WHEN GLOBAL TAX REFORM MEETS INTERNATIONAL TRADE RULES:
AN INQUIRY INTO THE INTERSECTION OF THE GATS AND THE BEPS PACKAGE

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1 This paper was presented at the 16th Annual Conference on WTO Law, Geneva, Switzerland, 10-11 July 2016. I am grateful to Rudolf Adlung for his many constructive comments. The usual caveats apply.

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Abstract

A recently published World Trade Organization (WTO) Panel report on *Argentina – Measures Relating to Trade in Goods and Services* ("Argentina – Financial Services") has drawn attention to the intersection of rules governing trade and direct taxation of multinational enterprises (MNEs). Nevertheless, such intersection was inevitable since the creation of the General Agreement on Trade in Services (GATS). While measures related to direct taxation are not carved out from the scope of application of the GATS, the drafters have left rooms for WTO Members to take measures to ensure the effective imposition of direct taxes and to conclude agreements among each other to avoid double taxation. However, the depth and breadth of the current global tax reform under the auspices of the Organisation for Economic Co-operation and Development (OECD) and the G20 goes beyond the scenarios envisaged by the GATS negotiators back in the 1990s. As will be explored by this paper, the *Argentina – Financial Services* case revealed just the tip of the iceberg. Whether the meeting between the global tax reform and the WTO rules will be amicable depends on how countries choose to implement and advance the tax reform project and how the WTO Members intend to accommodate the current trade rules to such reform project. This paper tries to assist this process by providing a systemic analysis of the measures envisaged by the OECD/G20 Base Erosion and Profit Shifting (BEPS) project and how the provisions of the GATS could be relevant. Keeping in mind that the GATS is still a “young” multilateral trade agreement with ambiguities and limited guidance in jurisprudence, recommendations will be proposed concerning the application of the GATS to measures with manifold policy objectives, keeping in mind the asymmetry of the WTO disciplines on goods and services.

To put the issue into perspective, this paper will start with an inquiry into the genesis of the current global tax reform project and the origin of its intersection of the GATS and the BEPS Package. Part II will take a detailed look at how the recommendations in the 2015 BEPS Package could potentially cause trade concerns under the GATS, and if the Agreement’s exception clauses are sufficient to excuse the measures taking to implement these recommendations. In doing so, measures related to the BEPS Package are categorized into three groups, namely measures specifically recommended by the BEPS Package; measures designed domestically, but under the guidance developed by the BEPS Package; and measures countries may unilaterally adopt to counteract non-compliance or induce compliance of BEPS Package’s recommendations by other countries. Finally, Part III will spell out recommendations to ensure an amicable meeting between the BEPS Project and the international trade rules.
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1. Introduction

A recently published WTO Panel report on Argentina – Financial Services has drawn attention to the intersection of the rules governing trade and those addressing direct taxation of multinationals. Nevertheless, such intersection was inevitable since the creation of the GATS in the early 1990s. While measures related to direct taxation are not carved out from the scope of application of the GATS, the drafters have left sufficient room for Members to ensure the effective imposition of direct taxes and to conclude agreements among each other to avoid double taxation. However, the depth and breadth of the current global tax reform under the auspices of the OECD/G20 goes beyond the scenarios envisaged by the GATS negotiators in the 1990s. The Argentina – Financial Services case reveals just the tip of an iceberg. This part will explain why the current global tax reform sits high on the political agenda and why the GATS is relevant.

a. The Genesis of the Current Global Tax Reform Project

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 lived in a global village with one central government implementing homogenous taxation measures on everyone, there would have been no need for professionals specializing in tax planning, nor would there be a need to conclude tax treaties. Yet, we live in a heterogeneous world. Heterogeneity exists at two levels. First, at the national level, all jurisdictions have different taxation policies in view of their respective needs for revenue to fund the government expenditures. The revenue required varies depending on each government’s “terms of reference” agreed with its constituents. For example, a government pursuing higher level of social welfare may reasonably 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 (e.g. Saudi Arabia). Second, within each jurisdiction, the distribution of the tax burden on individuals or classes of populations is not equal. Natural persons in some sectors may carry on a heavier tax burden than others, depending on the government’s use of fiscal measures to encourage or discourage the development of certain economic sectors or to protect certain groups of individuals. Since these heterogeneities arise from the fundamental differences in the government’s financial needs as well as their terms of reference, understandably countries do not wish their taxation autonomy to be lightly interfered at the international level. As a natural consequence, any tax treaty or tax-related initiatives at inter-governmental level take these heterogeneities as a given parameter. For example, the OECD made it clear 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.” On the other hand, countries do seek cooperation from other jurisdictions on taxation matters as companies increasingly operate globally.

