

Trade in Services: A Holistic Solution to New-Found Issues in Trade Law?

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AND YOU PUT THE LOAD RIGHT ON ME DIGITAL TAXES, TAX DISCRIMINATION AND TRADE IN SERVICES

PETROS C. MAVROIDIS*

The taxation of multinational digital companies has recently captured the policy headlines. A disagreement between France and the United States almost led to yet another trade feud. For now, at least, the disputing parties have moved away from pugilistic behaviour and have promised to attempt a negotiated solution. The solution to the issue should, of course, take into account the Members' rights and obligations under the relevant World Trade Organization (WTO) Agreements, especially the General Agreement on Trade in Services (GATS). Consistency with the GATS, however, is only one aspect of the story, albeit an important one. Taxation is generally legal, if a jurisdictional link between the taxing authority and the taxed entity can be established, and jurisdictional issues are not explicitly addressed in GATS, even though, absent implicit understanding on this score, key GATS principles risk being invalidated. The complicating factor in this discussion, is that multinational digital companies do not necessarily need to be physically incorporated in each jurisdiction where they operate. Tensions may arise since, in the absence of fiscal harmonisation, companies may have the incentive to choose the seat of their incorporation in jurisdictions where tax rates are lower, whereas governments in countries where tech companies operate may want to increase their tax burden. In this paper, we map the brass tracks of the relevant international legal framework that digital taxes must observe, and the evolving norms regarding the basis for taxation with special focus on the curious case of the digital sector.

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I. THE ISSUE

On January 19, 2020, France and the United States temporarily settled their row over the taxation of digital companies that had made headlines for a few weeks.¹ Eyebrows were raised when France introduced a tax on certain services supplied by digital companies that met specific revenue thresholds. Some were quick to point to discriminatory behavior, arguing that the tax was devised to specifically target certain large US companies. Some asked whether France had the right to tax US multinationals at all.

We will not know, not for now at least, whether the criticisms raised are well-founded or not. In the World Economic Forum meeting of January 2020, France, inspired by the cooperative ambiance reigning over Davos, promised to stop collecting taxes as per its law on digital taxation and the United States counter-promised to suspend planned tariffs of \$2.4 billion on imports of goods originating in France.

Nevertheless, disagreements about digital taxes risk resurfacing. First, as we discuss below, countries other than France are currently contemplating to unveil, or have already unveiled, their own counterparts of the Digital Services Tax (DST). Second, the multilateral tax regime, at least as it applies to digital business models, could be headed towards a new normative framework wherein taxing rights would depend on user/market jurisdiction and away from a permanent establishment and

¹Chris Giles, *US and France Agree Deal on Digital Tax*, FINANCIAL TIMES (Jan. 23, 2020), <https://www.ft.com/content/76cf4008-3db1-11ea-b232-000f4477fbca>.

transfer pricing framework, which had been the guiding principle governing jurisdiction to tax a non-resident enterprise for the longest time.²

We use the conditional form because, as we explain later on, discussions at the Organization of Economic Cooperation and Development (OECD) level on these issues are still underway and the governments participating therein, aim to reach an agreement. It is unclear nevertheless, at this stage at least, whether this will be the case, and even less what its relevance for WTO purposes will be.

Given these considerations, the spectre of the French DST, and its several other avatars that are taking shape around the world, will continue to affect the digital economy. In this paper, we address the treatment of DST under the GATS as it stands.

To do that, in Part II, we will discuss the GATS provisions that are relevant to digital taxes. We will thus, establish the framework that France and the United States (and any other Member of the WTO) will need to take into account in their search for cooperative solutions.

In Part III, we revert to a critical evaluation of the regime discussed in the previous part, highlight the shortcomings, and propose our preferred solution to deal with the issue. It is in this part, that we will briefly refer to the ongoing negotiation at the OECD, and discuss them both from a substantive—as well as a Realpolitik perspective (e.g., to what extent their transposition at the WTO level is on the cards). Part IV concludes.

II. THE GATS AND REVENUE-BASED DIGITAL TAXES

There is nothing explicit about taxation in the GATS. This does not mean that WTO Members do not have the right to tax services suppliers. The GATS is a negative integration contract, meaning that it does not require its contractors to harmonise their policies. Members are thus, in principle, free to design their tax systems and to determine their tax rates as they see appropriate. Nevertheless, this freedom is not unbound, and GATS rules may limit it under certain conditions.

² Itai Grinberg, *International Taxation in an Era of Digital Disruption: Analyzing the Current Debate*, 97(3) TAXES: THE TAX MAG. 85 (2019); *Secretariat Proposal for a “Unified Approach” under Pillar One*, OECD (2019), <https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf> [hereinafter Unified Approach]; *Global Anti-Base Erosion Proposal (“GloBE”) - Pillar Two*, OECD (2019), <https://www.oecd.org/tax/beps/public-consultation-document-global-anti-base-erosion-proposal-pillar-two.pdf> [hereinafter GloBE].

At the outset, it is important to stress that digital service taxes would be treated as domestic taxes under the GATS framework, as there is no room for customs duties in the GATS integration model, largely because of the impossibility to police various types of imports of services. Furthermore, taxation, just like any other measure, can affect trade. As per consistent case law, tax measures are, in principle at least, subject to the GATS disciplines.³ Before delving into the GATS provisions that could be relevant for understanding the international framework within which the DST is situated (sub-part II.E). It could be helpful to understand the nature and scope of the digital service taxes (sub-part II.A), their underlying policy rationale (sub-part II.B), and the source of disharmony between the proponents of these taxes and the United States (which is the pre-dominant supplier of the services that are proposed to be taxed) (sub-parts II.C and II.D).

A. What is a Revenue-Based Digital Tax?

At the risk of over-simplifying, a revenue-based digital tax is a tax calculated as a percentage of the revenues collected by a supplier for certain services that it provides in a given period of time. The rationale behind using revenues rather than other benchmarks, such as profits, as a basis to calculate the level of taxation appears to be two-fold. First, large tech companies are able to operate according to a business model whereby they produce gigantic revenues and at the same time manage to report very thin or even negative profits.⁴ Second, its proponents have argued that a revenue-based tax is arguably simpler to implement. The tax liability of a tech company under a digital services tax such as the French DST would be calculated by multiplying the amount of world revenues by the quotient of the number of users in France by the total number of users.⁵

In addition, digital companies are subject to income taxes in the country where they are incorporated. On the one hand, these companies may have the incentive

³ 3 PETROS C. MAVROIDIS, *THE REGULATION OF INTERNATIONAL TRADE: THE GENERAL AGREEMENT ON TRADE IN SERVICES* (forthcoming Nov. 2020).

⁴ Lina M. Khan, *Amazon's Antitrust Paradox*, 126(3) *YALE L.J.* 710, 747–753 (2016), explains this phenomenon in detail noting that the premise underlying this business model is to achieve scale by prioritizing growth and market leadership over profits. In this context, U.N. Conf. on Trade & Dev., *E-Commerce and Development Report 2001: Trends and Executive Summary*, UN Doc. UNCTAD/SDTE/ECB/1 (2001), https://unctad.org/en/docs/ecdr2001overview_en.pdf, cited a tech company as stating that “the key to long-term success in e-commerce was achieving a large market share fast. If this required huge investments with implausibly long payback periods, so be it. Profits would come later, as e-commerce matured.”

⁵ See Statement by Mr. Joël Giraud, *Report No. 64, Committee on Finance, General Economy, and Budgetary Control*, NATIONAL ASSEMBLY (Apr. 2, 2019), <http://www.assemblee-nationale.fr/15/cr-cfiab/18-19/c1819064.asp>.

to shift their profits to jurisdictions where the tax rates are comparatively lower. On the other hand, a great share of the value of the services traded by large tech companies is generated by the constant interaction between users who are located in other jurisdictions. This leads to a situation wherein the country where the value of the traded service is generated cannot avail the traditional taxation arsenal. It is against this background that the idea of taxing revenues came about.

Other countries are considering the introduction or have already imposed alternative forms of taxation on digital services. For example, several jurisdictions opted for the introduction or the increase of value added and sales taxes on digital services.⁶

Although France is thus not the only country entering the realm of digital taxation, we will focus on the French measure, which sparked the wrath of the United States.

