures under Articles XVII and XVI of the GATS.
[33] Appellate Body Report, *Argentina – Financial Services*, Section 6.1.1.
[34] Appellate Body Report, *Argentina – Financial Services*, para 1.5.
[35] Appellate Body Report, *Argentina – Financial Services*, para 1.5.
[36] Appellate Body Report, *Argentina – Financial Services*, para 1.5.
[37] Appellate Body Report, *Argentina – Financial Services*, paras 6.2-6.8.
[38] Appellate Body Report, *Argentina – Financial Services*, para 6.60.
[39] Appellate Body Report, *Argentina – Financial Services*, para 6.61.
[40] Appellate Body Report, *Argentina – Financial Services*, para 6.25.
[41] Appellate Body Report, *Argentina – Financial Services*, para 6.61.
[42] Appellate Body Report, *Argentina – Financial Services*, para 6.70.
[43] Appellate Body Report, *Argentina – Financial Services*, para 6.71.

Article II of the GATS as long as it is drawn up on the basis of objective criteria designed to safeguard the Member's tax base or counter tax evasion or avoidance and not on the basis of nationality distinctions".[44] To recall, the general exceptions under Article XIV(d) of the GATS only permits WTO Members to adopt Article XVII-inconsistent measures to safeguard the tax base. It does not apply to measures inconsistent with Article II of the GATS. The Secretariat note in 1993 indicates that this type of measures were not considered inconsistent with Article II. It proposed an objectiveness test. However, it did not specify whether the objectiveness of the measure should be considered in the assessment of "likeness" or under "treatment less favourable". Nor did it consider the competitive relationship between service and service suppliers. In light of the much more elaborated legal standard of the MFN and national treatment obligation under the GATT and the GATS since 1995,[45] the explanation offered in the 1993 Secretariat note seems insufficient in providing guidance in applying Article II of the GATS to this type of measures.

The panel in this dispute was aware of the lack of an MFN-exception for measures to safeguard the tax base under Article XIV of the GATS. It tried to incorporate the consideration of the regulatory framework in which service suppliers operate in its assessment of the "treatment les favourable".[46] The Appellate Body dismissed this approach and insisted that the legal standard for "treatment less favourable" should remain as "whether the measure modifies the conditions of competition to the detriment of like services or service suppliers of any other Member".[47] This is because the GATS has provided many flexibilities for WTO Members to pursue policy objectives.[48] The Appellate Body pointed out that where a measure is inconsistent with the non-discrimination provisions, "regulatory aspects or concerns that could potentially justify a measure are more appropriately addressed in the context of the relevant exceptions".[49]

Since the Appellate body reversed the panel's finding under Article II of the GATS, it did not deal with the issue of the lack of an MFN exception for tax measures aimed at ensuring the equitable or effective6 imposition or collection of direct taxes. As explained below, many of the BEPS-related measures provide different treatment to services and service suppliers from different countries, just as the Argentine measures did. The next Section will explore the implication of this case on the BEPS-related country-specific and other tax measures.

3.2Applying GATS to the measures implementing the BEPS

As mentioned in Section 2.1, the BEPS Package consists of a basket of recommendations and guidelines. WTO disciplines are only relevant if the rights and obligations of a Member are infringed by a measure of another Member. Thus, it is not the BEPS Package itself that can cause the intersection. Rather, it is the measures that the participating countries adopt to implement the recommendations and guidelines of the BEPS Package that may cause trade concerns. For the purpose of analysis, this paper categorizes measures that countries may take to implement the BEPS Package into three groups as follows:

- First, in areas such as harmful taxes and hybrid mismatches, the BEPS Package makes specific recommendations on measures or standards to be adopted by participating countries in their domestic legislation;

[44] GATT document MTN.GNS/49, p 2.
[45] See, for example, the summary of "likeness" test in Appellate Body Report, *Argentina – Financial Services*, Section 6.1.4; the summary of "treatment no less favourable" in Appellate Body Report, *Argentina – Financial Services*, Section 6.2.4.
[46] Appellate Body Report, *Argentina – Financial Services*, para 6.110.
[47] Appellate Body Report, *Argentina – Financial Services*, para 6.111.
[48] Appellate Body Report, *Argentina – Financial Services*, paras 6.111-6.113.
[49] Appellate Body Report, *Argentina – Financial Services*, paras 6.115-6.118.

