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Reconciling Tax and Trade Rules in the Digitalised Economy: Challenges for ASEAN and East Asia

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Abstract: *As the digital economy expands in scale, scope, and form it poses major challenges for public revenue and tax policy and administration in Asia and other parts of the global South. When attempts led by developed countries at the OECD-led Inclusive Framework on Base Erosion and Profit Shifting (BEPS) to agree on new norms for taxing digital giants like Facebook, Google, and Amazon stalled, individual countries, including a number of developing countries in Asia, began developing their own responses, notably the adoption of digital services taxes. High-level compromises have recently been announced at the OECD, but the details are yet to come and are not expected to address the needs of developing countries to effectively tax the activities of digital giants operating from offshore.*

As countries seek effective and workable means to tax the digitalised economy, existing and proposed international rules on digital trade in free trade agreements, and plurilateral moves to develop electronic commerce rules in the World Trade Organization, may fetter their ability to do so. To date, very little attention has been paid in trade negotiations to the consequences of these developments for countries' tax regimes. Nor have the adequacy, effectiveness, and workability of the tax exceptions in trade and investment agreements been properly re-assessed. Many governments are only becoming aware that trade rules may constrains their ability to regulate the (poorly understood and fast moving) digital domain after they have signed up to them.

A series of investigations by the US government under Section 301 of the US Trade Act 1974 into digital services taxes, including those adopted by India and proposed by Indonesia, provides a real-world basis on which to assess how binding and enforceable digital trade rules might be used to challenge digital tax measures at the unilateral, bilateral, and multilateral levels.

In highlighting these risks, the paper aims to provide a framework for the tax and trade divisions of governments in ASEAN and East Asia to reflect together on the potential for proposed digital trade rules to impact negatively on their public revenue.

Keywords: electronic commerce, digital trade, digital services tax, CPTPP, RCEP, BEPS

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1. Introduction

As the digital economy expands in scale, scope and form it poses major challenges for public revenue and tax policy and administration in Asia and other parts of the global South. Taxing multinational enterprises (MNEs) has long been problematic for developing countries, as the prevailing international taxation principles that distribute taxation amongst countries based on their domicile have been modelled by and for developed countries on behalf of their corporations. Today, digital giants like Google, Amazon, Facebook and Apple, which operate from offshore with no local presence in the source country, are major beneficiaries of that model.

Over the past decade even countries belonging to the Organisation for Economic Cooperation and Development (OECD) have recognised that the international corporate tax system is not fit for purpose in the 21st century's digitalised world. These challenges are at the centre of recent tax reform discussions on Base Erosion and Profit Shifting (BEPS) at the OECD. However, consensus on a new model has proved elusive. The United States (US), in particular, has sought to retain the core elements of the status quo.[1] The prospects for agreement on new norms rests on the Biden administration supporting meaningful reforms.

Meanwhile, a growing number of countries are developing their own innovative responses, including the adoption of digital services taxes, application of consumption taxes to cross-border transactions, and caps on contractual royalty payments between related entities. A number of countries in ASEAN and East Asia, and their neighbours in South Asia, have been early movers in this regard, and many others are considering their options.

As developing countries seek effective and workable means to tax the digitalised economy, they face the prospect that existing and proposed international trade rules may fetter their ability to do so. Disciplines first developed in the Trans-Pacific Partnership Agreement (TPPA) under the rubric of 'electronic commerce', and variations on 'digital trade' in subsequent free trade agreements (FTAs), constrain the governance and regulation of digital technologies, services, and activities at the national level. These new trade rules complement existing provisions on trade in services, including financial services, and agreements on

foreign investment and intellectual property rights, as they apply to the digital domain. Already, we are seeing countries adopt divergent and contested approaches to the nature, scope, and enforceability of emerging digital trade rules in regional and bilateral trade negotiations,[2] and in negotiations for a plurilateral agreement at the World Trade Organization (WTO).

To date, very little attention seems to have been paid in trade negotiations to the consequences of these developments for countries' tax regimes, and for the ability of tax authorities to innovate in response to the unique challenges of the digitalised economy and the dominance of 'Big Tech' multinationals. Nor have the adequacy, effectiveness and workability of the tax exceptions in trade and investment agreements been properly re-assessed. As a consequence, many governments are becoming aware that trade rules impose potentially serious constraints on their ability to regulate the (poorly understood and fast moving) digital domain only after they have signed up to them.

These developments are especially important for Asia. Seven of the twelve original signatories to the TPPA, and its successor the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), come from this region. The agreements' e-commerce template has been expanded through several bilateral free trade agreements (FTAs) between Asian parties, although mainly amongst developed countries. All the TPPA parties are now participating in a plurilateral negotiation in the WTO and other Asian countries, including least-developed countries (LDCs), have been encouraged to join. The reluctance of many developing countries to participate reflects their nervousness about the unforeseeable consequences of these proposed rules. That caution is also evident in the recently concluded Regional Comprehensive Economic Partnership (RCEP) where India,[3] China, and several ASEAN countries – for a number of different reasons – insisted that the e-commerce chapter was not binding and enforceable and omitted certain of the TPPA rules.

This paper aims to provide a framework for the tax and trade divisions of governments in ASEAN and East Asia to reflect together on the potential for proposed digital trade rules to impact negatively on their public revenue. The research brings a region-specific perspective to an analysis of the challenges these

rules pose for taxation of the digitalised economy at a global level, which the author published in 2020 in collaboration with several international tax experts.[4] That report found the existing and proposed digital trade rules could severely and permanently disadvantage developing countries by eroding their revenue base and constrict their policy space for digital development.

Since that report was published, the US Trade Representative (USTR) has undertaken a series of investigations into countries' digital services taxes pursuant to Section 301 of the US Trade Act 1974 and resolved to impose unilateral trade sanctions on some of those countries. The investigations into the digital tax initiatives adopted by India and proposed by Indonesia provide a real-world basis on which to assess how binding and enforceable digital trade rules might be used to challenge digital tax measures at the unilateral, bilateral and multilateral levels.

The first section of this paper identifies a number of concerns that are motivating governments to develop new strategies and laws to tax the digitalised economy. Section Two gives an overview of regional initiatives to tax digital corporations and activities.[5] Section Three provides a synopsis of the relevant regional and international trade rules that may apply to those initiatives. Section Four outlines the section 301 investigations launched by the USTR in 2020 into whether the digital tax measures introduced by Indonesia and India (and a number of other countries) constitute unfair trade practices that are damaging to US commerce. The arguments raised during those investigations are then used to identify legal risks that trade in services obligations and proposed e-commerce rules may pose for digital tax initiatives. The paper concludes by urging tax and trade officials to work together in assessing, and regularly reviewing, the effective protection of policy space in their trade negotiations and agreements to ensure that states can exercise their tax sovereignty over the rapidly changing digital domain and to adopt a moratorium on new obligations until that is in place.

2. Taxing the Digitalised Economy

Developing countries in Asia and beyond are seeking ways to harness the application of new digital technologies to improve their economic and social wellbeing and advance the Sustainable Development Goals. To achieve this, they need to bridge the deep digital divide, develop proactive digital industrialisation strategies that support fledgling businesses, secure technology transfer, enhance skills development and invest in their domestic infrastructure.[6] Governments also need to access the data generated within their countries and develop the capacity to utilise that data to the country's benefit. Funding those strategies involves significant demands on the public purse at a time when governments' revenue faces additional burdens and competing priorities resulting from the economic downturn and social costs associated with the COVID-19 pandemic.

As these demands multiply, the tax base of countries in the global South is being undermined by the growth in cross-border digital transactions and the tax minimisation strategies of the multinational digital service providers that control and operate the digital ecosystem from outside the country. Developing countries that struggle at the best of times to maintain effective tax regimes are falling further behind.

2.1. Multinationals' tax strategies

Multinational enterprises have numerous techniques to reduce their effective tax rates on corporate income to very low levels, including the location of subsidiaries in low-tax jurisdictions or in countries whose tax laws shelter certain types of income, including royalties paid on intellectual property such as software. These strategies generally involve complex corporate structures that reduce the taxable business profits of operating entities in high-tax countries.[7]

Such manoeuvres are not new. However, the digital economy enables MNEs to generate large revenues from countries anywhere in the world with little or no physical presence in those countries. These activities might involve the cross-border sale of physical or electronic goods, delivery of services into a country, user-generated advertising, algorithmic trading, or the mining and sale of data itself, with the revenue channelled to a low-taxed foreign jurisdiction. Highly digitalised MNEs

commonly operate a digital platform or an Internet marketplace from one or more global hubs that facilitate interactions between users, or users and service providers, again directing the revenue to a low tax jurisdiction. When digital MNEs do have a legal presence in countries where they operate, those local affiliates usually provide low-value services that are insulated from the main profit-generating activities.

