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On the Fragility of the International Taxation Legal System

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FLORIDA TAX REVIEW

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On the Fragility of the International Taxation Legal System

by

*Monica Victor**

Abstract

This Article focuses on the OECD's work on harmful tax competition to demonstrate how the OECD and subsidiary bodies' governance structure, and the standard-setting process, built a fragile international taxation legal system that is not just impairing legitimate tax competition but also failing to promote cooperation among tax jurisdictions. The option for the harmful tax competition work among other tax issues covered by the OECD is justified by the difficulties faced by the WTO Dispute Settlement Body (DSB) while adjudicating the Argentina-Financial Services dispute. In this dispute, Panama challenged the imposition of defensive tax measures against harmful tax competition based on a list of non-cooperative tax jurisdictions issued by the

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Argentine tax authority. The clash between the international trade legal system and the international tax system unveiled the fragilities of the last related not just to the global governance structure but also the international tax standards for harmful tax competition. In spite of the recent efforts by the OECD by the lauching of the BEPS Project, the challenge of making the international taxation system work for all Members and non-Members remains.

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I. Introduction

After a recent G-7 Meeting, Chancellor Angela Merkel's words caught the world's attention: "the times in which we can fully count on others are somewhat over, as I have experienced in the past few days. . . . [W]e need to know we must fight for our own future as Europeans for our destiny."[1] Chancellor Merkel just summarized the fractures of the international legal system that scholars had already noticed.[2] States are increasingly resorting to unilateral measures where the international legal system is not delivering clear and effective guidance for the challenges embedded in the accelerated and pervasive digitalization of the economy. Consequently, the international legal system coherence and authority is fractured by uncoordinated adoption of domestic public policies and measures affecting cross-border transactions. Furthermore, multinational companies and high net-worth individuals are exploring those fractures to maximize the pursuit of their interests.

The international economic law system developed by the Bretton Woods institutions and other international economic organizations was shaken by the above developments. The Basel Committee on Banking Supervision regulatory standards for the banking sector, known as the Basel I and the Basel II Accords,[3] did not prevent the 2008 financial

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1. Samuel Osborne, *Angela Merkel Says Germany Can No Longer Rely on Donald Trump's America*, Independent (May 28, 2017, 15:45 PM), https://www.independent.co.uk/news/world/europe/angela-merkel-donald-trump-germany-us-no-longer-rely-european-union-climate-change-g7-a7760486.html.

2. Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 Stan. L. Rev. 595, 632 (2007); Pierre-Marie Dupuy, *A Doctrinal Debate in the Globalisation Era: On the Fragmentation of International Law*, 1 Eur. J. Legal Stud., no. 1, 2007, at 25, 41; Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 Leiden J. Int'l L. 553-79 (2002); Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 Mich. J. Int'l L. 903, 916 (2004).

3. The Basel Accords are recommendations issued by the Basel Committee on Banking Supervision (BCBS). The Basel Accord I (1988) focused on the capital adequacy of financial institutions, and the Basel Accord II (2004) established standards for the Three Pillars: minimum capital requirements, supervisory review, and market discipline. *See History of the Basel Committee*, BIS, https://www.bis.org/bcbs/history.htm (last visited May 4, 2020).

crisis. Governments were compelled to grant huge bailouts to avoid the crash of "too big to fail" financial institutions.

The 2008 financial crisis's aftermath was the negotiation of the Basel III Accord, which is a new set of international financial standards for strengthening the supervision, regulation, and risk management for banks.[4] The foreign direct investment legal system failed the basic promises of increasing investments and fairly settling disputes. Thus, an increasing number of States denounced Bilateral Investment Treaties (BITs)[5] or developed their own foreign direct investment treaty model like the Indian BIT Model 2016.[6] Besides, Investor-State Dispute Settlement Mechanisms are under reform at the International Centre for Settlement of Investment Disputes[7] and U.N. Commission on International Trade Law (UNCITRAL)[8] in order to restore trust in the system among the participating countries. Likewise, under the World Trade Organization (WTO) umbrella, the debate about necessary reforms to the system is ongoing.[9]

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4. *Basel III: International Regulatory Framework for Banks*, BIS, https://www.bis.org/bcbs/basel3.htm?m=3%7C14%7C572 (last visited May 4, 2020).

5. *Five EU Countries Asked to Terminate Intra-EU Bilateral Investment Treaties*, Strategic Risk (June 18, 2015), https://www.strategic-risk-europe.com/five-eu-countries-asked-to-terminate-intra-eu-bilateral-investment-treaties/1414402.article; *Why Did Ecuador Terminate All Its Bilateral Investment Treaties?*, Transnat'l Inst. (May 25, 2017), https://www.tni.org/en/article/why-did-ecuador-terminate-all-its-bilateral-investment-treaties.

6. Model Text for the Indian Bilateral Investment Treaty: Bilateral Investment Treaty Between the Government of the Republic of India and __________, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (last visited May 4, 2020).

7. *ICSID Rules and Regulations Amendment Process*, ICSID, https://icsid.worldbank.org/en/amendments (last visited May 4, 2020).

8. United Nations Commission on Int'l Trade L., https://uncitral.un.org/ (last visited May 4, 2020).

9. *See DG Azevêdo: Rules-Based Trading System Is "Irreplaceable" but Must Be Ready to Evolve*, WTO (Apr. 11, 2019), https://www.wto.org/english/news_e/spra_e/spra258_e.htm (text of speech by WTO Director-General Roberto Azevêdo to the Peterson Institute,); *see also* Sofia Baliño, *As Members Debate WTO Reform, What Lies Ahead for 2019*?, Int'l Inst. Sustainable Dev. (Feb. 6, 2019), https://www.iisd.org/blog/wto-reform-2019.

In an interesting note, U.S. trade officials considered the WTO's Most Favoured Nation (MFN) rules to be a hurdle to Free Trade Agreements and to free trade itself, and the WTO Dispute Settlement system is about to collapse because the United States is blocking the appointment of new Members for the WTO Appellate Body. The WTO Appellate Body is responsible for the adjudication of appeals under the WTO Dispute Settlement Understanding, and, as of December 2019, only one out of seven Members statutory composition remain appointed.[10] Interestingly, causing the imminent collapse of the system[11] has not prevented the United States from resorting to the same system to safeguard its own economic interests.[12] Of course, the international taxation legal system was not immune. In 2013, the Organisation for Economic Co-operation and Development (OECD), under the G20 push,[13] launched the Base Erosion and Profit Shifting Project (BEPS) divided into 15 BEPS Action Plans to "provide countries with domestic and international instruments that will better align rights to tax with economic activities."[14]

The OECD BEPS Project was a set of 15 Action Plans,[15] and the outcome was that only four BEPS Reports were considered "minimum

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10. *Appellate Body Members*, WTO, https://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm (last visited May 9, 2020).

11. *See* Brandon J. Murrill, *The WTO's Appellate Body Loses Its Quorum: Is This the Beginning of the End for the "Rules-Based Trading System"?*, Cong. Res. Serv.: Legal Sidebar (Dec. 16, 2019), https://crsreports.congress.gov/product/pdf/LSB/LSB10385; Krzysztof J. Pelc & Joost Pauwelyn, *The WTO's Trade Dispute Appeal System Could End on Dec. 10. Here's What You Need to Know*, Wash. Post (Dec. 5, 2019, 7:00 AM), https://www.washingtonpost.com/politics/2019/12/05/wtos-trade-dispute-appeal-system-could-end-dec-heres-what-you-need-know/.

12. The United States has filed a compliance dispute against India regarding the India-Solar Cells (WTO/DS/456). *Panel Established to Determine India's Compliance with Solar Power Ruling*, WTO (Feb. 28, 2018), https://www.wto.org/english/news_e/news18_e/dsb_28feb18_e.htm.

13. G20, *G20 Leaders Declaration—Los Cabos Summit* (June 19, 2012), http://www.g20.utoronto.ca/2012/2012-0619-loscabos.pdf [hereinafter *G20 Los Cabos Declaration*]; *OECD Urges Stronger International Co-operation on Corporate Tax*, OECD (Dec. 2, 2013), https://www.oecd.org/newsroom/oecd-urges-stronger-international-co-operation-on-corporate-tax.htm.

14. OECD, *Action Plan on Base Erosion and Profit Shifting* 11 (2013), http://dx.doi.org/ 10.1787/9789264202719-en.

15. *BEPS Actions*, OECD, http://www.oecd.org/tax/beps/beps-actions/ (last visited May 14, 2020).

standards" and, thus, subject to the peer review and monitoring process by the BEPS Inclusive Framework.[16] Countries agreed that BEPS Action 5 (Harmful Tax Practices), BEPS Action 6 (Treaty Abuse), BEPS Action 13 (Transfer Pricing and Country-by-Country Report), and BEPS Action 14 (Dispute Resolution) would be closely monitored. The other 11 BEPS Reports relevance or implementation are disputable, to say the least—not to mention that, after the launch of the BEPS Final Reports, the United States sent a clear message in the Preamble to the new U.S. Model that it would not follow the BEPS approach but rather would address "BEPS concerns through changes to objective rules that apply on a prospective basis, rather than introducing subjective standards that could call into question agreed treaty benefits or applying wholly new concepts to prior years."[17] Later, the E.U. Members urged the adoption of rules in the context of European law to address the same BEPS issues, and the European Council adopted the Anti Tax Avoidance Directives,[18] laying down rules against tax avoidance practices to implement the BEPS Actions recommendations in a "sufficiently coherent and coordinated fashion" among the E.U. Members.[19]

The international taxation legal system is not the only one struggling to foster cooperation among States. The idea of self-contained international regimes and the independent development of the various economic international organizations and legal systems are critical features of a cracked and fragile international system that is failing to promote cooperation and coordination among countries. The international economic organizations are not prepared to face the challenges posed not only by recent technological and globalization developments but

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16. *See What Is BEPS?*, OECD, http://www.oecd.org/tax/beps/about/ (last visited July 14, 2020); Robert E. Gaut et al., BEPS: OECD Releases Multilateral Tax Treaty Convention, Proskauer (Dec. 6, 2016), https://www.proskauertaxtalks.com/2016/12/beps-oecd-releases-multilateral-tax-treaty-convention/.

17. Preamble to 2016 U.S. Model Income Tax Convention (Feb. 17, 2016), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Preamble-US%20Model-2016.pdf; *see also id.* ("The 2016 Model also contains rules to make more efficient and effective dispute resolution mechanisms between tax authorities through the use of mandatory binding arbitration.").

18. Council Directive (EU) 2016/1164 of 12 July 2016 Laying Down Rules Against Tax Avoidance Practices That Directly Affect the Functioning of the Internal Market, 2016 O.J. (L 193) 1 (EU).

19. *Id.* at 2.

also by the political rhetoric[20] and increasing populism. The attachment to the concept of tax sovereignty and the liquid international taxation global governance architecture led the system to the boiling point. The international taxation legal system turned into a cloud of uncoordinated unilateral measures that impairs legitimate tax competition. The biggest "tax war" erupted between the United States and the European Union over the collection of taxes from GAFA (Google, Apple, Facebook, and Amazon).[21] The big digital companies were publicly shamed for "unfairly" avoiding the payment of taxes, whereas their tax planning strategies are benefiting from loopholes derived from poor rules and regulations.[22] "No taxation without representation" or "strict legality," the most basic principle of taxation, was eroded by the vague concept of "fair taxation." Countries are increasingly adopting unilateral measures in an incoherent and uncoordinated way that imperils the international taxation legal system itself. Thus, the purpose of this Article is to outline the deficiencies of the current international taxation legal system and evaluate the ongoing reforms under the OECD umbrella.

This Article focuses on the OECD's work on harmful tax competition[23] to demonstrate how the OECD and subsidiary bodies' governance structure, and the standard-setting process, built a fragile international taxation legal system that is not just impairing legitimate tax competition but also failing to promote cooperation among tax jurisdictions.

The option for the harmful tax competition work among other tax issues covered by the OECD is justified by the difficulties faced by the WTO Dispute Settlement Body (DSB) while adjudicating the *Argentina–Financial Services* dispute.[24] In this dispute, Panama

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20. *See* Itai Grinberg, *The New International Tax Diplomacy*, 104 Geo. L. J. 1137 (2016).

21. *Europe's Tax War on U.S. Tech*, WSJ Opinion (Mar. 21, 2018, 6:45 PM), https://www.wsj.com/articles/europes-tax-war-on-u-s-tech-1521672316.

22. Vanessa Barford & Gerry Holt, *Google, Amazon, Starbucks: The Rise of 'Tax Shaming,'* BBC News Mag. (May 21, 2013), http://www.bbc.com/news/magazine-20560359.

23. OECD, *Harmful Tax Competition, An Emerging Global Issues* (1998), https://doi.org/10.1787/9789264162945-en.

24. Appellate Body Report, *Argentina–Measures Relating to Trade in Goods and Services*, WTO Doc. WT/DS453/AB/R/ (adopted May 9, 2016) [hereinafter Appellate Body, *Argentina–Financial Services*]; Panel Report, *Argentina–Measures Relating to Trade in Goods and Services,* WTO

challenged the imposition of defensive tax measures against harmful tax competition based on a list of non-cooperative tax jurisdictions issued by the Argentine tax authority. Panama claimed that the Argentine tax measures under dispute violated the non-discrimination provisions of the GATT and the GATS, especially the MFN and the National Treatment (NT) provisions.[25] The clash between the international trade legal system and the international tax system unveiled that the fragilities of the latter related not just to the global governance structure but also to the international tax standards for harmful tax competition.

The first part of this Article will focus on the reports issued and adopted by the WTO DSB in the *Argentina–Financial Services* dispute. In the second part, the Pre-BEPS OECD work on harmful tax competition will be described and criticized. The difficulties and uncertainties that the WTO panelists and Appellate Body Members faced while adjudicating the dispute are linked to the incoherencies and fragilities of the OECD's work on the issue. The OECD failed to provide clear guidelines for differentiating acceptable tax competition form harmful tax competition. Moreover, non-OECD Members were affected by the reports' recommendations without any participation in the standard-setting process. Finally, the conclusion will be devoted to the evaluation of the new global tax governance entities and new proposed international taxation standards vis à vis the legitimacy and effectiveness deficit.