- Second, in areas such as treaty abuse, the BEPS Package only provides for guidance, leaving participating countries with discretion to design their own rules; and
- Third, participating countries may adopt unilateral measures to counteract non-compliance or to induce compliance, especially in areas where minimum standards have been agreed in the BEPS Package.

This Section applies the GATS to these three groups of measures in turn to explore the potential intersections of the two regimes.

3.2.1 When specific recommendations are made by the BEPS Package

With regard to some BEPS concerns, such as harmful taxes and hybrid mismatches, the BEPS Package recommends specific instruments to be included in the participating countries' domestic law. Some are in the form of minimum standards, which participating countries have committed to implement in a consistent and prompt manner; others are in the form of common approaches or best practices. This part will go through some of these substantive recommendations to identify the potential overlap between the required amendment in domestic legislations and the GATS.

3.2.1.1 Measures to tackle harmful taxes

A regime is considered potentially harmful if, among other things, it imposes no or low effective tax rates on income from geographically mobile financial and other service activities and is not transparent.[50] Since these regimes may unfairly erode the tax bases of other countries and may distort the location of capital and services, Action 5 of the BEPS Package aims to reduce the discretionary influence of taxation on the location of mobile financial and services activities.[51] The fact that a jurisdiction has a tax regime that offers preferential treatment for certain types of incomes is not considered problematic *per se* under the BEPS Package. What the BEPS Package requires is that such preferences not be granted to certain enterprises, *e.g.* enterprises that have not undertaken the qualifying income generating activities in its jurisdiction.[52]

Participating countries have agreed on standards to assess the harmfulness of the preferential regimes. For example, if a country has a preferential Intellectual Property (IP) regime, it must amend its existing legislation according to the agreed "nexus approach", which allows a taxpayer to benefit from the IP regime only if the taxpayer itself has incurred qualifying research and development (R&D) expenditures.[53] This can only happen if the taxpayer conduct R&D internally and source R&D-related services locally. [54] Indeed, as explained in the Report, such

[50] See OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p 20.
[51] OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p 9.
[52] For details, see OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing.
[53] OECD (2019), *Harmful Tax Practices - 2018 Progress Report on Preferential Regimes: Inclusive Framework on BEPS: Action 5*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p 14. See also, OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p 11. See also OECD (2017), *Harmful Tax Practices - 2017 Progress Report on Preferential Regimes: Inclusive Framework on BEPS: Action 5*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.
[54] OECD (2019), *Harmful Tax Practices - 2018 Progress Report on Preferential Regimes: Inclusive Framework on BEPS: Action 5*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p 14. "This

recommendation was made in line with the purpose of the IP regime, which is "to encourage R&D activities and to foster growth and employment".[55] Thus, the essence of the suggested amendment is to condition the availability of a tax advantage to the use of locally sourced R&D activities.

From the trade perspective, the requirement to use locally sourced services may cause concerns under Article XVII of the GATS. To assess claims under Article XVII of the GATS, one must establish that: (i) the relevant WTO Member has scheduled national treatment commitments under the services sector concerned; (ii) that the measure in question affects the supply of services in the relevant sectors or modes of supply; and (iii) that the measure does not accord to the services and service suppliers of any other Member treatment no less favourable than that accorded to its own like services and service suppliers.[56]

Most WTO Members have made its specific commitments under the GATS following a GATT Secretariat document MTN.GNS/W/120 (also referred to as "W120" document). W120 lists R&D services as part of business services.[57] So far, 60 Members have made specific commitments under the R&D services.[58] Since the BEPS recommendation targets "geographically mobile activities",[59] it affects R&D services supplied through mode 1, *i.e.* cross-border supply of R&D services.

The next question is whether the measure may accord to the services and service suppliers of any other Member treatment no less favourable than that accorded to its own like services and service suppliers. In *Argentina – Financial Services*, the Appellate Body confirmed that in the context of trade in services "likeness" may be presumed if the measure at issue makes a distinction between services and service suppliers based exclusively on origin.[60] By applying the "nexus approach", countries may condition the availability of tax preferences to conducting the R&D services locally.[61] This requirement may be considered as making a distinction exclusively on origin. Accordingly, services and service suppliers locally recruited may be presumed "like" services and service suppliers provided through mode 1.[62]

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ensures that the core income generating activities are undertaken, including with an adequate number of fulltime qualified employees and an adequate amount of operating expenditure, supported by a transparent mechanism to ensure compliance."