The French DST⁷ is a useful case-study, for several reasons. First and foremost, the DST draws inspiration from a proposal originally tabled by the European Commission, and a similar instrument may still be considered in Brussels for

⁶ Andrew D. Mitchell et al., *Taxing Tech: Risks of an Australian Digital Services Tax under International Economic Law*, 20(1) MELB. J. INT'L ECON. L. 1 (2019) [hereinafter, Mitchell et al.] discusses legislative developments in Australia leading up to the consideration of a digital service tax as an interim measure until a global consensus-based solution is arrived at. Australia, much like France, has since then abandoned its plans to introduce the tax and said that it will instead focus its efforts on the ongoing multilateral process, Press Release, Treasurer of Commonwealth of Australia, Government Response to Digital Economy Consultation (Mar. 20, 2019), <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/government-response-digital-economy-consultation>.

⁷ Loi n° 2019-759 du 24 juillet 2019 portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés [Law n° 2019-759 of 24 July 2019 Creating a Tax on Digital Services and Modifying the Trajectory of Reduction in Corporate Tax], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 25, 2019, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000038811588&categorieLien=id>. Throughout the paper, we will occasionally refer to the English text of the law. Whenever that is the case, we will use the English translation annexed to USTR Report, OFFICE OF THE USTR, SECTION 301 INVESTIGATION – REPORT ON FRANCE'S DIGITAL SERVICES TAX, (2019), https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf [hereinafter USTR Report].

adoption at the EU-wide level,⁸ and in fact serves as the basis for measures that are about to be adopted elsewhere in the Old Continent (Italy *in primis*).⁹

Second, as anticipated the measure has certain features that substantially depart from the traditional disciplines on international taxation. The DST, as we noted earlier, focuses on the revenues generated from the supply of certain services, as opposed to using income as the relevant basis for taxation.

Accordingly, we consider the French DST as a relevant stress test for the GATS rules on taxation.

B. *Why Digital Taxes?*

Very few, if any, of the national governments that introduced digital services taxes have clearly articulated the policy considerations underlying this tax.¹⁰ France was one of the first jurisdictions to address what in the view of its political class, amounted to a distortion: digital companies established in lower tax jurisdictions earning billions in revenues not subject to taxation in France by selling services to customers located in France. Consumers located there purchased goods and services over the internet using non-French platforms or search engines. However, as we elaborate below, tax revenues might constitute only one of several motivations behind the imposition of the DST.¹¹

⁸Gary Clyde Hufbauer & Zhiyao Lu, *The European Union's Proposed Digital Services Tax: A De Facto Tariff*, (Peterson Inst. for Int'l Econ., Policy Brief, 2018), <https://www.piie.com/system/files/documents/pb18-15.pdf>.

⁹ Italy has made noises to this effect, as did other non-European countries, like Turkey, see William Hororbin & Aiofe White, *How 'Digital Tax' Plans in Europe hit U.S. Tech*, WASHINGTON POST (Dec. 3, 2019), https://www.washingtonpost.com/business/how-digital-tax-plans-in-europe-hit-us-tech/2019/12/02/f357b0aa-1558-11ea-80d6-d0ca7007273f_story.html.

¹⁰ France Stratégie Report 2015 briefly discusses taxes on advertising revenue and subscription fees earned by digital platforms, https://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/fs-rapport2015_0508_web.pdf; AUSTRALIAN TREASURY, *THE DIGITAL ECONOMY AND AUSTRALIA'S CORPORATE TAX SYSTEM* (2018), <https://treasury.gov.au/consultation/c2018-t306182>; HM TREASURY (UK), *DIGITAL SERVICE TAX: BUDGET 2018*, <https://www.gov.uk/government/publications/digital-services-tax-budget-2018-brief>.

¹¹ We are aware of only three papers, Wei Cui, *The Digital Services Tax: A Conceptual Defense*, 73(2) TAX L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3273641###; JULIEN PELLEFIGUE, *THE FRENCH DIGITAL SERVICES TAX – AN ECONOMIC IMPACT ASSESSMENT* (2019), <https://taj-strategie.fr/content/uploads/2020/03/dst-impact-assessment-march-2019.pdf>; and, Wolfram Richter, *The Economics of the Digital Services Tax* (Centre for Economic Studies,

As an initial matter, it might be worth noting that the DST constitutes the most recent policy intervention in a series of initiatives that governments around the world have unveiled to address the potential issues heralded by the inevitable digitalisation of all aspects of the economy. The most fundamental issue that governments are interested in addressing (whether through imposing restrictions on cross-border data flows or, limitations on the extent of data processing or, by imposing fines for abuse of market dominance) appears to be the recognition of the value and the sanctity of consumers' data with a focus on reducing any asymmetries between large tech companies and the consumers of their services. It will be difficult to view the policy rationale for the DST in any light other than that underlying these regulatory initiatives.

It could be argued that the DST, in so far as it targets services supplied by digital platforms that depend on user data for the profitability if not the very provision of those services, could be levied by the governments within whose tax jurisdiction where such users reside. There is indeed no doubt that the value of at least some services provided by digital platforms depends on the data that is gleaned from the users of those digital platforms. For example, an online retail platform could provide better interface services using the purchase history of a user by recommending products that are similar to the user's past search behaviour or an online video-sharing platform could recommend you videos based on your activity on the site.¹² Similarly, downstream services such as targeted advertising services rely almost entirely on the possibility to, as the name suggests, target the advertisements to the individual who views the ad based on data compiled by the digital platform regarding that individual. Indeed, most large tech companies recognise the crucial role that user data plays in the provision and profitability of their services.¹³ Hagiu and Wright have noted that there is a positive co-relation

CESifo Working Paper No. 7863, 2019),
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3467998&download=yes, that have carried out an economic analysis of the DST. All three papers argue that it may be rational, from a welfare maximisation perspective, for service importing countries to impose the DST.

¹²E.g., B. Smith & G. Linden, *Two Decades of Recommender Systems at Amazon.com*, 21(3) IEEE INTERNET COMPUTING, 12 (2017), <https://pdfs.semanticscholar.org/0f06/d328f6deb44e5e67408e0c16a8c7356330d1.pdf>; James Davidson et al., *The YouTube Video Recommendation System*, PROC. 4TH ACM CONF. RECOMMENDER SYSTEMS, 293 (2010).

¹³E.g., FACEBOOK, ANNUAL REPORT (2018), https://s21.q4cdn.com/399680738/files/doc_financials/annual_reports/2018-Annual-Report.pdf, ("If we are unable to maintain or increase our user base and user engagement, our revenue and financial results may be adversely affected. Any decrease in user retention, growth, or engagement could render our products less attractive to users, marketers, and

between the value added by customer data and the competitive advantage of the service.¹⁴ In other words, higher the value that is added by customer data into a service or product offering, higher the chances that the product or service will have a competitive edge. DST recognizes this *sui generis* business model of value creation¹⁵ in at least some of the services supplied by tech companies and uses that as a basis for vesting a taxing right on the government within whose tax jurisdiction the users are located.

C. The Apple of Discord: the French Digital Services Tax

On the 24th of July 2019, the French President signed into force a legislation that provided for the introduction of the DST in France.¹⁶ The French DST is a 3% tax on revenues generated from “digital interface services” and “targeted advertising services” within France by companies that meet certain revenue thresholds. In the days leading up to, and since its enactment, the French DST has been the subject of wide-ranging discussion and analysis with views being offered both in support and in opposition to the French legislation.¹⁷

developers, which is likely to have a material and adverse impact on our revenue, business, financial condition, and results of operations.”); TWITTER, ANNUAL REPORT (2018), https://s22.q4cdn.com/826641620/files/doc_financials/ar/2018/AnnualReport2018.pdf, (“If our users or content partners do not continue to contribute content or such content is not viewed as unique or engaging by other users, we may experience a decline in the number of users accessing our products and services and user engagement.”).

¹⁴ Andrei Hagiu & Julian Wright, *When Data Creates Competitive Advantage*, HARVARD BUSINESS REVIEW (Jan.-Feb., 2020), <https://hbr.org/2020/01/when-data-creates-competitive-advantage>.

¹⁵ In some economic literature, the work performed by individual users in the form of supplying their personal data towards producing Big Data and Artificial Intelligence (AI) has been referred to as “digital labour”. See CHRISTIAN FUCHS, DIGITAL LABOUR AND KARL MARX (2014), and TREBOR SCHOLZ, DIGITAL LABOUR: THE INTERNET AS PLAYGROUND AND FACTORY (2013). Some other scholars have advocated that data should be treated as labour and that individual users should be honoured as the suppliers of the data that make the digital economy work rather than as passive consumers. See ERIC A. POSNER & WEYL E. GLEN, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY (2019).

