

Article

The Complementary Role of the WTO in the Enhancement of the Base Erosion and Profit Shifting Project

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Abstract: The current rules on international tax do not function properly due to the gaps which allow for tax manipulation. Whereas most tax agreements largely contribute to the prevention of double taxation, they do not effectively approach double non-taxation matters arising from tax competition based on the agreements' bilateral nature. In order to tackle this issue, the Base Erosion and Profit Shifting project was introduced. Developed under the Organization for Economic Co-Operation and Development framework, the Base Erosion and Profit Shifting project deals with tax avoidance practices that use mismatches and gaps in tax rules. Nevertheless, the success of this new soft law initiative requires a forum that can promote and enforce its recommendations. The structural nature of the Organisation for Economic Co-operation and Development has led to the consideration of the World Trade Organization to be this forum by many. However, the World Trade Organization covered agreements are drafted in a way that includes some of the tax competition matters but not others, including traditional tax havens. This paper aims to bridge the gaps in the area of the international tax regime. By examining the international trade and international tax regimes, it is shown that there is space for variations in the World Trade Organization broadly drafted agreements for such matters to find a resolution. It is argued that the World Trade Organization can play a complementary role in the enforcement of the new international tax rules.

Keywords: Base Erosion and Profit Shifting (BEPS); World Trade Organization (WTO); international tax regime; Organisation for Economic Co-operation and Development (OECD); global tax reform

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1. Introduction

Regardless of the multilateral trade liberalization unleashed by the General Agreement on Tariffs and Trade 1947 (GATT) more than six decades ago, protectionist measures persist in international trade. The greatest challenge in the design of such multilateral trade agreements is that trade liberalization commitments with regard to one policy instrument, such as tariffs, may be easily vitiated by other protectionist instruments which are not fully constrained by these rules, such as tax measures [1]. Though interconnection between international trade and taxation historically exists and is not a novel issue, little research has been done on this interdisciplinary area. Thus, the paper examines the interference of the international trade regime with international tax to fill the research gap on how international trade law can enhance the international tax regime.

1.1. Identifying the Gaps in the Existing Tax Regime

The fundamental objective for both international tax law and international trade law is to facilitate cross-border trade by eliminating or reducing barriers that impede it. Indirect and direct taxes are both barriers to international trade [2]. Despite the international

tax and global trade regimes' common objectives to alleviate double taxation and support no discrimination, these two regimes are architecturally distinct with different structural and practical foundations which rarely interact [3]. The main difference between these regimes is the absence of a formalized international tax system or a supranational legal body compared to the World Trade Organization (WTO). Thus, the lack of a pivotal international law on taxation has led the international community to question the legal existence of this regime and often the expression international tax law is accepted as inaccurate [4].

The absence of a specialized international tax organization has created gaps in how taxes are operated globally. The current international tax regime mainly functions on a loosely framed network of tax treaties which tackle only some of the international tax matters and are grounded on reciprocity and bilateralism [5]. Thus, the international tax regime is seen as multigoverned which lacks transparency and enforcement. These bilateral treaties are notably identical in policy and in language based on the nonbinding soft law of the Organisation for Economic Co-operation and Development (OECD) or the United Nations (UN) Model Tax Conventions, of which the OECD is the leading one in this area [6]. That is why this study is focused on the OECD work on international taxation.

Although treaties have a higher status than domestic law in most states, and states are bound to behave in a certain way, these bilateral treaties do not have a real international reach. Direct modifications on specific tax rules applied to cross-border transactions are done on a case-by-case basis involving only the two state parties to the treaty [7]. Thus, tax rules can be amended much more easily and be bent for the purpose of receiving reciprocal benefits which are not always favorable for the rest of the international community.

Furthermore, tax treaties have certain gaps that create opportunities for regulatory tax competition and allow for strategic tax planning and tax manipulations [8]. Certain exceptions to rules initially designed to avoid double taxation are exploited by multinationals in a way that results in double non-taxation. Additionally, the arm's length principle, primary upholding transfer pricing allocations, is abused in a way that separates income from the economic activity that generates it, which allows for profits to be moved to low tax locations [9].

Moreover, there is no formal and binding dispute settlement mechanism which results in a lack of consistency and transparency in the international tax regime [10]. Disputes which arise from the application or interpretation of tax treaties are resolved through mutual agreement, and often, the chosen method is arbitration. The nature of arbitration usually entails private case proceedings and confidential awards which cannot establish a legal precedent on other parties.

Last but not least, there is no universal intergovernmental organization which takes charge of the development, enforcement, and sometimes the harmonization of the international tax regime. Although the work of the OECD's Committee on Fiscal Affairs is leading in defining international tax policies, it is based on soft law transnational initiatives, the most recent of which is the Base Erosion and Profit Shifting (BEPS) project. It is a set of major new tax rules which aim to increase tax transparency and alleviate tax evasion. Thus, there is no supervision of the implementation of tax rules to ensure they are beneficial to the wider international community.

In contrast to the international tax regime, the international trade system is built on a hard multilateral law, enforced and regulated by the quasi-judicial body—the WTO Dispute Settlement Mechanism (DSM). Despite some of the WTO's deficiencies, it is considered to be one of the most successful international legal systems which binds its members to compound trade obligations [11]. The WTO's biggest achievement is its formalized adjudicative dispute settlement system incorporating an appellate tribunal which does not exist in the international tax regime.

Nonetheless, despite these differences in form and substance, the intimate relationship between the two regimes cannot be concealed. Taxation is a constant barrier to trade that cannot be completely eliminated as it is a source of revenue to the current political reality. Thus, entire free trade cannot be fully achieved in a world with taxes, and a system that would more sufficiently regulate taxes needs to be established. This paper attempts to discover whether there is a scope for the WTO cover agreements to play a role in the promotion of tax rules and create a legal basis for their enforcement.

1.2. Research Question

This study aims to bridge the gaps in the area of international tax law as mentioned above. It addresses the question of how to fill the gaps in the current international tax regime. There is still no specialized global body that can legally enact tax rules. Consequently, other branches of international law such as trade law directly or indirectly germane to taxation need to be explored.

1.3. Significance and Implications of This Study

The significance of this study results from the urgency for discussion about tax transparency and enforcement in the global arena and whether it can be realized when there are various tax discrimination practices. This is predominantly essential in light of the Argentina—Financial Services (2016) [12] case which was recently published regarding taxation. Although a few studies have discussed international tax rules from the viewpoint of WTO treaties, condemning that these treaties both hinder and foster harmful tax policies, they did not provoke further research in the area. This is unfortunate as the dynamics between trade and tax rules have undergone important changes in the last decade, and this neglect of tax-trade relation was evident in the aftermath of the Panama Papers.

The Argentina—Financial Services case was filed by Panama against Argentina for imposing trade restrictive measures against it and ‘blacklisting’ it as a tax haven. This much anticipated decision should have shed light on whether and to what extent WTO member states (MSs) may enforce measures to address tax transparency without violating their WTO obligations [13]. Whereas the WTO panel found national treatment discrimination under the General Agreement on Trade in Services (GATS), the Appellate Body (AB) overturned the panel’s ruling. The AB adjudicated a narrow decision that provides relatively little guidance on how to deal with these substantive issues in the future [14].

As it is explored by this paper, this case exposed just the ‘tip of the iceberg’ [15]. It has drawn attention to the intersection of rules regulating direct taxation of multinational enterprises (MNEs) and international trade law. Such a connection was inevitable since the establishment of GATT and GATS. Even though direct tax measures are regulated under both GATT and GATS, the drafters have left necessary room for states allowing them to create arrangements between each other to prevent double taxation and to ensure effectual enforcement of direct taxation.

Still, the BEPS project global tax reform depth and breadth goes beyond what the GATS and GATT negotiators envisaged. Thus, the relation between WTO rules and these new global tax rules will be determined by how countries decide to fulfil and progress these tax reforms and how WTO members plan to adjust the current trade rules to meet their requirements. Hence, this study aims to examine whether the BEPS project goals can be accomplished under the WTO’s wings through legal and practical analysis.

It may be challenging to relate these two distinct organizations and their agendas, considering the limited literature on the topic and the lack of explicitly related WTO case law. However, this can emphasize the importance of this study. Furthermore, despite the prosperity and value of the WTO framework, it is still facing challenges. Nevertheless, even if one day the WTO was not functioning, many of the current trade agreements are based on the WTO model. This means that the findings of this study may still shed light on the issue.

1.4. Methodology and Proposed Approach

This study applies comparative law approach to analyze the international framework in relation to the topic by looking at international treaties and conventions related indirectly or directly to international tax policies. By applying a doctrinal approach, the study analyzes the scope and progress of tax under GATT and GATS nation treatment obligation in WTO case law [16]. It also draws on the economic analysis [17] of tax discrimination experienced by states and examines the WTO role for achieving the tax transparency goal.

1.5. Outline of the Paper

This paper examines how the new tax reform intersects with the present international trade rules regarding taxation. Emphasis is put on the national treatment provision found within both GATT and GATS. Whereas WTO law does not explicitly prohibit profit shifting and tax base avoidance, the research investigates the continued significance of direct and indirect taxation difference found in the national treatment discipline.

Then, it analyzes whether there is scope for the WTO to implement certain tax reforms in the absence of a binding dispute settlement organ in the international tax domain. The WTO with its DSM should have an important place in the international tax reform project as it can be the wheel for execution of some of the OECD's tax rules. The intention of this study is to emphasize the key role the WTO can play in the area of direct taxation and highlight its wide reach which could potentially assist with the relinquishment of harmful tax policies that damage tax competition.

Thus, this paper is divided into four major sections. Section 2 puts the matter into perspective by providing an overview of tax and trade regimes and the need for a global tax reform. Sections 3 and 4 analyze the national treatment within GATT and GATS, respectively, and its application in WTO case law to examine whether the BEPS project recommendations could be guarded under the WTO. Section 5 provides an insight in the potential trade concerns that the implementation of the BEPS project could cause under GATT and GATS. Finally, this study concludes by highlighting the WTO's role in international tax regulation and provides a recommendation to ensure for the amicable meeting between international trade law and global tax reform.