[55] See OECD, above OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p 9. See also OECD (2019), *Harmful Tax Practices - 2018 Progress Report on Preferential Regimes: Inclusive Framework on BEPS: Action 5*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p 14. "This ensures that the core income generating activities are undertaken, including with an adequate number of fulltime qualified employees and an adequate amount of operating expenditure, supported by a transparent mechanism to ensure compliance."

[56] Panel Reports, *China – Electronic Payment Services*, para. 7.641; *China – Publications and Audiovisual Products*, para. 7.944; and *EC – Bananas III*, para. 7.314; *Argentina – Financial Services*, para. 7.448.

[57] WTO document, MTN.GNS/W/120, Section 1.C.

[58] See database on services schedules at: http://i-tip.wto.org/services/default.aspx (last accessed 16 October 2019)

[59] OECD (2019), *Harmful Tax Practices - 2018 Progress Report on Preferential Regimes: Inclusive Framework on BEPS: Action 5*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p 14.

[60] Appellate Body Report, *Argentina – Financial Services*, para 6.52.

[61] OECD (2019), *Harmful Tax Practices - 2018 Progress Report on Preferential Regimes: Inclusive Framework on BEPS: Action 5*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p 14. "This ensures that the core income generating activities are undertaken, including with an adequate number of fulltime qualified employees and an adequate amount of operating expenditure, supported by a transparent mechanism to ensure compliance."

[62] The company that conduct R&D services by themselves can still be characterized as a service supplier of "R&D services", even if the company involves in other businesses. In *EC – Bananas*, the Appellate Body

As mentioned above, the Appellate Body reversed the Panel's approach to take into account "regulatory aspects" in the "less favourable treatment" analysis.[63] To condition the availability of low or zero tax upon the use of local R&D services and service suppliers may disadvantage foreign services and service suppliers because the companies which uses these R&D services may be incentivized to use local supply to obtain the benefit of the regime. This is a measure equivalent to a local content requirement in the context of trade in goods, which has been repeatedly found inconsistent with the national treatment obligations under the GATT 1994 or the Agreement on Trade-Related Investment Measures (TRIMS).[64]

If the measure is inconsistent with Article XVII of the GATS, the next question is if it can be justified under one of the exceptions under Article XIV of the GATS. Paragraph (d) of Article XIV GATS exempts measures "inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members". The term "difference in treatment" is not further defined. One might argue that such difference may only relate to the treatment of services and service suppliers directly subject to the taxation measure at issue and cannot be extended to different treatment to services and service suppliers, or goods suppliers not in direct competitive relationship with the services and service suppliers at issue. In the context of trade in goods, the Appellate Body opined that to qualify for the exemption from the national treatment obligation under Article III:8(a) GATT 1994, the product of foreign origin allegedly being discriminated against must be in a competitive relationship with the product purchased.[65] In the context of the "nexus approach", the service suppliers of foreign origin being discriminated are R&D services and service suppliers in foreign countries. They may not be in a competitive relationship with the companies which uses the R&D services and benefit from the preference regime. Therefore, countries implementing the "nexus approach" may find it difficult to justify the measure under Article XIV (d) of the GATS.[66]

In the area of non-IP regimes, ongoing discussions concern the determination of what constitutes the core activities necessary to earn the income. These regimes relates to distribution and service center regimes, financing or leasing regimes, fund management regimes, banking and insurance regimes, shipping regimes, etc.[67] Given the intersection with the GATS identified for the IP regime, trade negotiators may want to engage more actively when new standards are being discussed in these areas under the BEPS project.

3.2.1.2 Measures to neutralize the effects of hybrid mismatch arrangements

Hybrid mismatch arrangements exploit differences in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions to achieve double non-taxation,

clarified that even if a company is vertically integrated, and even if it performs other functions, to the extent that it is also engaged in providing the services at issue and is therefore affected in that capacity by a particular measure of a Member in its supply of those services, that company is a service supplier within the scope of the GATS. Appellate Body Report, *EC – Bananas*, para 227.