¹⁶ *Supra* note 7.

¹⁷ E.g., Liz Alderman, *France Moves to Tax Tech Giants, Stoking Fight With White House*, N.Y. TIMES (July 11, 2019), <https://www.nytimes.com/2019/07/11/business/france-digital-tax-tech-giants.html>; *France tech tax: What's being done to make internet giants pay more?*, BBC NEWS (July 11, 2019), <https://www.bbc.com/news/business-48928782>; *France Starts a Digital Tax War*, THE WALL STREET J. (July 16, 2019), <https://www.wsj.com/articles/france-starts-a-digital-tax-war-11563318469>; *The US is Right to Threaten Tariffs Over France's Tech Tax*, WASHINGTON EXAMINER (July 11, 2019), <https://www.washingtonexaminer.com/opinion/the-us-is-right-to-threaten-tariffs-over->

The French DST is a tax on revenues. More precisely, it is a 3% tax on the revenues generated in France from the supply of two services:

- digital interface; and
- targeted advertising.

“Digital interface” is defined in the DST law as:

“[t]he provision, by electronic communication, of a digital interface allowing users to be in contact with other users and to interact with them, especially for the purpose of delivering goods or providing services directly between these users.”¹⁸

The DST does not apply to certain services, including communication and financial services. In practical terms, the revenues generated by the excluded services are not taxable under the DST. Importantly, the DST does not apply to “digital interface” providers that sell goods or services that they own (as opposed to “digital interface” providers that act as intermediaries between owners of inventory and users/purchasers).

The DST law identifies “targeted advertising” as:

“[s]ervices marketed to advertisers, or their agents, for the purposes of placing on a digital interface advertising that is targeted based on user data collected or generated when such interfaces are visited.”¹⁹

The DST law further clarifies that targeted advertising services may include:

“purchasing, storage, and placement of advertisements, advertising and performance monitoring, and user data management and transmission services.”²⁰

Not all companies supplying these services are covered by the measure. It only applies to suppliers meeting two revenue thresholds:

- 750 million euros worldwide, of which

frances-tech-tax; *France leads the way on taxing tech more fairly*, FINANCIAL TIMES (July 11, 2019), <https://www.ft.com/content/6385c900-a3e6-11e9-a282-2df48f366f7d>.

¹⁸ USTR Report, *supra* note 7, Annex. at 2.

¹⁹ *Id.*, Annex. at 3.

²⁰ *Id.*, Annex. at 2.

- 25 million euros have been made in France.²¹

D. US Reaction

The US government was, arguably, the most vociferous opponent of the DST law, which, it alleged, was disproportionately burdensome for US companies. As expected, it did not take long for the Office of the United States Trade Representative (USTR) to react. In fact, it launched a Section 301 investigation against the DST, almost immediately after its entry into force.²²

On December 2, 2019, the Office of the USTR issued a report, the main findings of which we recap here:

- the DST de facto discriminates against service providers from the United States;
- it is unreasonable; and
- it is applied retroactively.²³

We now look at these three elements in turn.

Concerning the allegation of de facto discrimination, the Section 301 Report (Report) argues that the design of high revenue thresholds has a greater impact on US companies as compared to smaller providers of the same services from the rest of the world. Citing an economic impact assessment from a private company, the Report anticipates that the DST is expected to apply to 27 digital companies, 17 of which (around two-thirds) are US undertakings. The Report further notes that only one French company supplying targeted advertising services is expected to be subject to the DST. According to the Report, the DST will not apply to any French supplier of digital interface services.

Regarding the allegations of unreasonableness, the argument developed in the Report is threefold.

First, the Office of the USTR contends that the DST has extraterritorial application and imposes a fiscal burden in France on companies that already pay their taxes in their home jurisdictions.

²¹ *Id.*

²² USTR Report, *supra* note 7.

²³ *Id.*

Second, the Report argues that the DST is in stark deviation from established principles of international tax law. The argument is that tax law (domestic or international) is usually based on income. The shift in the tax basis from income to revenues is considered to be unduly burdensome for large digital companies, which generate large revenues often with low profits. It is unreasonable in other words, because it is disproportional.

Third, the Report challenges the idea to ring-fence digital companies, claiming that the imposition of a heavy tax burden hits severely and disproportionately efficient economic actors.

Finally, with regard to the allegation of retroactive application, the Report notes that the measure entered into force in the summer of 2019 but applies to revenues generated as from January 1, 2019.

Although the Report does not explicitly mention any provision of WTO law that the DST would allegedly violate, it nevertheless does contemplate the possibility that the United States bring a dispute against France before the WTO. In parallel, the Office of the USTR was also considering the imposition of retaliatory tariffs of up to 100% ad valorem on the importation of certain goods originating in France, including cheese, leather and make-up products. As already explained, because of the agreement of January 19, 2020, all this is suspended at the time of writing.

E. When Is Taxation GATS-Consistent?

The scope of GATS is circumscribed in Article I.²⁴ There, in Article I.1 we read that it applies to “measures affecting trade in services”, and in light of the broad interpretation of these terms, there should be no doubt that the DST qualifies as such. The applicability of GATS to tax measures has been explicitly recognised in official documents, and the working hypothesis is that WTO members should have important discretion in differentiating tax treatment across suppliers.²⁵

²⁴ General Agreement on Trade in Services art. I, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994)[hereinafter, GATS].

²⁵ A GATT Secretariat Note from 1993 notes that “it would appear that relatively few tax measures affecting service suppliers would even require justification under Article XIV (General Exceptions). Most tax measures providing distinct treatment to different categories of service supplier appear to deal with unlike service suppliers, to be based on objective considerations, or not in fact to accord less favourable conditions of competition.” See GATT Secretariat, *The Applicability of the GATS to Tax Measures*, GATT Doc. MTN.GNS/W/210 (Dec. 1, 1993).

The GATS is characterised by an idiosyncratic architecture, where general obligations (like Most Favoured Nation) are distinguished from specific commitments. Practically this means that a WTO member can keep its market closed to all services and/or services suppliers as long as it does so, on a Most Favoured Nation (MFN) basis. It is different from the GATT because in GATT, Market Access was practically guaranteed from day one: the original negotiation led to capped tariffs at more or less reasonable rates, and an immediate prohibition of import (and export) quotas, through the enactment of Article XI.²⁶ The closest to this in GATS, is Article XVI,²⁷ which is a specific commitment, and not a general market access obligation. A WTO member that accepts GATS can in principle, enter no specific commitments at all. This was an impossibility in the GATT, as Irwin et al. have shown, who underscore the obligation to negotiate tariff commitments from day one.²⁸

We recall that Article II:1 of the GATS reads:

“[w]ith respect to any 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.”²⁹

Taxing some and not other like suppliers would thus, lead to a violation of this provision. A measure may be discriminatory vis-à-vis certain suppliers in different ways. Concretely, a measure could expressly single out providers established in a certain jurisdiction and impose a certain tax exclusively on them and not on others. Such a measure obviously contradicts the letter and spirit of Article II of the GATS, and this may be the reason why they are not so popular. There are however other ways to discriminate against a subset of foreign suppliers. That is the case, for instance, when a measure (in our case a tax measure) is designed in such a manner so as to *de facto* only apply to suppliers from certain jurisdictions and not to others. As we saw earlier, the Office of the USTR in its Section 301 Report argues that the French legislators conceived very high revenue thresholds for the applicability of the DST in order to disproportionately affect US providers as opposed to competitors from other jurisdictions.

²⁶ General Agreement on Tariffs and Trade 1994 art. XI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

²⁷ GATS, *supra* note 24, at art. XVI.

²⁸ IRWIN DOUGLAS ET AL., THE GENESIS OF THE GATT (2008).

²⁹ GATS, *supra* note 24, at art. II:1.

More on this later, but the point we want to drive home at this stage is that, even if France (the European Union that is, since commercial policy is common in the European Union) had made no specific commitments at all, Article II:1 of the GATS applies to the French DST insofar as it affects international trade in services.³⁰

Nevertheless, the assessment is more complex with regard to specific commitments. France has undertaken commitments under the GATS with respect to advertising services (Annex 1 below reflects the French commitments). France (and the European Union) have not included the term “digital interface” services in the schedule, and the question arises whether France (the European Union), by undertaking commitments under, say “computer related services” has, ipso facto, committed to liberalizing “digital interface” services as well?