II. The *Argentina–Financial Services* Dispute

In 2012, Panama requested consultations with Argentina before the WTO DSB,[26] arguing mainly the inconsistency of Argentina's defensive tax measures against "jurisdictions with low or no taxes" with the

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Doc. WT/DS453/R (adopted May 9, 2016) [hereinafter Panel Report, *Argentina–Financial Services*].

25. General Agreement on Tariffs and Trade, arts. I & III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, as revised in 1994 [hereinafter GATT]; General Agreement on Trade in Services, arts. II:1 & XVII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

26. This Article will only deal with the relevant provisions, claims, defense, and findings related to the taxation measures' consistency with the GATS provisions because the dispute concerned the supply of financial services.

non-discrimination provisions of the GATS. In short, the disputed measures would provide a less favorable tax treatment for income derived from cross-border transactions involving one part from countries considered as "jurisdictions with low or no taxes," such as Panama, compared to the treatment provided for the non-listed tax jurisdictions and domestic taxpayers.[27]

In 2013, after Panama requested consultations with Argentina regarding the above-described tax measures, Decree 589/2013 replaced all references to "jurisdictions with low or no taxes" for "jurisdictions not considered 'cooperative for tax transparency purposes.'"[28] The replacement reflects the developments in the OECD's work on harmful tax competition and the theoretical difficulty of imposing any sanction on a tax jurisdiction for levying no or low income tax without affecting tax sovereignty.

Annually, the Argentine Tax Authority would publicize a list of countries regarded as "cooperative for tax purposes" jurisdiction,[29] including countries that either have already concluded or were negotiating a tax treaty with a broad exchange of information provision or a Tax Exchange of Information Agreements with Argentina.[30] Cross-border transactions where one of the parts was located in a country considered as a *non-cooperative tax jurisdiction* would be subject to defensive tax measures that would result in a different tax treatment than that accorded to cooperative tax jurisdictions and domestic taxpayers.

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27. After Panama initiated the dispute, Argentina's Decree 589 of the Federal Public Revenue Administration, art. 1, May 27, 2013, http://biblioteca.afip.gob.ar/dcp/DEC_C_000589_2013_05_27 [hereinafter Decree 589/2013], replaced the expression "jurisdictions with low or no taxes" of the Argentina's Decree No. 1037/2000 with "jurisdictions not considered cooperative for tax transparency tax purposes." Appellate Body, *Argentina–Financial Service*, *supra* note 24, ¶ 5.3 n.57. Article 1 of Decree 589/2013, *supra*, also required "as far as possible" compliance with the international standards for transparency adopted by the Global Forum on Transparency and Exchange of Information for Tax Purposes, again, after Panama requested for consultations with Argentina.

28. Appellate Body, *Argentina–Financial Service*, *supra* note 24, ¶ 5.3 n.57.

29. Decree No. 589/2013, *supra* note 27, art. 2.

30. *Id.* art. 1.

Among the eight measures under dispute, four were defensive tax measures against harmful tax competition imposed on cross-border transactions linked to a non-cooperative tax jurisdiction, according to a list published annually by the Argentine Tax Authority:

(a) Measure 1—"*Withholding tax on payments of interest or remuneration*"[31]—established the irrefutable presumption of net gains of 43% when the recipient of the payment of interest or remuneration paid on credits, loans, or placements of funds of any origin or type obtained abroad was located in a cooperative jurisdiction or 100% when the recipient was located in a non-cooperative jurisdiction. In both situations, the withholding tax rate was 35%;

(b) Measure 2—"*Presumption of unjustified increase in wealth*"[32]—was a refutable presumption that any entry of funds for the benefit of a taxpayer located in Argentina, irrespective of their nature or purpose, or the type of transaction involved, should be considered an unjustified increase in wealth for the borrower or recipient, if the payment is made from a non-cooperative country. The presumption of unjustified increases in wealth was rebuttable when the taxpayer would conclusively prove "that the funds originated from activities actually carried out by the taxpayer or by the third party in those countries or from placements or dully declared funds";

(c) Measure 3—"*Transaction valuation based on transfer prices*"[33]—consisted of the application of transfer pricing rules

31. Panel Report, *Argentina–Financial Services*, *supra* note 24, § 2.3.2. At issue was Law No. 20628, art. 93(c), Dec. 29, 1973, as amended through Jul. 11, 1997, http://biblioteca.afip.gob.ar/dcp/TOR_C_020628_1997_07_11#articulo_0112 [hereinafter Gains Tax Law].

32. Panel Report, *Argentina–Financial Services*, *supra* note 24, § 2.3.3. At issue was the unnumbered article after Article 18 of the Law on Tax Procedure. Law No. 11683, consolidated text of 1978, and amendments thereto, approved by Decree No. 821/1998, July 13, 1998, http://biblioteca.afip.gob.ar/dcp/TOR_C_011683_1998_07_13.

33. Panel Report, *Argentina–Financial Services*, *supra* note 24, § 2.3.4. At issue was Gains Tax Law, *supra* note 31, art. 8 ¶ 5, art. 15 ¶ 2.

to transactions between Argentine taxpayers and persons located, incorporated, or domiciled in non-cooperative countries, regardless of whether they were related or not; and,

(d) Measure 4—"*Payment received rule for allocation of expenditure*"[34] (i.e., cash accounting method)—instead of the general accrual rule when the outlay was sourced in Argentina, and the other party in the transaction was located, incorporated, based, or domiciled in a non-cooperative country.

A. Claims and Defense

Panama argued that the tax measures under dispute were inconsistent with the MFN and NT provisions of the GATS[35] because they did not provide for a "no less favourable" tax treatment for like services and services providers from Argentina or any other country listed as a "cooperative jurisdiction for tax purposes" compared to the tax treatment for non-cooperative tax jurisdictions. The "likeness" in this case should be presumed because the distinction was based exclusively in the origin of the service supplier according to the list. Also, if the presumption of likeness was not accepted, "likeness" of services and services suppliers should be assessed using the "four traditional" criteria accepted in previous disputes: "the nature of the services, their purpose, consumer preferences, and any possible governmental classification."[36] Any regulatory background should be considered a "factor external to the service supplier," otherwise the opposite would be a "likeness" assessment based on "aims and effects" that has "repeatedly been rejected by the Appellate Body."[37]

Argentina alleged that for the assessment of the "likeness" of services and service suppliers, the regulatory differences should be

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34. Panel Report, *Argentina–Financial Services*, *supra* note 24, § 2.3.5. At issue was Gains Tax Law, *supra* note 31, art. 18.

35. Panama argued that measures 2 and 3 were also inconsistent with the Article I:1 of GATT. Panel Report, *Argentina–Financial Services*, *supra* note 24, § 3. However, because the allegations related to the GATS were common to all measures, I decided to focus on the GATS.

36. Panel Report, *Argentina–Financial Services*, *supra* note 24, ¶ 7.120.

37. *Id.* ¶ 7.121.

relevant because they "affect the way in which suppliers operate" even though "these differences are not fully reflected in the market" and "do not affect the essential features of the service."[38] Moreover, being a non-cooperative jurisdiction would be "an essential feature of the service which consumers of services are seeking" when they choose where to do business, so affecting the conditions of competition among services and service suppliers and the characteristics of the service supplier.[39] Regarding the granting of "no less favorable treatment," Argentina argued that the differential treatment was a result "of its adherence to effective tax information exchange rules in effect at [the] international level," more specifically following the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, and, thus, legitimate.[40] Finally, even if the services and service providers were considered as "like" and the differential treatment "no less favorable" by the adjudicators, the discriminatory treatment was justified by the General Exceptions of the GATS designed "to secure compliance with laws and regulations which are not inconsistent with the provisions of [GATS] relating to . . . the prevention of deceptive and fraudulent practices" or "to ensure the equitable or effective imposition or collection of direct [income/corporate] taxes."[41]

B. GATS Relevant Provisions

An exhaustive discussion about the WTO Agreements is not the scope of the present Article; however, some brief explanation of the relevant provisions of the GATS related to the dispute may be useful for a better understanding of the decisions issued by the Panel and the Appellate Body.

The WTO system is a set of agreements concluded to promote trade liberalization on a nondiscriminatory basis. The MFN (Article II:1 of the GATS) and the NT (Article XVII of the GATS) provisions are among the pillars of the system.

According to Article II:1 of the GATS, the MFN clause is a non-conditioned provision and determines that "[w]ith respect to any

38. *Id.* ¶ 7.136.
39. *Id.* ¶ 7.137–.138.
40. *Id.* ¶ 7.140.
41. GATS, *supra* note 25, art. XIV(c)–(d).

measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to *like* services and service suppliers of any other country."[42] In contrast, the NT provision, Article XVII of the GATS, is applicable according to the Schedule of Commitments negotiated by each Member and provides that "each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."

Preliminarily to the assessment of the consistency of a measure with the non-discrimination provisions of the GATS, the applicability of the GATS to the measure must be determined. Article I:1 of the GATS establishes that the "Agreement applies to measures by Members affecting trade in services." The Appellate Body decided that this provision requires the examination of two legal issues: whether there is "trade in services" and whether the measure under dispute affects such trade in services.[43] Article I:2 of the GATS defines "trade in services" as the supply of a service in one of the four modes: from the territory of one Member into the territory of any other Member (Mode 1); in the territory of one Member to the service consumer of any other Member (Mode 2); by a service supplier of one Member, through commercial presence in the territory of any other Member (Mode 3); and, by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member (Mode 4). If the GATS covers the measure under dispute, that should be consistent with the substantive GATS provisions.

The non-discrimination provisions of the GATS related to Articles II:1 and XVII are applicable when the service and service providers from one Member are like the service and service providers of the other Members. The assessment of the "likeness" of the service and service providers is a complex task and is to be examined on a case-by-case basis.

At first, the complainant Member should make a prima facie case for "likeness"; if the discrimination is "based exclusively on the

42. Emphasis added.

43. Appellate Body Report, *Canada–Certain Measures Affecting the Automotive Industry*, ¶ 155, WTO Doc. WT/DS139/AB/R & WT/DS142/AB/R (adopted June 19, 2000).

origin of the services and service suppliers," then "likeness may be presumed."[44] This "presumed approach" was first applied in the GATS context in *China–Publications and Audiovisual Products*:

> When origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the "like service suppliers" requirement is met, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin. We note that similar conclusions have been reached by previous panels. We observe that in cases where a difference of treatment is not exclusively linked to the origin of service suppliers, but to other factors, a more detailed analysis would probably be required to determine whether service suppliers on either side of the dividing line are, or are not, "like."[45]

Later in *China–Electronic Payments*, the Panel Report, in the absence of evidence that discrimination was "exclusively linked to the origin of the service or service supplier," proceeded to the analysis of the likeness:

> In the light of the above, we consider that a likeness determination should be based on arguments and evidence that pertain to the competitive relationship of the services being compared. As in goods cases where a panel assesses whether a particular product is a "like product", the determination must be made on the basis of the evidence as a whole. If it is determined that the services in question in a particular case are essentially or generally the same in competitive terms, those

44. *Summary of Key Findings*, *DS453: Argentina—Measures Relating to Trade in Goods and Services*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds453_e.htm (last updated May 9, 2016).

45. Panel Report, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 7.975, WTO Doc. WT/S363/R (adopted Jan. 19, 2010).

> services would, in our view, be "like" for purposes of Article XVII.[46]

In other terms, no other factor should be decisive to the application of the discriminatory measure to make a prima facie assessment of the "likeness" of service and service suppliers. If the prima facie case is not established, the assessment should be made considering the physical characteristics, ends and uses, consumers' preferences, and the harmonized tariff classification system.[47]

Also, the measure affecting trade in services should grant to the like service and service suppliers "treatment no less favorable" than that accorded to like services and service suppliers of any other country or nationals of the Member imposing the measure. Further, Article XVII:3 of the GATS determines that "formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member." Although the provision is relating to the NT clause, the same understanding applies to the MFN clause.

A measure considered inconsistent with the MFN or NT provisions of the GATS may still be justified under the General Exceptions of the GATS (Article XIV). Two General Exceptions are specifically designed to safeguard tax sovereignty. The first exception is related to binding international taxation agreements and allows WTO Members to depart from the MFN Clause, Article XIV(d) of the GATS, and is followed by the Tax Base Erosion exception that justifies NT relating inconsistencies provided that "the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members."[48]

The analysis of the justification based on the General Exceptions is subject to a "two-tier test." First, a provisional justification relating to the content of the measure to the subparagraphs of the article is

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46. *China–Certain Measures Affecting Electronic Payment Services*, ¶ 7.702, WTO Doc. WT/DS413/R (adopted Aug. 31, 2012) (footnotes omitted) [hereinafter *China–Electronic Payment*].

47. Appellate Body, *Argentina–Financial Services*, *supra* note 24, ¶¶ 6.31–.32.

48. GATS, *supra* note 25, art. XIV(d)–(e).

assessed. Nonetheless, the characterization of a measure under one of the exceptions is not enough to justify the departure from the GATS provisions. In order to avoid abuses, the chapeau of Article XIV of the GATS requires that "such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade on services." Bartels observed the relevance of the chapeau in various disputes where measures adopted for legitimate reasons were nonetheless found to discriminate "arbitrarily or unjustifiably, or both, against the products or services."[49]

C. The Panel Report

First, the Panel Report concluded that the defensive tax measures affected the trade in services and service providers. Thus, the GATS would apply according to Article I of the GATS.[50] The finding about the application of the GATS was based on the broad scope of the expression "affect trade in services and service providers," which would consider not only measures that regulate or govern the supply of a service but also measures that affect trade in services and service suppliers indirectly, such as the defensive tax measures under dispute.[51]

Next, the Panel assessed the consistency of the measures with Article II:1 of the GATS. The Panel Report considered that the "difference in treatment between cooperative and non-cooperative countries" inherent in the eight measures at issue was "due to origin"[52] and that the services and services suppliers of cooperative and non-cooperative countries were like "by reason of origin."[53] The finding was based on the difficulty in determining "other factors" other than origin to justify the inclusion of a Member in the cooperative tax jurisdiction list.