The challenges these strategies pose are not confined to developing countries. Tax authorities around the world have responded to the growing share of digital services in their national economies by adopting innovative ways to protect their tax base. International initiatives have mainly been led by developed country governments in institutions that they dominate, notably the OECD. For years, the OECD's tax standards sought to facilitate the transfer of costs and revenues so that the profits of MNEs eventually land in company headquarters and become part of developed country tax bases after being routed through various tax havens. Those standards were supplemented by the arm's length principle that treats the parties to a transaction as separate equal and independent entities, even when they are related entities within the same corporate structure.[8]

2.2. OECD BEPS Process and Integrated Framework

In 2013 the OECD launched a process to reform international tax rules known as the Base Erosion and Profit Shifting (BEPS) project.[9] Together with the Group of 20 (G20), the OECD members invited developing countries to join their Inclusive Framework on Base Erosion and Profit Shifting. There are many developing countries are amongst the 137 participants in the Inclusive Framework deliberations, but its work remains dominated by the perspectives and expertise of the global North and builds upon fundamental principles that were originally developed in the absence of the global South. Other international institutions, notably UNCTAD and the Group of 24 (G24) developing countries, have been relegated to a secondary role.

Nominally, the OECD BEPS process addresses harmful tax practices in all countries; in practice, it has retained the bias in the existing system against taxation of business profits at source, which favours developed countries. In particular, it has made minimal changes to the taxable presence threshold (the concept of

'permanent establishment', or PE), and continues to apply the arm's length principle and transfer pricing methods for allocation of MNE income.

Identifying tax challenges raised by digitalisation was the top priority of the 15 points in the BEPS Action Plan of 2013.[10] However, little progress was achieved during the initial phase. The Integrated Framework's current work is re-examining the two main international taxation principles of (i) taxable presence (the PE rules), and (ii) the allocation of MNE income. Completing that work requires agreement on the nature of new rules and on the indicators that countries can use to calculate their share of a digital company's profit that is derived from their territory. Those negotiations were scheduled to conclude by the end of 2020. The deadline was extended to mid-2021 after the US first insisted that any new tax rules operate as a 'safe harbour' that corporations can elect to adopt and that the arm's length principle remains at the core of the international tax regime, and then withdrew temporarily from the process.[11]

At the 11th meeting of the International Framework in January 2021 the OECD Director General remarked that the

> *... importance of reaching an agreement is increasing by the day. And the COVID-19 pandemic has exacerbated many of the issues the Inclusive Framework has already [sic] trying to resolve. Left unchecked, the digitalisation of the economy will entrench longstanding imbalances and unilateral action could aggravate current tax-related trade tensions. If we do not deliver a solution by mid-2021, over 40 countries are considering, or will move ahead, with a Digital Services Tax (DST). While such measures may reflect pressure from citizens to take action, most governments agree that a multilateral, consensus-based solution would be preferable and have indicated that DSTs would be removed once an agreement is brokered by the Inclusive Framework. But we cannot wait forever.*[12]

The decision of the Biden Administration to re-engage with the Integrated Framework process has generated some cautious optimism.[13] But whatever rules the US and other developed countries might eventually agree to will not be designed for developing countries. Nor is there any guarantee that developed country states

will share the data, or technologies and capabilities, needed to monitor and regulate the digital economy.

2.3 Unilateral digital tax measures and US responses

The lack of progress at the international level has already prompted individual countries and regional groupings in Europe, parts of Asia and Africa to adapt existing tax measures and develop innovative new digital taxes. Probably the least controversial option is to extend value-added taxes (VAT) to cross-border digital transactions. Several countries, including India, have also moved to cap royalty payments in an attempt to stem a favoured tool for profit shifting.

The rapid emergence of digital services taxes is much more contentious. The DST is a transaction tax, not an income tax, and takes the form of an excise tax on a percent of gross income, or of turnover, realised from designated aspects of the digitalised economy. The details vary quite widely, but DSTs principally target revenues produced by one or more of four types of on-line businesses: (i) services delivered through the Internet, such as digital advertising; (ii) the provision of a digital platform or interface between two or more Internet users; (iii) the deployment of an Internet marketplace; or (iv) the collection and exploitation of data by an Internet provider. Financial services are often outside the scope of the tax.

The US responded unilaterally to the adoption of DSTs by launching investigations under Section 301 of the US Trade Act 1974, with the prospect of trade sanctions against the taxing country's exports if the USTR determined they constitute harmful trade practices. The aim was to intimidate the targeted countries into dropping their proposed taxes and deter other countries who are considering similar measures. The first Section 301 investigation, against France in 2019,[14] led to the US announcing trade sanctions against key French exports. Those punitive tariffs were deferred after France agreed to suspend the implementation of the tax pending the ongoing OECD discussions.[15] In 2019 and 2020 the USTR launched a further eleven investigations into alleged unfair trade practices under Section 301, including against Indonesia and India.[16] In January 2021 its reports on five of these investigations, including on India, upheld the allegations.[17] Following hearings on proposed trade sanctions[18] the USTR confirmed retaliatory tariffs, including up to

25% *ad valorem* duties on a list of products from India.[19] A 'status update' said the remaining investigations were ongoing.[20] However, they were discontinued in late March 2021 because the taxes had yet to be implemented and they fell outside the timeframe set out by the Act.[21]

These Section 301 investigations are canaries in the coal mine, for three reasons. First, many of the objections the USTR raised to digital services taxes correspond to the new rules being adopted on digital trade. Second, the US, as the domicile of the dominant tech companies, has shown that it will take legal action against countries that seek to tax those corporations more effectively and equitably. The challenges currently posed by Section 301 will be magnified several times over if the US, and other home countries of tech MNEs, can enforce trade rules more legitimately through bilateral or multilateral trade agreements.

Third, the 'transparency' and 'regulatory coherence' requirements that are being included in new trade agreements empower state parties and their commercial interests to comment on proposed new regulations. That significantly enhances the leverage of both foreign states and Big Tech companies, and the associated chilling effect of threats to retaliate unilaterally or by bringing trade disputes should the proposed digital tax measures proceed.

3. Asian Governments' Measures for Taxing the Digital Economy

A valuable source of information about digital tax measures, relied on in this paper, is KPMG's regularly updated stocktake of digital taxes. The design and designation of these taxes are crucial for the purposes of the digital trade rules. Further, their classification may determine whether exceptions for tax measures in trade agreements apply – notably, the WTO's General Agreement on Trade in Services (GATS), which is imported into FTAs, is available only for direct taxes. Some current measures do not fit comfortably into the traditional categorisations of 'direct' and 'indirect' taxes. For convenience, this paper adopts KPMG's definition of a DST as direct taxation and of consumption taxes, such as value-added tax or goods and services tax, as indirect taxes.

Table 1 provides a high-level overview of Asian countries' adoption of direct[22] and indirect taxation[23] of the digitalised economy, as categorised by KPMG.

Table 1: The Status of Asian Countries' Approach to Taxation of Digitalised Economy

Country	Status of direct taxation (DST, WHT, Digital PE)	Status of indirect taxation (VAT, GST)
Australia[24]	Rejection of a public accouncement/proposal	Legislation enacted
Bangladesh	-	Legislation enacted
China	Public announcement/ intention to implement	Legislation enacted
India	Legislation enacted	Legislation enacted
Indonesia	Legislation enacted	Legislation enacted
Japan	-	Legislation enacted
Malaysia	Legislation enacted	Legislation enacted
New Zealand	Public announcement/ intention to implement	Legislation enacted
Pakistan	Legislation enacted	-
Philippines	-	Draft legislation/public consultation
Singapore	Waiting for global solution	Legislation enacted
Rep. of Korea	-	Legislation enacted
Taiwan	Legislation enacted	Legislation enacted
Thailand	Draft legislation/ Public consultation	Draft legislation
Viet Nam	Legislation enacted	Legislation enacted

Source: Adapted by the author from KPMG, *Taxation of the digitalized economy. Developments summary,* 3 February 2021 at 5, 65, 77

This paper focuses on direct taxation measures that tax the earnings of digital corporations by targeting revenue, earnings or profits through:

(i) A withholding tax, which has attracted relatively little attention;

(ii) an equalisation levy, mainly associated with India; and

(iii) taxing a digital permanent establishment (digital PE), based on its 'significant digital presence'. [25] Commonly referred to as a DST, it taxes gross revenue, with a tax base that includes revenues derived from a specific set of digital goods or services or is based on the number of digital users within a country.