Multinational enterprises (MNEs) usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. The taxation of MNEs in different jurisdictions could bring about two issues. One is the potential of 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. This became a concern as it could impede the flow of cross-border trade and investment. Since the 1920s, countries started signing bilateral tax to mitigate the effect of double taxation and, more importantly, to allocate tax revenue between the source and the residence country. So far, there are over 1,300 tax treaties worldwide, which form the fundamentals of international tax law and provide rules under which multinationals are taxed. Companies are per se profit driven and it is only natural that they plan their businesses with international taxation regimes in mind. Here comes the second concern as MNEs exploit the heterogeneities in taxation systems in different jurisdictions or utilize tax treaties to minimize their tax base or shift their profits to low-tax jurisdictions in which little or no economic activity is performed. Tax planning by private economic operators is nothing new, nor is per se unlawful as long as these companies act within the boundary of law. 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 only gained intensity when the recent financial crisis hit. In addition, the fast pace of globalization and the growth of digital economy has increased the opportunities for multinationals to engage in tax planning. According to the OECD, the annual revenue loss due to base erosion and profit shifting is conservatively estimated at 100 to 240 billion US dollars. Understandably, when government revenues are low due to the economic recession, this figure raises the stakes for every government around the globe. As a result, in September 2013 G20 leaders endorsed an ambitious and comprehensive plan, developed with OECD members, to “restore confidence in the international tax system and to ensure that profits are taxed where economic activities take place and value is created”. That is the so-called Base Erosion and Profit Shifting (BEPS) Action Plan.

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.

6 ibid.
activities, resulting in little or no overall corporate tax being paid. The BEPS Project aims to tackle the BEPS structures by “comprehensively addressing their root causes”. In particular, the 2013 OECD report found that the “root causes” are: domestic laws and regulations are not coordinated across the borders; international tax standards have not always kept pace with the changing global business environment; and there is a pervasive lack of relevant information at the level of tax administrations and policy makers. In 2015, a comprehensive BEPS package consisting of reports on 15 actions were agreed to tackle these causes, as illustrated by the following chart.

The issue touched upon by the WTO case Argentina – Financial Services relates to the exchange of information and transparency with regard to tax havens. This work, originally fell under Action 5 is now handled by the Global Forum on Transparency and Exchange of Information for Tax Purposes. The report on Action 5 now focuses on preferential tax regimes. That explains why the Argentina – Financial Services case only touched upon a tip

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9 See OECD, above n 7, para. 6.
10 Ibid, para.5.
of the iceberg of the potential intersection of the WTO law and the current global tax reform.

With regard to specific recommendations, the BEPS Package sets out different types of measures:\(^{12}\)

- Minimum standards are developed to tackle issues in cases where no action by some countries would create negative spill over (including adverse impacts of competitiveness) on other countries. In particular, minimum standards are set for model provisions to prevent treaty abuse, standardized country-by-country reporting, a revitalized peer review process to address harmful tax practices and an agreement to secure progress on dispute resolution;
- International standards on tax treaties and transfer pricing are reinforced;
- 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. Recommendations on hybrid mismatch arrangements take the form of common approach.
- Guidance based on best practices for domestic law measures are recommended for countries that want to act in the areas of Controlled Foreign Company (CFC) rules and mandatory disclosure initiatives.

In all, this 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. As will be mentioned later, technical work on, for example, banking and insurance services, are still ongoing. The monitoring work just got started. In addition, the OECD and G20 countries are also working to better involve other interested countries and jurisdictions to join the BEPS Package.

**b. The Expanding Concept of Trade: the Origins of Intersection**

In the context of trade in goods, the 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 to *products* entering across the border.\(^{13}\) On the market where domestic and foreign products compete, fiscal policies, including those related to direct taxation, would

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\(^{12}\) See OECD, above n 7.