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49. Lorand Bartels, *Current Developments: The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: a Reconstruction*, 109 Am. J. Int'l L. 95, 96 (2015).

50. *See* Panel Report, *Argentina–Financial Services*, *supra* note 24, ¶ 7.114.

51. *See id.* ¶¶ 7.103–.106.

52. *Id.* ¶ 7.166 ("We therefore consider that the difference in treatment between cooperative and non-cooperative countries inherent in the eight measures at issue is due to origin.").

53. *Id.* ¶ 7.185.

Argentina argued that the possibility of acessing the taxpayer information by means of exchange of information was a decisive factor that influenced the consumer option for financial institutions located in Panama. Then, the Panel proceeded with the analyses of the "likeness" argument related to "other factors," in this case, the service regulatory framework. By the time the Panel Report was issued, Panama had been included in the list and had initiated negotiations of a tax treaty with Argentina. At the same time, Hong Kong was in the same condition and did not appear on the list.[54] The Panel later concluded, "it is obvious that the way in which Argentina classifies countries as cooperative or non-cooperative is not consistent with the possibility for Argentina to have access to tax information."[55]

Further, the Panel assessed whether or not the different treatment between cooperative and non-cooperative countries, and national services and service providers was "no less favorable" in detriment of the non-cooperative countries according to Articles II:1 and XVII of the GATS. The Panel considered that the "regulatory framework" concerning service suppliers, whether or not the Argentina tax authority would have access to tax information, could affect the conditions of competition between services and service suppliers of non-cooperative and cooperative tax jurisdictions.[56] Then, the Panel concluded again that the "difference in treatment [pursuant to Decree No. 589/2013] is not based, as Argentina argues, on whether or not Argentina has access to tax information," because the list contemplates countries with which Argentina had signed treaties with a comprehensive exchange of information provision and countries with which it had only started negotiating or even had not negotiated treaties to allow exchange of information for tax purposes.[57]

Then, the Panel found the measures inconsistent with the MFN provision of the GATS because "they do not immediately and unconditionally accord to services and service suppliers from non-cooperative countries treatment no less favourable than that accorded to like services and service suppliers from cooperative countries."[58]

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54. *Id.* ¶¶ 7.183-84.
55. *Id.* ¶ 7.290.
56. *Id.* ¶¶ 7.232–.235.
57. *Id.* ¶ 7.292.
58. *Id.* ¶ 7.367.

Regarding the non-consistency with the NT provision of the GATS, the Panel considered whether or not the exchange of tax information between Argentina and non-cooperative tax jurisdictions would constitute "a regulatory aspect that modifies the conditions of competition on the Argentina market in such a way that it converts different and, in principle, less favourable treatment into 'treatment no less favourable.'"[59] Next, the panel concluded that the objective of the disputed tax measures was

> "to level a playing field" which, as confirmed by the OECD and the G-20, is "not level" because of the lack of tax transparency caused by the absence of exchange of tax information. . . . [W]e understand that what measures 2, 3 and 4 do, rather than giving Argentine services and service suppliers an advantage, is to neutralize an "unintended competitive advantage" enjoyed by non-cooperative jurisdictions owing to the lack of exchange of tax information with the Argentina on their suppliers. This advantage is not available to Argentine service suppliers, whose tax information can be obtained by Argentine authorities.[60]

Then, the Panel found that measures 2, 3, and 4 were consistent with the NT provision of the GATS because they were designed to address the competition distortion caused by harmful tax competition *v*is à vis domestic services and service suppliers:

> We agree with the opinion expressed in other international fora such as the OECD and the G-20 on the effect of harmful tax practices on the conditions of competition. It is precisely these effects on the conditions of competition caused by the lack of tax transparency which prompted these fora to envisage the adoption of defensive measures whose objective is not to place domestic services and service suppliers in a more advantageous position but rather to address risks caused by the lack of tax transparency in their respective markets.

59. *Id.* ¶ 7.514.
60. *Id.* ¶ 7.515.

> Consequently, we do not consider that measures 2, 3 and 4 modify the conditions of competition *in favour* of Argentine like services and service suppliers.[61]

Next, the Panel assessed whether or not the measures' inconsistency with Article II:1 of the GATS would be justified under Article XIV(c) and (e) of the GATS.

The Panel report concluded that the inconsistent tax measures were justified on a preliminary basis under the General Exception of the GATS Article XIV(c) because the defensive measures were necessary to secure compliance with Argentina's tax laws and regulations.[62] The Panel affirmed that "protecting the national tax system is a question of primordial importance for any country, and particularly for a developing country,"[63] and quoted the OECD reports on Harmful Tax Practice and the Global Forum to affirm the need for measures "to facilitate transparency and the exchange of information" in the combat of tax evasion and "the support at the international level for protection of national tax collection systems against harmful tax practices, including tax evasion."[64]

The report also recognized

> the efficacy of defensive tax measures, such as the measures at issue in the present case, in preserving the integrity of national tax systems has been recognized in the relevant international fora, in particular, the OECD and the G-20. Argentina has provided ample evidence of the recognition by these fora of the important role of defensive tax measures as a means of protecting public revenue.[65]

Further, the panel report recognized that the measure's objective was "to protect the tax collection system against the risks posed by the harmful tax practices of jurisdictions that are non-cooperative for tax transparency purposes."[66] Thus, of vital importance, as recognized

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61. *Id.* ¶ 7.521.
62. *Id.* ¶ 7.740.
63. *Id.* ¶ 7.664.
64. *Id.* ¶¶ 7.665-.666, .671.
65. *Id.* ¶ 7.651.
66. *Id.* ¶ 7.664.

by relevant international fora such as the OECD, are the Global Forum and the G20.[67] Thus, the measures would also be preliminarily justified under Article XIV(e) of the GATS.

According to the Global Forum Term of Reference, the exchange of information must comply with three requirements: (1) "availability of information," (2) "appropriate access to the information," and (3) "the existence of exchange of information mechanisms."[68] The panel found that the Global Forum standard for exchange of information for tax purposes required an effective Exchange of Information (EoI) mechanism to be in place between both countries:

> As regards the "essential elements" of exchange of information, the Global Forum explains that exchange of information mechanisms should "provide for effective exchange of information and should be in force; where agreements have been signed, jurisdictions must take all steps necessary to bring them into force expeditiously". Accordingly, the Global Forum lays emphasis on the exchange of information having a legal basis which guarantees an effective exchange. The mere prospect—whether near or remote—of obtaining such information because negotiations on an information exchange agreement have been initiated (including negotiations initiated in good faith between Argentina and another country) does not appear to be in line with the standard established by the Global Forum.[69]

Therefore, the Panel concluded that by granting the status of cooperative tax jurisdiction to countries that do not have any international treaty in force providing for effective exchange of information, Argentina was acting in a "manner that is counterproductive regarding

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67. *Id.* ¶¶ 7.665–.670.

68. Glob. Forum on Transparency and Exch. of Information for Tax Purposes, *2016 Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information on Request for Tax Purposes*, OECD 2 (2016), https://www.oecd.org/tax/transparency/about-the-global-forum/publications/terms-of-reference.pdf. [hereinafter Glob. Forum, *Exchange*]

69. Panel Report, *Argentina–Financial Services*, *supra* note 24, ¶ 7.760 (footnotes omitted).

the objective it has itself declared in order to justify the distinction between cooperative and non-cooperative countries."[70] Thus, the measures were not fully justified because they failed to comply with the requirements of the second-tier test, the so-called "chapeau test," and constituted arbitrary and unjustified discrimination.

D. The Appellate Body Report

After addressing the complexity of assessing "likeness" of services and service suppliers and noting that domestic regulation may play a role "in shaping" the characteristics of services and service suppliers and consumers' preferences, the Appellate Body concluded that "whether a distinction is based exclusively on origin in a particular case would depend on 'the nature, configuration, and operation of the measure at issue and the particular claims raised'" in the dispute.[71] In the event that a panel finds that the complainant failed to make a prima facie case demonstrating that the presumption of likeness requirements were met, the panel should then turn to the analysis of the likeness based on the "relevant criteria" adapted to trade in services. Although the Appellate Body decided that the presumption of likeness based exclusively on origin was applicable in trade in services regardless of the complexities,[72] the Panel's findings regarding "likeness" were reversed because of an error in finding that the discrimination was "due to origin" and not "based exclusively on origin"—the standard applied in previous cases—to assess the presumption of likeness as argued by Panama.[73] The Panel found that the differential tax treatment was not "based on 'origin *per se*,' but on the 'regulatory framework inextricably linked to such origin.'"[74] In this case, the Panel should have engaged in the analysis of the relevant criteria to assess the "competitive relationship of the services and service suppliers of cooperative and non-cooperative countries."[75] More specifically, the panel should have engaged in the discussion of whether the access to tax information on foreign suppliers

70. *Id.* ¶ 7.761.
71. Appellate Body, *Argentina–Financial Services*, *supra* note 24, ¶ 6.41.
72. *Id.* ¶ 6.52.
73. *Id.* ¶¶ 6.56, 6.69 & 6.78.
74. *Id.* ¶ 6.56.
75. *Id.* ¶ 6.61.

affected the competitive relationship between services and service suppliers of non-cooperative tax jurisdictions, cooperative tax jurisdictions, national services, and service suppliers by affecting the services and consumers' preferences.[76] Nonetheless, the Appellate Body refrained from ruling about likeness, and the core issues in dispute remained undecided:

> Finally, we wish to emphasize that, while we have reversed the Panel's findings of "likeness" under Articles II:1 and XVII of the GATS for the reasons set above, we have taken no view on whether the services and service suppliers of cooperative countries are "like" the services and service suppliers of non-cooperative countries, or "like" Argentine services and service suppliers.[77]

The Appellate Body considered the other issues under appeal (i.e., Panel findings on "treatment less favorable") were "moot because they were based on the Panel's findings that the relevant services and service suppliers are 'like.'"[78] Nonetheless, the Appellate Body analyzed other issues raised in Panama's appeal based on Article 17.6 of the DSU that claims concerned "issues of law covered by the panel report and legal interpretations developed by the panel," and would "have implications for the interpretation of provisions of the GATS."[79]

Following the conclusion above, the Appellate Body proceeded to the analysis of the Panel findings about the conversion of a "less favourable treatment" into a "no less favourable treatment" due to regulatory aspects relating to the services suppliers. The view from the panel was criticized, and the Appellate Body clarified that the "regulatory aspects" relating to service suppliers were not a "separate step" in the assessment of whether or not a measure accords "treatment no less favorable," and that it could "convert[] the measure's detrimental impact on the conditions of competition into 'treatment no less favorable.'"[80] That issue should be addressed by the respondent by undertaking

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76. *Id.* ¶ 6.64.
77. *Id.* ¶ 6.80
78. *Id.* ¶ 6.83.
79. *Id.* ¶ 6.84.
80. *Id.* ¶ 6.111.

"specific market access commitments and [NT] obligations only in service sectors or subsectors, and only with respect to the modes of supply that it wishes to liberalize and inscribe in its Schedule of GATS Commitments" that would allow the Member to "subject [NT] obligations conditions and qualifications, and market access commitments to terms, limitations, and conditions."[81]

The Appellate Body also highlighted the two GATS exceptions relating to taxation either "aimed at ensuring the equitable or effective imposition or collection of direct taxes" or resulting from "an agreement on the avoidance of double taxation."[82] In footnote 311, the Appellate Body clarified that "Article XIV(d) allows for a derogation from the [NT] obligation in Article XVII of the GATS, while Article XIV(e) provides for derogation from the [MFN] obligation in Article II of the GATS."[83]

Furthermore, both exceptions "would reflect the fact that the GATS covers service suppliers, as the imposition of direct taxes and agreements on the avoidance of double taxation are particularly relevant for juridical and natural persons, and thus service suppliers."[84]

Then, the Appellate Body concluded that the balance between a Member's obligation under the GATS and the Member's right to pursue national policy objectives would be secured by the GATS flexibilities and exceptions. Thus, the legal standard for "no less favorable treatment" is "whether a measure modifies the conditions of competition to the detriment of like services or service suppliers of any other Member," and assessing them in the context of the non-discrimination provision would affect that balance.[85] Moreover, in the case that a measure is inconsistent with the non-discrimination provisions of the GATS, "the regulatory aspects or concerns that could potentially justify such a measure are more appropriately addressed in the context of the relevant exceptions."[86] The Appellate Body explained that the national policy objectives that could be pursued by the Members are not restricted by the exceptions, but in the seeking of goals other than those referred to in the exceptions Members should comply with their

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81. *Id.* ¶ 6.112.
82. *Id.* ¶ 6.113.
83. *Id.* ¶ 6.113 n.311.
84. *Id.* ¶ 6.113.
85. *Id.* ¶ 6.115.
86. *Id.*

GATS obligations and commitments. Otherwise the "existing balance under the GATS" would be upset.[87]

The Appellate Body reversed the Panel's finding that the eight measures at issue were inconsistent with the MFN provision and that measures 2, 3, and 4 were not inconsistent with the NT provision of the GATS because they lacked a "proper basis" and could not stand.[88]

The provisional justification of the measures under dispute under the General Exception of the GATS on Article XIV(c) was also analyzed by the Appellate Body. First, the Appellate Body affirmed that the provisional justification of an inconsistent measure should be "on the relevant aspects of the measure itself, rather than on how, for example, the measures affect the conditions of competition in the relevant market."[89] In spite of the "paucity of Panama's arguments,"[90] the Appellate Body proceeded to the examination of the Panel's findings in this regard. The principal argument in connection with the topic under discussion in this Article is whether the measures were "necessary to secure compliance with laws or regulations" that are not inconsistent with the GATS, namely "relevant provisions of the Gains Tax Law, the Law on Tax Procedure, the Criminal Tax Law, and the Constitution of the Republic of Argentina."[91]

E. The Outcomes

The potential friction between the international tax and international trade systems is not a new issue. The GATS negotiators were aware of the impacts of the agreement on domestic tax policies and rules. The total submission of direct taxation to the MFN would undermine the international tax system, which is based on a set of bilateral treaties. The application of the NT provision, without any exception, would affect the exercise of tax sovereignty on foreigner taxpayers and cross-border transactions. Aware of the potential frictions between its income tax rules and the GATS, the United States made substantial exceptions in the schedule of commitments related to the NT provision to safeguard individual income and corporate tax legal provisions.