Equalisation levies and DSTs, in particular, face problems of asymmetry. The digital corporations are usually located offshore and may have no, or only a nominal legal presence in the source country. Their earnings are usually structured through multiple related entities that seek to distance the earnings or profits sourced from a country from any tax liability in that country. Data is usually held outside the source country, and the software that drives the platforms, marketplaces, search engines, and other core activities being taxed is the property of the digital MNEs. It is ironic that both the existing international taxation norms and the emerging digital trade rules purport to remove discrimination and create a level playing field across companies and countries, yet the key features of the tech corporations' business model disproportionately disadvantage dependent developing countries.

4. Digital Trade Rules related to Taxing the Digital Domain

The main reference point for the new digital trade rules is the novel Chapter 12 on Electronic Commerce in the Trans-Pacific Partnership Agreement (TPPA) that twelve countries, including six from Asia,[26] signed on 4 February 2016. Although the US later withdrew from the TPPA, the remaining eleven countries kept the electronic commerce chapter intact in the renamed Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The TPPA text subsequently informed other bilateral and mega-regional agreements involving the US, and other countries, notably Japan,[27] Australia,[28] Singapore[29] and New Zealand.[30]

Governments in Asia are also under pressure to participate in plurilateral negotiations on 'electronic commerce' that were launched after WTO Members declined to mandate multilateral negotiations at the 11th Ministerial Conference in November 2017.[31] Around half the WTO's Members are currently involved in what is called the Joint Statement Initiative (JSI) on Electronic Commerce. There is no published record of participants and observers, but most of the Asian TPPA parties and a number of ASEAN members, including LDCs, have participated at some stage.[32] China is also participating and has advocated measures that focus on the trade facilitation aspects of the much broader TPPA-style agenda.[33]

Many developing countries have rejected this plurilateral initiative as illegitimate and its substantive rules as anti-development.[34] Similar reservations underpinned the negotiation of the Electronic Commerce chapter in the sixteen country Regional Comprehensive Economic Partnership (RCEP), whose negotiating parties included China, India[35] and the ten ASEAN countries. The text that was signed in November 2020 omits certain core e-commerce rules, notably on secrecy of source code. It strengthens the security exception for cross-border data flows and requiring local storage of data. Most importantly, the chapter is not enforceable.[36]

4.1. Variable trade rule obligations affecting digital tax measures

The provisions on digital trade in recent agreements and those currently under negotiation have general application. They are not designed with taxation in mind, despite its complexity and unique considerations. Moreover, different taxes may trigger different trade rules and minor variations can alter the legal consequences of seemingly similar taxes.

Different countries also have widely varying levels of exposure to the trade rules. For example, Indonesia (Case study 1) is currently not subject to enforceable digital trade rules. Indonesia's obligations under the RCEP are not enforceable, although there is still a good faith obligation to comply. Indonesia inscribed specific policy space reservations in RCEP for access to, and location and storage of, data and requirements for local presence and specific legal forms of establishment.[37] It also has very cautious GATS commitments. Despite that caution, Indonesia has

submitted several documents to the plurilateral e-commerce negotiations at the WTO.[38]

India (Case study 2 below) is in the fortunate position that it is not currently a party to any agreements that have substantive digital trade rules, having withdrawn from the RCEP, and it is not participating in the WTO JSI on e-commerce. However, some argue that India has adopted relevant GATS commitments on cross-border telecommunications services.

By contrast Malaysia[39] and Viet Nam,[40] which have also adopted digital taxes, are TPPA/CPTPP signatories. Viet Nam has ratified the CPTPP and is taking part in the WTO JSI.[41] Malaysia has not ratified CPTPP but is participating in the WTO plurilateral talks.

4.2. Overview of trade rules relating to digital tax measures

Table 2 provides a short-hand cross-reference between the main digital tax measures and the most relevant trade rules.

Table 2: Trade Rules relating to Digital Tax Measures

Digital tax measure	Trade law issues
Digital Services Tax	Cross-border trade in services: - Classification of services - National Treatment - Market access - Local presence - Administration of domestic regulation E-commerce: - Source codes - Cross-border information transfer - Use of local computing facilities (servers) Other: - Transparency - Regulatory coherence Exceptions: - GATS tax exception - FTA tax exception - General exception

Value added tax	<u>Cross-border trade in services:</u> - National treatment <u>Exceptions:</u> - GATS tax exception - FTA tax exception - General exception
Cap on royalty payments offshore[42]	<u>Investment:</u> - Performance requirements on royalties <u>Exceptions:</u> - GATS tax exception - General exception
Lobbying	Transparency

4.3. Digital trade rules

Digital trade rules are, on their face, neutral and apply equally to all parties. They purport to establish a level playing field that belies asymmetries of development, size, capacity, and access to technology. However, their practical effect is to enhance and entrench the market dominance of major developed countries and their digital firms, especially the US.

The e-commerce/digital trade chapters apply broadly to '*measures* that *affect* trade by electronic means', not just laws, regulations and administrative decisions that are directed to such trade. The substantive rules on 'electronic commerce' or 'digital trade' that are most relevant for digital taxes aim to prohibit requirements:

a) to store data locally or use local facilities and servers;
b) that the cross-border suppliers of digitalised services have a substantial presence in the country where they supply the service; and
c) to disclose source codes (and sometimes algorithms).

Data transfer rules: Unrestricted transfer and storage of data offshore undermines the ability of governments to exercise of jurisdiction and effectively tax the mining and use of data that is sourced from their country. As well as impacting directly on the revenue base, offshoring of data can undermine the ability of countries to build their own infrastructure and to use digital technologies and locally generated data to advance their development prospects, which brings

dynamic economic and revenue benefits for the local economy. Consumer countries are also disadvantaged when they cannot require foreign firms to use local computing facilities, including servers, which they have established with public funds to strengthen their national capacity, or to include inputs from local businesses and tech start-ups.[43]

The details of these rules vary across agreements. There are also some important limitations on these data mobility obligations. E-commerce chapters usually exclude information '*held or processed by or on behalf of a government*', including measures related to its collection.[44] Information that is collected and held by or for tax authorities is therefore protected from the chapter's rules. It is unclear whether 'for government' extends to information that a tax authority requires others to collect pursuant to regulation or a government contract, but probably not.

It seems clearer that the exclusion would not cover requirements for taxable businesses to retain within the country the kind of information needed for compliance with, say, a digital services tax, such as information on the number of local users or transactions, or the value of the user-generated data arising from targeted advertising. This exclusion would also not cover relevant information or data that tax authorities may wish to access, such as property transactions, gambling, student loans, futures trading, royalty payments or related party loans, which are held by the private individual or firm or by third party intermediaries. Other exceptions would have to be relied on.

A further exception to the data location rules applies to measures a government has adopted to achieve a '*legitimate public policy objective.'* Taxation, in its broad sense, would qualify. However, the legitimacy of a specific tax measure may be challenged if is not widely used internationally or its merits are disputed.[45] The US and its powerful technology lobbies argue that DSTs are inconsistent with international taxation norms.[46] The actual policy measure must also be considered an effective way to achieve the specific objective, which could be difficult to prove for innovative taxation measures, and not impose any greater restrictions than are necessary to achieve the policy's objective.[47] The US and its industries will almost always argue that voluntary and self-regulatory arrangements are the least burdensome means to achieve policy objectives effectively.

Further, the 'legitimate public policy' must not be applied in a way that constitutes 'arbitrary or unjustified discrimination'. Discrimination is not limited to national origin; it could involve differential treatment of services that are engaged in similar practices. Examples cited in the USTR investigations into digital services taxes include differential treatment of digital versus brick-and-mortar suppliers of the same goods and services; application of taxes above a value threshold that only captures US firms; and measures that apply to data mining by digital interfaces and search engines, but not to data generated by smart products.[48] Governments would also have to avoid measures that could be seen as disguised ways of providing benefits to their local operators, including of computing facilities.