This silence is not surprising, as the GATS was negotiated between the late 1980s and the early 1990s and the internet revolution was still in *statu nascendi*. One could thus, take the view that digital interface services are entirely new services, and since they do not appear as such in the Central Product Classification (CPC),³¹ no commitment was even possible when the GATS had been negotiated.

GATS case law has ruled, in similar cases, otherwise. In *US — Gambling*, the Panel was dealing with a case of betting and gambling services. Internet betting and gambling did not exist when the United States had made commitments under “betting and gambling”. Antigua nevertheless claimed that the US commitment by and large sufficed to cover Internet gambling as well, a position which the panel accepted. In the panel’s view, Internet gambling is a means to supply betting and gambling services, and not a separate service.³² In the name of technological neutrality in supplying services, all means are covered by commitments entered.

This finding was not appealed, and one can consider it water under the bridge by now, even though in literature, the premise of this approach has been a matter of much debate.³³ What matters though (legally, at least), is case law and not academic

³⁰ In Annex 1, we have included the commitments that France has undertaken under the GATS.

³¹ THE DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS OF THE UNITED NATIONS, CENTRAL PRODUCT CLASSIFICATION VERSION 2.1, U.N. Doc. ST/ESA/STAT/SER.M/77/VER.2.1 (2015), provides a product classification covering all goods and services. In the absence of a Harmonised System for services, the document is a relevant tool for the identification and comparison of services.

³² Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.285, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005).

³³For a critique, see e.g. MAVROIDIS, *supra* note 3.

positions. Thus, consistent with the idea that the GATS is technologically neutral, some scholars even argue that most ‘new’ services are not ‘new’ at all, but are simply supplied in different ways, taking advantage of technological innovations.³⁴

The intensity of commitments entered under the GATS can vary in function depending on the mode of supply of the particular service. The GATS knows of course, of four modes: Mode 1 is cross-border (neither the supplier nor the consumer moves as the service is supplied into the consumer's territory); Mode 2 is consumption abroad (the consumer consumes the service in the jurisdiction of the supplier); Mode 3 is commercial presence (the supplier supplies service in the jurisdiction of the consumer through commercial presence therein); and, finally, Mode 4 is referred to as temporary presence (supplier, a physical person, supplies a service in the market of the consumer).

Mode 4 is irrelevant for our discussion. Mode 3 is relevant, but, we would argue, is of secondary importance to our discussion.

When a company is incorporated in France, it, of course, as per globally accepted rules as well as French law, must pay taxes in France. But what if it only has servers or data storage centres in France, or a mere processing unit? Does the presence of a local server or data storage or processing unit qualify as “commercial presence” for the purpose of Mode 3 supply of service under the GATS? There is no definitive response to these questions as a matter of case law.

Modes 1 and 2 are particularly relevant to the discussion of the DST. As noted, the intensity of commitments can vary as a function of the mode of supply used, so the proper characterisation of a transaction as Mode 1 or Mode 2, might have dramatic consequences as far as the extent of obligations assumed is concerned. Assume that a digital platform has no commercial presence in France at all, and a French consumer, completes an online transaction using the services provided by that digital platform. The question is, is that digital platform supplying its service through cross border flow of services (Mode 1) (cross-border) or is the consumer travelling abroad (Mode 2) to access the services provided by that digital platform? Once again, case law has not dealt with this issue.³⁵

³⁴ Ines Willems, *GATS Classification of Digital Services – Does 'The Cloud' Have a Silver Lining?*, 53(1) J.WORLD TRADE 59 (2019).

³⁵ Ahmed Usman et al., *Mode 1, Mode 2, or Mode 10: How Should Internet Services Be Classified in the Global Agreement on Trade in Service?*, BOS. UNIV. INT'L. L. J. (Nov. 24, 2015), <http://www.bu.edu/ilj/files/2015/11/BUSL-ILJ-Ahmed-Bieron-Horlick.pdf>, discusses this issue, and the lack of definitive resolution under current case law. See also, SACHA WUNSCH-VINCENT, *THE WTO, THE INTERNET AND TRADE IN DIGITAL PRODUCTS – EC-US PERSPECTIVES* (2006); Emad Tinawi & Judson O. Berkey, *E-Services and the WTO: The*

The discussion above could be even more complicated if the same company acts as a middle entity. What if that company, for example, facilitates a transaction between a French consumer and a supplier of service (say an attorney at law) located in Argentina?

With this in mind, we turn to the specific legal provisions of interest to our discussion.

1. MFN

If one recalls this about MFN, like suppliers should be treated in like manner. In *Argentina — Financial Services*, the Appellate Body endorsed the Panel’s finding that likeness-analysis across Articles II (MFN), and XVII (National Treatment) of GATS, should be identical. The key difference between the two provisions, is that whereas WTO members must observe MFN anyway, they have to observe National Treatment for a service sector only if they have entered National Treatment commitments for that sector in their Schedule of Specific Commitments.³⁶

Unlike the case under the GATT, WTO members can take exceptions from MFN by simply tabling a list to this effect. Article II:2 of the GATS allows Members to maintain measures that are not consistent with the MFN clause, provided that such measures are listed in the respective Member’s list of Article II Exemptions. No exemption on digital advertising or digital interface services features has been listed in the EU (French) list under Article II. This is a factual issue, and we do not need to delve into it any further. There are of course, statutory exceptions as well, and we will turn to them later.

2. National Treatment

National Treatment means that foreign services (and services suppliers) will access a foreign market under the same conditions as their domestic counterparts. Imagine two WTO members, Home and Foreign. Imagine further a transaction, where Home “imports” services originating in Foreign. Home does not have to accept Foreign’s standards as equivalent to its own. Foreign’s suppliers must

Adequacy of the GATS Classification Framework, IATP (Mar. 16, 2000), https://www.iatp.org/sites/default/files/E-Services_and_the_WTO_The_Adequacy_of_the_GAT.pdf.

³⁶ Appellate Body Report, *Argentina — Measures Relating to Trade in Goods and Services*, ¶ 6.25, WTO Doc. WT/DS453/AB/R (adopted May 9, 2016).

conform to Home's standards, if they want to access Home's market. This is what National Treatment is all about.

i. Likeness

National Treatment covers both services, as well as services suppliers. The fact that two suppliers supply the same services does not make them necessarily like. The DST-controversy concerns, of course, the tax treatment of behemoths like Google or Amazon as opposed to companies supplying similar services that are much smaller in size.

Let us pause for a moment, and reflect on this excerpt from the Panel report on *Canada — Autos*,³⁷ which reads:

“[w]e agree that to the extent that the service suppliers concerned supply the same services, they should be considered ‘like’ for the purpose of this case.”

This sentence suggests that, to the extent two suppliers provide a like service they are like as well. Yet, nothing could be more remote from the truth. The point is this. As services suppliers do not necessarily exhibit the same portfolio, likeness of services and likeness of services suppliers do not necessarily overlap. Two companies that provide the same service are not necessarily like services suppliers.

Now, before we turn to a discussion of likeness of suppliers, the ‘plat de resistance’ of our paper, let us see first which services could come into play in the context of suppliers like digital providers serving national markets. We follow the CPC/W/120 classification, for ease of reference.

The services affected by the French DST could potentially fall under the following headings: Advertising services; Computer and related services;³⁸ Air and road transport services (online third-party platforms selling air tickets); Tourist guide services (like Tripadvisor). One can thus, easily grasp the size of the market

³⁷ Panel Report, *Canada — Certain Measures Affecting the Automotive Industry*, ¶ 10.248, WTO Doc. WT/DS/139/R, WT/DS/142/R (adopted June 19, 2000).

³⁸ The question arises whether “digital interface services”, as well as “targeted advertising services” are covered? Footnote 36 to “computer and related services” provides that “in many cases, computer and related services enable the provision of other services by both electronic and other means. However, in such cases, there is an important distinction between the computer and related service (e.g., web-hosting or application hosting) and the other service enabled by the computer and related service. The other service, regardless of whether it is enabled by a computer and related service, is not covered by CPC 84.”

involved. Of course, this is not all. Platforms like Amazon, and Alibaba are online shopping centers.

When it comes to “like suppliers”, case law has not managed to come up with a coherent and repeatable test. It has made some, but only some headway. What do we know for sure?