2. Interface between International Tax and International Trade

This section introduces the overlap in the objectives set by both trade and tax treaties. It starts by introducing the theoretical and structural differences between international trade and international tax law and exploring their interconnection. Then, the origins of the present global tax project and its mechanisms are discussed together with the potential of expanding concept of trade.

2.1. Overview of International Trade and Tax Regimes

Under GATT 1947 auspice, the international trade framework has long regulated the more traditional trade taxes such as custom duties and internal indirect taxes (value added tax (VAT), sales tax, etc.) through the enforcement of non-discrimination principles, border tax adjustments (BTAs), and tariff bindings. However, this can lead one to the thought that while cross-border indirect tax matters are monitored by the global trade law, cross-border tax matters are regulated by the international tax system and never the two shall meet. This leaves us with the belief that this is where the role of international trade law for taxation ends.

Nonetheless, with time, it was proven that every trade resolution has tax complications, and every tax solution has caused trade issues [18]. Therefore, since the creation of the WTO in 1995, the GATT 1947 successor, the influence of global trade framework over taxation has increased. The Uruguay Round of Trade Negotiations (1986–1994) created new aspiring multilateral agreements collectively known as the WTO 'single package' which cover a broader scope of trade from goods and services to the trade-related aspects

of intellectual property, compared to GATT 1947 which regulated only the trade in goods. This has broadened the chances of conflict between MSs' tax policies and international trade rules and has in turn formed new regulatory repercussions where discriminatory income tax practices occur that extend far beyond the originally intended by the GATT 1947.

The WTO is a rule-based organization which has a unique system of law represented by its DSM [19]. The WTO law is grounded on two unprejudiced principles, known as the Most Favored Nation (MFN) treatment and National Treatment (NT). These non-discriminatory requirements are enclosed in almost all of the WTO's covered agreements. The ultimate basis of this multilateral trade organization is the gentle balance between the right of states to regulate in a broad range of matters and the pursuit of trade liberalization of trade tariffs, taxes and other indirectly or directly applied internal charges [20]. These extended WTO agreements are the proof of the states' recognition that multilateral rules should have an imperative role in regulating tax and non-tax measures, predominantly where these measures impact the international movement of goods, capital, services, persons, and technology.

As a result of all these agreements, the variety of tax measures which were challenged by WTO members has widened in reach and has gone beyond the more traditional trade taxes. The two key WTO agreements in this area are GATT 1944, which consists of the provisions made in GATT 1947, and GATS, both covering substantive tax requirements. Therefore, these WTO rules which are agreed by state consensus are likely to play an imperative role in the way MSs construct their tax policies in order to avoid having their tax regulation successfully challenged in disputes [21]. In spite of the broader jurisdiction of these agreements over tax matters, the connection between international tax and trade rules is often misjudged.

After the failure of the ITO in 1950, the UN Fiscal Commission worked for another four years and ceased operation. Then, the main international tax activity shifted to the Organisation for European Economic Co-operation (OEEC), now known as OECD. Since then, the UN has not contributed much to the international tax field, except with the non-binding Model Tax Convention, heavily based on the OECD work, which has a limited scope tackling only tax problems between developed and developing countries.

The international tax regime is mainly regulated through a network of bilateral tax treaties which mostly draw their text on the non-binding multilateral model convention developed and regularly updated by the OECD. Rixen argues that states maintain a bilateral tax system and resist an international tax organization to preserve their tax sovereignty. This can be due to the fact that taxes are the main source of income for states.

However, the present international tax system is considered to be quite deficient. The rules regulating tax base between countries do not always function properly and in some cases can lead to unjust international tax policies [22]. There is a growing concern with respect to the substantial losses of national tax revenues due to the way in which MNEs shift their profits to erode the taxable base. International legal arrangements established to regulate such MNEs' conduct have proven unsuccessful in stopping profit shifting and tax base erosion from happening. This is mainly based on the absence of a monitoring and enforcement body in the international tax domain.

The OECD has recently put a lot of effort into establishing international cooperation against harmful tax competition. To help to mitigate this problem in October 2015, the OECD agreed on the BEPS project. It provides countries with the tools to help them to limit disputes over international tax rules' application and provides tax planning strategies that uncover gaps and mismatches in their tax regulations. The key component of the implementation of this project is the compliance aspect of the BEPS measure enforcement.

Although the OECD has created a BEPS inclusive framework, where interested countries and jurisdictions can cooperate with the OECD to monitor the BEPS project implementation by assessing their own tax systems, this international tax law is still enacted on

a country-by-country basis which lacks enforcement and monitoring mechanism. This differs from international trade law, which uses multilateral WTO agreements to regulate much of the global trade [23]. Consequently, the BEPS project tax policy recommendations are not self-executing. The next part of this section explores the normative base for taxes and the need for global tax reform, the mechanisms of the BEPS project, and the expanding WTO role.

2.2. Normative Base for Taxes and the Need for Global Tax Reform

A tax is a fiscal fee levied by government on a taxpayer, an individual or legal entity, to finance different public services. There is not always a clear distinction on what constitutes indirect or direct tax. Usually, direct taxes are enacted on the income of individuals and corporations, while indirect taxes are levied on the production, sale, or delivery of goods, and on the provision of services [24].

As we live in a heterogeneous world, every jurisdiction has different tax policies to fulfil the needs for funding of government services. While a jurisdiction with a high social welfare system may need a higher tax contribution from taxpayers, governments which generate revenue from other activities may require less tax contribution. Further, the tax burden distribution may vary depending on the state's use of financial measures to foster or impede the progress of some economic sectors or groups of individuals. These fundamental differences arise from the various financial needs of jurisdictions. Reasonably, states do not want their taxation sovereignty to be affected on an international level.

Additionally, globalization has encouraged states to regularly adjust their tax structures and expenditures on public services where needed to attract more foreign direct investment. The solution is often the reduction of corporate tax to nearly zero on certain types of income, such as income from the delivery of intangibles or financial activities. This creates tax heaven locations that attract MNEs but might be detrimental to the rest of the global community.

Although tax reduction might initially increase investment, it can also be a race to the bottom, which can harm states in the long run. The interaction of these harmful tax practices can generate negative spillover effects. Some of these effects include indirect disturbance of real investment flows, disruption of the tax structures' integrity and fairness, discouragement of all taxpayers to be compliant, and undermining of tax burden distribution, where MNEs can pay as little as 5% corporate tax compared to up to 30% for smaller businesses.

Taxation of MNEs in several jurisdictions creates a complex situation and thus brings some issues. Firstly, a possibility of double taxation is created or the enactment of similar taxes in two or more jurisdictions regarding the same matter on the same taxpayer. This was long recognized as a hurdle for the flow of cross-border investment and trade, and most of the bilateral tax treaties signed by states try to mitigate the double taxation issue by allocating tax revenue base between the domicile country and the source. Although these treaties form the basics of international tax law by offering rules under which MNEs are taxed, in many cases, they do not function as intended, which results in double non-taxation.

Additionally, by nature, corporations are profit driven and plan their business activities with international taxation rules in mind. Often, they use the heterogeneities in the different tax systems or exploit the gaps in the tax treaties to minimize their tax base or move their profits to lower tax jurisdictions where little or no economic activity is conducted. In most of the cases, tax planning is not unlawful as businesses act within the boundary of the law, utilizing its exceptions and exploiting the outdated international tax system.

Globalization and the development of the digital economy have further assisted corporations' engagement in tax planning as national tax laws and international rules have not kept their pace of development. Accordingly, the global corporate income tax revenue loss due to profit shifting and base erosion is estimated at between 100 to 240 billion US

dollars annually. Therefore, when global economic recession hits the government revenues further, this raises the stakes for states to search for a way to stop these harmful practices.

Accordingly, states need to pursue collaboration with other jurisdictions on tax matters as more and more businesses operate internationally. There are tax treaties or inter-governmental initiatives that try to address these issues but not sufficiently. They do not dictate to any country what tax rates are appropriate but rather advise that taxes be equally shared and not be the leading factor in making investment decisions by businesses [25]. Consequently, there is a need for new initiatives to reform these malpractices and address the existing gaps.

2.3. Overview of the BEPS Project and Key Issues of the International Tax Regime

To restore trust in the international tax regime and to ensure that revenues are taxed where economic activity is performed, the OECD members developed the ambitious and comprehensive BEPS Action Plan. The BEPS project addresses tax planning practices that utilize the mismatches in tax rules to artificially move revenue to low tax jurisdictions where they perform little or no economic activity in order to evade paying corporate tax. The project intends to challenge the base erosion strategies by addressing their origins. The main problems are, in particular, the lack of coordination across borders between domestic regulations and laws, the inability of the international tax regime to keep up with the quickly moving global business environment, and the absence of information at the policy makers and tax administrations levels.

The OECD has identified three key causes for BEPS practices. The first cause is the existence of mismatches and hybrids arrangements due to variances in states' tax rules to generate arbitrage opportunities and achieve a considerable tax evasion or double non-taxation [26]. Another cause is the existence of preferential regimes and transfer pricing strategies which are used for artificial profit shifting for tax purposes. Additionally, MNEs may obtain a favorable tax base by altering the amount of debt in a group entity by placing higher levels of debt in high tax states, using intragroup loans to generate higher interest deductions than interest expense, or using intragroup financing to fund tax-exempt earnings.

The last cause is the source–residence tax balance, in the context of the digital economy. The digital economy is the result of a technology transformative process which has improved business processes. Because of its special nature, it has become an economy itself, although it has not been separated from the rest of the economy for tax purposes. The digital economy creates broader tax challenges for policy makers related to data, characterization, and nexus for direct tax purposes, which often overlap with each other. The digital economy also raises challenges for VAT collection, mainly where services and goods are received by consumers from suppliers overseas [9].