Lastly, financial data is excluded from the TPPA e-commerce chapter, but such a protection may be neutralised by rules in the financial services chapter and in other agreements. A number of developing countries have already made GATS commitments not to restrict the cross-border supply of services such as the transfer of financial information and financial data processing.[49] Requiring financial data to be held locally for tax purposes could see them accused of breaching those rules. Because the obligations apply to 'measures that affect' the supply of financial services committed in the country's schedule, some might even argue that all financial services rely on the international movement of financial data and are caught by those rules.

Local presence rule prevents governments from requiring offshore digital services suppliers to have a local presence in their country as a condition of supplying the service. Many large tech firms operate across borders from digital hubs with no, or an insubstantial and untaxable, local presence. Under 20th century tax 'norms' a local presence has been essential to tax a 'permanent establishment.' Offshore firms may also seek to evade the jurisdiction of tax authorities and courts in countries where they operate, refuse to comply with filing and disclosure requirements, and resist the enforcement of administrative and judicial rulings. This rule is a standard feature of the new e-commerce and digital trade template, but it is located in trade in services rather than digital trade chapters, including the ASEAN Trade in Services Agreement (ATISA).[50] The obligation is subject to the schedules of commitments on trade in services, as discussed below.

Source codes and algorithms are the brainpower of digitalised activities and businesses, such as digital platforms, marketplaces and search engines, transnational and multimodal supply chains, high-frequency trading, targeted advertising, back office legal and accounting services, amongst many others. They are also the mediums through which data is collected, analysed, targeted and utilised. Governments wanting to tax those activities, and the value of the data itself, may need access to the relevant source codes and algorithms.

E-commerce rules that prevent governments requiring the disclosure of source code and algorithms as a condition of using that software or products in the country have been adjusted over time, as governments have become more aware of the obstacles this poses to monitoring, compliance, investigations and enforcement. The TPPA has a limited exception for disclosure that is necessary to *remedy* a violation of competition laws.[51] The text the EU proposed to Indonesia has a broader version of that exception, but it applies only to competition laws, not to tax laws;[52] it also includes a 'legitimate public policy' exception similar to that for data transfers.[53]

The recently concluded United States Mexico Canada Agreement (USMCA) goes further. While it prevents mandatory disclosure of all source code and the algorithms embedded in source code,[54] it allows regulatory bodies, including tax authorities, to require disclosure for a *specific* investigation, inspection, examination or enforcement, but not as a matter of course. That exception is subject to safeguards against unauthorised disclosure, which could prevent the granting of access to non-government analysts whose external expertise may be essential to decode and analyse them.[55] The final e-commerce chapter of RCEP, whose parties include ASEAN and China, has no source code provision at all. If these exclusions and exceptions fail to protect digital tax-related measures, governments would have to resort to the general, tax or security exceptions.

4.4. Trade in services

Not all the e-commerce rules are new. International trade in services covers situations where foreign firms supply services to another country's consumers. Digitalised services are most commonly delivered by a foreign supplier remotely from across the border, such as a consumer buying an e-book online from an offshore distributor or using Facebook's social media platform operated from another country (known as mode 1), or when the customer is using the service outside of their country, such as storing data in offshore servers or an offshore investment in a digital currency fund that trades through blockchain (mode 2).

Trade in services rules*:* The following existing rules in the GATS and trade in services chapters potentially affect digital taxation:

a) non-discrimination between suppliers of like services from different offshore countries ('most-favoured-nation treatment' or MFN);
b) non-discrimination between foreign and domestic suppliers and services ('national treatment');
c) not restricting the size of a service provider or market ('market access');
d) not requiring a foreign firm that establishes a local presence to take a particular legal form, such as one to which local earnings can be attributed ('market access'); and
e) administration of laws of general application must be 'reasonable and objective' ('domestic regulation disciplines').

The GATS and trade in services chapters in FTAs allow a country to formulate its commitments so as to limit its exposure to the national treatment, market access, local presence and sometimes MFN[56] rules (there is no equivalent mechanism in e-commerce/digital trade chapters).

These schedules of commitments or annexes of reservations have to be negotiated and agreed between the parties. They follow two different approaches. Under the *positive list* approach used in the GATS and some FTAs, the country is only bound when it has committed a particular service sector to a specific rule in the relevant mode of supplying the service, subject to any specified limitations.

More recent FTAs, including the TPPA, use a *negative list* in which parties must identify what measure, sector or activity is *not* covered by the rules. They can preserve existing non-compliant measures that they list in an Annex (at a 'standstill'), but new liberalisation may automatically be locked in (a 'ratchet'). A second annex preserves the right to maintain specified non-compliant measures and adopt new ones, thus preserving policy space. If there is no reservation in either annex, the government must fully comply with the rules.

Positive lists allow countries more control over their exposure. Negative lists foreclose a government's ability to regulate unforeseen services, including new technologies and uses of them, in breach of the rules, unless it has explicitly preserved the right to do so. Requiring governments to state what is *not* covered by the rules also carries serious risks of error. Despite those risks, negative lists are now more common.

Regulatory processes: Trade rules are increasingly directed to the *processes* of decision-making, legislation and administration. The GATS and many FTAs already require measures of general application that *affect* trade in services to be *administered* in a *reasonable, objective and impartial* manner. So the way that digital tax regulations are administered could be challenged as unreasonable and not objective or impartial – for example, reporting requirements on offshore digital services suppliers, such as on ride-share transactions or the quantum of data generated by nationals of the taxing country.

In the name of 'regulatory quality' and 'best practice regulation' there is also pressure to conduct narrow cost/benefit impact assessments of proposed measures that are supported by 'objective' evidence, which makes innovation difficult and contestable. These tests seek to institutionalise OECD models of light-handed and self-regulation that leaves the dominant digital corporations free to consolidate their oligopolies.

Recent FTAs and several plurilateral proposals at the WTO give foreign states and firms the right to comment on proposed new laws, such as digital services taxes, in the name of 'transparency'. These rights have very little to do with trade. Instead, they formalise the leverage of the Big Tech companies to threaten withdrawal of services (or investment disputes) and empower governments, in particular the US,

to threaten other sovereign governments with unilateral investigations and trade disputes.

These rules have increasing significance for ASEAN countries as they are found, with some variation on the wording, in the TPPA/CPTPP, the RCEP and the ATISA. Whereas the RCEP was cautious on some matters, the ATISA[57] contains stronger text that approximates the TPPA/CPTPP, and the Reference Paper proposed in the plurilateral negotiation on domestic regulation in the WTO. Significantly, a number of ASEAN countries have yet to ratify these agreements.

4.5 Exceptions

Exceptions for digital taxation: All agreements have some kinds of exceptions for taxation measures, but these are limited in scope, inconsistent across agreements and legally uncertain, with no jurisprudence to assist their interpretation. The tax-related exception in the GATT is concerned with border taxes and the neutral application of internal charges on goods.[58] The tax exception in the GATS[59] is limited to the equitable or effective collection of direct taxes, which makes the categorisation of digital taxes very important.

As FTAs have become larger and more complex, so their tax exceptions have become more convoluted. The exceptions in recent multi-chapter and mega-regional agreements are especially complicated as they attempt to adapt pre-existing exceptions to new rules on digital services (including financial services), investments and electronic commerce. Applying these exceptions to the complex array of trade rules that apply to digital technologies, owners, services, and transactions creates a legal minefield for tax administrations, especially in developing countries with limited resources. Even welcome variations designed to increase the flexibility for tax authorities to treat foreign and local individuals or entities differently, especially in cross-border digital transactions,[60] increases the legal uncertainty.

Other exceptions: Aside from specific tax exceptions, governments may rely on general provisions to justify tax measures. Some are built into specific articles, as with the ‘legitimate public policy’ exceptions on movement and location of data. Others may apply only to a particular chapter. There is also usually a stand-alone exceptions chapter for the entire FTA based on the GATT and GATS General

Exceptions. Some exceptions may be relevant to tax-related measures for non-revenue purposes, such as health or public morals; however, multiple steps need to be satisfied for the exception to apply so they have a poor record of success.[61]

The Security Exception in the WTO allows a government to determine whether it needs to take action in its essential security interests, but the right to do so is limited to specific situations, notably an 'emergency in international relations'. That might be used to override obligations relating to aspects of digital technology and services, but it is difficult to apply to revenue measures. These exceptions vary significantly across FTAs because negotiating parties can tailor them to their sensitivities. The TPPA[62] and RCEP[63] have broad, totally self-judging, exceptions for 'essential security' that are shielded from challenge in a dispute.