\(^{13}\) 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.
only be constrained to the extent they constitute a subsidy falling under the ambit of the SCM Agreement.\(^{14}\)

However, when the concept of trade was expanded in the Uruguay Round of the multilateral trade negotiations to embrace trade in services, the intersection of domestic direct taxation measures and trade disciplines became inevitable. Unlike trade in goods, the delivery of trade in services often requires the presence of service suppliers. Thus, in addition to cross-border trade (mode 1), the GATS also covers further three modes of supply, namely consumption abroad (mode 2), commercial presence (mode 3) and the presence of natural persons (mode 4).\(^{15}\) In the later two modes of supply, service suppliers move across border. Since in most cases, countries impose taxes on income from a source inside the country, service suppliers under mode 3 and mode 4 are normally taxed in the services importing country, i.e. the country where they provide their respective services. Thus, a direct tax imposed on service suppliers under mode 3 and 4 constitutes a measure “affecting trade in services” under the meaning of Article I:1 of the GATS. For example, as mentioned before, the imposition of tax on a foreign supplier established in the services importing country may result in double taxation, which may disadvantage the foreign service supplier vis-à-vis the domestic ones, thus cause national treatment concern under Article XVII GATS; a bilateral tax treaty which aims to avoid double taxation may cause Most-Favoured-Nation (MFN) treatment concerns under Article II GATS. The negotiators did have these intersections in mind and discussed the applicability of the GATS to tax measures.\(^{16}\) In particular, exceptions were drafted to secure Members’ right to impose and collect direct taxes\(^{17}\) and to grant tax treaties a permanent exemption from the MFN obligation.\(^{18}\) The resulting leeway was considered sufficient then.

Nevertheless, the negotiators of the GATS in 1994 could not have envisaged the scope and coverage of the current global tax reform, which is transforming the fundamentals of how MNEs have been taxed since the 1920s. The BEPS Package represents the first substantial renovation of the international tax standards in almost a century. It calls for extensive amendments in domestic legislation as well as international tax treaties to address BEPS concerns. Thus it is imperative to assess if the implementation of the BEPS Package would bring about new intersections of the GATS and the upgraded international taxation law.

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\(^{14}\) 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 WTO Discussion Paper No 9, Michael Daly, ‘The WTO and Direct Taxation’, June 2005.

\(^{15}\) Article I:2 of the GATS.

\(^{16}\) See GATT document MTN.GNS/W/210, Note by the Secretariat, ‘The Applicability of the GATS to Tax Measures’, 1 December 1993.

\(^{17}\) Article XIV(d) of the GATS.

\(^{18}\) Article XIV(e) of the GATS.
2. Exploring the Intersection Between the GATS and the BEPS 2015 Final Reports

As mentioned in Part I, the BEPS Package consists of a basket of recommendations and guidelines. Nevertheless, the WTO rules only come into play if the rights and obligations of a Member are disturbed 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 these recommendations and guidelines that can bring about trade concerns. Thus, the focus of analysis is on measures developed to implement the BEPS 2015 Final Reports. For the purpose of this paper, these measures are discussed under the following three scenarios:

- 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;
- 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 induce compliance, especially in areas where minimum standards have been agreed in the BEPS Package.

This following part of this section will address these three scenarios in turn to explore the potential intersections of these measures and the GATS.

a. 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; the 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.

i. Measures to tackle harmful taxes (IP regime)

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. 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

19 See OECD, above n 11, at 20.
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Package aims to reduce the discretionary influence of taxation on the location of mobile financial and services activities. 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 would not be granted to certain enterprises, e.g. enterprises that have not undertaken the qualifying income generating activities in its jurisdiction. Under Action 5 of the BEPS Package, countries have agreed on standards to assess the harmfulness of the preferential regimes. In particular, 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 to the extent that the taxpayer itself incurred qualifying research and development (R&D) expenditures. Arguably, this can only happen if the taxpayer source R&D-related services locally. Indeed, as explained in the Report, such 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”. Thus, the essence of the suggested amendment is to condition the availability of a tax advantage to the use of local R&D activities. As will be explained below, from a trade perspective, this requirement may be problematic under the GATS.