To address these issues, the comprehensive BEPS project has 15 actions which set out different types of measures under five broad categories. This includes a development of minimum standards to deal with issues where lack of action by some states creates negative spillovers and adverse influence on competitiveness on other states. These minimum standards comprise model law provisions to avoid treaty exploitation, a uniform country-by-country reporting, an invigorated process to deal with harmful tax practices, and an agreement to ensure progress on dispute resolution.

Moreover, reinforcement of international rules on tax treaties and transfer pricing is advocated, and a common approach for domestic law measures is established. It is developed in the interest of converging different jurisdiction approaches over time and enabling such measures to become minimum standards in the future. This common approach includes recommendations on best domestic rules procedure proposed to states which wish to act in concert with the Controlled Foreign Company (CFC) regulations, obligatory disclosure initiatives, and guidance on hybrid mismatch arrangements.

Overall, the OECD project seeks major changes to some of the current tax rules and suggests a swift action to prevent uncoordinated unilateral state actions. The BEPS project recognizes the fact that the current international tax regime has not kept pace with the progress of international businesses, resulting in inappropriately low tax rates. Thus, it aims to equip countries with the tools to address tax evasion and ensure that incomes are taxed where economic activities are executed.

2.4. Challenges for Achieving the Objectives of the BEPS Project

Despite all the efforts of the OECD to fill the gaps of the international tax regime, there is some concern regarding the success of its project. While the BEPS project represents the first significant development of the international tax regime in almost a century, it faces challenges due to the growth of global marketplaces and the need to monitor larger trade volumes and increasingly complex cross-border transactions concerning multiple jurisdictions, which often have conflicting tax bases. Then the question arises of whether an organization such as the OECD which has fewer adjudicatory powers, a restricted membership, and more advisory rather than obligatory initiatives can achieve those objectives alone. Reservation upon the OECD to control tax competition comes from three significant motives.

First, the restricted OECD membership of only 35 countries creates doubts regarding the effective enforcement of the anti-tax competition rules on states which are not members. Although a few developing countries have joined the OECD, it is difficult to imagine India or China doing so in the near future, and rules that rely on OECD enforcement might lose their effectiveness. Although the BEPS project reflects the concern that many major economic powers are not OECD members and the OECD is working on involving other countries to join the BEPS project, it has not provided any real solution to it.

Moreover, there is also the belief that most of the OECD tax competition solutions are accommodated to benefit developed states and may not be suitable to those non-members. Despite the OECD's great effort to embrace non-members in the tax competition project, there are still some reservations from developing countries on whether the OECD will act in their interest. Exactly these reservations have led to the failure of the OECD Multilateral Agreement on Investments (MAI) negotiations because of developing countries' belief that it represented the interests of the rich states and their MNEs.

Finally, the OECD's work has been limited to mobile financial services so far and omits real investments, even though these are a major part of the problem. Moreover, the BEPS project's technical work on banking and insurance services is still in progress. However, even for the spheres that the OECD incorporates, it only has the authority to reassure, not adjudicate. States cannot be legally forced to implement these standards but are only expected to act in good faith. Thus, the next section introduces the WTO's role in achieving the BEPS project objectives before going into a deep analysis later.

2.5. The Potential for Expanding the Role of the WTO

It has largely been proven to be true that states would agree to compromises or concessions in multilateral arrangements, and there is a clear need for a multilateral effort. Thus, when it comes to meeting this need, the question is whether the WTO can play a role in achieving the BEPS objectives. The WTO has a much broader membership compared to the OECD, where developing countries have a better representation, and the WTO agreements already incorporate and prohibit quite a few forms of harmful tax practices recognized by the OECD.

Although it is considered that generally, WTO law does not affect the operation of the international tax regime, this is likely to change. The connection between the international trade and tax regimes becomes more pronounced as the potential advantages from protectionism are growing with globalization. Moreover, the development of WTO rules regarding trade and investment has increased the possibility for clashes between tax and

trade rules. Therefore, it is possible that states will try to use protectionist measures that escape the WTO rules, such as income taxes which are considered by some to fall out of its scope.

Unsurprisingly, disputes regarding taxation arise more frequently at the WTO, suggesting discrepancy between WTO agreements and MSs' tax laws [27]. Thus, states engaging in protectionism may find it extremely difficult to do so due to the evolvement of the WTO's supranational law and the existence of the WTO's binding dispute settlement mechanism. This has recently been seen in the Argentina—Financial Services case related to transparency and exchange of information with regard to tax havens, highlighting the possible connection between the current global tax reform and the WTO.

3. Re-Assessment of the Role of GATT in Regulating Tax

One of the imperative requirements of the WTO framework is non-discrimination. Embraced through the MFN and NT principle, it creates obligations and influences the way states form their tax policies. This and the following section offer an in-depth analysis of the national treatment principle in the two main agreements of GATT and GATS, respectively. They also discuss the continued relevance of the indirect versus direct taxation division.

The intention of Sections 3 and 4 is to evaluate the tax provisions incorporated in the national treatment provision of these two multilateral agreements and address the questions of whether the WTO can regulate direct tax measures and to what extent. Section 3 begins with an analysis of the oldest of these trade agreements, the GATT. The reason Section 3 focuses on GATT is that it has laid the foundations of the rest of the WTO agreements, including the GATS, but very little research has studied the role of GATT in regulating taxation and, in particular, direct tax measures. Thus, this section attempts to fill this research gap and resolve the question of whether the National Treatment clause of GATT can be applied not only to indirect taxes but also to direct taxes.

3.1. GATT Article III National Treatment on Internal Taxation and Regulation

Article III of GATT demands from MSs to provide an equal competitive environment to both imported and like domestic products and fairness in their competitive relationship. In other words, it safeguards internal trade neutrality and in turn prevents its undermining through the enactment of protectionist taxes or charges. The purpose of Article III is not to regulate domestic tax policy, but to prevent the use of taxes to differentiate between domestic and imported goods. Regardless of the scope of the NT principle, it has been poorly designed with obscure and vague terminology especially with regard to its application to tax measures.

The NT principle can also be found in the OECD Model Tax Convention and most of the tax bilateral treaties based on it. Nonetheless, the extent of the NT principle in tax treaties falls far behind the one in the WTO Agreements regarding internal direct taxes. The NT in bilateral tax treaties is usually applied only on a reciprocal basis, and the division between non-residents and residents in the OECD Model Tax Convention allows states to act in a non-neutral fashion. Moreover, tax treaties also tend to provide a bargaining advantage to a large capital state in negotiations with a small capital state due to their bilateral nature.

There are very few direct tax cases brought to the WTO adjudicatory body and even fewer that successfully managed to challenge a direct tax measure on NT grounds [28]. Hence, there is a little authority on the applicability of the principle to direct taxes. The main reason is the existing belief that the NT principle does not deal with direct taxes. Even if a direct tax is considered under the NT principle, in most of the cases, the party fails to establish a *prima facie* case for likeness or direct competitiveness. Thus, the inter-

pretation is rejected by the panel or AB without providing a clear guidance or interpretation on what would constitute a violation of the NT principle and how it should be established—likewise in the Argentina—Financial Services (2016) case.

Article III provides three main obligations in relation to taxation, each of them offering a different level of breadth of tax measures. The general principle set out in Article III:1 ensures that none of the ‘internal taxes and other internal charges’ or ‘laws, regulations and requirements’ that affect the trade of goods are applied ‘so as to afford protection to domestic production’ (SATAP). This principle establishes the context of the rest of the Article III provisions while acknowledging their distinct meaning. Consequently, the three available routes for a complainant to challenge a tax measure within Article III are Article III:2’s first sentence, Article III:2’s second sentence, and Article III:4.

3.2. Analysis of GATT Article III:2

Article III:2 covers the state commitments regarding direct or indirect application of any ‘internal taxes and other internal charges’ and consists of two separate obligations. Article III:2’s first sentence governs the responsibility regarding internal tax imposition on ‘like products’, and Article III:2’s second sentence regulates the internal tax application to products which are ‘directly competitive or substitutable’ (DCS). The Article III:1 general principle informs distinctly the context of Article III:2’s first and second sentence. The Appellate Body (AB) in Japan—Taxes on Alcoholic Beverages II (1996) confirmed that protectionist measures should be determined in a distinctive way within Article III:2’s first and second sentences.

The GATT Article III:2’s first sentence does not allow the enactment of any internal charges or taxes ‘directly or indirectly’ on goods imported from any contracting party in the territory of another contracting party ‘in excess of’ those imposed to ‘like products’ of domestic origin [29]. Despite the absence of explicit referral of the general obligation in the first sentence, the existence of protective measures under Article III:1 is not separately determined from the specific requirements of Article III:2’s first sentence in the WTO case law. As a result, goods of one member state imported within the borders of another member which are subject to internal taxes ‘directly or indirectly’ applied ‘in excess of’ those applied to like domestic goods would violate the general principle [30].

In contrast, Article III:2’s second sentence explicitly prohibits members from levying any internal charges or taxes on imported goods in a way that infringes the SATAP principle of Article III:1. Moreover, the second sentence is supplemented by *Ad Article III:2* which states that even if an internal tax is found in conformity with the Article III:2’s first sentence, it could still be in breach of the second sentence if the products not similarly taxed are DCS. Hence, internal tax or charge pursuant to Article III:2’s first sentence should also be checked on its consistency with Article III:2’s second sentence, which includes a wider category of products.

Although *Ad Article III:2* is placed in Annex I of GATT, it is with an equal legal status to Article III:2’s second sentence. *Ad Article III:2* does not alter or amend the language of Article III:2’s second sentence but clarifies further its interpretation. Thus, both should be perused together to grasp the meaning of this provision.

The significant difference between Article III:2’s first and second sentences lies in the way they address the Article III:1 general principle. While the SATAP principle implicitly approaches the first sentence requirements, the second sentence explicitly raises the general principle as an entirely separate matter addressed along the other two requirements of the provision. As a result, to establish that an imposed internal tax or charge is consistent with Article III:2’s first sentence, it should be determined if the imported and domestic products are ‘like products’ and if imported products are taxed ‘in excess of’ like domestic products. In comparison, a tax would violate Article III:2’s second sentence if the imported DCS products to domestic ones are dissimilarly taxed and the tax is applied SATAP to domestic production.