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87. *Id.* ¶¶ 6.115–.117.
88. *Id.* ¶ 6.154.
89. *Id.* ¶ 6.168.
90. *Id.* ¶ 6.171.
91. *Id.* ¶¶ 6.155, 6.158.

Also, two tax related general exceptions were inserted in Article XIV of the GATS. Measures aimed at curbing tax base erosion are not covered by the NT provision (Article XIV(d)) while Article XIV(e) precluded the application of the MFN clause to tax agreements or any other binding agreement to avoid double taxation:

> Article XIV: General Exceptions
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
> . . .
> (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;
> (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.[92]

Notwithstanding GATT 1947[93] cases dealing with direct taxation and the GATS final text that addressed direct tax related measures, tax scholars were divided about the WTO's jurisdiction to settle disputes involving international tax measures per se, like tax rates, tax deductions, and inclusions.[94] On the other hand, international trade literature

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92. GATS, *supra* note 25, art. XIV (footnote omitted).

93. *See supra* note 25.

94. The international taxation literature focused on the Subsidies and Countervailing Measures Agreement. *See* JENNIFER E. FARRELL, THE INTERFACE OF INTERNATIONAL TRADE LAW AND TAXATION (2013); WTO AND DIRECT TAXATION (Michael Lang et al. eds., 2005).

already predicted frictions between both systems and the possible outcomes.[95]

Although the OECD Harmful Tax Competition reports were hardly criticized, only in 2013 was a dispute brought before the WTO to challenge the imposition of countermeasures against illegitimate tax competition. The tricky assessment of "likeness"[96] precluded a conclusive decision about the consistency of the challenged measures with the WTO agreements.

In spite of not rendering a conclusive decision about the consistency of the disputed countermeasures with the GATS, the Appellate Body position triggered an unprecedented action from the United States that blocked the reappointment of one of the Appellate Body Members, Professor Chang, who acted as a panelist in the dispute:

> First, in the recent DS453 appellate report in the financial services dispute between Panama and Argentina, more than two-thirds of the Appellate Body's analysis—*46 pages*—is in the nature of *obiter dicta*. The Appellate Body reversed the panel's findings on likeness and said that this reversal rendered moot all the panel's findings on all other issues, including treatment no less favorable, an affirmative defense, and the prudential exception under the GATS. Yet, the Appellate Body report then went on at great length to set out interpretations of various provisions of the GATS. These interpretations served no purpose in resolving

95. *See* Roman Grynberg & Bridget Chilala, *WTO Compatibility of the OECD Defensive Measures Against Harmful Tax Competition*, 2 J. World Inv. 507 (2001); Stephen J. Orava, *Potential WTO Claims in Response to Countermeasures Under the OECD's Recommendations Applicable to Alleged Tax Havens*, *in* International Tax Competition: Globalisation and Fiscal Sovereignty 177 (Rajiv Biswas ed., 2002); Michael Daly, *The WTO and Direct Taxation* (WTO Discussion Paper No. 9, 2005), wto.org/english/res_e/booksp_e/discussion_papers9_e.pdf.

96. Nicolas F. Diebold, Non-Discrimination in International Trade in Services: 'Likeness' in WTO/GATS (2010); Mireille Cossy, *Determining "Likeness" Under the GATS: Squaring the Circle?* (WTO Staff Working Paper No. ERSD-2006-08, 2006), https://doi.org/10.30875/d979431e-en; Joost Pauwelyn, *The Unbearable Lightness of Likeness* (2006), https://ssrn.com/abstract=2030940.

> the dispute—they were appeals of moot panel findings. Thus, more than two-thirds of the Appellate Body's analysis is comprised simply of advisory opinions on legal issues.
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> The Appellate Body is not an academic body that may pursue issues simply because they are of interest to them or may be to certain Members in the abstract. Indeed, as the Appellate Body itself had said many years ago, it is not the role of panels or the Appellate Body to "make law" outside of the context of resolving a dispute—in effect, to use an appeal as an occasion to write a treatise on a WTO agreement.
>
> But that is what the report did in this appeal.[97]

Furthermore, the Panel developed an interesting understanding of "measures affecting trade in services" that was not the object of the appeal and may spill over to many unilateral tax measures adopted to combat harmful tax competition such as a diverted profits tax, an exit tax, or the tax treatment of inversions:

> [T]he concept of "measures . . . affecting trade in services" covers measures related to the "constitution" or "acquisition" of a legal person within the territory of a Member for the purpose of supplying a service. . . .
>
> The fact that this requirement does not apply at the time of establishing a commercial presence in Argentina but rather at the time of withdrawing the investment from the Argentine market does not prevent this requirement from being related to the supply of services through commercial presence . . . Indeed, such a measure may have an impact on a service supplier's decision to invest in the market or, in the terms of the GATS, to establish a commercial presence. . . . It is our view that the

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97. *Statement by the United States at the Meeting of the WTO Dispute Settlement Body Geneva*, WTO 3 (May 23, 2016), https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf (footnotes omitted).

> determination which implies leaving outside the scope of the GATS those measures which apply at the time when a legal person withdraws from a market could open up a breach in the Agreement, as it would mean that measures which influence the decision to set up in the territory of a Member would not be covered by the Agreement.[98]

All controversy and noise surrounding the *Argentina–Financial Services* decisions could be explained by the threat it represents to BEPS and the frightening awareness that tax sovereignty is not absolute. The International Taxation measures are not only subject to international taxation standards, tax treaties, and domestic provisions, but to a broader set of multilateral and bilateral rules. Moreover, States had to face the inevitable: measures to curb tax base erosion, either international or domestic, cannot be applied in an "arbitrary or unjustified" way.

This case is unique. The dispute was between two non-OECD Members and, nonetheless, Argentina argued that the measures under dispute were grounded in the OECD work on the Harmful Tax Competition Reports (1998 and subsequent), the Global Forum on Transparency and Exchange of Information for Tax Purposes, and the OECD BEPS Action Plan 5—Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance.[99] Further, not

98. Panel Report, *Argentina–Financial Services*, *supra* note 24, ¶¶ 7.111–.112 (first omission in original). The findings are related to Measure 8 under dispute that requires service suppliers from non-cooperative countries to obtain prior authorization from the Central Bank of the Argentine Republic (BCRA) in order to be able to repatriate their direct investments. A more robust development about the consequences of that finding and unilateral tax measures to curb tax base erosion is not in the scope of this present Article.

99. *Id.* ¶ 7.527:

> Argentina maintains that it has followed the recommendations of the OECD's Global Forum in establishing a comprehensive regulatory framework to address the risks posed by harmful tax competition to the integrity and stability of its tax system. Argentina argues that measures such as the withholding tax on payments of interest or remuneration (measure 1), the presumption of unjustified increase in wealth (measure 2), transaction valuation based on transfer prices (measure 3), the

only international tax measures per se were challenged before the WTO for the first time, but tax measures based on the OECD's "globally accepted" international standard for exchange of information were at the core of the dispute. Moreover, the disputed tax measures were also related to the core mission of the Global Forum on Transparency and Exchange of Information for Tax Purposes, which is part of the OECD system. So, the legitimacy of the international taxation bodies and standards were under dispute as well. Both the Panel and the Appellate Body reports assumed the high value of the commitment with the EoI standard and the above mentioned international bodies without any concerns about the legitimacy or the "degree of normativity" of the commitments under the OECD and the Global Forum framework.

A few months after the Appellate Body report on *Argentina–Financial Services* was circulated among WTO Members, the *India–Solar Cells* report was issued. In this dispute, India's measures concerning the development of solar energy production under the "Jawaharlal Nehru National Solar Mission" were challenged by U.S.-India's defense under the GATT General Exception Article XX(d)[100] alleging

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> payment received rule for the allocation of expenditure (measure 4) and the requirements for the registration of branches (measure 7) are widely accepted in the Global Forum's initiative as appropriate regulatory responses to address the harmful effects of tax jurisdictions which do not cooperate in the collection of taxes and compliance with the tax laws of third parties.[679] [Text of n.679:] Argentina's first written submission, paras. 244-248 (referring to OECD, *Harmful Tax Competition—An Emerging Global Issue*, OECD, 1998, (Exhibit ARG-5), and *OECD, OECD's Project on Harmful Tax Practices, The 2004 Progress Report*, (Exhibit ARG-9), *available at* http://www.oecd.org/tax/harmful/30901115.pdf.

Id.

100. Article XX(d) of the GATT, *supra* note 25, is similar to Article XIV(c) of the GATS:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall

that the measures were implemented to comply with international obligations related to climate change, and identified the preamble of the WTO Agreement, the U.N. Framework Convention on Climate Change, the Rio Declaration on Environment and Development, and U.N. Resolution A/RES/66/288 (Rio+20 Document: "The Future We Want") as "laws and regulations" that the measures under dispute were necessary to secure compliance with.[101] The Appellate Body recalled that "the degree of normativity of an instrument is one of the relevant factors in assessing whether such instrument qualifies as a 'law or regulation' under Article XX(d);"[102] in other terms, to be considered as "laws or regulations" the international agreement should be enforceable domestically. Then, the report stated that "this assessment must always be carried out on a case-by-case basis, in light of the specific characteristics and features of the instruments at issue, the rule alleged to exist, and the domestic legal system of the Member concerned,"[103] and concluded that India did not demonstrate that the international instruments it had identified fell within the scope of "laws or regulations" under Article XX(d).[104]

Comparing the reports issued in both cases, consider the weight attributed to environmental international agreements that were negotiated, signed, and ratified by both parties to the dispute; in contrast, the compliance with international taxation standards by two Members were not part of the international organization standard setter, and they did not participate in the standard setting process, which denotes not only a double-standard assessment but also the bias toward the OECD and

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> be construed to prevent the adoption or enforcement by any contracting party of measures . . . (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices; . . .

101. Appellate Body Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, ¶ 5.92 n.275, WTO Doc. WT/DS456/AB/R (adopted Oct. 14, 2016).

102. *Id.* ¶ 5.121.

103. *Id.* ¶ 5.150.

104. *Id.* ¶ 5.151.

the Global Forum work on taxation. Certainly, the reluctancy to rule on the tax regulatory framework effects on "consumer preferences" and "conditions of competition" relating to the supply or suppliers of services and the bias toward the OECD standards is related to the difficulty faced by the panelists and Appellate Body Members in ruling on the international taxation legal system, which is yet deeply connected to sovereignty and based highly on competition rather than on cooperation.

Indeed, the *Argentina–Financial Services* reports were mirrors reflecting the international taxation legal system's fragility that is backed up by a set of coercive measures to ensure compliance with imposed standards settled in non-inclusive fora. The next Part will explain how the incoherencies of the OECD's Harmful Tax Competition reports affected the *Argentina–Financial Services* reports that failed to assess relevant issues to the dispute.

III. *Argentina–Financial Services* Reports: Mirrors Reflecting the International Taxation Legal System's Fragilities

When two international systems clash, their strengths and weaknesses become evident. In this dispute, the fragility of the international taxation legal system stood out. Effectively, the international taxation legal system was put on trial before the international trade. The vulnerability of the liquid model of international governance characterized by the absence of a global international taxation organization with a coherent set of rules, guidance, and recommendations became evident. When confronted with the international trade system, a rule-oriented system where coherence and proportionality are crucial elements for the assessment of the consistency of a trade restrictive measure, the international taxation legal system cracked. Actually, the OECD work on Harmful Tax Competition with all its inherent incoherencies is one of the best topics, if not the best, to demonstrate the fragility of the international taxation legal system, which is not able to stand for itself when confronted with other international legal systems (i.e., the international trade system).

Argentina's defense was based on the necessity of defensive tax measures to secure compliance with national laws and regulations, namely the income tax and criminal tax code, and the constitutional principle of capacity to pay, and the OECD and Global Forum reports on harmful tax competition were referred to as the basic instruments globally accepted and recommended for the application of defensive tax measures. Thus, the Panel findings and conclusions often rely on those

non-binding instruments. Both the Panel and the Appellate Body Reports mirrored the OECD and Global Forum Reports without further consideration about the compatibility of the views expressed by the Harmful Tax Competition (HTC) Reports and the binding rules and objectives of the WTO Agreements. The HTC Reports were referred to without any questioning about their legitimacy and correctness.

Although the WTO system recognizes the sovereignty of Members to establish their public policies and the degree of protection, tax policies should be subject to high scrutiny because the imposition of corporate tax on cross-border transactions might serve to maintain tax system integrity and distribute income, but free trade increases the global tax basis that would be harmed by double taxation. Regarding the measures under dispute, the problem is aggravated by the high degree of competition among tax jurisdictions. The imposition of defensive measures against harmful tax competition may be disguised protectionism against legitimate changes in the patterns of trade among countries due to the increasing digitalization of the economy and trade of intangibles. E-commerce and the low investment costs to create the needed infrastructure for its expansion have enabled the growing participation of developing countries in the supply of digital goods and services in the international context. Thus, the inability to cooperate in tax issues should not legitimize severe trade restrictions leading to double taxation. That would not be in the best interest of peoples and could harm the benefits of free trade, mainly to developing countries.