In summary, the expanding web of cross-cutting trade agreements means a single tax measure would need to comply with a country's obligations in the WTO and all its FTAs, which contain some or all of these rules and may not be consistent. Divergent tax and related exceptions add further layers of inconsistency and legal complexity, on top of which governments may need to factor their obligations under double taxation treaties.

5. Section 301 Investigations into Digital Services Taxes

ASEAN countries who have adopted, or are looking to adopt a DST, need to understand the potential legal issues that might arise under existing trade in services obligations, and more importantly may result from adopting proposed e-commerce or digital trade rules in FTAs and at the WTO. At this time, the clearest insights can be gleaned from several investigations the USTR has launched into eleven countries' DSTs under Section 301 of the US Trade Act 1974.

5.1. Section 301 investigations

Section 301 authorises the USTR to determine whether an act, policy or practice of a foreign country is actionable under that section. The action could involve a dispute under a trade agreement, a unilateral inquiry or both. Matters that are considered 'actionable' include acts, policies or practices that are 'unreasonable or discriminatory and burden or restrict U.S commerce'. The measure is deemed

‘unreasonable’ if it is considered unfair and inequitable, even if it does not violate US rights under international law. When the USTR launches an investigation, it seeks comments from ‘interested persons’, as the same time seeking consultations with the targeted country. If the investigation finds the measure is actionable, the USTR can implement remedial measures, including retaliatory trade sanctions.

The Section 301 process is controversial. As a WTO member the US is obliged to comply with its rules. In a WTO dispute that challenged the WTO-consistency of Section 301 investigations the US promise[64]d that it would only exercise those powers consistently with WTO rules. Yet, it makes no effort in its Section 301 reports to show how it meets this obligation. The United States Council for International Business (USCIB) urged the USTR to probe whether the DSTs were consistent with countries’ GATS obligations,[65] and consider pursuing discussions under WTO auspices, but there is no indication that it will do so.

The unilateral process is clearly a more expedient means for the US to seek to deter governments from exercising their sovereign right to regulate, as it does not need to formally allege, let alone prove, actual violations of a country’s international trade law obligations.

a. The Section 301 DST investigations

In July 2019, the USTR announced the first Section 301 investigation into a DST, involving France. The report issued in December 2019 found France’s DST tax was actionable.[66] After the US announced it would impose sanctions on French exports, France agreed to defer the implementation of the tax pending resolution of the OECD work on a multilateral solution. The US then suspended its sanctions. When the OECD process remained stalled, France required the first payments under its DST in December 2020.[67]

In January 2021 the USTR said it would further suspend tariff retaliation against France while it completed investigations into ten other countries that had adopted or proposed to adopt digital taxes.[68] These countries included Indonesia and India.[69] According to the US Federal Register:

The investigation initially will focus on the following concerns with DSTs: discrimination against U.S. companies; retroactivity; and possibly unreasonable tax policy. With respect to tax policy, the DSTs may diverge from norms reflected in the U.S. tax system in several respects. These departures may include extraterritoriality; taxing revenue not income; and a purpose of penalizing particular technology companies for their commercial success.

The US Congressional Report on this investigation expected the following questions to be addressed:

Are the DSTs inconsistent with international commitments and obligations under the WTO or other agreements?
Does the WTO General Agreement on Trade in Services (GATS) cover digital trade? If so, the USTR may invoke the dispute settlement procedures of the WTO DSU.[70]

Significantly, none of the targeted countries had FTAs with the US that contained the e-commerce or digital trade rules.

Submissions are useful indicators of the domestic political and policy pressures that will shape the USTR's calculation on how to respond to DSTs. The technology industry lobbyists advocated for a hard line approach that would punish early movers as a means to deter other countries.[71] The Asia Internet Coalition (whose members are Airbnb, Amazon, Apple, Expedia Group, Facebook, Google, LinkedIn, SAP, LINE, Rakuten, Twitter and Yahoo (Verizon Media), Cloudflare and Booking.com) focused on India and Indonesia. The Coalition describes itself as 'actively involved in regular industry submission and dialogues on the regulations concerning digital taxation in Asia',[72] and working closely with the governments of India, Indonesia, the Philippines and Thailand to 'advocate best practices' to create an effective taxation regime. Its submission said the Indian and Indonesian digital tax measures:

threaten to normalize discrimination in the global tax system, encourage countries to develop ever-expanding universes of activities subject to digital taxes, escalate the potential of double or multiple

taxation on the same revenue, and jeopardize the foundation of a discipline [sic] international tax policy. A strong response by the USTR is therefore warranted, given that other jurisdictions could emulate the concept and impose similar taxes on trade dependent countries.[73]

Broader-based corporate lobby groups also believed the taxes met the threshold for a breach, but urged the US not to impose retaliatory tariffs on imports that could hurt US businesses and consumers and fuel further trade wars. Instead, the US should re-engage with the OECD process. IBM went further and called out Big Tech's tax avoidance practices:

This dispute is principally about the insufficient payment – or non-payment – of taxes by a limited number of large internet-based platform companies in the United States. ... The approach the Administration has adopted would, in effect, impose significant costs on very many U.S. companies to protect the interests of only a very few. We therefore believe the use of Section 301 in this case is unwise and unwarranted. Should USTR nevertheless conclude in this investigation that action is warranted, we recommend the pursuit of remedies only through established institutions such as the OECD or the World Trade Organization.[74]

Non-government organisations Oxfam and FACT Coalition were the only supporters of DSTs as a means of redressing the low effective tax rates of digital companies. They said the taxes were not 'unreasonable', and were innovations that anticipated the multilateral agreement under negotiation at the OECD. Indeed, Maryland had already passed a tax bill similar to those under investigation. They further argued that companies generating windfall profits during the Covid-19 pandemic should be asked to provide revenue to fight the coronovirus, in the US as well as other countries. Both IBM and Oxfam/FACT called for the US to re-engage in developing a multilateral solution.

For completeness, it is important to note that all US double tax treaties have an article that prohibits a more burdensome tax requirement on nationals of the other party than on their own taxpayers. Submitters cited this as further evidence of

‘unreasonable tax policy’ that departs from international norms, as well as breaching tax treaties. This argument is problematic for many Asian countries. India, for example, has 85 double taxation treaties in force, including one with the US since 1990.[75] Indonesia had 66 DTTs in place in February 2018, including with the US.[76] Whether DSTs are consistent with the double tax treaties is especially significant in trade terms because tax exceptions generally give preference to obligations in the taxation treaties.

5.2. (Case 1) The Section 301 Investigation of Indonesia’s Digital Taxes

The two Asian countries that were subject to Section 301 investigations in 2020–2021 provide important insights for ASEAN in assessing the legal risks of adopting trade rules that would constrain their capacity to introduce a DST. Submissions to the two investigations and the USTR’s reports raised somewhat different issues, with arguments on trade law much more prominent in relation to India than to Indonesia.

Indonesia’s tax measures: In 2019 an Omnibus tax bill was drafted and forwarded to the Indonesian parliament for discussion at the end of that year. The Government expedited the measure in light of the Covid-19 pandemic. Government Regulation in Lieu of Law (Peraturan Pemerintah Pengganti Udang-Udang) No. 1 of 2020 (Perppu No. 1/2020) was adopted on 31 March 2020 as an emergency economic response package related to Covid-19. Because it was an emergency decree there were no submissions or debate. The Law had immediate effect, subject to later ratification by the parliament which occurred on 18 May 2020 as Law No. 2 of 2020 in the Financial Policy and Stability of Financial System for Covid-19. Details (the rate and method of calculation of the tax) would be set through regulations. The Indonesian Government subsequently postponed its implementation of the tax to 2021 in recognition of the OECD process.

The decree contained three tax elements:[77]

(i) A foreign business that does not have a physical presence in Indonesia, but is determined by the Ministry of Finance to have ‘significant economic presence’ (SEP), based on an assessment of gross revenues, sales in Indonesia, and number of users, will be declared a permanent establishment and subject to Indonesian corporate income tax.