In every case, these requirements are addressed separately to determine violation of Article III:2's first or second sentence. The WTO panels and AB stressed the importance of an objective and vigilant analysis of the relevant facts in the individual case to condemn protective tax existence [31]. The next part of this study analyzes how Article III:2's first and second sentences' requirements are applied in cases to decide whether certain internal measures are enforced SATAP and determine whether these requirements can move beyond their traditionally accepted scope of application and incorporate direct tax measure.

3.2.1. 'Like' or 'DCS' Products

To condemn inconsistency of applied internal taxes or charges with the NT principle of Article III:2's first or second sentence, one of the requirements is to determine whether products at issue are 'like' or 'DCS'. Without satisfying the 'like product' test or the broader test of 'DCS products', then GATT non-discrimination obligation does not hold to the taxes at issue. Only if an entirely unique product emerges on the market for which there is no 'like' or 'DCS' product might the tax measure then be considered discriminatory.

Article III:2's First Sentence: 'Like Products'

An exact and absolute meaning of likeness under GATT was not defined by the negotiators, despite its wide use in different provisions. Thus, likeness has been accepted as a relative notion that fluctuates when various GATT articles are enforced [32]. This notion is also used in other GATT provisions, particularly for tax matters, such as MFN (Article I) and Fees and Formalities (Article VII); hence, a test of likeness is central throughout GATT.

In 1970, the Working Party Report on Border Tax Adjustments established the basic criteria on determining products likeness under GATT 1947, which is also enforced into the WTO. Accordingly, 'like products' should have identical physical traits; be mentioned in the international products category for tariff purposes; have similar or identical end-use in a certain market; and be considered by consumers as alternative option to perform a specific action [33]. In a close look, the likeness approach incorporates the apparent or objective aspect found in the first two requirements and a more obscure one grounded on the market base components. While these requirements seem quite distinct, they are not mutually exclusive [34].

Usually, likeness relates to the competitive degree between two goods to establish the economic consequences that dissimilar treatment will lead to. Thus, if a direct tax is considered to be in violation of the NT principle, likeness text will be applied to establish the degree of competitiveness of the products. Nevertheless, these requirements give no course to which of the numerous degrees of competitiveness is required or what policy objectives they are meant to nurture [35]. Therefore, although this approach is used in almost all of the adopted reports concerning likeness, it is not a comprehensive one, and the details of each individual case should be considered [36].

A question then arises as to what is to be compared to identify likeness. There is no standard of similarity with regard to the product's physical traits requirement, and the resolution is primary left to the adjudication. To establish a finding of likeness under it, the second component of the criteria is often applied. This practice is occasionally found harmful for the NT principle. Then, the less subjective market-based requirements of the criteria are found more favorable since they are based on statistical information.

On the other hand, market prerequisites are also used when establishing 'DCS products'. Even though an overlap between 'like' and 'DCS' products exists, the key features that distinguish them are the physical traits and other non-market distinctions rather than market rivalry. Accordingly, to avoid intersection with 'DCS', likeness should be considered narrowly as 'an accordion that stretches and squeezes in different places'.

This approach has been mostly referred to with certain exceptions. Some panels narrowed the extent of their deliberations to the more objective elements as product traits and tariff classification together with the general end-use, rather than in a given market [37]. This method was challenged in Japan—Alcohol Beverages II (1996), where it was explicitly required to check both objective and market-based factors since goods could be considered ‘DCS’ or ‘like’ in one market, but not in another. This brought back the market-based requirement and alerted the investigation from general to more market-specific end-use.

Moreover, some other relevant factors such as consumers’ dispensable income and price level of the goods at issue may be appropriate for consideration to establish likeness [38]. An unfair treatment can also be grounded in the absence of imports due to, e.g., an import embargo. In Indonesia—Autos (1998), a breach of Article III:2 was found on the grounds of imposition of internal taxes based on origin distinction even without tangible traded ‘like products’.

Perhaps the best analysis of likeness is found in the Philippines—Distilled Spirits (2012) case, where it was stated that the prerequisites of the likeness test are the essence and scope of a competitive degree between the goods. The test is a tool to systematize and weigh the evidence regarding competition, and even though the analysis should logically begin with the goods’ physical characteristic, none of the components of the criteria has a pivotal role. Additionally, goods with very comparable physical traits might occasionally not be found alike under the meaning of Article III:2, since there is low competitiveness or substitutability. However, goods with some physical dissimilarities but extremely competitive might be alike. Thus, likeness should be established on the basis of whether internal taxes or charges directly or indirectly applied are enforced so as to protect domestic production.

Therefore, the interpretation of likeness is done on a case-by-case basis as one approach is not always appropriate. This is observed in three similar cases involving taxation of alcohol, which were approached differently by the adjudication. In every case, the determination of alleged breach of the NT was proven on different grounds in accordance with the case specifics.

Article III:2’s Second Sentence: ‘DCS’ Products

If imported and domestic products are not found alike within Article III:2’s first sentence, then in accordance with the nature of competition on the market, they can fall into the broader classification of ‘DCS’ goods under the second sentence. Products are considered ‘DCS’ if they are compatible and serve as an alternative means to fulfil a certain need. The category of ‘DCS products’ is wider than the one of like. Thus, every ‘like product’ is ‘DCS’, whereas not entirely all ‘DCS products’ are alike, and while perfectly substitutable goods fall into the first sentence, imperfectly substitutable goods are within the second.

The ‘DCS’ concept is not given full meaning in GATT; likewise, likeness and how much broader this category of products might be is defined in each case based on the specifics. This suggests a special type of relationship between imported and domestic goods. The term ‘competitive’ restricted by the word ‘directly’ hints at a proximity of competition and excludes indirectly ‘DCS products’, and the term ‘substitutable’ refers to a good which can be replaced by another [39]. Though most panels put goods in a sole ‘competitive or substitutable’ category, the word ‘competitive’ refers to the point of view of producers, while the term ‘substitutable’ to the perspective of consumers.

The ‘DCS’ concept is not often applied in cases [11]. The Japan—Alcoholic Beverages I (1987) case first established violation of Article III:2’s second sentence based on the current competitive relationship of the products at issue and the difference in customer behavior depending on price variations. In Korea—Alcoholic Beverages (1999), the potential competition, ‘trade effects’, and expectations were also examined [40]. A current internal tax or charge levied on imported products may influence consumers’ behavior in the fu-

ture. Consequently, when evaluating the competitive relation between goods, both current and potential consumer preferences should be considered as a possibility of products becoming alternatives exists, though currently, they are not perceived as substitutes [41].

Moreover, several other aspects regarding competitive conditions in an appropriate market could be observed, such as channels of distribution, advertising activities, and cross-price elasticity. Additionally, evidence of competition not from every, but other relevant markets to the case is accepted to identify a 'DCS' relationship between products. In Korea—Alcoholic Beverages (1999), proof from a third market was applied to determine a surrogate interest in imported products.

3.3. Analysis of GATT Article III:4

If a tax measure does not find grounds for challenge under Article III:2, it may fall under the broader category of 'laws, regulations and requirements' affecting products found in Article III:4. Three tier criteria, similar to Article III:2, must be fulfilled for a tax measure to fall under Article III:4. These include the likeness test; establishing whether the measure at issue is a law, regulation, or requirement; and existence of 'less favourable' treatment.

This sub-article makes no explicit reference to the general principle of Article III:1 similarly to the Article III:2's first sentence and prohibits only laws, regulations, and requirements that unfairly affect 'like' imports. Thus, Article III:4 does not include differential treatment of 'like products' which is 'no less favourable' and different treatment when the products at issue are not 'like'. Additionally, the panels mostly approach the Article III:4 'like product' determination in the same lines as that of Article III:2 and use the same test. However, the 'like products' notion in Article III:4 is considered slightly differently compared to Article III:2's narrow interpretation, which leaves some space for 'DCS products'. Thus, the Article III:2 determination is found too strict for Article III:4.

Moreover, there is no guidance on what the notions 'laws, regulations and requirements' incorporate. Article III:4's national treatment obligation is generally considered to apply to all domestic regulations 'affecting' the products sale and use. Accordingly, the selection of the word 'affecting' by the drafters is believed to imply that Article III:4 comprises both laws and regulations which directly govern the goods purchase or sale conditions and those which might adversely change the competition environment between imported and domestic goods.

Article III:4 is interpreted broadly as to include a wide range of government measures that may modify the competition environment on a market. This wide-ranging interpretation has led to the belief that certain tax measures can also be subject to Article III:4. In China—Auto Parts (2009) case, the same Chinese law provisions were found to be in breach of both Article III:4 and Article III:2.

Overall, the above analysis of GATT Article III suggests several grounds available to MSs to challenge an adverse tax measure. Therefore, it is no surprise that Article III is a very litigious provision for tax challenges which attracts most of the WTO tax disputes. Therefore, the next two sections evaluate the indirect and direct tax distinction to shed some light on whether direct taxes are governed under Article III.

3.4. Indirect and Direct Taxes

Even in the absence of a precise definition of which specific taxes fall under Article III, numerous discriminatory tax measures have been successfully challenged under it as mentioned in the above analysis. However, most of the GATT/WTO cases do not provide any further clarification on this matter but mainly establish that a tax measure violates the NT obligation when de facto or de jure dissimilarity exists. Therefore, there is little authority on the national treatment applicability to direct taxes, and Article III's text is unclear on this issue.

This provision and the GATT as a whole do not explicitly embrace indirect and direct tax terminology, compared to the GATS, which offers this distinction and a definition of direct taxes. Consequently, the GATT, in particular Article III, is typically interpreted within the normative definition of indirect taxes [42]. This reflects the implicit belief that the GATT only governs indirect taxation as it would have received little support in the international community if the drafters tried to be bold enough to include direct taxes such as income taxes, since states regard it as a sovereign prerogative [43].