First, to contingent the availability of a tax exemption upon the use of local R&D activities would disadvantage foreign services and service suppliers of R&D-related activities in the services sectors concerned. 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 TRIMS Agreement. R&D services are specifically listed in the Services Sectoral Classification List (the so-called “W/120” document), a document that WTO Members generally referred to when making their specific commitments under the GATS. So far, 60 Members have made specific commitments under the R&D services. If these commitments are undertaken with regard to national treatment, such local content requirement may be found inconsistent with Article XVII GATS.

Second, whether Article XIV (d) GATS may be adequate to exempt such local content requirement is arguable. Subparagraph (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

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21 For details, see OECD, above n 11.
22 See OECD, above n 11, at 9.
24 The Montreal Ministerial Declaration of December 1988 mandated the GATT Secretariat to prepare such a list. For more information on this and related issues see Eric H. Leroux, ‘From Periodicals to Gambling: A review of systematic issues addressed by WTO adjudicatory bodies under the GATS’, in Marion Panizzon, Nicole Pohl, and Pierre Sauve (eds), GATS and the Regulation of International Trade in Services (Cambridge: Cambridge University Press, 2008), at 236–75.
defined and may be subject to interpretative debate. 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 input services and service suppliers. 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.\textsuperscript{25} To apply this rationale here, the service suppliers of foreign origin being discriminated are in the R&D services sector, which is different from the service and service suppliers upon which different tax policies are imposed. Therefore, a case may be made that Article XIV (d) should not be available to justify a domestic content requirement. WTO Members may thus consider clarifying the applicability of Article XIV (d) to the recommendations under Action 5 of the BEPS Package.

In the area of non-IP regimes, discussions are being undertaken on 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.\textsuperscript{26} 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.

\textbf{ii. 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, including long-term deferral.\textsuperscript{27} 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. Nevertheless, there is no impediment in applying the GATS to such measures according to the most recent case law. In \textit{Argentina Appellate Body Report, Canada – Renewable Energy}, para. 5.79.

\textsuperscript{25} See OECD, above n 11, at 38.

\textsuperscript{27} See OECD, above n 11, at 38.

– Financial Services, two measures at issue are of similar nature as the one recommended by the BEPS Package here. The Panel opined that the GATS applies 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.” In particular, Panama identified services sectors concerned are “all services whose payment generates revenue of Argentine source for the service supplier” and the Panel deemed it sufficient to establish a case under the GATS. This legal issue with regard to the application of the GATS to a horizontally applied taxation measure was not appealed.

The legal question that may arise from the implementation of this BEPS Package recommendation is also similar as in Argentina – Financial Services, i.e. revolving around the question 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 GATS. The Panel tried to squeeze in regulatory considerations in its analysis under both the “likeness” and the “less favorable treatment” test under Article II. In appeal, the Appellate Body reversed the Panel’s approach to take into account “regulatory aspects” in the “less favourable treatment” analysis, but did not spell out “the relevance and weight of specific criteria for determining whether service suppliers and services provided are ‘like’”.

To recall, the exception clause under Article XIV with respect to measures “aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members” is not available to justify an MFN violation. Thus, if this exception is not modified, the only way to accommodate this BEPS action is to give more leeway in the “likeness” assessment under Article II GATS. This might explain the Appellate Body’s ambiguous statement relating to “likeness”: while acknowledging the relevance of the likeness criteria developed under the GATT, it also showed flexibility to take into account other characteristics of trade in services, e.g. the presence of service suppliers and the four modes of supply. The downside of this ambiguous taking is that it may render the “likeness” test under the GATS highly unpredictable. The conventional debate on process and production method (PPM) in the context of trade in goods may find its way under the GATS in a more salient manner.