Although the Appellate Body Report in *Argentina–Financial Services* was not conclusive about the consistency of the defensive tax measures with the GATS provisions, the reasoning developed by the Panel and the Appellate Body regarding the status of the OECD and Global Forum as the relevant fora for setting "globally" accepted international taxation standards, and the effectiveness of the exchange of information for tax purposes to curb tax basis erosion, may be subject to scrutiny.

A. The OECD and the Global Forum for Transparency and Exchange of Information for Tax Purposes: "Relevant International Organizations"?

Both the OECD and the Global Forum were found to be international relevant fora in the reports without any assessment of the WTO agreements provisions related to the characterization of an international organization as a relevant standard setter: "It also appears significant to us

that, in the relevant international fora (especially the OECD and the G-20), the use of defensive measures has been recognized as a legitimate tool which countries may utilize to protect their tax systems and prevent harmful tax practices."[105]

However, the governance structure of both entities may lead to a different conclusion. Krisch observed that the more States have concerns about sovereignty, the more liquid the international system will be, and the International Taxation legal system is an example.[106] A liquid international system is characterized by fragmented authority, whereas the decisions are taken by multiple entities that are not necessarily coordinated and coherent. Besides, the asymmetry of technical capacity among States and the use of coercive diplomacy are determinants for "dull consent" by developing countries. Furthermore, short deadlines to negotiate and reach an agreed solution for international taxation issues impose additional obstacles for developing countries' effective inclusiveness in the international taxation global governance structure. Hence, the international taxation global governance system is characterized by a high degree of liquidity and "dull acceptance" of the standards, guidance, and recommendations (i.e., the OECD and the Global Forum).

The international taxation legal system was developed through a network of bilateral tax treaties, guidance, recommendations, standards, and domestic legislation, and absent a global organization to function as a forum for negotiations and dispute resolution. Besides, the concept of "tax sovereignty" permeates the system. In fact, the persistent recourse to the "tax sovereignty" discourse is an obstacle to effective cooperation among tax jurisdictions. The international taxation legal system is still highly competitive. Not surprisingly, "beggar-thy-neighbor" and "race to the bottom" policies are features of a system where States are competing for revenue and foreign investments in a "zero-sum" game.[107]

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105. Panel Report, *Argentina–Financial Services*, *supra* note 24, ¶ 7.715.

106. Nico Krisch, *Liquid Authority in Global Governance*, 9 Int'l Theory 237 (2017); *see also* Michael Zürn, *From Constitutional Rule to Loosely Coupled Spheres of Liquid Authority: A Reflexive Approach*, 9 Int'l Theory 261 (2017).

107. *See* Yariv Brauner, *What the BEPS?*, 16 Fla. Tax Rev. 55, 65 (2014). In this Article, the author proposes a paradigm shift from a

The OECD is a closed international organization, and the membership is conditioned on an invitation. Furthermore, it has only 36 members in contrast with the 164 WTO Members. Despite all efforts to include the non-Members as observers, the implementation of the guidance and recommendations developed by the OECD is confined to the interests and the suggestions of its Members.[108] Indeed, neither Argentina nor Panama are OECD Members.

In 2000, the Global Forum for Tax Transparency was established to monitor the implementation of the transparency and the exchange of information for tax purposes standards. The Global Forum was open to the participation of OECD and non-OECD members willing to contribute to the peer review process and the budget. Although the Global Forum membership counts 154 tax jurisdictions participating on an equal footing basis, it delivers progress reports to the G20 Leaders and G20 Ministers of Finance and Central Board Governors regularly.[109] In 2009, the OECD Council Decision C(2009)122/Final restructured the Global Forum on Transparency and Exchange of Information for Tax Purposes. The Global Forum is an international body without legal personality and connected to the OECD Center for Tax Policy and Administration. It is located in the OECD headquarters, and the Centre for Tax Policy and Administration Secretariat provides support for its activities. Although 139 countries have adhered to the Global Forum, they do not influence the setting of the standards of exchange of information for tax purposes that was recommended by the OECD Centre for Tax Policy.

The WTO Agreements define "relevant international organizations" to set internationally accepted international standards.[110] The term

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completion-based system to a collaborative-based international taxation system because most of the international taxation system's failures are due to its current features such as the physical presence and the residence and source paradigm. *See also* Allison Christians, *How Nations Share*, 87 Ind. L.J. 1407 (2012).

108. *See* Christina L. Davis, *More than Just a Rich Country Club: Membership Conditionality and Institutional Reform in the OECD* (Harvard Working Paper, 2016), https://scholar.harvard.edu/files/cldavis/files/davis2016b.pdf.

109. *About the Global Forum*, OECD, http://www.oecd.org/tax/transparency/about-the-global-forum/ (last visited May 17, 2020).

110. GATS, *supra* note 25, art. VI, 5(b) n.3; Agreement on the Application of Sanitary and Phytosanitary Measures, annex A, 3(d), Apr. 15, 1994,

"relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO. The OECD is not an open membership international organization. The Global Forum is not even an intergovernmental organization with legal personality.

In sum, the OECD and the Global Forum do not match the requirements for "relevant international organization" to set internationally accepted international tax standards that could justify the adoption of measures inconsistent with the WTO Agreements.

The legitimacy of the OECD as an authority to set international tax standards and tax policy recommendations is highly questionable. The most typical example of the fragility of the OECD as an international taxation standard setter is the OECD Model Convention—the most solid of all OECD's recommendations.

States have been concluding bilateral tax treaties since the end of the 19th century to establish a system to avoid double taxation. The conclusion of tax treaties was encouraged by the League of Nations, which drafted the original Model Treaty. Based on the League of Nations' Model, the OECD developed its Model Tax Treaty to guide the negotiations of tax treaties.[111] The Model Treaties are recommendations for States and subject to "reservations" and observations when the State would not follow the guidance or clarify the application of a provision.

However, the OECD is not the only source of Model Tax Treaties. The United Nations developed a Model accounting for the interests of developing countries, adding provisions such as tax sparing.[112]

Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493; Agreement to Technical Barriers to Trade, Annex 1.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120.

111. Reuven S. Avi-Yonah, International Tax as International Law: An Analysis of the International Tax Law Regime (2007); Klaus Vogel on Double Taxation Conventions: A Commentary to the OECD-, UN- and US- Model Conventions for the Avoidance of Double Taxation of Income and Capital with Particular Reference to German Treaty Practice (3d ed. 1997); Yariv Brauner, *An International Tax Regime in Crystallization*, 56 Tax L. Rev. 259 (2003) [hereinafter Brauner, *Crystallization*].

112. U.N. Dep't of Econ. & Soc. Affairs, Financing for Dev. Office, Manual for the Negotiation of Bilateral Tax Treaties Between Developed and Developing Countries (2019); Michael Lennard, *The UN Tax Convention as Compared with the OECD Model Tax Convention—Current*

The U.S. Treasury Department drafted a Model to guide the negotiations between the United States and other countries. The U.S. Model also contains numerous departures from the OECD Model[113] that were enlarged with the publication of the U.S. Model 2016. Grinberg noted that the multilateral discussion about taxation is historically perceived "as a second-order matter," and any multilateral tax initiative contrary to the U.S. interests would be vetoed or not approved by the U.S. Congress[114]—not to mention other international organizations and regional agreements dealing with taxation (i.e., the Forum on Tax Administration).

The fragility of the OECD system was acknowledged by the negotiators that include a "carve-out" for the OECD Arrangement on Officially Supported Export Credits (OECD Arrangement) Commercial Interest Reference Rate (CIRR) in the Subsidies and Countervailing Measures Agreement.[115] The Illustrative List of Export Subsidies, section (k), second sentence, (the OECD "Safe Haven") states:

> Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.[116]

Points of Difference and Recent Developments, ASIA-PAC. TAX BULL., Jan.–Feb. 2009, at 4; Luís Eduardo Schoueri, *Tax Sparing: A Reconsideration of the Reconsideration*, *in* TAXATION, LAW AND DEVELOPMENT 106 (Yariv Brauner & Miranda Stewart eds., 2013).

113. Omri Marian & Yariv Brauner, *United States*, *in* DEPARTURES FROM THE OECD MODEL AND COMMENTARIES: DEPARTURES FROM THE OECD MODEL AND COMMENTARIES 537 (Guglielmo Maisto ed., 2014).

114. Grinberg, *supra* note 20.

115. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

116. *Id.* annex 1(k).

Thus, the assumption made by both the Panel and Appellate Body Reports that the OECD and the Global Forum are international taxation authorities is highly questionable, not just because neither Argentina nor Panama are OECD Members but also for the departures from the OECD and the Global Forum standards by Members. Besides the legitimacy issues, the OECD standards and recommendations on Harmful Tax Competition have changed from report to report adding uncertainties and incoherencies that will be described in the following Part.

Nonetheless, the parties to the dispute arguments and the reports' findings may be explained by the shared perception of the OECD as the *de facto* world tax organization.[117] Grinberg described that in spite of their soft law nature, the OECD Model Convention Commentaries are largely adopted by national courts and tax administrations.[118]

B. The OECD's International Taxation Standards and Harmful Tax Competition

The Argentine defense was based on the necessity of defensive tax measures to secure the compliance of national laws and regulations, namely the income tax and criminal tax code and the constitutional principle of capacity to pay, based on the OECD reports on harmful tax competition and the Global Forum standards for the exchange of information for tax purposes. Both the Panel and the Appellate Body Reports mirrored the OECD and Global Forum Reports without further consideration about the compatibility of the views expressed by the Harmful Tax Competition Reports and the binding rules and objectives of the WTO Agreements. The Harmful Tax Competition Reports recommendations were accepted as international standards without any questioning. This

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117. *See* Brauner, *Crystallization*, *supra* note 111; Arthur Cockfield, *The Rise of the OECD as Informal 'World Tax Organization' Through National Responses to E-Commerce Tax Challenges*, 8 Yale J.L. & Tech 136 (2006); Diane M. Ring, *Who Is Making International Tax Policy?: International Organizations as Power Players in a High Stakes World*, 33 Fordham Int'l L.J. 649 (2010).

118. Grinberg, *supra* note 20; *see* Michael Lang & Florian Brugger, *The Role of the OECD Commentary in Tax Treaty Interpretation*, 23 Austl. Tax F. 95, 99 (2008) (criticizing the behavior of national courts and tax administration).

section will provide a brief historical perspective on the Harmful Tax Competition Reports and describe the changes in the recommendations and standards.

1. The Harmful Tax Competition: An Emerging Global Issue Report and Subsequent Reports

In 1996, the OECD Ministers issued a Communiqué[119] that was endorsed by the G7 about the problems posed by harmful tax competition to the integrity of national tax systems by promoting national tax base erosion.[120] Then, the OECD Committee of Fiscal Affairs launched the Harmful Tax Competition (HTC) project. In 1998, the OECD Report on Harmful Tax Competition: An Emerging Global Issue was published.[121] The report urged countries to reach an agreement that the decision about the location of mobile financial and services activities based on economic reasons rather than primarily on tax reasons to "help move towards the 'level playing field' which is so essential to the continued expansion of global economic growth."

Nonetheless, the report recognized that "countries should remain free to design their own tax systems as long as they abide by internationally accepted standards in doing so."[122] In other words, tax sovereignty rights should be limited by international tax standards to avoid harmful tax competition and tax base erosion. So, the HTC report would assist tax jurisdictions to agree on a set of international standards on the matter.

The report recognized the difference between "acceptable" and "harmful" preferential tax regimes.[123] Moreover, the fact that the

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119. OECD, *Meeting of the Council at Ministerial Level, Paris, 21–22 May 1996*, http://www.g7.utoronto.ca/oecd/oecd96.htm.

120. G7, *Economic Communiqué: Making a Success of Globalization for the Benefit of All* (June 28, 1996), http://www.g8.utoronto.ca/summit/1996lyon/communique.html.

121. OECD, *Harmful Tax Competition: An Emerging Global Issue* (1998), https://doi.org/10.1787/9789264162945-en [hereinafter HTC Report].

122. *Id.* at 15.

123. *See* Michael C. Webb, *Defining the Boundaries of Legitimate State Practice: Norms, Transnational Actors and the OECD's Project on Harmful Tax Competition*, 11 Rev. Int'l Pol. Econ. 787 (2004); Joann M. Weiner & Hugh J. Ault, *The OECD's Report on Harmful Tax Competition*, 51 Nat'l Tax J. 601 (1998).

"harmfulness" of a tax regime is a matter of "point of view" was also acknowledged because countries may have structural disadvantages (i.e., grant of tax incentives to offset non-tax disadvantages to attract investments).[124] The intent to design a tax regime that is "in effect, tailored to attract investment or savings originating elsewhere or to facilitate the avoidance of other countries' taxes"[125] would be the distinctive feature of a harmful tax regime.

Then, the report identified two types of harmful tax jurisdictions: tax havens and preferential tax agreements in non-tax haven jurisdictions. The report recognized the difficulties in defining a tax haven and opted to identify the critical features of a tax haven jurisdiction: no or only nominal taxes, lack of effective exchange of information, lack of transparency, and no substantial activities.[126] A harmful tax regime would be identified by four key factors: no or low effective tax rates, "ring-fenced" tax regime, lack of transparency, and lack of effective exchange of information.[127] Additionally, other factors could assist in the identification of a harmful tax regime: an artificial definition of the tax base, failure to adhere to international transfer pricing principles, foreign source income exempted from residence country tax, negotiable tax rate or tax base, existence of secrecy provisions, access to an extensive network of tax treaties, regimes that are promoted as tax minimization vehicles, and regimes that encourage purely tax-driven operations or transactions.[128]

Disregarding the previous encouragement for countries to sign tax treaties as a public policy destined to attract and protect trade and

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124. HTC Report, *supra* note 121, at 15:

> Tax competition and the interaction of tax systems can have effects that some countries may view as negative or harmful but others may not. For example, one country may view investment incentives as a policy instrument to stimulate new investment, while another may view investment incentives as diverting real investment from one country to another.