[63] Appellate Body Report, *Argentina – Financial Services*, para 6.111.

[64] See, for example, Appellate Body Report, *Canada – Renewable Energy* and Panel Report, *India – Solar Cells*.

[65] Appellate Body Report, *Canada – Renewable Energy*, para 5.79.

[66] Nevertheless, countries may comply with Article XVII of the GATS by not granting any tax preferences, or eliminating all the preferential IP regimes.

[67] See OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p 38.

including long-term deferral.[68] The recommendations in Action 2 take the form of "linking rules", which align the tax treatment of an instrument or entity with the tax treatment in the counterparty jurisdiction. More specifically, countries are recommended to deny a deduction of a payment from the tax base if it is not includible in income by the recipient counterparty jurisdiction or it is also deductible in that counterparty jurisdiction. The essence of this recommendation is to apply different tax treatment if the counterparty jurisdiction has a specific taxation principle in place.

However, as acknowledged by the BEPS report, there are difficulties in identifying the hybrid element in the context of hybrid financial instruments. In other words, it is difficult to differentiate the purpose of the payment, *i.e.* whether it is for BEPS purposes or it constitutes a service supplied from the payee country. The GATS applies to this type of measures, even though the measure applies to all economic activities. In *Argentina – Financial Services,* two measures at issue are of similar nature as the one recommended by the BEPS Package. [69] The panel opined that the GATS applied to all measures affecting trade in services, "irrespective of whether service suppliers of the complaining party are engaged in trade or seeking to engage in trade with the Member applying the measure."[70] The services sectors concerned in this context should be all services sectors which have foreign service suppliers supplying their services through mode 3 (commercial establishment).[71]

Similar to the case in *Argentina – Financial Services,* the legal question under the GATS would be whether the different tax treatment based on the difference in tax regimes in the counterpart jurisdiction constitutes a violation of the MFN obligation under Article II of the GATS. The panel in that dispute considered that regulatory aspect in the jurisdictions of the service suppliers' home countries may be taken into account, provided that it was reflected in the competitive relationship between services and service suppliers from different jurisdictions.[72] However, the panel considered that the factual situation in the present case made it extremely difficult to undertake the required analysis of "likeness".[73] For this reason, the Appellate Body did not clarify if there would be possible to taken into consideration in the "likeness" assessment of some regulatory aspects in the jurisdictions of the service suppliers' home countries.[74]

As mentioned above, the Appellate Body reversed the Panel's approach to take into account "regulatory aspects" in the "less favourable treatment" analysis.[75]

If regulatory concerns cannot be taken into consideration in examining Article II of the GATS, the last resort of defense is Article XIV of the GATS. To recall, paragraph (d) of Article XIV provide exception for Article XVII-inconsistent measures that "aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of

[68] For details, see OECD (2015), *Neutralising the Effects of Hybrid Mismatch Arrangements,* Action 2 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.
[69] In *Argentina – Financial Services,* two measures at issue are of similar nature as the one recommended by the BEPS Package. Measure 1 of the impugned measures applies different gain withholding taxes on interest or remuneration to service suppliers in non-cooperating countries; Measure 4 applies different rules on the allocation of expenditure for transactions between Argentine taxpayers and persons of non-cooperative countries. See Appellate Body Report, *Argentina – Financial Services,* Sections 5.2, 5.5.
[70] Panel Report, *Argentina – Financial Services,* para 7.89.
[71] See the services sectors identified in *Argentina – Financial services.* Panel Report, *Argentina – Financial Services,* paras 7.97 – 7.98.
[72] Panel Report, *Argentina – Financial Services,* para 7.179.
[73] Panel Report, *Argentina – Financial Services,* para 7.184.
[74] Appellate Body Report, *Argentina – Financial Services,* Section 6.1.6.1.
[75] Appellate Body Report, *Argentina – Financial Services,* para 6.111.

other Members", but is not available to justify an MFN violation. For this reason, it is not possible to justify this type of measures under Article XIV of the GATS.