3.4.1. Narrow Interpretation of GATT Article III

The basis for narrow interpretation of Article III can be found in its literal reading. This refers to the customary rules of treaty interpretation of the Vienna Convention on the Law of Treaties (VCLT) that the terms of the treaty should be given ordinary meaning in context of its purpose and objective. At first sight, the traditional understanding of this provision is that it refers to the 'indirect taxation of products', including VAT or specific consumption taxes [44]. The term 'internal taxes' is equated to 'indirect taxes' based on the indirect tax definition found in the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) [45].

Furthermore, most discriminatory rules under direct tax law or conventions are rather grounded on foreign 'production' or 'producers' than on foreign 'products'. In this context, the majority opinion for several decades was that Article III of the GATT does not govern the area of direct taxes. Furthermore, if Article 31 of VCLT leaves the interpretation obscure or ambiguous, recourse to the travaux préparatoires of the treaty at issue is followed.

Likewise, it is argued further that supporting evidence for the narrow interpretation lies in the GATT's negotiating history. During the ITO negotiations which never emerged, but instead the less ambitious GATT was introduced, the Sub-Committee considering the national treatment article stated that neither exemptions from income taxes nor import duties fall under its scope, since the provision refers explicitly to internal taxation of products. Consequently, the drafters excluded income taxes from the national treatment obligation [46].

While this literal interpretation seems logical, it still does not clarify the meaning of the wording 'directly or indirectly' as found in Article III:2's first sentence. During the Havana Charter for ITO preparatory meetings, the original wording 'applied in connexion' was substituted for the phrase 'directly or indirectly' based on an obvious struggle to find a French translation. However, no indication during this adjustment was given as to whether it altered the provision's meaning or intentions. This cast doubts on whether a direct tax can be regarded as an internal measure imposed 'indirectly' to a good. The 1970 Working Party later noted that the modification of the wording had been used to exclude a broader interpretation.

The last persuasive evidence supporting the narrow interpretation can be found in Article 110 of the Treaty on the Functioning of the European Union (TFEU). Its text, similar to that of Article III:2's first sentence, was ratified in its earlier version in 1957 and derives from the GATT 1947 drafted a few years earlier. Thus, the application and interpretation of Article 110 can provide some direction on the direct taxation matter. One would have imagined that, considering the more ambitious aspirations of the European Union (EU) compared to the GATT, a broader interpretation would have been embraced, which is not the case. Article 110 text 'imposed directly or indirectly' has been interpreted widely within the extent of indirect taxes and has not been extended to cover direct taxes.

3.4.2. Broader Interpretation of GATT Article III

Despite the supporting evidence of a narrower interpretation of Article III, there is a growing view that in some cases, direct taxes may be included in the NT requirement [47]. One of the reasons national treatment is mainly applied to taxes on products, but not to

income taxes, is the belief that indirect taxation of products can have a far higher degree of influence on internal consumption compared to direct income taxation of foreign manufacturers. Notwithstanding this fact, one can also imagine an instance of consumers' encouragement achieved through a direct taxation initiative that could have an equal effect on internal consumption as an indirect tax applied to the goods.

Thus, having a uniform tax rate but manipulating tax depreciation schedules, capital taxes, the rate of investment credits, and inventory accounting rules could similarly influence the consumption of final products [48]. Moreover, direct taxes can be used as a vehicle to offer fiscal advantage where charges for inputs are deductible only for domestically produced intermediate goods, which would affect imports similarly to levying an import tariff. Consequently, eliminating direct taxes from the NT requirement could provide a loophole for MSs to enact direct taxes to protect domestic production.

For instance, a member state, cognizant of a threat to its domestic industries from cheaper imports, could offer tax breaks including income tax reduction and lower VAT rate to domestic producers to cover the profit loss of lowering prices to compete with importers. While both examples are undoubtedly protectionist tax measures which achieve a desired outcome, only the latter one infringes the NT obligation. The income tax measure could be in breach of the WTO subsidy obligation only if it is aimed at specific industry or dependent on export performance. However, if it is applied across a few domestic industries, it can avoid the subsidiary requirement and fall outside the WTO's reach. Thus, a MS could indisputably protect its domestic productions by enacting income tax measures closely related to manufacture.

There is rarely evidence to prove that business tax measures have been manipulated by states to accomplish a desired subsidy equivalent. However, excluding such taxes from the GATT undermines the object and purpose of the agreement. Furthermore, the influence of the GATT national treatment rule on income taxation would be restricted since income taxes hardly relate explicitly to trade in goods [49]. Other possible examples of direct tax measures that can potentially breach the NT obligation include anti-avoidance law that rejects deductions on cross-border payments and less favorable cost distribution.

One of the first instances where several MSs expressed a clear indication that the NT rule may incorporate a discriminatory income tax could be found in the record of the Job Development Tax Credit (1971) dispute. This dispute, which did not reach a panel stage, was related to an explicit direct tax measure imposed by the United States (US) as part of an emergency plan [50]. The US introduced an income tax credit available only for taxpayers who procured certain domestically produced capital assets. Several countries raised concerns about the biased effect of such a tax and contended that the exclusion of direct taxes would be inconsistent with the obligations set forward in the GATT Article III provisions.

Further support for the broad interpretation could be found in the reasoning of the AB in the Japan—Taxes on Alcoholic Beverages II (1996) case, which has become the leading authority regarding the NT obligation. It was highlighted that Article III's essential purpose is to avoid protectionism in the enactment of internal taxes and other regulatory measures and to provide equal competitive conditions for imported and domestic products. Even though there is no explicit reference to direct taxation, this statement demonstrates a disposition to accept a broad reading of Article III. Whereas the above analysis highlights how direct taxes can be used as a protectionist instrument, there is little clarification regarding on which grounds such taxes can be challenged under Article III of GATT. The next two sections explore whether Articles III:2 and III:4 could be invoked in direct tax disputes.

GATT Article III:2

The terminology used in Article III:2's first sentence is ambiguous and creates a possibility to embrace a broader interpretation of 'internal taxes and other charges' enacted

‘directly or indirectly’ which goes beyond the more traditional view. While the term ‘internal taxes’ is often equated to ‘indirect taxes’, it is argued that there is still an opportunity for direct taxes to fall under the undefined ‘other internal charges’. This broader reading can be based on the absence of any limits on the extent to which indirect impact of taxation falls under this provision. In contrast to Article III:2’s first sentence, direct taxes are unlikely to find a challenge under the second sentence as the internal measure must be enacted to a product and there is no requirement of direct or indirect application.

The AB in China—Auto Parts (2009) explained that internal measures are usually those taxes or charges enacted on imports which have already entered the country or prompted by an internal factor. Thus, what makes a measure related to internal tax rather than to custom duty is not the moment when the charge is paid, but the fact that the charge derives from an internal event such as sale, transportation, and distribution of the products. In US—Malt Beverages (1992), it was established that even a measure preventing imports from being traded in a way that would allow them to evade taxation was within the scope of the national treatment rule.

The Argentina—Hides and Leather (2001) case perhaps offers the most interesting analysis to date with regard to the tax scope of Article III:2. The panel in this case claimed that the term ‘internal taxes’ was anticipated by the drafters to include a wide range of tax measures from sale taxes and VAT to excise duties and the term ‘any other charges’ indicates, *inter alia*, a financial burden. Accordingly, an internal measure that creates a liability to pay money should be subject to Article III:2.

The panel found that both indirect and direct tax measures in this case were in breach of the first sentence of Article III: 2. This case is remarkable as the panel decided that ‘tax administration’ measures which are attached to direct taxation are covered by the national treatment obligation. Respectively, the Thailand—Cigarettes (Philippines) (2011) AB explained that if a measure applied for administrative necessities only creates a tax burden on the imported goods, it would fall into the scope of Article III:2.

Accordingly, although this is not the widely accepted view in the GATT/WTO jurisprudence, in certain cases, direct taxes indirectly applied which affect the competitive environment of goods may find a challenge under Article III:2. Nevertheless, a question arises as to when a tax becomes too distant to influence product competitiveness. This linkage between a direct tax and a product is something the GATT/WTO case law has omitted to determine so far. Thus, Article III:2’s first sentence application to direct taxation appears conceivable but too uncertain.

GATT Article III:4

When a fiscal trade restrictive measure does not fall under Article III:2’s first sentence, it can fall under the Article III:4 broader category of ‘laws, regulations and requirements’ affecting the internal sale, transportation, or distribution of products. It is this wider component of the NT rule that is believed to offer a challenge of direct tax measures under the GATT. The ruling in the US—FSC case, regarding the US Foreign Sales Corporation (FSC) scheme which replaced the fairly disputable US Domestic International Sales Corporation (DISC) scheme, confirmed that such taxes do indeed fall within the reach of Article III:4.

While this case mostly focused on the inconsistency of the US income tax breaks with the SCM Agreement, during its second stage, the tax break consistency with the GATT’s NT rule was also questioned. This was based on the local content requirement of the tax break which offered more favorable conditions if national products were used in the assembly of the final good and was argued to violate Article III:4. Although Farrell and others argue that the GATT Article III does not cover income taxes, the panel declined this argument by explaining that nothing in the ordinary language of Article III:4 explicitly excludes income tax measures from its scope. The panel claimed that Havana preparatory work comments were framed around the context of Article III:2 and concluded that the

GATT Article III:4 would apply to ‘measures conditioning access to income tax advantages’ to certain goods.

By referring to the broader reading principle found in the Japan—Taxes on Alcoholic Beverages II (1996), the AB agreed with the panel reasoning. Even though this case ruling missed the chance to observe the direct taxation applicability to Article III overall, it made it clear that some direct taxes fall within its reach. Nonetheless, one should consider this ruling with some notice as the complaint claim was centered on the foreign content restriction of the respondent’s tax break, not the tax break itself.

Article III:4 broad reading can be also reaffirmed by the Agreement on Trade-Related Investment Measures (TRIMs Agreement), which deals with investment measures. This agreement only exists to elucidate the application of Article III:4 and Article XI:1 of the GATT [51]. Article II of the TRIMs Agreement brings investment measures into the scope of the NT rule within the context of Article III:4. The agreement confirms that trade-related investment fiscal incentives are incompatible with Article III:4 if they entail a local content or a trade-balancing requirement and provide grounds for challenge in disputes similar to the earlier case.