125. *Id.* at 16.
126. *Id.* at 23.
127. *Id.* at 27.
128. *Id.* at 30–34.

investments,[129] the OECD report considered an extensive net of bilateral tax treaties one of the indicators of harmful tax competition:

> The OECD has encouraged countries to extend their treaty networks since an extensive network of treaties helps eliminate double taxation and encourages co-operation between tax authorities. Yet an extensive treaty network may open up the benefits of harmful preferential tax regimes offered by the treaty country to a broader array of countries than would otherwise be the case. One of the motivations for extending the treaty network in some countries may be to enhance the benefits of harmful preferential tax regimes. A wide treaty network is less vulnerable to abuse if the treaties involved contain self-protection measures, such as clear definitions of residence, specially designed and comprehensive anti-abuse provisions, and effective mechanisms for engaging in information exchange.[130]

The incoherent position of giving incentives to the conclusion of bilateral tax treaties and, then, appointing an extensive net of tax treaties as a tool for harmful tax competition is one of the examples of the fragility of the international taxation standards, guidance, and recommendations. International tax policies once encouraged can later be considered as harmful and subject to defensive measures that are nothing else than economic sanctions.

The 1998 Report also recommended countermeasures to curb the harmful effects of tax havens and preferential tax regimes. The defensive measures against harmful tax competition could be domestic, bilateral, or multilateral actions.

Although, the Report recognized the possibility of leakages in the absence of international cooperation,[131] not only did the domestic and

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129. OECD, *Recommendation of the Council Concerning the Avoidance of Double Taxation* (July 30, 1963), https://legalinstruments.oecd.org/public/doc/405/405.en.pdf.

130. HTC Report, *supra* note 121, at 33.

131. HTC Report: "[I]n the absence of international cooperation, there is little incentive for a country which provides a harmful preferential tax regime to eliminate it since this could merely lead the activity to move to another country which continues to offer a preferential treatment." *Id.* at 38.

bilateral recommended defensive measures outnumber the international defensive measures, but they were also more detailed and rule-oriented (Table 1).

Domestic	Bilateral	Multilateral
1. Recommendation concerning Controlled Foreign Corporations (CFC) or equivalent rules. 2. Recommendation concerning foreign investment fund or equivalent rules. 3. Recommendation concerning restrictions on participation exemption and other systems of exempting foreign income in the context of harmful tax competition. 4. Recommendation concerning foreign information reporting rules. 5. Recommendation concerning tax rulings. 6. Recommendation concerning transfer pricing rules. 7. Recommendation concerning access to banking information for tax purposes.	1. Recommendation concerning greater and more efficient use of exchanges of information. 2. Recommendation concerning the entitlement to treaty benefits. 3. Recommendation concerning the clarification of the status of domestic anti-abuse rules and doctrines in tax treaties. 4. Recommendation concerning tax treaties with tax havens. 5. Recommendation concerning co-ordinated enforcement regimes (joint audits; co-ordinated training programmes. 6. Recommendation concerning co-ordinated enforcement regimes (joint audits; co-ordinated training programmes).	1. The adoption of a set of Guidelines intended to ensure that Member countries refrain from adopting preferential tax regimes constituting harmful tax competition and gradually to eliminate those harmful preferential tax regimes that currently exist. 2. The creation of a subsidiary body of the Committee, the Forum on Harmful Tax Practices. 3. The preparation of a list of jurisdictions constituting tax havens. 4. The development and active promotion of principles of Good Tax Administration relevant to counteracting harmful tax practices.

The report also recommended the creation of the Forum for Harmful Tax Practices to monitor the implementation of the guidelines and recommendations of the HTC Report and also to produce a list of tax havens among other activities. The Forum was effectively

established by the OECD Council of Ministers[132] as a subsidiary body of the Committee on Fiscal Affairs.

Although the HTC report acknowledged that each country was sovereign to choose its tax system and tax rates, it recommended extensive defensive measures against countries that did not impose income or corporate taxes or applied low rates. Swiss and Luxembourg submitted statements about their disagreement with the OECD Report on harmful tax competition but did not veto the report.[133]

In 2000, the Towards Global Tax Co-operation Report recommended that instead of using a list of tax havens; countries should have recourse to a list of "non-cooperative" tax jurisdictions based on compliance with the effective exchange of information for tax purposes standard after the United States opposed to the HTC report.

2. The U.S. Backlash Against the HTC Report (1988)

In spite of the initial support,[134] the Harmful Tax Competition work received backlash from the United States for imposing restraints on tax sovereignty.[135] In 2000, U.S. Secretary of the Treasury Paul O'Neill published a statement harshly criticizing the OECD work on harmful tax competition.[136] More than criticizing the OECD interference on countries right to design domestic tax system and the "potentially unfair treatment of some non-OECD countries," the U.S. Treasury Secretary admitted the intent to lower the tax rates and to reform the U.S. tax system:

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132. *Id.* at 65–66 (reprinting the Recommendation of the Council on Counteracting Harmful Tax Competition, adopted by the Council on April 9, 1998).

133. *Id.* at 73–78.

134. See Weiner & Ault, *supra* note 123.

135. For a detailed description of the U.S. position, see Ring, *supra* note 117; *see also* Robert T. Kudrle, *The OECD's Harmful Tax Competition Initiative and the Tax Havens: From Bombshell to Damp Squib*, 8 Global Econ. J., Feb. 29, 2008, art. 1.

136. Press Release, U.S. Treas. Dep't, Treas. Sec'y O'Neill Statement on OECD Tax Havens (May 10, 2001), https://www.treasury.gov/press-center/press-releases/Pages/po366.aspx [hereinafter O'Neill Press Release]; Paul O'Neill, *Confronting OECD's 'Harmful' Tax Approach*, Wash. Times (May 11, 2001), http://www.uniset.ca/microstates/ oneill.pdf.

> I am troubled by the underlying premise that low tax rates are somehow suspect and by the notion that any country, or group of countries, should interfere in any other country's decision about how to structure its own tax system. I also am concerned about the potentially unfair treatment of some non-OECD countries. The United States does not support efforts to dictate to any country what its own tax rates or tax system should be, and will not participate in any initiative to harmonize world tax systems. The United States simply has no interest in stifling the competition that forces governments—like businesses—to create efficiencies.
>
> In fact, the Administration is actively working to lower tax rates for all Americans. After reducing our tax burden, we will turn our attention toward reforming our system to make it simpler and more efficient. On these principles the United States remains firm.[137]

The U.S. position is explained not only by the intended tax cuts but also by the portfolio interest exemption that was introduced by the Deficit Reduction Act of 1984 and abolishment of the withholding tax of 30% on portfolio interest income earned by foreign persons from sources within the United States.[138] Moreover, the portfolio interest income would not be subject to the reporting requirements of Code section 6049, which regulates the collection of information on certain U.S. sourced income paid to foreign persons. In other terms, the portfolio interest exemption has precisely the same tax results—no collection of taxes on interest income paid to foreign persons by domestic financial services providers—as tax havens or harmful tax regimes. Also, the U.S. would not be compliant with the effective exchange of information and transparency standards due to the no reporting requirements. In fact, no data on the foreign taxpayer or exempted portfolio interest payment would be effectively available to the U.S. tax authority to exchange with the requesting tax authority. Also, the U.S. portfolio interest exemption promoted a well-documented "race to the bottom," with the major

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137. O'Neill Press Release, *supra* note 136.

138. I.R.C. § 871(h); I.RC. § 881(c).

economies enacting similar legislation motivated by the fear of losing portfolio investments to the United States.[139]

Later in the statement, the U.S. Treasury Secretary urged the OECD to work to change its focus to the effective exchange of information for tax purposes:

> Where we share common goals, we will continue to work with our G7 partners to achieve these goals. The work of this particular OECD initiative, however, must be refocused on the core element that is our common goal: the need for countries to be able to obtain specific information from other countries upon request in order to prevent the illegal evasion of their tax laws by the dishonest few. In its current form, the project is too broad, and it is not in line with this Administration's tax and economic priorities.[140]

After the U.S. backlash on the report, the OECD changed its understanding about tax havens and preferential tax regimes, unlisted tax havens, coined the expressions "cooperative" and "uncooperative" tax jurisdictions, and touted the complete success of the Harmful Tax initiative.[141] Moreover, the OECD's Project on Harmful Tax Practices: The 2001 Progress Report[142] reinforced that the "no or nominal tax" criterion was insufficient to characterize tax havens and that every jurisdiction had the right to determine whether to impose a tax on income and at what rate.[143] Moreover, the requirements for the characterization of a tax haven changed to lack of transparency and exchange of information. So, the OECD only required transparency and efficient exchange

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139. For a detailed outline on the U.S. portfolio interest exemption and the resulting "race to the bottom," see Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 Harv. L. Rev. 1573 (2000); Reuven S. Avi-Yonah, *What Goes Around Comes Around: Why Was the U.S. Responsible for Capital Flight (And What It Can Do About It)* (U. Mich. Pub. Law Research Paper No. 307, 2013), https://ssrn.com/abstract=2208553.

140. O'Neill Press Release, *supra* note 136.

141. Webb, *supra* note 123, at 787.

142. *The OECD's Project on Harmful Tax Practices: The 2001 Progress Report* (2001), https://www.oecd.org/ctp/harmful/2664438.pdf.

143. Michael Littlewood, *Tax Competition: Harmful to Whom?*, 26 Mich. J. Int'l L. 411 (2004).

of information provision for a country be classified as a cooperative tax jurisdiction.

3. The Exchange of Information for Tax Purposes Standard

In 2000, the Global Forum for Tax Transparency and Exchange of Information for Tax Purposes was established to monitor the implementation of transparency and the exchange of information for tax purposes standards. The Global Forum was open to the participation of OECD and non-OECD members willing to contribute to the peer review process and the budget. Although the Global Forum membership counts 154 tax jurisdictions participating on an equal footing basis, it delivers progress reports to the G20 Leaders and G20 Ministers of Finance and Central Board Governors regularly.[144]

In 2010, the OECD published a new report, Promoting Transparency and Exchange of Information for Tax Purposes,[145] and States agreed on the Automatic Exchange of Information (AEoI) and the Exchange of Information on Request (EoIR) standards. The Global Forum monitors the implementation of the standards. Also, countries agreed on the Common Reporting Standard (CRS) in 2014.[146]

The United States did not commit to the Global Forum AEoI standard. Instead, the United States launched the negotiations of FATCA and IGAs with other tax jurisdictions to receive information about U.S. taxpayers from financial institutions abroad and committed to "pursue the adoption of regulations and to advocate and support relevant legislation to achieve such equivalent levels of reciprocal automatic exchange."[147]

Recently, France has announced the possibility of renouncing the France-U.S. FATCA agreement in the case of a failure to renegotiate

144. Glob. Forum, *Exchange*, *supra* note 68.

145. OECD, *Promoting Transparency and Exchange of Information for Tax Purposes* (Jan. 19, 2010), http://www.oecd.org/newsroom/44431965.pdf.

146. OECD, *Automatic Exchange of Financial Account Information: Background Information Brief* (Jan. 2016), https://www.oecd.org/ctp/exchange-of-tax-information/Automatic-Exchange-Financial-Account-Information-Brief.pdf.

147. *Automatic Exchange of Information (AEOI): Status of Commitments*, OECD, https://www.oecd.org/tax/automatic-exchange/commitment-and-monitoring-process/AEOI-commitments.pdf (last updated May 2020).

the agreement to protect dual nationals that have been facing hurdles in contracting with financial institutions.[148]

As outlined above, the OECD "globally accepted international taxation standards" have changed throughout the years, and expressions such as tax havens and preferential tax regimes based on tax and tax rates changed to non-cooperative tax jurisdictions related to the effectiveness of the means of exchanging information for tax purposes.

Argentina argued that the measures under dispute were "widely accepted in the Global Forum's initiative as appropriate regulatory responses to address the harmful effects of tax jurisdictions which do not cooperate in the collection of taxes and compliance with the tax laws of third parties"[149] and referred to the Harmful Tax Competition: An Emerging Global Issue, and the OECD's Project on Harmful Tax Practices: The 2004 Progress Report to support the argument. The Panel Report concluded that "Argentina had provided ample evidence of the recognition by these fora [G-20 and the OECD] of the important role of defensive tax measures as a means to protecting public revenue."[150] However, the Harmful Tax Competition Reports' conclusions were not undisputable, not only because of their incoherencies but also for the achieved results.

First, although it acknowledged that each country was sovereign to choose its tax system and tax rates, it recommended extensive defensive measures against countries that did not impose income or corporate taxes or applied low rates. The existence of a mandatory international tax rule for exchanging of information is debatable. Garufi[151] argued that uncooperative behavior is not in violation of international law rules because the exchange of information for tax purposes contributes to

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148. Gregory Viscusi, *France Should Consider Abandoning FATCA, Parliament Reporter Says*, Bloomberg (May 15, 2019, 7:00 AM), https://www.bloomberg.com/news/articles/2019-05-15/france-should-consider-abandoning-fatca-lawmakers-report-says.

149. Panel Report, *Argentina–Financial Services*, *supra* note 24, ¶ 7.527.

150. *Id.* ¶ 7.651.

151. Sebastian Garufi, *Tax Havens and Exchange of Information: Is Uncooperative Behaviour a Violation of International Law?* (Bocconi Leg. Stud. Res. Paper No. 2355679, 2013), https://ssrn.com/abstract=2355679.

tax compliance.[152] However, the requirements of efficient exchange of information and transparency combined with the recommendation to strengthen Controlled Foreign Corporation (CFC) rules are useful for developed countries where parent companies are set but not developing countries that usually host the subsidiaries. In fact, the efficiency of CFC rules depends on the exchange of information and transparency standards for the imposition of income inclusion rules. Thus, developing countries, in general, do not benefit from the "global accepted international tax standards" of exchange of information for tax purposes, transparency, and strengthening of CFC rules. However, under the threat of defensive measures, like the imposition of higher tax rates for cross-border activities conducted in their jurisdictions, the developing countries had no option but to "accept" and comply with standards that ultimately add costs to tax administrations and business.