This consideration might explain the Appellate Body's ambiguous statement relating to the "likeness" test under Article II of the GATS in *Argentina – Financial Services.* While acknowledging the relevance of the likeness criteria developed under the GATT, it also shows flexibility to take into account other characteristics of trade in services, *e.g.* the presence of service suppliers and the four modes of supply.[76] However, this ambiguity may render the "likeness" test under the GATS unpredictable.[77]

3.2.1.3 CFC rules

CFC rules respond to the risk that taxpayers with a controlling interest in a foreign subsidiary can strip the base of their country of residence (and other countries in some instances) by shifting income into a CFC.[78] The recommended measures are designed to ensure that the jurisdictions that choose to implement them will have rules that effectively prevent taxpayers from shifting income into foreign subsidiaries. One of the building blocks that the BEPS Package recommends is that CFC rules only apply to controlled foreign companies that are subject to effective tax rates that are meaningfully lower than those applied in the parent jurisdiction. This means if the service supplier established under mode 3 is from a jurisdiction where the effective tax rates are meaningfully higher than those of the services importing country, a higher tax rate would apply. This practice equals a border tax adjustment often debated in the context of trade in goods.

Indeed, the BEPS report highlighted that this initiative is to "level the playing field". The question is – the playing field among whom? Three situations may be envisaged. First, the "disadvantaged" service suppliers are from the same (or other) high tax jurisdictions, but they are not multinational enterprises (MNEs) which can use such tax planning techniques. In this case, the recommended measure aims to compensate these non-MNEs for not being able to employ tax planning. Second, the "disadvantaged" service suppliers, such as subsidiaries of MNEs, are from jurisdictions with lower tax rates. In this case, there may be an element of discrimination between service suppliers from high tax jurisdictions and low tax jurisdictions. In this scenario, as explained above, the measure may be inconsistent with Article II of the GATS. Also, as discussed before, Article XIV(d) does not exempt measures inconsistent with Article II. Third, if the foreign subsidiaries at issue are competing with domestic service suppliers, any measure aiming at levelling the playing field might cause national treatment concerns under Article XVII of the GATS. This is because the domestic service suppliers would not be better off but for such measure. However, as elaborated above, Article XVII-inconsistent measures can be justified by virtue of paragraph (d) of Article XIV.

3.2.2 When countries are left with discretion to implement the BEPS Package

The work on preventing treaty abuse under Action 6 develops model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of bilateral tax treaty benefits in inappropriate circumstances.[79] With regard to domestic law, it recommends

[76] Appellate Body Report, *Argentina – Financial Services*, paras 6.31-6.33.
[77] For this reason, the conventional debate and controversy on the process and production method (PPM) in the context of trade in goods may also find its way under the GATS.
[78] For details, see OECD (2015), *Designing Effective Controlled Foreign Company Rules*, Action 3 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.
[79] For details, see OECD (2015), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, Action 6 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. See also recent updates in OECD, OECD/G20 Inclusive Framework on BEPS, Progress report, July 2018-May 2019.

that countries should institute anti-abuse rules in their domestic legislations to refuse granting treaty benefits in terms of double taxation to certain foreign service suppliers. Nevertheless, it is in each country's hands to design its own domestic regulations. As envisaged by Action 14 of the BEPS Package, the application of a treaty anti-abuse provision or a domestic law anti-abuse provision may trigger disputes between the taxpayer and the tax authorities.[80] In this regard, it is requested by Action 14 that countries should provide Mutual Agreement Procedure (MAP) to ensure the timely, effective and efficient resolution of treaty-related disputes.[81] The question arises if the application of anti-abuse provision in domestic law leads to less favourable treatment (e.g. double taxation) to foreign service suppliers and consequently gives rise to national treatment concern under Article XVII GATS; and if the counterpart country can bring a case under WTO's dispute settlement to halt such anti-abuse practice.

Article XXII:3 GATS provides that Members may not invoke Article XVII under the Agreement's consultation (Article XXII) and dispute settlement (Article XXIII) provisions with respect to a measure that "falls within the scope of an international agreement between them relating to the avoidance of double taxation." Article XXII further provides that in case of disagreement on the scope of the tax treaty, "it shall be open to either Member to bring this matter before the Council for Trade in Services". The Council "shall refer the matter to arbitration" and the decision of the arbitrator shall be final and binding on the Members. It additionally provides, in a footnote, that "[w]ith respect to agreements on the avoidance of double taxation which exist on the date of entry into force of the WTO Agreement, such a matter may be brought before the Council for Trade in Services only with the consent of both parties to such an agreement." That means for disputes relating to tax agreements already existed by the time when the WTO was established, the submission of such disputes to arbitration requires positive consensus. Otherwise it requires negative consensus.