(ii) An alternative Electronic Transaction Tax (ETT) applies to gross revenue on sale of goods and services over the Internet by foreign firms in situations where application of the tax based on SEP would breach an international tax treaty.[78]

(iii) Value-added tax applied to cross-border sales of digital goods and services to Indonesian customers from 1 July 2020.

Both the SEP and ETT required implementing regulations, including the applicable tax rates, the scope of the rules, and the threshold at which they apply.

The US Federal Register notice of the Section 301 investigation in June 2020 focused on the ETT, which it summarised as 'an electronic transaction tax that targets cross-border, digital transactions. Further implementing measures are required for the new tax to go into effect.'

The USTR Investigation: Most US corporate lobby groups condemned Indonesia's digital taxes as discriminatory against foreign firms and against digital suppliers of goods and services, incompatible with international tax norms, and likely to result in double taxation. On the trade side, the ETT was said to impose a tariff for doing business in Indonesia, and a non-tariff barrier to foreign firms entering the Indonesian market.

Although the docket establishing the investigation only referred to the ETT, both the SEP and ETT were attacked. The Information Technology Industry Council objected that the SEP measure would create 'an entirely new taxation right' and 'deviates from the accepted definition of permanent establishment which, in tandem with the arm's length principle, has anchored liability in the global tax system for generations'.[79] The alternative ETT went further, introducing an uncertain status for non-Indonesian businesses that was specifically designed to bypass the non-discrimination rules in the Indonesia-US Double Taxation treaty, which would have otherwise prevented the tax from applying. It was also unclear whether the tax would be treated as income tax, as with countries deemed to have SEP, or an indirect tax (as noted earlier, categorisation is important for double taxation treaties and the tax exceptions in trade agreements).

The Silicon Valley Tax Director's submission was the most detailed. As in other investigations, they cited statements from Indonesian officials to show that

US companies were being targeted, but omitted the officials' anti-discriminatory rationale for doing so: 'in principle, we want a fair play, whoever buys must pay, anyone who earns income in Indonesia must pay. That's the point'.[80] The officials pointed to difficulties in collecting taxes from digital-based Big Tech companies that earn profits in Indonesia, naming Netflix, Spotify, Google, Facebook, Twitter and Amazon – all members of the Asia Internet Coalition.

The Silicon Valley submission also quoted from the academic paper that accompanied the original Omnibus bill in 2019 as further evidence of discrimination – again, ignoring the clearly articulated tax policy rationale:

> *Taking into account the size of the capitalization of the digital economy, there are several main points of concern ... . First, the issue of unequal treatment due to digital economic development, for the people of a jurisdiction, for example developing countries, should not only be used as an e-commerce market, but must also be involved as actors in e-commerce markets.* ***Therefore the tax is expected to be a fiscal barrier to cross-border competition.*** *Second, there is a risk of tax avoidance in the scheme of e-commerce, which is proven empirically by the scouring of the taxation base as a consequence of a shift in the transaction done conventionally to be done electronically.*(original emphasis)[81]

The academic paper had also explained that the measures aimed 'to provide equal treatment to business actors (equal level playing field) between conventional and e-commerce trading that exists today and other digital economic patterns which will develop in the future, as well as to mitigate the risk of tax avoidance in the e-commerce transaction scheme.'[82]

The Silicon Valley Tax Directors further criticised adoption of the tax within an emergency measure as unfair, because that deprived them of the opportunity to make submissions – and hence to pressure the Government not to proceed.

Another common submission blamed Indonesia and other countries that adopted unilateral taxes for the failure to reach a consensus in the Integrated Framework, when the US had obstructed the reform process. The US–ASEAN Business Council, which represents 160 US multinationals operating across Southeast Asia, including tech companies, said Indonesia would create a negative

negotiating environment and undermine trust in the OECD process if it proceeded with its taxes. The Council had already lobbied the Government 'intensively' with recommendations that were 'based on international best practices on the taxation of the digitalizing company' and encouraged ASEAN governments including Indonesia to engage in the ongoing OECD process. It urged the Indonesian Government to dialogue with the USTR to avoid unilateral measures that would set bad precedents.

Other comments were tailored to appeal to or threaten Indonesia's development aspirations. The Asia Internet Coalition, representing the main targeted companies, said the taxes were 'misaligned with Indonesia's goal of stronger ties with other nations and a thriving digital economy', likely to halt the growth of the digital sector, and fall hardest on small entrepreneurs. They were not only likely to inhibit cross-border trade activities – they might worsen disruptions from the global health crisis.[83] The attempt to circumvent 'international tax norms' was also likely to attract retaliation from trading partners.

Alongside the call for 'interested persons' to make submissions to the investigation, the USTR wrote to Indonesia's Finance Minister requesting consultations. The letter cited three 'problematic aspects' of the DSTs that would be investigated: 1) whether the tax amounts to *de facto* discrimination against US companies; 2) whether it has retroactive elements; and 3) 'whether the tax diverges from norms reflected in the U.S. tax system and the international tax system due to, *e.g.* possible extraterritorial application, or a purpose of penalizing certain technology companies for their commercial success.'[84]

The Government of Indonesia's response: The Government of Indonesia made a brief and conciliatory comment in response, but did not resile from the need for the tax. Observing how its economy had transformed into the largest in South East Asia, now constituting an upper-middle-income country, the Government viewed digitalisation as key to the country's future prosperity. It observed that America's technology companies already saw many opportunities and were expanding their investments in Indonesia, and the Government foresaw a mutually beneficial long-term trade and investment relationship with the US.

Reform efforts to further develop the digital economy, consistent with Indonesia's international commitments, included involvement in the BEPS Integrated Framework. The Government noted how 'the current COVID-19 crisis has emphasised the need to deliver fair, non-discriminatory, and consistent taxation of multinationals, despite having no physical presence, without resulting in double taxation'. Indonesia reaffirmed its commitment to developing a global consensus and remarked, rather vaguely, that the implementation of the ETT took into account such global consensus. The Government remained open to dialogue with all stakeholders regarding the policy. A 'positive conclusion of this investigation is an important step in this undertaking'.

Outcome: A Status Report on the investigation issued in January 2021 noted that Indonesia had not yet adopted implementing measures. Nevertheless, it fleshed out three concerns regarding the text of the law. First, the tax applied only to electronic commerce 'conducted by non-resident tax subjects' and may therefore discriminate against and target US companies for 'special, unfavourable tax treatment'. Second, it may be inconsistent with 'principles of international taxation', such as 'taxing revenue instead of income, inconsistency with existing principles regarding permanent establishments, extraterritoriality, and double taxation'. Third, the tax may burden or restrict US commerce by creating an additional tax burden for US companies, require them to undertake costly compliance and reporting requirements, and subject them to double taxation.

On 31 March 2021 the USTR announced it was terminating the investigation of Indonesia's DST because the tax had not yet been implemented. Section 301 requires determinations to be made within one year of initiating an investigation, being 2 June 2021. Even if Indonesia did implement the tax prior to that date, it would be impossible to complete the inquiry process within that time. The USTR reserved the right to initiate a new investigation in the future.[85]

5.3 (Case 2) The Section 301 Report on India's Digital Taxes

India's tax measures: As part of the 2016 Union Budget, India introduced without prior notice an Equalisation Levy of 6% on gross revenues earned by non-resident companies from digital advertising. The measure was based on a report of a specially established Committee on Taxation of e-Commerce that was presented

that year.[86] The Committee originally identified 13 services on which the levy should be imposed, but the Government chose to focus on online advertising and related services.

The Government also notified a residuary clause, which empowered the Government subsequently to expand the scope of the levy. The Indian Government activated this clause via the Finance Bill 2020, which was introduced on 1 February 2020. The amendment was inserted on 23 March 2020 while the legislation was before parliament, also without prior notice and absent parliamentary debate. It was adopted on 27 March 2020 and became effective on 1 April 2020, with initial payments due on 7 July 2020.

The 2020 Equalisation Levy has the following key elements:[87]

- The Levy applies a 2% tax to sales of goods and services to a person resident in India, or who has an Indian IP address, where those sales are facilitated by an 'e-commerce operator'.
- An 'e-commerce operator' is an electronic facility or platform for online sale of goods and/or online provision of services that is owned, operated or managed by a non-resident.
- The tax applies to 'e-commerce suppliers of services' that provide: online sales of goods owned, or services supplied, by the e-commerce operator; the online sale or provision of goods or services facilitated by the e-commerce operator through a platform; and provision of advertising services between non-residents targeting Indian users or those with an Indian IP address.
- The Levy also applies to the sale of data 'collected from a person who is resident in India or from a person who uses an internet protocol address located in India.'[88] This appears to include personal and non-personal data collected in the past and in the future.