Further, the efficiency of the exchange of information for tax may be minimized by the countries' resistance to agree on mutual assistance to tax collection.[153] Not always is the tax owed spontaneously paid, and the tax authorities must rely on tax collection procedures. If the company has no assets in the country where the tax was assessed, the only way to compel the taxpayer to remit the amount would be through administrative or judicial assistance to tax collection. In other words, tax authorities could assess unpaid taxes, but tax assessment would be time-barred in the absence of tax collection assistance.

Other hurdles make the exchange of information for tax purposes ineffective. First, there is no unified tax identification number. The linguistic problem is also an obstacle: unless the tax authority can pay for an official translation, it is impossible to analyze the data

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152. Leandra Lederman & Joseph Dugan, *Information Matters in Tax Enforcement*, 2020 BYU L. Rev. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3325598.

153. The United States and Brazil, for example, made reservations to the multilateral Convention on Mutual Administrative Assistance in Tax Matters. *See Reservations and Declarations for Treaty No.127*, Council Eur., https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/127/declarations (status as of May 23, 2020); *see also Convention on Mutual Administrative Assistance in Tax Matters*, OECD, https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm (last updated Jan. 2020).

transferred. The lack of harmonized tax rules also contributes to the inefficiency of the exchange of information. For example, Helminen described the different meanings of "dividends" across tax jurisdictions and how the differences create opportunities for profit shifting strategies.[154] The use of hybrid instruments allows the same income to be taxed as interest in one tax jurisdiction and dividends in another one. So, even the characterization of income could be flawed, if the tax authority analyses only the tax return or information within reports such as the Country-by-Country reporting of a taxpayer without considering the legal mismatches.

Regarding the automatic exchange of information, the implementation of that standard will flood tax administrations with data that would require sophisticated IT tools to be criticized and meaningfully organized.[155] For developing countries, no or little benefit would result from a broader exchange of information, not to mention the prejudice for the Exchange of Information on Request once all available data is

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154. Marjaana Helminen, The International Tax Law Concept of Dividend (2010).

155. Arthur J. Cockfield, *Big Data and Tax Haven Secrecy*, 18 Fla. Tax Rev. 483 (2016) (explaining that the use of big data information technology tools have improved the analyses of unstructured data received by tax administrations by means of exchange of information). However, the incentives for the use of offshore tax havens remain due to the asymmetry of information between tax havens and tax authorities that makes almost impossible the tax audit; the reliance on secrecy laws to promote economic growth; the use of tax havens by elites as outlets for transferring assets and income abroad; the benefits accrued by stable economies from the inward investments of those elites; the influence of cultural, political, and historical factors on financial privacy laws. These factors would create a barrier to a global reform. He concluded that

> While big data provides a potential tool to assist in investigations, history and path dependence reduces the likelihood of progress at both the national and international level. Even in a world of perfect information, current political incentives promote the maintenance of the status quo of tax haven secrecy. Until these incentives change, it may be difficult or impossible for global reforms to reduce global financial crime in any meaningful way.

Id. at 539.

already available to the requesting tax authority. Thus, the onus of finding the specific information related to a taxpayer in the middle of the pile of unstructured data will rely on the requesting tax authority.

Another disputable issue is the contribution made by the "exchange of information for tax purposes" in combatting tax evasion. LuxLeaks[156] undermined the exchange of information standard's credibility. Luxembourg is not only a member of the Global Forum on Tax Transparency and Exchange of Information but also relies on an extensive network of exchange of information treaties and provisions. According to the Global Forum peer review processes, Luxemburg is also a "high compliance" tax jurisdiction.[157] Marian,[158] through an in-depth analysis of the leaked documents, demonstrated how a tax jurisdiction poaches other jurisdictions' income tax bases by offering shelter for a price. In other words, administrative practices (i.e., tax rulings and advanced transfer pricing agreements could be used and are used to erode tax bases), and the exchange of information mechanism did not prevent that.

While a formal definition of "tax haven" is elusive, it is generally understood that tax haven jurisdictions possess two essential characteristics: low statutory tax rates and strict secrecy laws. The results demonstrate how such features can be generated by opaque administrative practices, rather than by explicit statutory prescriptions. In fact, Luxembourg's tax laws look nothing like one might expect from a tax haven. Luxembourg's corporate tax rate is about 29%, higher than the rate in most industrialized jurisdictions. It has anti-tax-avoidance measures in place and requires taxpayers who seek favorable administrative rulings to have a substantive presence in Luxembourg. Nonetheless, during the sample period, Luxembourg enabled taxpayers to eliminate their tax liabilities by administrative rulings. Luxembourg did this by issuing binding, yet unpublished agreements, without reviewing

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156. Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. Rev. 532 (2018).

157. *Phase 1 and Phase 2 Reviews*, OECD (Nov. 2016), http://www.oecd.org/tax/transparency/GFratings.pdf.

158. Omri Marian, *The State Administration of International Tax Avoidance*, 7 Harv. Bus. L. Rev. 201 (2017); Omri Marian, *Is Something Rotten in the Grand Duchy of Luxembourg?,* 84 Tax Notes Int'l 281 (Oct. 17, 2016); *see also* Tracy A. Kaye, *Tax Transparency: A Tale Of Two Countries*, 39 Fordham Int'l L.J. 1153 (2016).

taxpayers' submissions, without asking taxpayers for information where information was missing while ignoring Luxembourg's own administrative guidance, binding intergovernmental legal procedures, as well as well-established principles of international tax law.

In 2013, OECD and G20 countries released the report Addressing Base Erosion and Profit Shifting and adopted a 15-point action plan (BEPS) to introduce coherence in the domestic rules that affect cross-border activities, reinforcing substance in the existing international standards, and improving transparency and certainty.[159] BEPS Plan Action 5 dealt with harmful tax competition and was a "revamp" of the previous OECD Reports. Mainly, the final report reinforced the standards for transparency and exchange of information for tax purposes without any relevant contribution.

In the context of the international taxation legal system, the adoption of standards, guidance, and recommendations weakened the system because, differently from other economic fields (e.g., the International Financial System),[160] the "no taxation without representation" principle is at its core. Any attempt to compare the international taxation legal system and other international economic system ignoring that unique feature will stick the "international tax diplomacy" in the dead-end road of States aggressively competing for tax revenue and well-advised taxpayers benefiting from tax loopholes.[161]

Both Reports assumed the relevance of the OECD work and the success of the exchange of information standard without any critical analysis. Consequently, the fragilities of the OECD and the Global Forum's work on Harmful Tax Practices were mirrored in *Argentina–Financial Services*. But the incoherencies and bias towards the OECD's work on international taxation also influenced the WTO reports on other aspects that will be outlined in the next Part of this Article.

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159. OECD, *Addressing Base Erosion and Profit Shifting* (2013), https://doi.org/10.1787/9789264192744-en; *BEPS Actions*, *supra* note 15.

160. *See* Grinberg, *supra* note 20.

161. Hugh J. Ault, *Reflections on the Role of the OECD in Developing International Tax Norms*, 34 Brook. J. Int'l L. 757 (2009); Rifat Azam, *Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS*, 50 Suffolk U. L. Rev. 517 (2017); Yariv Brauner, *Treaties in the Aftermath of BEPS*, 41 Brook. J. Int'l L. 973 (2016); Allison Christians, *BEPS and the New International Tax Order*, 2016 B.Y.U. L. Rev. 1603; Ring, *supra* note 117.

C. "The Muted," "The Forgotten," and "The Tax Principle"

Not only were the OECD and the Global Forum's authority and standards' degree of normativity not adequately assessed by the *Argentina–Financial Services* reports, the fragility of and the legitimacy bias towards the OECD international taxation legal system also (1) precluded Argentina from arguing the general exception of the GATS that relates to international taxation rules compliance under Article XIV(e); (2) forgot the Article of the Annex on Financial Services and the Substance standard for assessing the harmfulness of a tax regime; and, (3) dragged to the irrelevance domain the most basic tax principle "no taxation without representation" or the "strict legality."

1. Article XIV(e) of the GATS: The Muted Defense

Although the panel report found that the defensive tax measures were inconsistent with the MFN provision of the GATS (Article II), the General Exception of Article XIV(e) was not argued by Argentina to justify the application of the inconsistent measures.

Article XIV(e) of the GATS provides an exception for the MFN provision for tax measures "provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound."

The option for a "soft law" approach[162] compromised the recourse to Article XIV(d) to justify the discriminatory tax treatment under the grounds of compliance with international standards due to the non-binding nature of the recommendations. Again, the fragility of the international tax legal system shone through when confronted with a rule-oriented international legal system.

2. Article 2(b) of the Annex on Financial Services: The Forgotten Provision

Not all the Panel and Appellate Body reports mirrored the idiosyncrasies of the international taxation legal system. Whenever a measure affects the supply of financial services as defined in Article I:2 of the

162. Allison Christians, *Hard Law, Soft Law, and International Taxation*, 25 Wis. Int'l L.J. 325 (2007).

GATS, the Annex on Financial Services shall apply.[163] The relevance of the Annex on Financial Services for the interpretation and application of other provisions of the GATS was recognized in *China–Electronic Payment Services*.[164] Nonetheless, Panama's claims did not mention Article 2(b) of the Annex on Financial Services, which provides "Nothing in the Agreement shall be constructed to require a Member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information on the possession of public entities."

Clearly, Article 2(b) of the Annex on Financial Services prohibits coercive measures targeting the exchange of an individual's financial information or any information handled by public entities relating to the financial situation of individuals among Members (i.e., FATCA). The General Exceptions related to taxation are part of the GATS agreement; thus, both Article XIV(c) and (e) of the GATS part of Argentina's defense should not be applied and interpreted to justify the use of coercive measures to force WTO Members to disclose information in possession of public authorities as in the case of provisions or agreements for exchange of information. The use of defensive measures against harmful tax practices should not be a means of coercive negotiation of treaties or treaty provisions that would require the exchange of information for tax purposes.

3. Substance: The Forgotten Standard

Although Argentina only focused on the exchange of information for tax purposes standards, the reports on Harmful Tax Competition set the "substance standard" also. It is crucial that the business entity

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163. GATS, *supra* note 25, Annex on Financial Services art. 1(a).

164. *China–Electronic Payment*, *supra* note 46, ¶ 7.139 (alternation in original):

> Article XXIX of the GATS (*Annexes*) states that "[t]he Annexes to this Agreement are an integral part of this Agreement". Pursuant to that provision, the GATS Annex on Financial Services is treaty text. Moreover, it constitutes context for purposes of interpreting China's Schedule, which is itself an integral part of the GATS. . . . We shall therefore turn to the Annex as relevant context for the interpretation of China's Schedule.

carries on activities in the place where it is located. Consistent with BEPS Action 5, the "substance standard" for banking and insurance companies is that "the regulatory environment, where applicable, should already ensure that a business is capable of bearing risk and undertaking its activity." The terms of art for the OECD "substance standard" for banks are capital adequacy, liquidity, and systemic risk assessment. Unfortunately, BEPS Action 5 did not mention and clarify that the "substance standard" for banking companies is the core mission of the Basel Committee on Banking Supervision (BCBS), a global standard setter for the prudential regulations of banks, and the Basel Accords I, II, and III.

The International Financial system and the International Taxation legal system governance model is very similar. As observed by Lupo-Pasini, States chose to adopt soft law so they "can renounce them at any time if they consider it necessary to protect their own political interests."[165] Moreover, the system lacks a system to solve disputes relating to the failure or refusal to apply the negotiated standards by any of the Members, which are solely subject to a peer review process. Not surprisingly, Argentina's laws and measures relating to the financial system were also challenged by Panama in the *Argentina–Financial Services* dispute.

The adoption of the Basel Accords as standards to assess the banking sector's substance standard is coherent and sound. The link beyond capital adequacy, liquidity, and systemic risk and taxation is based not only on the avoidance of artificial comparative advantage but also on the fact that the burden of banking bailouts is borne by taxpayers. Moreover, in a system based on trust, the ability of the headquarter governments to bailout banking institutions plays a significant role in consumers' preferences as well as secrecy laws, for example.

Panama is not part of the Basel Committee banking regulation system, and no data on the implementation of Basel I, Basel II, or Basel III is available. However, the United States and the E.U. Members were evaluated and are not "compliant" jurisdictions. The United States was considered "largely compliant" while the E.U. Members are "materially non-compliant" jurisdictions.[166] The situation is dramatic whereas 19 of

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165. Federico Lupo-Pasini, The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law 3 (2017).

166. *RCAP on Consistency: Jurisdictional Assessments*, BIS, https://www.bis.org/bcbs/implementation/rcap_jurisdictional.htm (last visited May 23, 2020).

30 of the G-SIB listed banking institutions[167] are headquartered either in the European Union or the United States. Consequently, both the United States and the E.U. Members are not compliant with the OECD "substance standard" for banking companies. Moreover, Cockfield observed that the United States, Germany, and Japan "are ranked in the top 12 countries with the strongest financial secrecy laws, while countries at times labelled tax havens (such as Barbados, the Bahamas, and Liechtenstein) have more favorable rankings."[168] Thus, any coherent set of defensive measures against banking institutions should also contemplate adding the United States and the E.U. Members for poor compliance with the banking sector substance standard.[169]

D. Tax Avoidance and Tax Evasion: "Taxation Without Representation Is Tyranny"

The Panel Report following the view of the Addressing Base Erosion and Profit Shifting Report[170] affirmed that "[w]ith regard to Panama's argument that a distinction has to be made between tax evasion and tax avoidance, we consider that such a distinction is not relevant for the purposes of Argentina's defense under Article XIV(c) of the GATS."[171]

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167. *2017 List of Global Systemically Important Banks (G-SIBs)*, Fin. Stability Board (Nov. 21, 2017), http://www.fsb.org/wp-content/uploads/P211117-1.pdf. E.U. listed banks are Deutsche Bank, HSBC, Barclays, BNP Paribas, Groupe Crédit Agricole, ING Bank, Royal Bank of Scotland, Santander, Standard Chartered, and Unicredit Group. *Id.* U.S. listed banks are JP Morgan, Bank of America, Citigroup, Goldman Sachs, Wells Fargo, Bank of New York Mellon, Morgan Stanley, and State Street. *Id.*

168. Cockfield, *supra* note 155, at 490.

169. Recently, the U.S. Senate voted on a banking bill that would loosen the rules for the banking sector and depart from the Basel standards for banking regulation. *See* Donna Borak & Ted Barrett, *Senate Votes to Roll Back Parts of Dodd-Frank Banking Law*, CNN (Mar. 14, 2018, 7:09 PM), https://www.cnn.com/2018/03/14/politics/banking-bill-vote-mike-crapo/index.html.