WTO Members should consider if an agreement on the avoidance of double taxation, modified according to the 2015 BEPS Package and the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS can be qualified as an agreement existing on the date of entry of the WTO Agreement. If the newly amended agreement cannot "benefit" from the grandfathering, the "scope" of the newly amended tax agreement may be subject to the decision of a WTO arbitration tribunal, according to Article XXII of the GATS.

If the matter falls outside the scope of the tax treaty, for the same elaborated above, the measure may be inconsistent with Article XVII of the GATS. As already mentioned, with regard to tax agreements, paragraph (e) of Article XIV can only justify measures inconsistent with the MFN obligation.[82] Therefore, unless Article XXII can cover all the tax treaties modified by the BEPS Package, the anti-abuse rules recommended by the BEPS Package in domestic law may risk being inconsistent with Article XVII of the GATS.

3.2.3 Unilateral measures to counteract non-compliance or to induce compliance

To recall, minimum standards are developed under the BEPS Package to tackle issues in cases where no action by some countries would create negative spill overs (including adverse impacts

[80] For details, see OECD (2015), *Making Dispute Resolution Mechanisms More Effective*, Action 14 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.

[81] See recent updates in OECD, OECD/G20 Inclusive Framework on BEPS, Progress report, July 2018-May 2019.

[82] While Article XIV(d) can justify Article XVII-inconsistent measures if the different treatment is "aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members", the proviso of "equitable" and the chapeau of Article XIV may operate together to ensure that the anti-abuse domestic legislation is not used as a disguised restriction on trade in services.

of competitiveness) on other countries. Nevertheless, the recommendations in the BEPS Package are soft law legal instruments. It means that these recommendations are not legally binding, although there is an expectation that they will be implemented accordingly by countries that are part of the consensus.[83] In this scenario, can individual participating countries adopt unilateral measures to induce compliance, especially in view that the success of the BEPS Package, especially in the areas where minimum standards are developed, depends on the consistent and prompt implementation by all participating countries?

For example, Action 13 of the BEPS Package aims to improve the rules regarding transfer pricing documentation to enhance transparency for tax administration.[84] A minimum standard on Country-by-Country (CbC) Reporting was adopted. It requires that large MNEs file a Country-by-Country Report to provide, on an annual basis, information including the amount of revenue, profit before income tax and income tax paid and accrued and other indicators of economic activities. CbC reports should be filed in the ultimate parent entity's jurisdiction and shared automatically through government-to-government exchange of information. This initiative will give tax administrations a global picture of where MNEs' profits, tax and economic activities are reported, enabling them to use this information to assess transfer pricing and other BEPS risks. More specifically, BEPS participating countries are requested to adjust domestic legislation to require, in a timely manner, ultimate parent entities of MNE groups to file the CbC Report in their jurisdiction of residence; and exchange this information on an automatic basis with the jurisdiction in which the MNE group operates and which fulfills certain conditions.

As a minimum standard, the BEPS Package requests that the CbC Reporting be implemented effectively and consistently. However, the BEPS Package does not specify how implementation can be assured. Can countries take countermeasures to induce compliance when (i) a jurisdiction has not required CbC Reporting; b) a jurisdiction with which no agreement has been reached for the exchange of the CbC reporting; and c) a jurisdiction that fails to exchange information in practice?

As has been witnessed in *Argentina – Financial Services*, this type of countermeasures could inevitably give rise to either MFN or national treatment concerns under the GATS when different treatment is applied to service suppliers from complying and non-complying jurisdictions.[85] Also, as has been discussed, the exceptions under the GATS may not have been adequately equipped to except certain BEPS-related measures which are inconsistent with Article II or Article XVII of the GATS. In *Argentina – Financial Services*, the panel tried to weave regulatory considerations into its assessment of Article II and Article XVII of the GATS, but did not succeed. The Appellate Body also seemed to be hesitant to embrace regulatory considerations beyond those explicitly endorsed by the exception provisions.[86] As has been argued, the current case law has left uncertainties in applying Articles II and XVII GATS to some BEPS-related measures. Especially, it remains uncertain whether differences in regulatory framework in services exporting country may be considered relevant in assessing the "characteristics" of the service suppliers so as to make them unlike; if so, what kind of regulatory aspect be taken into the consideration; and finally, how to evaluate the