While there are many tax measures linked to the use of domestic products including income tax credits, accelerated depreciation allowances, and exemptions favoring domestic products over imports which can increase the number of measures challenged under Article III:4, TRIMs is an agreement that adds little to the limits already enforced by the GATT. Hence, it cannot cover all sorts of protectionist direct taxes. Moreover, the TRIMs Agreement does not deter discrimination in favor of foreign corporations, but only against foreign corporations in limited situations, similarly to the GATT.

4. Re-Assessment of the Role of GATS in Regulating Tax

This section continues with the analysis of the national treatment principle found in the other main agreement of GATS, which governs the trade in services. It builds on the findings of Section 3 in addressing whether the WTO can regulate direct taxes as it does with indirect taxes and to what extent. Thus, this section further examines whether WTO rules can complement the BEPS project to fill the gaps in the area of international taxation.

4.1. GATS 1994

GATS was the first agreement to bring trade in services within a legal context and is considered one of the most notable achievements of WTO law. It is a relatively young agreement, which is the reason the WTO Secretariat recognized that its rules might be incomplete and largely untested. However, the impact of the GATS on tax matters should not be disregarded.

Reflecting GATT, GATS also requires non-discrimination incorporating the MFN and national treatment obligations, although not in the exact same way as the GATT does. The significant difference between the approach to non-discrimination of GATS and GATT is that the former does not embrace the all-inclusive nature of the latter. Instead, GATS is an agreement full of exceptions, optional commitments, and exemptions.

The liberalization of international trade in services has also brought tax implications, predominantly as the delivery of services frequently requires the presence of service suppliers. The GATS national treatment obligation is of particular importance since it encompasses non-discrimination on the basis of origin for both services and service suppliers [52]. GATS covers further three modes of supply in addition to cross-border trade, which include consumption abroad, commercial presence, and presence of natural persons.

Service suppliers under the latter two modes of supply are usually taxed in the service-importing country where they provide their services since states enact taxes on income from a source within the state. Hence, the taxation of a foreign supplier operating in the service-importing country might result in double taxation. This may disadvantage foreign service suppliers compared to domestic counterparts, causing concern under the

GATS Article XVII National Treatment. Consequently, the intersection of domestic direct tax measures and international trade became inevitable.

GATS negotiators had in mind these intersections and considered the applicability of GATS to tax measures. Exceptions were drafted in particular to secure the right of states to impose direct taxes. Therefore, national treatment commitments of states apply to tax measures including tax incentives unless such measures are intended to ensure 'equitable or effective' imposition of direct taxes regarding services or service suppliers of other member states.

These exceptions were considered sufficient then. At a glance, it seems that GATS is deprived of any influence over direct taxes as they are subject to extensive exceptions. However, GATS negotiators could not have envisioned the scope of the current global tax reform, which aims to transform the way the MNEs are taxed. This section demonstrates that the carve-outs are not absolute, and tax implications in GATS are yet to come.

4.2. GATS Article XVII National Treatment

The GATS national treatment rule ascertains that foreign service providers or services operating in a MS should not be provided with less favorable treatment than their internal counterparts. The NT rule, in its pure form, is extremely litigious for corporate income tax matters and could certainly lead to similar tax disputes as observed in the EU. However, whereas GATT Article III has a universal application to almost all measures affecting the trade in goods, GATS Article XVII is not absolute in nature.

The NT obligation under GATS adopts a 'bottom-up' approach and is applied only to measures explicitly granted to a specific sector or service by a MS. Additionally, it does not have distinct provisions on internal regulations and taxes as commitments vary considerably, often restricted and subject to qualifications and conditions. Thus, Article XVII's interpretation has been controversial and has raised queries regarding its extent of application, questioning whether most of the income taxes are carved out of its reach. Moreover, up until today, very few cases were brought forth questioning states' NT obligation under GATS, which further limits the analysis.

GATS Article XXI provides a framework for modification or withdrawal of specific commitments. This provision aims to preserve a general level of mutually beneficial commitments 'no less favourable' to trade in service than what was before. Furthermore, states' limitations and commitments are subject to further liberalization in the WTO future trade rounds, which might increase the scope of application of the GATS NT rule and its coverage of tax matters.

A test of consistency with the GATS NT provision similar to GATT has been developed in WTO case law. For a tax measure to be challenged under Article XVII, it should be established if the foreign service or service supplier is treated less favorably than domestic counterparts, then whether they are considered alike, and finally, whether there is a commitment in respect of the sector at issue and whether the MS has opt-in for this specific service. Both formally different and formally identical treatments are considered less favorable if they modify the condition of sale of service or service provider to advantage domestic counterparts. Therefore, this provision deals with both *de facto* and *de jure* discrimination.

Still, before these points can be addressed, the AB held that it is essential to confirm that the disputed measure falls within the scope of Article XVII by establishing the existence of 'trade in services' in one of the four modes of supply and that the measure 'affects' trade in services. Hence, the scope of national treatment rule is defined on whether the WTO MS has made a 'specific commitment' in the pertinent service sector and whether the measure at issue 'affects' such a trade.

However, this determination raises several problems as the interpretation of the terms is controversial. Likewise, there is disagreement on the interpretation of likeness and 'no less favourable' treatment. The WTO adjudicating bodies have tried to address the interpretation of national treatment under the GATS. However, they have elucidated

some points, while leaving others largely uncertain [53]. Thus, all of these conditions are examined in turn.

4.2.1. Schedules of Specific Commitments

The NT rule under GATS is a very unclear concept due to the fact that the commitments can be quite ambiguous as members choose the service sector to liberalize and the level of liberalization. This was evident in the US—Gambling (2005) case, where it was examined whether the wording ‘Other recreational services (except sporting)’ incorporates a specific commitment to betting and gambling services. Grounding their reasoning on the customary rules of international law codified in the Vienna Convention, both the panel and the AB concluded that the US’s Schedule granted a commitment to these services.

Furthermore, specific commitments are also made under Article XVI Market Access. Both national treatment and market access cover discriminatory measures, and there is no hierarchy between these provisions. Although the discriminatory measures described in the list of measures under Article XVI:2 are claimed to fall outside the scope of Article XVII, certain measures such as quotas on foreign suppliers or nationality requirements may fall within the scope of either. Thus, sometimes, their respective domains are unclear and can create controversial situations. This intersection influences the interpretation of non-discrimination, as the content of both provisions is different and the determination of which of them is applicable in the event of such an overlap is based on the scope of the non-discrimination requirement and, indirectly, national treatment.

4.2.2. Measure Affecting Trade in Services

Once established that Article XVII applies, the next question is whether the measure affects the trade in services. To determine this, two key issues should be resolved—first, to establish the existence of ‘trade in services’ and then to prove that the measure in question is ‘affecting’ such trade.

The question is how a complainant can prove the existence of such trade. The panel in Argentina—Financial Services (2015) found that the ascertainment of ‘trade in services’ under Article XVII must be grounded on competition conditions, not on actual implications on service suppliers, as the NT obligation objective is to ensure equal competitive prospects rather than trade quantity. This NT interpretation is consistent with the one in GATT; hence, the determination of measures applied to the specific sector and mode of supply is enough to establish the existence of trade in services, and actual flows do not need to be demonstrated. Nevertheless, a complainant cannot simply assert a claim without a careful analysis of the measure and its effect on the marketplace.

Regarding the requirement to prove that the measure ‘affects’ trade in services, the AB in EC—Bananas III (1997) claimed that all measures are encompassed by GATS, both those that directly govern the service supply and those that regulate other matters which still impact trade in services. It also confirmed that the term ‘affecting’ has a broad extent as its ordinary meaning infers a measure that has ‘an effect on’, wider in scope than terms including ‘governing’ or ‘regulating’. This interpretation extends the coverage of GATS. After determining that a measure falls within Article XVII and is covered by GATS, the next to assess is the existence of likeness and ‘less favourable’ treatment.

4.2.3. Likeness

The starting point in the analysis of establishing a discriminatory measure under Article XVII is a determination of likeness of foreign and domestic services and service suppliers. Adopting a similar approach to define likeness under Article XVII as established in GATT Article III, the panel in China—Electronic Payment Services (2012) explained that for services or service suppliers to be considered ‘like’, they do not need to be exactly the

same but generally or essentially the same. Although likeness has experienced an extensive analysis under Article III GATT, the interpretation cannot be directly transferred to GATS as, unlike products, services and service suppliers are intangible, have four modes of supply, and are regulated differently. Therefore, likeness requires a separate interpretation under GATS Article XVII. Two issues are addressed in case law: whether likeness of both services and service suppliers need to be proven and what the criteria are for assessing likeness.

Like Service and Service Suppliers

In contrast to GATT, the NT provision under GATS does not only focus on the likeness of services but also incorporates service suppliers. Therefore, the issue is whether the likeness of both services and suppliers should be demonstrated or just the likeness of either of them is sufficient. Article XVII does not provide a clear direction on this matter.

Scholars have debated three possible approaches to establish likeness in order to prove a measure that breaches Article XVII: the cumulative, alternative, and disjunctive. Under the first, the complainant must establish the likeness of both services and service suppliers; under the second, the likeness of either of them can be demonstrated; and under the disjunctive, the WTO adjudicatory body first has to determine whether the measure addresses a service or a service supplier and then establish a likeness of the one concerning the dispute.

The WTO case law has not yet provided an authoritative and conscience statement on this issue. The panel in *US—Gambling* (2005) had conflicting viewpoints [54]. While the panels in *EC—Bananas III* (1997) and *Canada—Autos* (2000), seemed to prefer the alternative approach, the panel in *China—Publications and Audiovisual Entertainment Products* (2009) appeared to embrace the disjunctive approach.