First, the Appellate Body in its report on *Argentina — Financial Services*,³⁹ established that it is the competitive relationship between suppliers that will define likeness, but this would require a “holistic analysis”, even though that notion is not self-explanatory.⁴⁰

Under this case law, income (turnover) may not provide a bullet-proof criterion that can lawfully distinguish between two suppliers.⁴¹ But, recall that the fact that two suppliers overlap with respect to the sale of one service does not necessarily make them “like”, especially if the non-overlap is substantial. We are mindful of potential framing effects that might misguide the adjudicator, but we find it important to stress that, if it is the supplier (and not the service) that is being taxed, two considerations are in order:

- partial overlap in the supply of a service is a necessary but not a sufficient condition to decide on likeness;
- we are in the dark as to what more is required to establish likeness.

There is an additional complication. The Appellate Body left the door open to policy likeness, when holding:

“[f]irst, we have found above that the determination of ‘likeness’ under Articles II:1 and XVII:1 involves consideration of both the service and the service supplier. Accordingly, depending on the circumstances of the particular case, an origin-based distinction in the measure at issue would have to be assessed not only with respect to the services at issue, but also with regard to the service suppliers involved. Such consideration of both

³⁹ *Supra* note 36, ¶ 6.25.

⁴⁰ The facts, in brief, are as follows: Argentina differentiated treatment reserved to foreign financial institutions depending on whether they were cooperating with it, in its quest to fight against tax evasion by Argentine citizens and companies. The complainant had claimed that this distinction was arbitrary, and had no support in the GATS.

⁴¹ *Contra*, Conrad D. Noronha, *Determining “Likeness” in Digital Services: A Case for Network Effects* (2020) (on file with the author), according to whom revenue thresholds are justified. According to this author, network effects can render services or service suppliers unlike when looking at the market from the side of the demand.

the services and the service suppliers may render more complex the analysis of whether or not a distinction is based exclusively on origin, in particular, due to the role that domestic regulation may play in shaping, for example, the characteristics of services and service suppliers and consumers' preferences.⁴²

The emphasised words unambiguously suggest that regulation is an element to be accounted for, when deciding on likeness.⁴³ The impact of this exercise in the overall evaluation remains an open question.⁴⁴

Think of it this way. If in the post-financial crisis world, Home treats differently two banks originating in two different countries, only one of which observes Basel III, would it be violating MFN and/or National Treatment? Depending on the weight the Appellate Body will give in the emphasised words cited above, the response might be a yes or a no.

⁴² *Supra* note 36, ¶ 6.39 (emphasis added).

⁴³ Panos Delimatsis & Bernard Hoekman, *National Tax Regulation, International Standards and the GATS: Argentina — Financial Services* (Tilberg Law and Economic Centre, Discussion Paper No. 33, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3026094, argue that policy considerations should not have an impact on determinations of likeness and, at most, should be accounted for when examining less favourable treatment.

⁴⁴ Note, that this report might be hard to reconcile with a prior report that the Appellate Body had issued in, Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/AB/R (adopted Sept. 25, 1997). There, the Appellate Body had explicitly rejected the relevance of the aims and effects-standard of review in the context of claims under Article II of GATS when dealing with the likeness-analysis (¶¶ 240 – 241):

“The European Communities argue that the EC licensing system for bananas is not discriminatory under Articles II and XVII of the GATS, because the various aspects of the system, including the operator category rules, the activity function rules and the special hurricane licence rules, ‘pursue entirely legitimate policies’ and ‘are not inherently discriminatory in design or effect’. We see no specific authority either in Art. II or in Art. XVII of the GATS for the proposition that the ‘aims and effects’ of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions. In the GATT context, the ‘aims and effects’ theory had its origins in the principle of Art. III:1 that internal taxes or charges or other regulations ‘should not be applied to imported or domestic products so as to afford protection to domestic production’. There is no comparable provision in the GATS. Furthermore, in our Report in *Japan — Alcoholic Beverages*, the Appellate Body rejected the ‘aims and effects’ theory with respect to Art. III:2 of the GATT 1994. The European Communities cites an unadopted Panel report dealing with Art. III of the GATT 1947, *United States — Taxes on Automobiles*, as authority for its proposition, despite our recent ruling.” (italics in the original).

Or think of “shadow banking,” where financial intermediaries, not subject to regulatory oversight, facilitate the creation of credit across the financial system. Home might allow for similar operations to be performed by banks registered in its sovereignty, and not by non-bank banks that are accountable nowhere.

Now think of two banks operating in the credit business. One is very large, and the other is a local bank. The Financial Stability Board (FSB) has listed the first bank as a “Global Systemically Important Financial Institutions” (G-SIFI), and the other is not as it is too small. Pursuant to post-crisis regulatory developments, G-SIFIs are subject to an extra set of rules besides other regulations that apply to all financial institutions.

Panels and the Appellate Body have also dealt with the issue of whether the mode of supplying a service affects the evaluation of likeness. In *Canada — Autos*, the Panel was requested to decide head-on, whether the mode of supply should affect, or not, its likeness-analysis. Without spending too much time thinking about it, it responded in the affirmative:

“[w]e note that the [measures] ... do not discriminate between domestic and foreign services and service suppliers operating in Canada under modes 3 and 4. This observation, however, does not suffice to conclude that the requirements of Article XVII are met. In our view, it is reasonable to consider for the purposes of this case that services supplied in Canada through modes 3 and 4 and those supplied from the territory of other Members through modes 1 and 2 are ‘like’ services. In turn, this leads to the conclusion that the [measures]... provide an incentive for the beneficiaries of the import duty exemption to use services supplied within the Canadian territory over ‘like’ services supplied in or from the territory of other Members through modes 1 and 2, thus modifying the conditions of competition in favour of services supplied within Canada. Although this requirement does not distinguish between services supplied by service suppliers of Canada and those supplied by service suppliers of other Members present in Canada, it is bound to have a discriminatory effect against services supplied through modes 1 and 2, which are services of other Members.

In light of the foregoing, we find that [the measures] ... accord less favourable treatment to services of other Members supplied through modes 1 and 2 and are therefore inconsistent with Canada’s obligations under Article XVII of the GATS.”⁴⁵

⁴⁵ *Supra* note 37, ¶¶ 10.307-10.308.

This view seemed to gain traction in subsequent case law. In *China — Electronic Payments*, the Panel seemed to endorse the view expressed in *Canada — Autos*, when it did not see any reason why the supply of the same service through different modes could affect the likeness-analysis.⁴⁶ In a subsequent case, in *Argentina — Financial Services*, the Appellate Body opened the door to the possibility that delivery of the same service through different modes of supply might affect the likeness analysis. Without categorically taking a stance, the Appellate Body held:

“[...] different modes of supply as defined in Article I:2 exist only in trade in services under the GATS, and not in trade in goods under the GATT 1994, and, accordingly, the analysis of ‘likeness’ of services and service suppliers may require additional considerations of whether or how this analysis is affected by the mode(s) of service supply.”⁴⁷

Citing the panel report on *China — Electronic Payments* in support, and omitting references to the report on *Canada — Autos*, the Appellate Body opened the door to the possibility that the same service might be considered as unlike if supplied through different modes. Alas, it did not explain how this could be the case. As a result, we can only note that the possibility might exist (at least in the eyes of the Appellate Body), but so far there is no concrete example of how it could be done.

Whatever the practical applications might be, likeness of services across modes should not entail that WTO members cannot differentiate their commitments across modes because they have to treat like services in like manner. In fact, the Scheduling Guidelines and the relevant practice leave no doubt that WTO members can be more liberal in Mode 1 than say in Mode 3, with respect to the same service.⁴⁸ WTO Members can, of course, differentiate when scheduling their commitments between different modes. A lawyer, in this line of thinking, is a lawyer irrespective of the mode of supply he/she uses to provide a service, even though he/she might be facing lawful, asymmetric barriers across different modes when doing so.

Another element that deserves being addressed here concerns the implication for likeness of the idea that the GATS is technologically neutral.⁴⁹ The USITR's Section

⁴⁶ Panel Report, *China — Certain Measures Affecting Electronic Payment Services*, ¶ 7.704, WTO Doc. WT/DS413/R (adopted Aug. 31, 2012).

⁴⁷ *Supra* note 36, ¶ 6.33.

⁴⁸ Council for Trade in Services, *Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services*, WTO Doc. S/L/92 (adopted Mar. 23, 2001).

⁴⁹ *Supra* note 32, ¶ 6.285. On the principle of technological neutrality, *see also supra* note 34.