The threshold over which the tax applies is much lower than other DSTs, being companies with revenues of 20 million rupees, around US$267,000 (the EU's proposed global threshold is €750 million[89]).

In launching the Section 301 investigation the US Federal Register described India's tax as follows:

In March 2020, India adopted a 2% DST. The tax only applies to non-resident companies, and covers online sales of goods and services to, or aimed at, persons in India. The tax applies only to companies with annual revenues in excess of approximately Rs 20 million (approximately US$267,000). The tax went into effect on April 1, 2020.

USTR's investigation into India's Equalisation Levy: The major corporate lobby groups – the US Council for International Business, Information Technology Industry Council, Asia Internet Coalition, US–India Strategic Partnership Forum, Silicon Valley Tax Directors Group, the Coalition of Services Industries – all said their submissions focused on India's tax out of concern that its broad scope, covering all goods and services with a much lower threshold, might set a precedent.

Their arguments were broadly similar and focused more on trade rules than with Indonesia. Tech industry submissions that addressed the trade rules focused on the potential for DSTs to violate three kinds of WTO obligations:[90] the MFN and national treatment obligations in the GATT; the national treatment obligations in the GATS; and the moratorium on customs duties on e-transmissions.[91] The Coalition of Services Industry, which commented only on India's DST, alleged the following breaches of India's WTO obligations:

- Article II.1(b) of the GATT 1994, to the extent that the Levy imposes duties or charges other than customs duties, in connection with the importation of goods sold over e-commerce platforms;
- The national treatment obligations in Article III.2 and III.4 of the GATT 1994, 'to the extent that the Levy disproportionately burdens non-Indian products (i.e. the products that are more likely to be sold by non-resident e-commerce operators) as compared to domestic Indian products';
- 'at least the spirit, and potentially the letter, of the WTO Declaration on Global Economic Commerce, in which WTO Members agreed not to impose customs duties on electronic transmissions (while not framed as a customs duty per se, the 2020 Levy imposes a tax on the online sale of goods and services)'; and
- national treatment commitments under Article XVII of the GATS, 'to the extent that it places a disproportionate administrative or tax burden on foreign

online service suppliers in sectors where India has taken a national treatment commitment.'[92]

Many of their arguments would be applicable to rules on trade in services and digital trade: explicit discrimination, and express intent to discriminate against foreign, and specifically US companies; discrimination against digital forms compared to their brick-and-mortar competitors supplying the same goods and services; equivalence to additional tariffs on exports sold to Indian residents; unreasonable compliance costs and administrative burdens, including tracking IP addresses and storage of user data; burdens on SMEs due to the low threshold for application; inadequate notice and opportunities to comment; and lack of timely implementing guidelines.

In relation to international tax norms, the Asia Internet Coalition complained that India was not complying with international principles and norms that are 'based on nexus rules for the taxation of business income grounded in physical presence and on profit allocation rules based on the arm's length principle'.[93] Breaches of these norms included extraterritoriality, retroactive taxation, taxing revenue not income, and apportionment between tax jurisdictions, including double or multiple taxation. As with Indonesia, the Coalition accused India of undermining of the OECD BEPS project – while insisting that any consensus on new rules at the OECD must respect the outmoded and self-serving 20th century norms. The Coalition also recounted its extensive lobbying of the Indian Government over tax measures.[94]

The Indian Government's response: Unlike Indonesia, the Government of India challenged the Section 301 investigation and provided a robust defence of its specific measures.[95] The Government insisted that its Equalisation Levy was 'entirely consistent with India's commitments under the WTO and international taxation agreements'. If the US has specific concerns or needs clarifications it needed to raise them in the appropriate forum, in accordance with the dispute settlement provisions in the relevant trade agreements. Nevertheless, India was prepared to accede to the US's request to hold bilateral discussions over the Equalisation Levy, and provide further clarifications the US might seek.

The Government implicitly foreshadowed a WTO challenge to any adverse determination and sanctions by recalling the USTR's promise in the WTO dispute over a Section 301 investigation that the US would only render determinations that were in conformity with its WTO obligations. [96] That Panel had observed the failure to meet this standard would put the US in breach of those obligations.

The Indian Government's comment also responded to three specific complaints over the Levy: discrimination, extra-territoriality, and retrospectivity.

In rebutting arguments of *discrimination*, India directly addressed the asymmetries between the offshore Big Tech firms and the domestic economy. The 'underlying policy objective and application' of the Levy was to ensure 'neutral and equitable taxation' and a 'level playing field with regard to e-commerce activities undertaken in India' – the antithesis of what the US had claimed. The low threshold (approx US$267,000) was designed to exempt very small operators globally and applied to all non-resident commercial operators internationally and hence was consistent with India's MFN obligations.

India's Committee on Taxation of E-Commerce had recommended the Equalisation Levy on specified digital services after considering the challenges posed by the digital economy, and the asymmetrical tax burden between purely domestic enterprises and multinationals, with an adverse impact on domestic businesses that created distortions in market competition. The Levy also aimed to improve 'clarity, certainty and predictability' in the characterisation of transactions and tax liabilities and minimise tax disputes.

Importantly, the tax commmittee had developed the concept of the Levy in 2016 by drawing on the BEPS Report in 2015, which represented a broad consensus view on the issues. The BEPS report identified three options for countries to consider: a new nexus based on significant economic presence; a withholding tax on digital transactions; and an Equalisation Levy.[97] The BEPS report did not recommend any specific option because more work might be needed on the attribution of profits, but noted that: 'Countries could, however, introduce any of these three options in their domestic laws as additional safeguards against BEPS, provided they respect existing treaty obligations, or in their bilateral tax treaties.'[98]

While not dismissing the relevance of the OECD process, India remarked on the failure to arrive at any consensus after many years of discussion and considered the introduction of the Levy was an additional safeguard against BEPS and loss of revenue in India due to e-commerce multinationals operating there.

Responding to complaints of *extra-territorial application*, India cited the opening observation in the 2015 OECD BEPS Report on Action 1 that digitalisation of the economy posed tax challenges for countries. Further, the physical presence nexus in existing tax rules, developed last century for the business models of that time, was 'no longer the only justifiable indication of nexus'. The taxable nexus needed to evolve in response to new business models. The OECD had recommended the equalisation levy as one of the options that countries could consider, and India's measure reflected that understanding. As additional support, the Government cited a 2018 US Supreme Court decision[99] and several recent Indian court decisions, to show that new interpretations were necessary to reflect the new reality of digital enterprises and their business models.

Finally, the Indian Government rejected claims of *retroactivity*, given the Levy had been enacted before the date on which it became effective.

Outcome: In its report issued in January 2021 the USTR concluded that India's DST was 'unreasonable and discriminatory and burdens or restricts US commerce', and was therefore actionable. On 31 March the USTR called for submissions on the imposition of additional *ad valorem* tariffs of up to 25% on a schedule of products, featuring seafood, basmati rice, bamboo products, jewelry, nickel and refined copper, and furniture, to meet the equivalent of the $55 million India the USTR expected India to collect from US companies under the tax.[100] On 7 June 2021 the USTR confirmed its determination and the nature of the sanctions, but suspended implementation for up to180 days to allow additional time for multilateral and bilateral discussions.[101]

5.4. Digital trade law implications of Section 301 investigations

These two investigations provide an entry point to assess the legal risks for governments wanting to introduce DSTs arising from rules and commitments on trade in services and adopting emergent digital trade rules at the WTO or under FTAs. The nature of the Section 301 inquiry meant they merely needed to make

allegations, not prove them through a robust legal argument. Indeed, it was very rare to find any detailed arguments. The emergent status of the e-commerce/digital trade rules meant only one submission directly referred to them.[102] Nevertheless, arguments raised in the industry submissions indicate the potential for issues to arise under those rules.