The panel in *China—Electronic Payment Services* (2012) brought some clarification to the issue by explaining that service suppliers that provide like services may lead to the belief of likeness, but in certain situations, it is necessary to determine the likeness of suppliers separately on a case-by-case basis. The *AB Argentina—Financial Services* (2016) further clarified that to determine likeness under Article XVII, both terms are relevant and separate examination of the likeness of services and service suppliers is not compulsory, as the relative weight accorded to the likeness of either depends on the competitive relationship in the specific case. Hence, the AB seems to uphold the cumulative approach, although not fully, as it considers the likeness of both terms necessary but to a certain degree, depending on the case specifics. Following this, it remains to examine the criteria used to determine likeness.

Liikeness Test

The determination of what constitutes 'like services and service suppliers' is addressed by very few WTO adjudicatory bodies. Consequently, the question arises of whether the likeness criteria established in GATT can be applied to GATS. The recent case law tries to shed some light to the matter.

The panel in *China—Publications and Audiovisual Entertainment Products* (2009) inferred that if origin is the only factor for differential treatment between foreign and domestic suppliers, then the likeness requirement is met. However, if there are other factors, a more comprehensive analysis is needed. The *AB in Argentina—Financial Services* (2016) followed a similar interpretation, suggesting that in the event of establishing a discrimination not exclusively based on origin, an analysis of likeness considering other relevant criteria must be engaged. It further deliberated that the criteria used in assessing likeness in the context of trade in goods can be applied to services provided that they are altered to the specific characteristic of such a trade and are simply used as an analytical tool, not a closed list.

This demonstrates that the interpretation of likeness could be grounded on the criteria developed in GATT. The case law has not yet addressed to what extent this is applicable. First, physical properties seemed irrelevant in the services context as they are intangible, but it is possible to evaluate the qualities and nature of a service. Moreover, tariff classification does not apply to services and so cannot be used to determine likeness.

Nevertheless, when states enter a service sector in their schedule of commitments, they use the same description based on the Services Sectoral Classification List, which intends to provide a common terminology. However, the services listed in this document are both too broad and inadequate. Hence, it might lead to 'like' services classified into different sectors to be assumed as unlike.

Finally, consumer taste and habits and end-use elements are particularly relevant to assess likeness in services. They are good indicators of a competitive relationship within the meaning of Article XVII and can establish if service suppliers and services are substitutable in a given market. Nonetheless, the determination of likeness is not enough to establish a breach of national treatment principle as it is necessary to demonstrate that there is 'less favourable treatment' accorded to foreign services and service suppliers as compared to domestic counterparts.

4.2.4. No Less Favorable Treatment

Establishing a 'less favourable treatment' (LFT) is the final step to determining a breach of GATS Article XVII. Any measure will be considered less favorable if it changes the competitive conditions for service and service providers to benefit their domestic counterparts. As already mentioned, this includes both *de jure* measures, related to different treatment depending on the origin of service suppliers and services, and *de facto* discriminatory measures which refer to 'neutral' criteria.

Whereas the determination of a *de jure* discriminatory measure is a straightforward process, the interpretation of a *de facto* measure is a more complex one. Taken literally, it may incorporate a wide range of origin-neutral measures which affect trade in services and modify the competitive conditions base. Although the NT obligation appears to have a set limit of application and violation would only arise if the discrimination were caused by a state's action in the form of a practice or regulation, there is no determination of the limits of *de facto* discrimination [55]. The mere presence of diversity in cross-border regulatory measures creates a burden for services and service suppliers.

This controversial issue created an extensive academic discussion suggesting either limiting the scope of *de facto* application or including it in the assessment of the purpose regulatory measure. Recently, a few WTO disputes have also addressed this subject. Their analysis was focused on the assessment of the measure objective. They considered whether the application of either the aim-and-effect test or assessing if the limitation stemmed solely from legitimate regulatory differences is consistent with Article XVII.

While the AB in EC—Bananas III (1997) rejected the application of the AF test in the GATS context, the panel of Argentina—Financial Services (2015) inferred that the regulatory setting in which service suppliers operate may, in some situations, be applicable to the GATS context. This led the Panel to conclude that some measures enacted by Argentina which altered the condition of competition to favor domestic services and suppliers were designed to neutralize an unintended competitive advantage provided to foreign counterparts but not to nationals. Thus, these measures are consistent with Article XVII since their objective was to guarantee equal competitive conditions.

Nevertheless, the AB has dismissed this interpretation. It claimed that there is no legal basis in GATS that would allow the measure regulatory objective to convert a measure that has a LFT into a GATS-consistent measure. The AB has closed the door for the AF test under Article XVII, but this is not the only effort to embrace the measure regulatory objective in the assessment of LFT.

There was also a push to use the interpretation of LFT under the Agreement on Technical Barriers to Trade (TBT) national treatment as found in US—Clove for Article XVII.

However, the recent case law rejected this analysis, which also includes defining the objective of a measure. Therefore, the only element to establish a LFT is to prove that the challenged measure modifies the competitive conditions. However, none of the cases elucidate the extent of de facto discrimination and whether it should be limited. Now that it has been established when a measure could violate the NT principle of GATS, the next section analyzes the concept of tax under GATS and whether tax policies can be challenged under Article XVII.

4.3. The Concept of Tax in the GATS

Whereas GATT uses vague terminology including ‘internal taxes’, GATS employs the catch-all term of ‘measure’ concerning trade in services. The term incorporates any measure by a MS in any form that can influence trade in services. Therefore, any tax that affects trade in service providers or service is covered by this broad term. Furthermore, GATS has a comprehensive definition of direct taxes. It is similar to the definition of taxes in the OECD MTC. However, there is no indication that the GATS direct taxes definition was affected by the OECD.

4.3.1. Tax Limitations to GATS National Treatment

GATS contains several tax exceptions in addition to the availability of limitations. Thus, the NT principle is also subject to direct tax exception under Article XIV(d) and discriminatory tax measures can avoid the NT obligation if enacted to ensure the ‘equitable or effective imposition or collection’ of direct taxes. The cover of this exception is extended based on a list of measures that fall under it.

Furthermore, one of the measures in this list permits the application of taxes which aim to prevent tax avoidance and invasion. This presents a new dimension to the WTO that has been limited by other GATS provisions related to avoidance of double taxation. Likewise, measures related to tax evasion may also be safeguarded from NT challenges by Article XIV(c)(i), which excludes measures applied to secure compliance with the prevention of fraudulent practices, law, and regulations. The question is what gaps are left in this provision for tax challenges to arise under GATS Article XVII.

A limitation to the tax exceptions can be found in Article XIV *chapeau*. Consequently, tax measures under those exceptions may still violate the NT rule if it is a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services. Hence, the Article XIV(d) exception is not an absolute carve-out of the NT obligation, and direct taxes may find a challenge under GATS. However, no WTO adjudicatory body has defined the meaning of Article XIV’s requirement of unjustifiable or arbitrary discrimination.

A clarification can be found in the case law of GATT Article XX that has a similar caveat, although the GATS Article XIV one is more pertinent as it directly qualifies the application of the tax exception. The AB in US—Gasoline (1996) noted that Article XX exceptions should be assessed based on the *chapeau*, which prevents abusing exceptions. Consequently, exceptions should not be invoked to frustrate the legal responsibilities under the GATT substantive rules. Thus, the *chapeau* addresses not so much the measure at issue but the manner in which it is applied.

If this interpretation is applied to the corresponding *chapeau* in GATS Article XVI, the determination of unjustifiable and arbitrary can be seen as one of rationality. Therefore, direct taxes would not fall by default under Article XIV(d) exceptions. These exceptions should be viewed as conditional as many measures go beyond their strict reading.

4.3.2. Indirect and Direct Taxes

Since indirect tax measures are not included in the NT exceptions of Article XIV(d), they remain largely open to challenges under the NT provision insofar as the tax in question does not fall under the unbound service sectors or NT limitations. Hitherto, only two

indirect tax measure complaints had recourse to the GATS NT rule, both of which did not make it to the Panel stage.

On the other hand, when it comes to direct tax matters, the case becomes more complicated. There are a few gaps for direct tax challenges to arise under GATS Article XVII. Subject to states' limitations and commitments, a direct tax measure can be challenged if it is established that the purpose of measure is not to ensure effective or equitable imposition of direct taxes, or if it is covered by this exception, it fails the *chapeau* requirement.

In limited circumstances, a measure may fall outside the broad scope of the Article XIV(d). To date, there is only one WTO direct tax dispute involving the GATS NT rule. That is the very controversial Argentina—Financial Services case, the rulings of which were expected with anticipation. However, the panel and the AB body had different views in their reasoning and did not provide a clear guidance.

In this case, the WTO adjudicatory body reviewed claims raised by Panama against Argentina, which enacted certain tax measures against service suppliers and services from countries considered 'not cooperating for tax transparency purposes'. The panel in Argentina—Financial Services (2015) found, among other things, that some of the Argentinian measures violated the NT obligation of GATS. While the measures fulfilled the exception requirements of Article XIV(d), they did not constitute an arbitrary or unjustified discrimination.

The AB reversed this ruling on the grounds that the panel erred in determining likeness as it found that the discrimination was 'due to origin', but not 'based exclusively on origin'. However, the AB refrained itself from determining whether the services at issue were 'like', and the core issue of the dispute remained unsolved. Furthermore, this AB's ruling left unanswered the question of whether MS may take action against states that are deemed to be 'not cooperating for tax transparency purposes'.

All controversy surrounding the Argentina—Financial Services case rulings can be explained by the danger it could have presented to the BEPS project. Moreover, members could have to face the foreseeable problem that tax sovereignty is not absolute and measures to eliminate tax base erosion cannot be enacted in an arbitrary or unjust way [56]. International tax measures are not only subject to tax treaties and international tax standards but also to multilateral trade rules. The next section covers this in more detail.

5. The WTO Role in the Promotion of the BEPS Project—A Legal Basis for Its Enforcement and Implementation

This section provides insight into the trade concerns that the BEPS project recommendations may cause under GATT and GATS. It analyzes to what extent MSs may enforce measures to address tax transparency without violating its WTO obligations. The analysis focuses on the Argentina—Financial Services case not only because international tax measures were challenged for the first time before the WTO, but also because at the core of the dispute were the effectiveness and legitimacy of the OECD's globally accepted international standards.