301 Report is particularly relevant in this regard as it upholds the claim by interested parties and stakeholders that the DST, by ring-fencing digital companies, disproportionately targets large US companies involved in the digital advertising business as opposed to large French companies that, for example, coordinate and publish advertisements on newspapers or other publications.⁵⁰ The logic behind this argument is that advertising is the same service irrespective of whether it is supplied digitally or through other forms. The counterargument would be that the scalability and network effects of digital advertising are disproportionately higher when compared to more traditional forms of publicity, and therefore not eligible for comparison with the latter.⁵¹

The question on likeness is even more complex as regards digital interface services. Recall that the French DST only applies to companies supplying digital interface services that do not own their own inventory of the traded goods or do not own the service that is provided. One example that is provided in the Section 301 Report is that the DST is expected to cover Uber (because Uber does not own the transport service provided by riders) and not the French Taxi company that recently launched an app to connect users and drivers (because it owns the underlying service that is supplied).⁵² One way to bring clarity to the discussion would be an assessment of the interface services that is separate from that of the underlying services that are traded. To borrow a notion made famous by Bhagwati in a seminal paper,⁵³ the issue could perhaps be best understood if the interface service is “splintered” from the other service.⁵⁴

Eventually, what is clear is that the French DST is, on its face, origin neutral. As we know from case law, however, *de facto* discrimination is also covered by the GATS non-discrimination obligations. The Section 301 Report concludes that the design of very high revenue thresholds is conceived so as to produce a detrimental impact on US large digital firms. Commenting on a similar proposal tabled by the European Commission, Hufbauer and Lu reached the same conclusion.⁵⁵

⁵⁰ USTR Report, *supra* note 7.

⁵¹ *Supra* note 42.

⁵² USTR Report *supra* note 7.

⁵³ Jagdish Bhagwati, *Splintering and Disembodiment of Services and Developing Nations*, 7(2) THE WORLD ECON. 133 (1984).

⁵⁴ The only panel so far that was confronted with the argument that various components of a service could or should be separated was not impressed by that argument and dismissed it. *See supra* note 36.

⁵⁵ Gary Hufbauer, & Zhiyao (Lucy) Lu, *The European Union’s Proposed Digital Tax, a De Facto Tariff*, (Peterson Institute for Int’l. Econ., Policy Brief 18-15, 2018), <https://www.piie.com/publications/policy-briefs/european-unions-proposed-digital-services-tax-de-facto-tariff>.

We note that the extant WTO legal framework is not adequately evolved to respond to questions of likeness and discrimination posed by measures that relate to digital platforms. Features that are idiosyncratic yet fundamental to digital business models—such as scalability and network effects that could act as potential barriers to entry—could make it particularly complex to respond to these questions.

With this in mind, we now turn to the second element of the analysis under the National Treatment clause.

ii. Less Favourable Treatment

If the concept of ‘likeness’ is agnostic to regulation, then all sorts of problems will arise. If it is informed by policy objectives, however, it is not the end of the game.

Establishing that two service suppliers are ‘like’ is, in fact, only the first step. It is also important to show that the tax measures provide less favourable treatment to the foreign service supplier as compared to the domestic supplier.

One way to look at the issue is to consider that, assuming that the services and the service suppliers at hand are ‘like’, the introduction of a tax that is designed to impact foreign suppliers disproportionately when compared to local suppliers amounts, by itself, to less favourable treatment.

Admittedly, however, the wording of Article XVII of the GATS seems to allow for another reading. First of all, footnote 10 to Article XVII of the GATS reads:

“[s]pecific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.”⁵⁶

Recall that one of the claims made by scholars and stakeholders is that large multinational companies are already subject to income taxes in their home jurisdictions,⁵⁷ and that the imposition of a DST would be unduly burdensome and effectively amount to “double taxation”. Such extra taxation would put these

⁵⁶ GATS, *supra* note 24, at art XVII n.10.

⁵⁷Unified Approach, *supra* note 2. See also the arguments made by the representatives of various US companies in the context of the Section 301 hearings, Office of the United States Trade Representative, *Section 301 France Digital Services Tax (DST) Public Hearing*, (Aug. 19, 2019), <https://ustr.gov/sites/default/files/enforcement/301Investigations/0819USTR.pdf>.

companies at a disadvantage when compared to French operators. When read against the background of footnote 10 to Article XVII of the GATS, however, this argument risks falling short of establishing less favourable treatment. The requirement to already pay income taxes in the home jurisdiction could in fact be read as an "inherent disadvantage" that afflicts a foreign company vis-à-vis a domestic supplier of services.⁵⁸ In this regard, a regulating Member is not required to compensate for such inherent disadvantage.

More compelling doubts as to the occurrence of less favourable treatment derive from the reading of Articles XVII:2 and XVII:3 of the GATS. The former stipulates that a Member can act consistently with the National Treatment obligation even when it accords to foreign suppliers treatment that is formally different from what it accords to its own like services and service suppliers. In this regard, the Panel in *China — Publications and Audiovisual Products* noted that the language of Article XVII:2 calls for a careful analysis of the impact of the measure on the marketplace.⁵⁹ Article XVII:3 clarifies that formally identical or formally different treatment can be considered as being less favourable if they modify the conditions of competition in favour of domestic services or service suppliers compared to foreign like services or service suppliers.

In the case at hand, some of the companies affected by the measure are dominant players in their respective segments of the market.⁶⁰ One may wonder whether the imposition of a 3% tax on the revenues generated exclusively by the supply of certain services is capable of producing any meaningful effect. In other words, it is at least conceivable that a relatively small tax on revenues does not alter the competitive equilibrium between large tech companies that will keep their leadership in given relevant markets and smaller domestic service suppliers who are in any event subject to income taxes in Home.

3. General Exceptions

⁵⁸ The Appellate Body in *Argentina — Financial Services*, *supra* note 36, ¶¶ 6.103-6.104, stressed that the "inherent competitive disadvantages" result from the foreign character of the relevant services or service suppliers, rather than from the measure adopted by the importing Member. The Panel in *Canada — Autos*, *supra* note 37, ¶ 10.298, in an unappealed finding, held that footnote 10 "does not provide cover for actions which might modify the conditions of competition against services and service suppliers which are already disadvantaged due to their foreign character". It would thus appear that WTO panels have not yet scrutinized the situation described in this paper.

⁵⁹Panel Report, *China — Publications and Audiovisual Products*, ¶¶ 7.1130 - 7.1131, WTO Doc. WT/DS363/R (adopted Aug. 12, 2009).

⁶⁰USTR Report, *supra* note 7, acknowledges on multiple occasions that certain US digital companies are "dominant" players in their respective markets.

Assuming a violation has been established, France could justify its measures by invoking one of the grounds invoked in the list of agreed general exceptions.⁶¹ The natural candidate would be Article XIV (a), which covers measures necessary to protect public morals or to maintain public order. Article XIV (d) is inapplicable, since it covers only measures aimed at ensuring equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other WTO members,⁶² and the French DST is not a direct tax. In any event, the exception under Article XIV (d) would only apply to measures that are inconsistent with the National Treatment obligation, thus it would not help with regard to possible other findings of inconsistency.

The argument France could raise is that, in line with its past fiscal policy, it is necessary to ensure that higher incomes are targeted with heavier taxes. This is a debatable argument, since it will be called to show that, for French morality to be preserved, this form of taxation is necessary. Since though, the Appellate Body has repeatedly stated that the degree of deference it will show is in direct correlation with the importance of the objective sought (and social peace is an important societal preference), one cannot outright exclude that France's claim might eventually carry the day.⁶³

Assuming it can show that it has complied with the chapeau of Article XIV as well (which, for all practical purposes requests from WTO members to treat similar situations in even-handed manner), then France could prevail.

III. THE MISSING LINK IN THE GATS: JURISDICTION

A key element in the US argument is that France has no right to tax multinational tech companies established (and subject to income taxes) elsewhere. The GATS is silent about prescriptive jurisdiction, but in the absence of some common understanding of this notion, key institutions like national treatment, cannot function.

⁶¹ GATS, *supra* note 24, at art. XIV.

⁶² Mitchell et al., *Supra* note 6, reach the same conclusion.

⁶³ Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 306, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005), noted that the process of weighing and balancing factors in the assessment of the “necessity” standard requires, as a first step, an assessment of the “relative importance” of the interests or values furthered by the challenged measure. “Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be ‘weighed and balanced.’” This view was reiterated by the Appellate Body in, Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, ¶ 143, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007).

If we are not dealing with specific instances, like piracy where universal jurisdiction is acknowledged, states can lawfully exercise jurisdiction asserting either territoriality or nationality as the basis for it. The former would allow France to tax income made in France, and the latter would provide taxing right over income made by the French anywhere around the world. It is thus, not difficult to see why conflicts might arise. A French making income in the United States might be liable to pay taxes both in France as well as in the United States. To avoid inefficient double taxation, states often agree contractually who should tax what.