28 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.
29 Panel Report, Argentina – Financial Services, para. 7.89.
30 Ibid, paras. 7.97 – 7.98.
31 Ibid, para. 6.151.
32 Appellate Body Report, Argentina – Financial Services, para.6.33.
33 Ibid, paras. 6.31-6.33.
iii. Controlled foreign company (CFC) rules

Controlled foreign company (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, in some cases, other countries by shifting income into a CFC. The recommended measures are designed to ensure that 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 recommended 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. That is to say 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, may come from jurisdictions with lower tax rates. In this case, there may be an element of discrimination between service suppliers from high and low tax jurisdictions, thus an MFN case may be made. As discussed before, Article XIV(d) does not exempt measures inconsistent with Article II. Thus, if such measures are to be exempted, the only avenue available now is to read regulatory concerns in the “likeness” test under Article II GATS. This raises the same concerns concerning the scope of “likeness” as in Argentina – Financial Services, as already discussed above. 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. This is because the domestic service suppliers would not be better off but for such measure. However, such inconsistency with Article XVII GATS may be exempted by virtue of Article XIV(d).

b. 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

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tax treaty benefits in inappropriate circumstances. With regard to domestic law, recommendations are made 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. 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. 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, could the counterpart country bring a case under the dispute settlement system of the WTO to ensure such anti-abuse practice is halted?

First, 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.” But what defines “the scope” of the international tax agreement between the disputing parties? Article XXII further provides: 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. A footnote additionally provides 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.” Two questions may arise in the application of Article XXII GATS as follows:

First, whether an agreement on the avoidance of double taxation, modified according to the 2015 BEPS Package, could be qualified as an agreement existing on the date of entry of the WTO Agreement. One may argue that the newly amended agreement should not benefit from grandfathering as WTO Members should be aware of Article XXII GATS when they amend their tax treaties. In this case, as long as one disputing party elects to bring the case before the Council for Trade in Services, the arbitration under the WTO will have the final say on the scope of the tax agreement at issue.

Second, if the matter falls outside the scope of the tax treaty, whether the measure will be found inconsistent with the GATS. As already mentioned, with regard to tax agreements,

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Article XIV(e) only exempts measures inconsistent with the MFN obligation, but not those found inconsistent with Article XVII. Article XIV(d) can exempt Article XVII violations 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” as well as the chapeau of Article XIV may ensure that the anti-abuse domestic legislation is not used as a disguised restriction on trade in services.

c. Measures to Counteract Non-compliance or Induce Compliance

As mentioned before, 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 of competitiveness) on other countries. Nevertheless the recommendations in the BEPS Package are soft law legal instruments, meaning they are not legally binding but there is an expectation that they will be implemented accordingly by countries that are part of the consensus. The question is: can individual participating countries adopt unilateral measures to induce compliance, given 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? This Part of the paper takes the minimum standard developed under Action 13 of the BEPS Package regarding transfer pricing documentation requirements as an example.

Action 13 of the BEPS Package aims to improve the rules regarding transfer pricing documentation to enhance transparency for tax administration. A minimum standard on Country-by-Country (CbC) Reporting was adopted, requiring large MNEs to file a Country-by-Country Report that will provide annually and for each tax jurisdiction in which they do business, the amount of revenue, profit before income tax and income tax paid and accrued and other indicators of economic activities. Country-by-country 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, countries are requested to:

- Adjust domestic legislation to require in timely manner ultimate parent entities of MNE groups to file the Country-by-Country Report in their jurisdiction of residence.
- Exchange this information on an automatic basis with the jurisdiction in which the MNE group operates and which fulfills certain conditions. A Multilateral Competent

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Authority Agreement on the Exchange of Country-by-Country Reports ("CbC MCAA") has been developed to set forth rules and procedures as may be necessary for Competent Authorities to automatically exchange Country-by-Country Reports prepared by the Reporting Entity of an MNE Group and filed on an annual basis with the tax authorities of the jurisdiction of tax residence of that entity with the tax authorities of all jurisdictions in which the MNE Group operates.

As a minimum standard, it is requested that the CbC Reporting be implemented effectively and consistently. However, the BEPS Package does not specify how implementation can be assured. The question is: can countries take countermeasures to induce compliance when: a) a jurisdiction has not required Country-by-Country Reporting; b) no agreement has been reached for the exchange of the Reporting; c) a jurisdiction 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 the national treatment concerns under the GATS when different treatment is applied on service suppliers from non-complying jurisdictions for the following reasons.

First, as mentioned before, countermeasures may easily fall under the ambit of the GATS and the complaining party may find it easy to establish a case, according the Panel ruling in Argentina – Financial Services.