5.1. The Interface between the WTO and the BEPS Project

The BEPS project entails measures which call for wide-ranging modifications in both international tax treaties and domestic legislation to deal with BEPS concerns. Therefore, it is crucial to evaluate whether the enactment of such measures would bring about intersections with GATT and GATS. The WTO rules would come into effect only if the rights of a MS are affected by a measure applied by another MS. Hence, the BEPS project itself does not create the intersection, but rather the measures that states implement to fulfil these recommendations can raise trade concerns. The focus of the analysis is on some of the measures required by the BEPS 2015 Final Reports and the potential intersections of these measures with the WTO rules.

5.1.1. Specific Recommendations

The BEPS project recommends specific measures for matters such as harmful taxes to be incorporated in the participating states' national legislations. Some of these measures can create a potential intersection between the required modification in national laws and the WTO. For example, Action 5's target is to decrease the discretionary effect of taxes on geographically mobile financial and other services activities.

However, the Intellectual Property (IP) regime actually encourages a tax exemption if local Research and Development (R&D) activities are used. This would disadvantage service suppliers of foreign R&D-related activities in the concern sector, which is similar to a local content requirement in GATT found repeatedly inconsistent with the NT rule. Currently, 60 members have made R&D services commitments, and if these commitments are undertaken with regard to NT, such requirements may be found in violation of GATS Article XVII.

Further, CFC rules are designed to stop taxpayers from moving income into foreign subsidiaries. The rules only apply to foreign companies that are subject to lower tax rates than those in the parent country. Thus, if a service supplier is from a jurisdiction with higher tax rates than those of the service-importing state, then a higher tax rate should apply, which may cause NT concerns under GATS. This practice can also be equated to the border tax adjustment often disputed in GATT.

5.1.2. Model Law on International Tax

Furthermore, some of the BEPS project measures' implementation is left to the discretion of the countries. For instance, Action 6 has model treaty provisions for the design of domestic regulations such as anti-abuse rules to cease the granting of advantages from bilateral tax treaties in inappropriate situations. Thus, under the state's discretion introduced into the domestic laws, anti-abuse rules would prevent granting treaty benefits regarding double taxation for certain foreign service suppliers.

However, the enactment of anti-abuse rules may lead to less favorable treatment such as double taxation to foreign service suppliers. Consequently, these measures may violate the NT obligation under GATS Article XVII if they fall outside the scope of tax treaties. Although Article XIV(d) can exempt NT, if the different treatment is to ensure equitable imposition of direct taxes, the *chapeau* of Article XIV may ensure that the anti-abuse domestic legislation is not used as a disguised restriction on trade in services.

5.1.3. Minimum Standards

Minimum standards are developed in the BEPS project to deal with cases where no action by some states can inflict negative spillovers on others. Action 13 aims to enhance the rules in terms of transfer pricing documentation to improve tax transparency. A minimum standard on country-by-country (CbC) reporting was adopted, requiring MNEs annually to file a financial CbC report for each tax jurisdiction in which they operate.

Although it is required that CbC reporting be applied consistently and effectively by states, the BEPS project does not stipulate how this can be ensured. The question arises of whether countries can take countermeasures to encourage compliance when a state fails to provide such information. The Argentina—Financial Services (2015) case has shown that such countermeasures could certainly give rise to national treatment concerns under GATT and GATS when different treatment is given to a non-complying state.

Overall, the BEPS project provides tax planning strategies which are still untested or are a work in progress. The recommendations mainly encourage the adoption of unilateral measures which may result in more competition, and rather than easing the problem, they may aggravate it. As seen above, some of the recommended measures may raise concerns under the WTO depending on the way states implement them since jurisdictions may decide to engage in protectionism for efficiency or political reasons. Thus, the next section

addresses to what extent WTO Members may enforce measures to address tax transparency without violating its WTO obligations by focusing on the Argentina—Financial Services case.

5.2. Argentina—Financial Services

It is in this case when the fragility of international tax system and the lack of a global tax organization with coherent set of rules was witnessed for the first time in the WTO. The dispute questioned for the first and perhaps not the last time the OECD's work on taxation. The case ruling was drafted in a blurred language different from the one of previous WTO decisions.

Around 90% of cases in the WTO have been found in favor of the complainant [57], and those where taxation is central to the dispute have nearly an 80% win rate. Although the reason behind this high win rate is more complex, it certainly relates back to the fact that if a MS is not confident in their legal actions, a complaint will not be pursued. States are reassured that their tax regulations will be challenged only if a major trade infringement has arisen. Hence, if a tax is challenged in the WTO, it is likely that it will be struck down, which was not the case in the Argentina—Financial Services dispute.

Even though the BEPS project recommendations are considered to lack legitimacy by some jurisdictions due to the low involvement of non-OECD Members, all states are pressured to adhere to them through diplomatic means. Thus, they are seen as a product of coercive diplomacy play of a closed international organization promoting its members' interests. The Argentina defense rested mainly on the necessity of defensive tax measures as recommended in the OECD Harmful Tax Competition reports.

Both the panel and the AB findings relied on those non-binding instruments and applied them without any consideration of their compatibility with the WTO general principles. The WTO adjudicatory body has tried to defend these contradicting measures as universally recognized and referred to the OECD reports without questioning their legitimacy and rightness. Moreover, while the panel found some of the tax measures to be inconsistent with the WTO non-discrimination principles, the AB has overturned this decision by rendering a very limited opinion and not providing any clarity on the situation [58].

The reason behind this may be the fact that for the first time, the WTO had to challenge the fragility of the international tax rules and whether they limit the benefits of trade liberalization. The dispute also showed that direct tax challenges are becoming more common, and the range of the challenged tax measures goes beyond the traditional taxes. Thus, the WTO will play a vital role in regulating international tax matters in future. This dispute brings lessons for both the international trade and international tax regimes.

6. Conclusions and Recommendation

The OECD Harmful Tax Competition initiative provided a topic for research on interrelation between the international tax regime and the WTO [59]. The studies were focused on the effects of trade policy on domestic taxes, such as VAT, concluding that trade treaties both fostered and hindered policy options for restricting harmful tax practices. However, no further analysis, with certain exceptions, is found on how trade rules affect anti-tax avoidance initiatives. This paper has tried to highlight the effect that the international trade regime has on the international tax flight in light of the new OECD tax erosion initiative, i.e., the BEPS.

After WWI, the visionary framework for an international tax regime started by assigning corporate tax to the jurisdiction of source and investment tax to the country of residence to reduce barriers to international trade. To further progress this after WWII, the establishment of the WTO culminated. However, the absolute abolition of income taxes is unlikely since most states finance their operations with them. Thus, a compromise that permits some tax trade barriers but promotes free trade must be created.

Nonetheless, the international tax regime was addressed in the WTO for the first time in the Argentina—Financial Services case. In this dispute, state tax measures were questioned on whether they violate the WTO's non-discrimination principles, including national treatment. Thus, when the relationship between trade and tax regimes is examined, there is no dividing line between allowed and prohibited income tax discrimination against international trade. The continued division of these two regimes is puzzling since they are related on many ways as stated in Section 2.

The international tax regime currently faces challenges due to the need to regulate greater trade volumes and complex cross-border transactions involving multiple jurisdictions with conflicting tax regulations. The OECD's role as a global tax forum is questioned due to its one-size-fits-all approach, lack of transparency, inclusivity, and trust from developing states, compared to the WTO, which takes into account the different incentives of its developing and developed members. Thus, there is a belief that asymmetry exists between tax jurisdictions imposing sanctions and the sanctioned ones based on the differences between non-OECD and OECD members. This affects the legitimacy and democracy of the OECD's initiative, and its success is questionable until a more inclusive and transparent forum is established to promote cooperation on equal basis among countries.

Although there are quite a few discrepancies between the BEPS project recommendations and the WTO obligations, as seen in Argentina—Financial Services case, so far, the WTO adjudicatory body has refrained from questioning their legitimacy or finding these in violation of the WTO principles. This can lead us to the thought that the WTO indirectly supports the current tax reform. However, the question is for how long. States are granted the discretion to decide how to implement BEPS project recommendations, and in the long run, they might apply more protection measures.

Consequently, some of these measures might be disputed in the WTO in the future since there is no absolute escape from its jurisprudence as seen from the analysis above. The international tax rules would not be allowed to be a safe haven for states to bluntly breach their WTO obligations for long. Therefore, a coordination of these two international regimes is required. Some of the BEPS project recommendations are still being negotiated, which means that negotiators need to be cautious on how these can affect states' WTO obligations. Coordination is a feasible solution in the short run to reduce conflicts between the two regimes so they can complement each other.

Nevertheless, in the long run, a more comprehensive solution is needed which would probably involve reforming either one or both regimes. For instance, the international tax regime may advance to a supranational legal arrangement or a global policy forum with a dispute settlement mechanism to monitor the execution of its rules. However, some mechanism to incorporate smaller and developing countries needs to be put in place, otherwise this will still not be effective.

Then, a more radical reform would be to integrate the BEPS initiative in the WTO. Although this would be difficult, since the WTO framework is intended to facilitate trade and not state revenue, it is not impossible, as the WTO has already handled some tax matters. The integration of the BEPS project in the WTO would increase the price of failure to conform, as disregarding the project could potentially lead to the violation of GATT or GATS. The analysis of the possibility and success of the suggested reforms goes beyond the scope of this paper.

As states continue to confront the challenges of international tax evasion and harmful tax practices in the future, reform of the international tax regime becomes increasingly crucial for the success of any new initiatives. Whereas substantial progress has been made in agreeing on the BEPS project to serve as the basis for the current tax regime, less emphasis has been put on creating the structure necessary to implement these recommendations. The paper concludes by highlighting the crucial complementary role that the WTO can play in the enforcement and monitoring of international tax rules.

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