In the absence of contractual solutions, differences in tax rates across countries are the source of growing concerns for citizens and governments around the world. As technological developments have made the world increasingly “flat”, enabling multinationals to expand their activities more rapidly than in the past, concerns regarding the erosion of the tax base, or the shifting of profits from higher to lower-tax jurisdictions have grown exponentially.

This issue is even more problematic for digital companies and online platforms. Exploiting the internet revolution and the reduction of transaction costs, large multinational tech companies have been able to conquer growing shares of the world market without necessarily establishing subsidiaries or branches in each and every territory where they conduct their operations. As taxation (normally) follows incorporation of an entity in a given territory, these companies are subject to little or no taxation in territories where they generate a substantial amount of revenues. Accordingly, it has been observed that they are subject to relatively low taxes on income, precisely the concern that France has raised.

A. Addressing Jurisdictional Conflicts Through Unilateral Measures

In principle, a state can unilaterally desist from invoking its jurisdiction, if it takes the view that another state has more of a jurisdictional claim over the particular transaction. This is what the principle of ‘comity’ amounts to. Alas, it is often not an incentive-compatible structure, and conflicts routinely arise. They are usually redressed through cooperative solutions.

B. Cooperative Solutions: the OECD BEPS

Since 2013, Members of the OECD and the G-20 have launched talks to reform the global tax system within the Inclusive Framework on Base Erosion and Profit Shifting (BEPS), which now includes 135 jurisdictions.⁶⁴ Although progress has

⁶⁴ *Base Erosion and Profit Shifting*, OECD, <https://www.oecd.org/tax/beps/> (last visited May 31, 2020). For a concise discussion, see, Avi-Yonah, *The Triumph of BEPS: US Tax Reform*

been made and governments have identified 15 actions to implement in order to fight tax avoidance and profit shifting,⁶⁵ conflicting agendas and complex technical questions have made the process rather lengthy. Towards the end of 2019, the OECD Secretariat published two papers, taking stock of the various proposals tabled by governments over the years, with a view to identifying common aspects of those proposals and facilitating political compromise.

The first paper suggests a “Unified Approach” to address two main issues:

- the reform of the rules on where taxes should be paid and on what basis (nexus); and
- the value of the profits that could be taxed in jurisdictions where the consumers of goods or services provided by a multinational company reside (profit allocation).⁶⁶

These two issues are commonly referred to as “Pillar One” issues.

The second paper targets “Pillar Two” issues, namely the design of a system whereby multinational enterprises are subject to a minimum level of taxation.⁶⁷

The logic behind the OECD papers is compelling. Essentially, the OECD Secretariat identified areas on which, based on the proposals tabled by states in the past, it is more likely that governments will eventually agree. The agenda is ambitious, and the declared aim is to complete the negotiations before the end of 2020.

Currently, the OECD Secretariat is consulting with governments and stakeholders, prior to submitting a finalized text. As things stand, several outstanding issues remain. For the purposes of this paper, however, we signal one aspect that we find particularly relevant. The proposals are not meant to target exclusively highly digital business models. On the contrary, the idea is to adopt a broad notion of “consumer-facing businesses”, with limitations to the scope and carve-outs to be further discussed. This aspect is relevant, as it directly responds to the concerns of digital behemoths who argue that they are unjustifiably ring-fenced.

and the Single Tax Principle (Univ. of Mich. Public L. & Legal Theory Research Paper No. 579, 2017).

⁶⁵ *BEPS Actions*, OECD, <https://www.oecd.org/tax/beps/beps-actions/> (last visited May 31, 2020).

⁶⁶ Unified Approach, *supra* note 2.

⁶⁷ GloBE, *supra* note 2.

C. The Legal (Ir)relevance of BEPS in the WTO-Legal Order

At the time of writing, talks within the BEPS Framework are still underway. A number of national governments have decided not to wait for the final political agreement at the OECD level, and to introduce instead new legislation, targeting specifically the tax treatment of digital companies.

But even if BEPS talks were to be successfully concluded, there is no guarantee that it would be legally relevant in the WTO, not even as a justification.

Consider for example Article XIV(c), which allows Members to adopt measures that would otherwise be GATS inconsistent if they are necessary to secure compliance with laws or regulations that do not violate the GATS. Interpreting the corresponding GATT provision, Article XX(d), the Appellate Body held that an international agreement cannot be considered as a “law or regulation” for the purposes of the application of the exception. According to the Appellate Body, the wording “laws or regulations” narrows down the scope of application of the provision to domestic instruments as opposed to international agreements.⁶⁸

An OECD arrangement on export credits has been explicitly inserted in the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and thus, has gained legal relevance within the WTO legal order.

Annex I to the SCM Agreement provides for an illustrative list of export subsidies. Letter (k) of Annex I reads, in relevant part:

“...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.”

⁶⁸Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, ¶ 70, WTO Doc. WT/DS 308/16 (adopted Mar. 24, 2006). In a more recent case, the Appellate Body held that it did not mean to foreclose the possibility for international arrangements to fall completely outside the scope of Article XX(d) of the GATT, to the extent that they are transposed into instruments of domestic law and are enforceable. *See* Appellate Body Report, *India — Certain Measures Relating to Solar Cells and Solar Modules*, ¶ 5.140, WTO Doc. WT/DS 456/20 (adopted Oct. 14, 2016).

While not explicitly mentioning the OECD Arrangement on Guidelines for Officially Supported Export Credits ("OECD Arrangement"), it is well established that letter (k) specifically refers to it. This was further clarified by the panel in *Canada — Aircraft (Article 21.5 — Brazil)*, which found that the OECD Arrangement is an international agreement for the purposes of letter (k) and, actually, it is the only international undertaking fitting that description.⁶⁹

History also tells us that, absent agreement between WTO Members, the fate of disciplines negotiated elsewhere may not be rosy.

In the mid 1990's negotiations took place at the OECD with a view to concluding a Multilateral Agreement on Investment (MAI). The idea was to lay down a multilateral set of rules for the protection of foreign investments and an effective dispute settlement mechanism. Some developed countries that were involved in those OECD negotiations attempted at transposing the MAI into the WTO, but the initiative failed due to the pushback of developing countries who did not participate in the initial negotiations.⁷⁰

D. On the Adequacy of the Current Regime

As the discussion conducted so far reveals, we are confronted with a clash of two inadequacies. On the one hand, the GATS is a largely under-litigated agreement, and the interpreter cannot rely on a consolidated body of panel or Appellate Body reports on relevant provisions. Specifically, as the measure concerned is a tax on providers, clarity on the notion of "likeness of service suppliers" would have permitted to frame the problem right away and to ensure legal certainty. As things stand, however, the case law on likeness under the GATS is unclear and does not allow us to draw definitive conclusions on the matter.

The second inadequacy is in the current international regime concerning the taxation of large corporations. Clausing,⁷¹ convincingly argues that international cooperation on matters related to the taxation of large corporations is a good example of a prisoners' dilemma situation.⁷² In a scenario where there is no or

⁶⁹ Panel Report, Recourse by Brazil to Article 21.5 of the DSU, *Canada — Measures Affecting the Export of Civilian Aircraft*, ¶ 5.78, WTO Doc. WT/DS70/RW (adopted Aug. 4, 2000).

⁷⁰ Michael Daly, *Investment Incentives and the Multilateral Agreement on Investment*, 32 J. WORLD TRADE 5 (1998).

⁷¹ KIMBERLY CLAUSING, *THE PROGRESSIVE CASE FOR FREE TRADE, IMMIGRATION, AND GLOBAL CAPITAL* (2019).

⁷² Bankman et al., *Collecting the Rent: The Global Battle to Capture MNE Profits* (Stanford Law School, Working Paper No. 527, 2018), <http://ssrn.com/abstract=3273112>, made similar

limited cooperation, national jurisdictions have the incentive to lower their taxation rates in the attempt to attract an increasing tax base at the expense of other countries. However, should the scenario change and a significant amount of countries decide to effectively cooperate, national tax authorities could actually sustain higher tax rates with a similar (if not better) distribution of economic activities. We agree with Clausing's intuition and we share the idea that cooperation is to be preferred to unilateralism on such matters.

In this respect, the talks currently underway in the context of the OECD/G20 Framework on BEPS are particularly interesting. Although the intention of the parties involved in the negotiations is to complete the work by the end of 2020, conflicting agendas and sensitivities are delaying the process and, at this stage, it is not possible to predict what the outcome will be.