[83] OECD, "BEPS - Frequently Asked Questions", Question 4 "What is the nature of the BEPS outputs? Are they legally binding?" available at: http://www.oecd.org/ctp/beps-frequentlyaskedquestions.htm (last visited 22 July 2016).
[84] For details, see OECD (2015), *Transfer Pricing Documentation and Country-by-Country Reporting*, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.
[85] Panel Report, *Argentina – Financial Services*, para 7.89.
[86] Appellate Body Report, *Argentina – Financial Services*, paras 6.31, 6.34.

appropriateness of the countermeasure at issue, *i.e.* what is the proportionality standard to be applied. Instead of leaving these uncertainties to the judicial prong of the WTO, it would be more preferable if WTO Members can take initiatives to clarify the scope of the exceptions under Article XIV of the GATS or to develop certain guidelines in view of the current global tax reform.[87]

4 Conclusion: to keep or level the playing field?

As illustrated above, the ongoing global tax reform under the BEPS Package is extensive and profound. Its intersection with trade rules is inevitable from both conceptual and practical points of view. Conceptually, the BEPS Package aims to "level the playing field" among businesses. More specifically, it aims to modify the competitive condition between the MNEs which can engage in tax planning on the one hand, and the other types of enterprises on the other hand; and between the MNEs with their parent company or related entities located in jurisdictions with particular types of taxation principles or tax rates on the one hand, and the other MNEs on the other hand. To level the playing field, the BEPS Package makes recommendations, implying differential treatment for different types of enterprises. Such distinctions in treatment may give rise to concerns over the MFN and national treatment principle in trade disciplines. Under the GATS, the MFN obligation is a universal obligation applied to all services sectors unless the measure was listed by the Member concerned as an MFN exemption.[88] However, countries could not have been aware of the current BEPS concerns when they made their MFN exemption lists in 1994. Similarly, with regard to the national treatment obligation, which applies only to sectors where specific commitments are undertaken, it is unreasonable to expect that Members could have crafted their specific commitments with such BEPS concerns in mind. As has been argued in this paper, the two tax-specific exceptions under Article XIV of the GATS, which were considered sufficient by the negotiators in the 1990s, may no longer be adequate in addressing both the MFN and national treatment concerns arising from the implementation of the 2015 BEPS Package. WTO Members should revisit these provisions in parallel to the reform initiatives in international taxation field. As a temporary solution, Members may seek reaching a gentleman's agreement that certain tax measures, although potentially inconsistent with Article II and Article XVII of the GATS, should not give rise to any action under the WTO dispute settlement. [89]

Furthermore, there are areas in which the rules to tackle BEPS concerns are in making and may have an impact on the ongoing trade liberalization initiative under the GATS. Given the intersections identified in this paper, trade negotiators may need to keep a close eye on the development of rules in these areas. One of such areas is digitalization. Countries participating in the Inclusive Framework of the BEPS Package are working on rules to address the tax challenges of the digitalization of the economy, while WTO Members are exploring possibilities to upgrade the trade rules to accommodate the same challenge by digitalization.

[87] Noting, however, not all WTO Members are participating in the BEPS Project. The Inclusive Framework on BEPS has included 125 jurisdictions, while the WTO has 164 Members.

[88] Article II:2 of the GATS: "A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions".

[89] Such approach was used by WTO Members during the extended Uruguay Round negotiations on basic telecommunications with regard to the use of differential accounting rates for the termination of international traffic. See Rudolf Adlung and Antonia Carzaniga, 'MFN Exemptions Under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?' Journal of International Economic Law 12(2), 357-392, p 389.

To sum up, WTO Members should carefully consider the implication of the intersection of the GATS and the rules developed or being developed under the BEPS Package. This is a task to balance the goal of protecting market access and non-discrimination under the GATS on the one hand, and to embrace the principle of the BEPS Package to "level the playing field" for taxation purposes on the other hand.