Second, the concept of "fairness" in taxation system has many dimensions. As has been discussed, the exceptions that the GATS has embraced with regard to Member’s sovereign right to secure equitable or effective collection of taxes are limited. In Argentina – Financial Services, the Panel hearing the case tried to weave other regulatory considerations into its analysis under Article II, and XVII of the GATS and was heavily criticized by the Appellate Body. However, the Appellate Body was hesitant to address regulatory considerations beyond those explicitly endorsed by the exception provisions. As has been argued, the current case law has left uncertainties in applying Articles II and XVII GATS to the impugned measure. Especially, it has remained uncertain whether differences in regulatory framework in services exporting country may be considered relevant to the “characteristics” of the service suppliers so as to make them unlike; if so, what kind of regulatory framework should be taken into the consideration; and finally, how to make sure the appropriateness of the countermeasure at issue, including the proportionality. Instead of leaving these uncertainties to the judicial prong of the WTO, it would be more preferable if Members can take the initiative clarify the scope of the exceptions under GATS Article XIV in view of the current global tax reform. Noting, however, not all WTO Members are participating in the BEPS Project.

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39 Appellate Body Report, Argentina – Financial Services, paras.6.31, 6.34.
40 More than 60 countries and regional tax organisations directly involved in the technical work. For a list of countries, see OECD, “Background Brief: Inclusive Framework for BEPS Implementation”, March 2016, n 1.
3. To Keep or To Level the Playing Field?

As has been illustrated, the on-going global tax reform under the BEPS Project is extensive and profound. Its intersection with trade rules is inevitable from both a conceptual and a practical perspective. Conceptually, the BEPS Project aims to level the playing field among businesses. More specifically, it aims to modify the competition condition between the MNEs, which can engage in tax planning, and the other types of enterprises; and between the MNEs with their parent company or related entities located in jurisdictions with particular types of taxation principles or tax rates and the other MNEs. To level the playing field, the BEPS Project has come up with recommendations entailing different treatment on these enterprises. Such distinctions in treatment may give rise to both MFN and national treatment-related concerns. Under the GATS, the MFN obligation is a universal obligation applied across all services sectors unless the measure at issue was listed by the Member concerned as an MFN exemption. However, countries could not have reasonably 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 commitments are made, 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 specific tax-related exceptions under Article XIV, which were considered sufficient by the drafters of the Agreement in the 1990s, are no longer sufficient to address both the MFN and national treatment-related concerns arising from the implementation of the 2015 BEPS Package. WTO Members may want to revisit provisions in view of the reform initiatives in the taxation field. As a temporary solution, Members may seek to reach a gentleman’s agreement that certain tax measures, although potentially inconsistent with MFN and national treatment provisions, would not give rise to action under the dispute settlement system under the WTO.

Furthermore, there are areas where the rules to tackle BEPS concerns are underway of making and may have an impact on the ongoing trade liberalization under the GATS. For example, Action 4 of the BEPS Package calls for recommendations regarding best practices in the design of rules to prevent base erosion through the use of interest expense. The Report recommended a fixed ratio rule, which limits an entity’s net deductions for interest and payments economically equivalent to interest to a percentage of its earnings before interest, taxes, depreciation and amortisation (EBITDA). However, the Report acknowledged

41 Ibid, para.3.
42 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”.
43 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, at 389.
that particular features of the banking and insurance industries mean that the fixed ratio rule and the group ratio rule set out in this Report are unlikely to be effective in addressing BEPS involving interest in these sectors. Further work will thus be conducted, to develop rules dealing with the BEPS risks posed by banks and insurance companies. Given the intersections identified in this paper with regard to the recommendations already made under the BEPS Package and the complexities of financial services, trade negotiators may need to keep a close eye on the development of rules in these areas to assess not only their trade impact, but also the impact on the existing trade obligations and commitments under the GATS. Earlier in this paper, attention has also been drawn to the on-going work under Action 5 with regard to distribution and service center regimes, financing or leasing regimes, fund management regimes, banking and insurance regimes, as well as shipping regimes.

In all, WTO Members are advised to carefully consider the intersection of the GATS and measures related to direct taxation to ensure compatibility between their trade obligations and the rules considered and implemented under the BEPS project. In the end, WTO Members need to strike a balance between the objective under the GATS to promote trade in services on the one hand, and the objective of the BEPS Project to level the playing field on the other hand.