Importantly, the G20/OECD discussions are taking place in a pure tax law context, without necessarily looking at the interplay of any new rules with the existing regime governing trade in services at the WTO.

The matter is certainly delicate, and the stakes are high. As things stand, a negotiated solution is clearly to be preferred as opposed to a lengthy and controversial legal feud between Members with different sensitivities on the matter.

Irrespective of the outcome of the OECD/G20 talks on the matter, it is important for the trade community to engage with the international trade dimension of the matter and to negotiate solutions that would allow host jurisdictions to collect taxes from activities taking place in their territories while at the same time avoid unduly hindering international trade in services.

The WTO already has institutional instruments dealing with situations where only a subset of Members is ready to agree on new discipline in a specific sector: plurilateral agreements. Such agreements allow those parties who are ready to further the integration of their trade policies to do so, while at the same time leaving the door open for latecomers to join in. While the instrument has only been actively resorted to in a handful of cases, it nevertheless represents a powerful tool, especially at a time when the consensus rule is making practically impossible for Members to complete meaningful negotiations at the WTO.⁷³

remarks on the virtues of cooperation, without resorting to the notion of "prisoner's dilemma".

⁷³ See, Bernard M. Hoekman & Petros C. Mavroidis, *WTO 'à la carte' or 'menu du jour'? Assessing the Case for More Plurilateral Agreements*, 26(2) EUR. J. INT'L L., 319 (2015).

Should incorporation of new rules in the GATS be unfeasible, the negotiation of a plurilateral agreement is, in our view, the more viable and practical way to address the issue of international taxation at the WTO level.

IV. CONCLUDING REMARKS

Taxation is a sensitive matter as it is deeply intertwined with states' jurisdiction and sovereignty. In the absence of meaningful cooperation on taxation matters, it is almost inevitable that tensions will mount, especially at times like these when the institutions of multilateralism are under strain. In this paper, we have tried to bridge the gap between the tax and the trade dimensions of recent initiatives aimed at increasing the fiscal burden on large multinational companies.

The long-established firewall between tax and trade issues no longer holds, for two complementary reasons. On a rather obvious note, literally everything can affect trade, including the exploitation of tax rates' mismatches by multinational players. Less obviously, the progressive liberalisation of trade in services combined with technological developments has allowed traders to exploit the benefits of free trade without a corresponding increase in fiscal responsibility.

These clearly are two faces of the same problem and the solution requires joint efforts by the trade and tax communities. While tax experts and regulators have been discussing the issue for quite some time, the emergence of unilateral responses to the problem has brought trade problems to the surface.

In this paper, we used the French DST as a stress-test for the largely under litigated and uninterpreted GATS obligations. We have laid down several possible outcomes with regard to controversial interpretative issues, and this very fact is a symptom of legal uncertainty. Irrespective of the fact that legal certainty is an institutional value, what matters is that it is nonetheless vital for international traders and consumers alike.

The fact that France and the United States have decided to set their controversy aside and committed to explore multilateral solutions is positive. This also increases the expectations as regards the fate of the OECD/G20 talks. However, such talks are so far agnostic as regards the trade dimension of the international tax problem, and the risk is that issues of alleged discrimination will arise again in the future. To mitigate this problem, we suggest the possibility to discuss the trade component of such tax issues in the context of a plurilateral agreement under the aegis of the WTO. Such an agreement would be an opportunity to better define the scope of application of the GATS, with regard to digital services and would give Members the chance to clarify the meaning of delicate concepts such as likeness and less favourable treatment. These concepts remain ambiguous for

services, 25 years after the entry into force of the GATS, unlike the clarity seen in the domain of trade in goods.

Annex 1: the French (EU) Offer

	Limitation on National Treatment
<p><u>Other Business Services</u></p> <p>a) Advertising (All Member States except PL, SI: CPC 871; PL: CPC 871 excluding advertising of tobacco products, alcoholic beverages, pharmaceuticals; SI: part of CPC 8711 and part of CPC 8712, excluding direct mail advertising, outdoor advertising and excluding for goods subject to import authorisation and excluding pharmaceutical products, alcohol, tobacco, toxic explosives, weapons and ammunition)</p>	<p>1) All Member States: None</p> <p>2) All Member States except CY, MT: None CY, MT: Unbound</p> <p>3) All Member States except CY, MT: None CY, MT: Unbound</p> <p>4) <u>ICT and BV:</u> All Member States except CY, FI, LV, MT, PL: Unbound except as indicated in the horizontal section FI, LV, PL: None CY, MT: Unbound</p>
<p>Computer and related services⁷⁴</p> <p>c) Data Processing Services (CPC 843)⁷⁵</p>	<p>1),2), 3) All Member States except MT: None MT: Unbound</p>

⁷⁴In many cases, computer and related services enable the provision of other services* by both electronic and other means. However, in such cases, there is an important distinction between the computer and related service (e.g., web-hosting or application hosting) and the other service* enabled by the computer and related service. The other service, regardless of whether it is enabled by a computer and related service, is not covered by CPC 84. (footnote original)

* e.g. W/120.1.A.b. Accounting, auditing and bookkeeping services, W/120.1.A.d. Architectural services, W/120.1.A.h. Medical and dental services, W/120.2.D. Audiovisual services, W/120.5. Educational services.

⁷⁵ This heading also covers the commitments undertaken by CZ, EE, LV, LT and SK under CPC 843 in Telecommunication (sub-item (n) on-line information and/or data processing (including transaction processing)). (footnote original)

	<p>4) <u>ICT and BV:</u></p> <p>All Member States except FI, LV, MT, PL: Unbound except as indicated in the horizontal section</p> <p>FI, LV, PL: None MT: Unbound</p>
<p>Road transport Services</p> <p>a) Passenger Transportation All Member States except FI, LV, LT: CPC 71213 and 7122. FI: CPC 71213, 71222 and 71223. LV: CPC 71213, 71222, 71223. LT: CPC 7121, 7122). For LV, LT and SE: cabotage excluded</p> <p>Rental of Commercial Road Vehicles with Operator (CPC 7124)</p>	<p>1) All Member States: Unbound</p> <p>2) All Member States except AT, CY, CZ, EE, HU, MT, PL, SK, SI: None AT, CY, CZ, EE, HU, MT, PL, SI, SK: Unbound</p> <p>3) All Member States except AT, CZ, EE, FI, HU, LV, LT, MT, PL, SE, SI, SK: Unbound for transport within a Member State (cabotage), by a carrier established outside that Member State. AT, CZ, EE, HU, MT, PL, SI, SK: Unbound FI, LT: None LV, SE: Requirement on established entities to use vehicles with national registration.</p> <p>1) All Member States except AT, CY, CZ, EE, HU, LV, LT, MT, PL, SK, SI SE: None AT, CY, CZ, EE, HU, LV, LT, MT, PL, SK, SI, SE: Unbound</p> <p>2) All Member States except AT, CY, CZ, EE, HU, LV, LT, MT, PL, SK, SI, SE: None AT, CY, CZ, EE, HU, LV, LT, MT, PL, SK, SI, SE: Unbound</p>

	<p>3) All Member States except AT, CY, CZ, EE, HU, LV, LT, MT, PL, SK, SI, SE: None AT, CY, CZ, EE, HU, LV, LT, MT, PL, SK, SI, SE: Unbound</p> <p>4) <u>ICT and BV:</u> All Member States except AT, CY, CZ, EE, FI, HU, LV, LT, MT, PL, SK, SI, SE: Unbound except as indicated in the horizontal section AT, CY, CZ, EE, HU, LV, LT, MT, PL, SK, SI, SE: Unbound. FI: None</p>
<p>Tourist guide services</p>	<p>1) All Member States except AT, CY, CZ, HU, LT, MT, PL, SK, SI: None AT, CY, CZ, HU, LT, MT, PL, SK, SI: Unbound</p> <p>2) All Member States except CY, HU, LT, MT, PL, SI: None CY, HU, LT, MT, PL, SI: Unbound</p> <p>3) All Member States except CY, HU, LT, MT, PL, SI: None CY, HU, LT, MT, PL, SI: Unbound</p> <p>4) <u>ICT and BV:</u> All Member States except CY, CZ, FI, LV, LT, MT, PL, SI, SK: Unbound except as indicated in the horizontal section CY, CZ, HU, LT, MT, PL, SI, SK: Unbound FI, LV: None</p>