170. Panel Report, *Argentina–Financial Services*, *supra* note 24, ¶ 7.639 n.817 ("[I]f other taxpayers (including ordinary individuals) think that multinational corporations can legally avoid paying income tax it will undermine voluntary compliance by all taxpayers—upon which modern tax administration depends." (quoting OECD, *Addressing Base Erosion*, *supra* note 159, at 8)).

171. *Id.* ¶ 7.640.

Further, the Panel recognized that at the international level, the protection of domestic tax collection against harmful tax competition, including tax evasion, is supported. Consequently, the objective, interest, or value at stake was of vital importance[172] and "even more important for developing countries because they deprive their public finances of financial resources vital to promoting their economic development and implementing their domestic policies."[173] The conclusion about the irrelevance of the distinction between tax avoidance and tax evasion echoed the G-20 Summit Saint Petersburg Summit Declaration that triggered the BEPS Action Plan, as quoted in footnote 818 of the Panel decision.[174]

However, the distinction between tax avoidance and tax evasion is crucial for the WTO system that was designed to promote trade liberalization. One of the objectives of the WTO agreements is the reduction of barriers to trade, and taxation on cross-border transactions is a

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172. *Id.* ¶ 7.671.

173. *Id.* ¶ 7.681.

174. *Id.* § 7.640 n.818:

> We note in this regard that the evidence provided by Argentina indicates that in the relevant international fora both tax evasion and tax avoidance are considered to be problematic practices that should be combated and eliminated. For example, in 2013, the G-20 stated: "Cross-border tax evasion and avoidance undermine our public finances and our people's trust in the fairness of the tax system. Today, we endorsed plans to address these problems and committed to take steps to change our rules to tackle tax avoidance, harmful practices, and aggressive tax planning." See the G-20 Declaration, Saint Petersburg Summit, 5-6 September 2013, (Exhibit ARG-87), p. 4. . . . We also note that the multilateral Council of Europe/OECD Convention on Mutual Assistance in Tax Matters condemns both tax evasion and tax avoidance: "The Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters was developed jointly by the Council of Europe and the OECD to provide for all possible forms of administrative co-operation between states in the collection and assessment of taxes, in particular with a view to combating tax avoidance and evasion." See the OECD Report, *Tax Co-operation 2009: Towards a Level Playing Field*, (Exhibit ARG-41), p. 346. . . .

barrier to trade. Thus, transactions that lawfully reduce tax liability are not only desirable but should also be protected and incentivized by the system. On the other hand, tax evasion is the unlawful reduction of tax liability and should be curbed because it affects the conditions of trade and artificially unlevels the playing field for international trade.

The efforts to curb harmful tax competition and aggressive tax planning are based on two pillars: shaming and the imposition of economic sanctions. First, States were shamed through blacklisting. Recently, multinational enterprises (MNEs) were publicly shamed for avoiding taxes. The principle of no taxation without representation and the legality of the tax planning strategies did not allow the collection of taxes by the authorities; thus, instead of changing the rules, closing loopholes, and strengthening the International Taxation legal system, the politicians decided for the shortcut of shaming. The governments' failure to enact better regulations to impose a fairer tax system and to improve the cooperation among States to deal with a problem, which only the adoption of clear and effective international rules could adequately assess, ended up in a display of tyranny by diverting the public debate focus to the MNEs. Fairness would be restored with better rules and regulations, and cooperation and coordination among tax jurisdictions. Ignoring the most ancient tax principle of "no taxation without representation" is to turn into ashes "4,300 years of riots, rebellions, protests, and war triggered by abusive taxation and tax collecting systems around the world"[175]: the brave fight against tyranny.

The developments of good corporate governance and social responsibility are not strong enough to trump the principle of no taxation without representation.[176] Representation is derived from the enactment of rules because it is based on due process to levy taxes. International Taxation has teeth and shall be restrained by the democratic consensus.

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175. *Synopsis of* David F. Burg, A World History of Tax Rebellions: An Encyclopedia of Tax Rebels, Revolts, and Riots from Antiquity to the Present (2004), Questia, https://www.questia.com/library/107966008/a-world-history-of-tax-rebellions-an-encyclopedia (last visited May 25, 2020).

176. Eric C. Chaffee & Karie Davis-Nozemack, *Corporate Tax Avoidance and Honoring the Fiduciary Duties Owed to the Corporation and Its Stockholders*, 58 B.C. L. Rev. 1425 (2017); Doron Narotzki, *Social Corporate Responsibility and Taxation: The Next Step of the Evolution*, 16 Hous. Bus. & Tax L.J. 166, 167 (2016).

In fact, the acceptance that both tax avoidance and tax evasion undermine the fairness of the income tax system and should be subject to the same defensive tax measures without any reasoning based on declaration and non-binding instruments undermines the benefits accrued by WTO Agreements and hurts trade liberalization. Tax avoidance or tax planning constitute lawful transactions that minimize tax liability—a fiduciary duty of the board of directors of any entity engaged in commercial activities. Moreover, tax planning reduces the trade barrier created by the taxation of cross-border transactions. Taxation loopholes are not created by business entities that only benefit from the States' inability and low willingness to cooperate for the sake of tax sovereignty. The distinction between illegal transactions and legal transactions should have been a benchmark and not neglected. Furthermore, the assumption of the rightness and coherence of the OECD and the Global Forum recommendations without more profound reflection endangered the coherence of the WTO system. The degree of normativity of environmental agreements was debated in *India–Solar Cells*,[177] and those agreements were negotiated in a democratic and inclusive framework, signed by countries; thus, no reason assists the Panel in entirely relying on non-binding recommendations from a closed international organization that membership counts with States and "accepted" by non-Members under the menace of defensive tax measures and with questionable efficiency.

Another point to be revisited is the difference between tax avoidance and tax evasion. Tax avoidance is a legal and legitimate tax strategy and should result in sanctions. On the other hand, tax evasion is illegal behavior. The current debate on BEPS is about tax avoidance resulting in non-taxation of income. The tax strategy adopted by MNEs was not unlawful. Furthermore, the tax loopholes could be attributed to the low grade of cooperation and coordination between tax authorities.

Once more, the divergence between the panel and the AB reports regarding the meaning of the expression "level the playing field" should be attributed to the confusion over the real objective of the harmful tax competition recommendations. The recommendations were not designed to impair legitimate tax competition but to curb harmful tax competition. For that reason, the imposition of defensive tax measures based only on the effective exchange of information between the tax jurisdictions is not aligned with the OECD recommendations. But

177. *See supra* notes 101–104 and accompanying text.

the confusion is understandable. Although the reports are clear that all four key factors should be assessed to determine the harmfulness of a tax regime, the OECD had monitored, and peer-reviewed, the preferential tax regimes only based on the exchange of information and transparency. The other factors such as substance were not evaluated and, as stated above, if the substance standard were considered, tax jurisdictions in Europe and the United States should be listed as non-cooperative tax jurisdictions as well.

Both the Panel and the Appellate Body reports linked Argentina's tax measures to the defense against money laundering. Littlewood argues that although "a number of havens appear, indeed, to be guilty," if the problem is money laundering, taxation is not the point and the tax system should not be reformed to tax the proceeds of money laundering and take advantage of illicit gains.[178]

IV. Conclusion

The adjudication of the Argentina-Panama dispute generates lessons for both the international taxation and international trade systems. The WTO DSB had to deal with a fragile international taxation system that was reluctant to issue a conclusive decision about the global governance model and the degree of normativity and coherence of the international taxation standards. Meanwhile, the OECD redesigned the global governance model to address inclusiveness by creating the Inclusive Framework on BEPS. Unfortunately, the outcomes of the dispute crossed the adjudication borders. The decision triggered an unprecedented reaction from the United States that rejected the reappointment of one of the Appellate Body Members. In another move, the U.S. 2016 Model Tax Convention added more comprehensible and rigid rules regarding preferential tax regimes, increasing the gap between the OECD and the U.S. Models and proposals. Now, not only does the United States have specific exchange of information agreements but also the definition of preferential tax regimes and rules to address tax base erosion.

Argentina–Financial Services was the first dispute to deal with the OECD work on international taxation and most probably will not be the last. The BEPS Project recommendations are stringent and lack legitimacy due to the low participation of non-OECD Members, although

178. Littlewood, *supra* note 143, at 441.

all countries will be pressured to comply with the recommendations again through coercive diplomacy means.

Although the WTO system recognizes the sovereignty of Members to establish their public policies and the degree of protection, tax policies should be subject to a high scrutiny because the imposition of corporate tax on cross-border transactions might serve to maintain tax system integrity and distribute income, but free trade increases the global tax basis that would be harmed by double taxation. Although most of the protectionist international tax measures are unilateral, the international tax system was designed to promote trade and investment avoiding double taxation, which is undesirable. Thus, trade restrictiveness of an international tax measure should also account for the objective of international tax rules, if no consideration is given to the avoidance of double taxation, which happens in the context of the exchange of information agreements, the process of weighing and balancing should consider the harmful effect of the measure to international trade itself.

The number of disputes involving the digital economy before the WTO dispute settlement system among developed and developing Members demonstrates the importance of recent technological developments in the change of economic activity and the consequent shift of income among developed and developing Members. The distance from high-income consumer centers is not an obstacle anymore for developing countries: medical services, financial services, call center services, for example, are now provided in real time, and the distance between the service provider and the consumer is not an issue anymore.

If countermeasures were not recommended and even encouraged by OECD and with damaging effects due to the asymmetry between tax jurisdictions imposing the sanctions and the sanctioned ones, the outcome regarding the acceptance of the global standards and even the Model Convention would be different. The success of the OECD's initiatives should be granted to the differences between OECD and non-OECD Members more than to legitimacy and democracy. This Article is not a defense of harmful tax competition or money laundering but a critique of the international taxation global governance model and the standards. The negotiations should be more democratic and attentive to the changes in the pattern of trade that the digital economy will bring. The opportunities for developing countries derived from disruptive technology should be secured to avoid deep frictions with the international trade system. The shift of economic activity and related income when based on new patterns of trade derived from new technologies in connection with the development of developing countries are

to be preserved. At this point, the international taxation legal system failed, and the competitive environment has a significant part in this failure. In fact, a "new international tax diplomacy"[179] is not yet in place and will not be until a genuine inclusive forum is settled to promote cooperation on an equal basis among States.

The problem remains if the Post-BEPS new international bodies, especially the Inclusive Framework on BEPS,[180] will be able to serve as an international taxation forum able to address the tax challenges of all constituencies and detach from the OECD image of a forum for implementing the tax policies and development objectives of developed countries, mainly in Europe.[181]

The work on BEPS is not promoting higher cooperation or coordination among tax authorities but legitimating the double taxation of income, regardless of the legality of the tax strategy adopted by MNEs. The number of unilateral measures proposed based on the data received through the exchange of information will foster double taxation harming trade. Furthermore, the implementation of the GloBE measures[182] will increase the number of unilateral tax measures without a clear distinction between legitimate tax competition and harmful tax competition, thus, replicating the HTC Report primary flaw.

The international taxation legal system is fractured at such a deep level that even traditional OECD Members have not reached a consensus about what harmful tax competition is and how desirable it is to keep the system based on competition or move to a more cooperative environment. Now, there is no clear answer, and I am inclined to conclude that States are far from designing a new international taxation legal system on a more cooperative basis. The competition for investments and revenue is fierce and, maybe, at a level that has never been

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179. Grinberg, *supra* note 20.

180. *See* OECD, *Background Brief: Inclusive Framework on BEPS* (Jan. 2017), http://www.oecd.org/tax/beps/background-brief-inclusive-framework-for-beps-implementation.pdf.

181. *See* Monica Victor, *Addressing Developing Countries' Tax Challenges of the Digitalization of the Economy*, Tax Cooperation Pol'y Brief (S. Centre), Nov. 2019, at 1.

182. *See* OECD, *Public Consultation Document: Global Anti-Base Erosion Proposal ("GloBE")—Pillar Two* (Nov. 8–Dec. 2, 2019), https://www.oecd.org/tax/beps/public-consultation-document-global-anti-base-erosion-proposal-pillar-two.pdf.pdf

before. Unforeseen economic, social, political, and technological developments reshaped the world that the international organizations were designed to deal with. The need for revenue to deal with tech and geo-displaced populations and to maintain the post-World War II level of welfare and the tax uncertainties of the digitalization of economy are stressing and testing the international taxation legal system boundaries and effectiveness. Will the OECD international taxation legal system adapt to survive? That is the puzzling question. Nonetheless, due to the increasing adoption of unilateral measures and the absence of broader and more effective non-discrimination provisions in bilateral tax treaties,[183] the WTO may continue to be the forum for the settlement of cross-border tax measures related disputes.

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183. *See* Yariv Brauner & Georg Kofler, *The Interactions of Tax Treaties and International Economic Laws*, *in* Global Tax Treaties Commentaries (2014), https://www.ibfd.org/IBFD-Products/Global-Tax-Treaty-Commentaries-GTTC; Steven A. Dean, *Philosopher Kinds and International Tax: A New Approach to Tax Havens, Tax Flight, and International Tax Cooperation*, 58 Hastings L.J. 911 (2007); Michael Lennard, *The GATT 1994 and Direct Taxes: Some National Treatment and Related Issues*, *in* WTO and Direct Taxation, *supra* note 94, at 73.