Trade in Services: Most submissions that referred to existing trade in services obligations were vague, generalised and/or not correct. Most references to the GATS cited the national treatment obligation to treat foreign services and suppliers no less favourably than 'like' domestic counterparts where that would adversely affect their competitive position, but without any supporting argument. For example, the Asia Internet Coalition said: 'The high revenue thresholds and choice of covered services may be inconsistent with national treatment obligations under the General Agreement on Trade in Services (GATS) given WTO Members' commitments in data processing services, database services and advertising services.'[103]

However, as Section Three explained, those obligations would only apply where the taxing country has national treatment commitments in a relevant service sector and mode of supply. That requires careful analysis, not generalisations. The Internet Association, for example, said Indonesia's tax 'would likely violate Indonesia's WTO commitments to allow computing and other digital services to be provided on a cross-border basis'.[104] Indonesia has no GATS commitments in cross-border (mode 1) computer and related, advertising or distribution services. That also means the flow-on rule regarding administration of measures of general application, such as tax measures, would not apply as that only applies to services committed in the country's schedule.

The only submission that seriously considered trade in services obligations was from the Silicon Valley Tax Directors. India has no commitments on the direct targets of their Equalisation Levy, being advertising, distribution and computer and related services. However, the Silicon Valley Tax Directors observed that India has committed to provide market access and national treatment in cross-border delivery (mode 1) of Telecommunications services for 'data and message transmission services', which includes cross-border data processing and data base services.[105]

Their argument was not well developed and depends on two unsettled and contested legal questions. First, GATS obligations apply to 'measures that affect' the supply of committed services. The submission implies there would be a breach if a tax measure has an affect on the technological medium used to deliver a service, however indirect the impact of the measure may be on the suppliers of that service. Secondly, it assumes the validity of a highly controversial principle of 'technological neutrality',[106] whereby GATS commitments that were made in 1994 extend to contemporary digital services that were never envisaged at the time. Both assumptions would render nugatory a government's deliberate decision in 1994 not to commit specific services to those rules and impose GATS obligations on them that are potentially far-reaching and unintended.

The novelty of this argument in relation to digital services makes it impossible to predict how a WTO dispute panel would respond. If the Indian Government had to rely on the tax exception in the GATS, the panel would have to agree that the Levy is a direct tax, as that is the only category to which the exception applies. Even then, the Silicon Valley Tax Directors argue that India would fail the restriction in the 'chapeau' of the General Exceptions that says the measure must not be applied in a manner that constitutes arbitrary or unjustified discrimination, because India's tax makes 'not even a pretence of even handedness'.[107]

These uncertainties are extremely important, given that threats of, or actual, disputes can have a serious chilling effect on government decisions, especially in developing countries. India may be sufficiently confident to resist, but other countries may not.

Other countries also have much more extensive obligations than India, especially in recent FTAs. While ASEAN countries' commitments in GATS and FTAs are traditionally limited, RCEP's chapter on cross-border services is much more extensive, and is enforceable. It contains the rule that governments cannot require a cross-border supplier of services to have a local presence, which is problematic for the existing permanent establishment rule and for legal jurisdiction.[108] The RCEP allowed parties to choose their approach to scheduling, but countries that used a positive list must convert to a negative list within 3 years, while LDCs have 12 years to do so;[109] ATISA has a similar rule.[110]

Expanded disciplines on domestic regulation of services in the TPPA, RCEP, ATISA and proposed in the WTO also provide further opportunities for home states of tech companies, and/or the corporations and their lobby groups, to allege breaches of both process-related and substantive rules. The TPPA/CPTPP, RCEP and ATISA also have 'transparency' chapters that empower corporations established in their parties to comment on proposed new laws and regulations. The Big Tech companies that belong to the Asian Internet Coalition, and other dominant digital companies that establish themselves in regional hubs, will benefit from these rules and their lobbying practices to date show they are likely to use them to pressure governments not to adopt new digital tax rules. Similar provisions are proposed in all three of the WTO's plurilateral 'Joint Statement Initiative' negotiations on domestic regulation of services, e-commerce and investment facilitation.

Digital trade rules: The new digital trade rulebook would add to the potential legal risks. Only one submission, from TechNet, suggested the 'strong digital chapter' in the recently implemented USMCA might be applied to the DST's 'unnecessary barriers to trade that will have a chilling effect on the digital economy.'[111] The lack of such reference reflects the limited number of countries with extensive digital trade law obligations to the US. No country investigated under Section 301 had TPPA-style e-commerce obligations to the US that could ground trade law objections. That would change dramatically if e-commerce rules are adopted in the WTO.

As noted earlier, India has no such e-commerce obligations to any country. Indonesia has adopted the RCEP's unenforceable e-commerce chapter and the local presence rule on the cross-border services. However, Malaysia and Viet Nam, which both favour DSTs (see Table 1[112]), are already subject to the TPPA rules that were carried through to the CPTPP. The implications of those rules for digital tax measures and their administration were outlined in Section Three. The CPTPP's tax exception is extraordinarily convoluted, comprising exclusions, carve-backs and further exceptions across multiple chapters and would offer no guaranteed protection for digital tax initiatives.

If the original TPPA had come into force with the US as a party, the USTR could have enforced those digital trade rules directly against Malaysia, Singapore, Viet Nam, Brunei Darussalam, Australia, New Zealand and Japan. While the US is not a party to CPTPP, there is nothing to stop US tech companies from locating themselves in regional hubs to take advantage of its rules. The combination of broad presumptive rules, uncertain limitations, an almost unfathomable tax exception, and consultation with affected corporate interests in the name of 'transparency', would enhance the risks of a dispute by a host country, such as Japan or Singapore, or that a lobby group like the Asian Internet Coalition would pressure the USTR to take unilateral action.[113] In addition to the existing eleven parties,[114] Indonesia, Thailand, Taiwan, and the Republic of Korea have talked of acceding to the CPTPP.

In principle, similar concerns apply to Asian countries that ratify the RCEP, with the important caveat that RCEP's e-commerce chapter is not unenforceable. Many ASEAN and East Asian countries are also involved in bilateral negotiations with countries that are strong advocates of the new digital trade rules, including the 'refresh' of the Australia New Zealand ASEAN FTA and negotiations with the EU. Despite opting out of RCEP, India's announcement in November 2020 that it intends resuming FTA negotiations with the US means it will face US insistence on USCMA-style digital trade rules.[115]

Finally, any plurilateral agreement that emerges from the Joint Statement Initiative on e-commerce in the WTO will be a somewhat diluted version of the TPPA. ASEAN countries that adopt that outcome would face potentially serious constraints on their options for taxing foreign digital services, transactions and corporations.

The more of these trade rules that ASEAN and East Asian countries sign up to, the greater the constraints on their fiscal sovereignty will be.

6. Conclusion

To date, very little attention has been paid to the interface between trade law initiatives relating to the digitalised economy and the widely recognised need to reform international tax norms to address the tax minimisation practices of dominant digital corporations. It is timely to prioritise countries' fiscal imperatives

so that they can protect and grow their revenue base, fund their digital development and promote the wellbeing of their citizens and the region. Innovative digital services taxes are an important instrument to achieve that. Yet, those initiatives face potential barriers from existing and proposed trade rules.

If governments of the global South, including ASEAN and East Asia, are to be truly responsive to the challenges and opportunities for development that a transforming digitalised economy presents, they will need to adopt trade policies that protect their policy space to adopt new regulatory measures as the digital domain expands and transforms.

This paper has identified a number of legal risks that the emerging digital trade rulebook poses to the ability of ASEAN and East Asian governments to adopt effective, equitable and developed-focused digital tax strategies. These risks include: not requiring foreign tech firms to have a local presence or use taxable legal forms; inability of tax authorities to access data on domestic digital operations and the value of locally generated data and other information they require to assess compliance with domestic taxation rules; problems applying domestic legal jurisdiction to offshore digital services and suppliers and enforcing penalties for breaches of tax or related laws; access to source codes and algorithms to enable informed assessment of tax liability; inability to require major digital providers to use and help pay for the domestic computing infrastructure and build domestic capacity; no caps on royalty payments in contracts between related parties; inability to rely on tax exceptions; and more.

These risks make it crucial for ASEAN's tax regulators to work with trade ministries to assess the potential implications of existing and proposed rules for their tax policy space and regularly re-evaluate the relationship between their trade and tax strategies on a national and regional basis. That includes agreements yet to be ratified, notably CPTPP, RCEP and ATISA, those being 'refreshed', including with Australia and New Zealand, proposed accession to the CPTPP, and trade texts under negotiation bilaterally and in the WTO. Until that assessment mechanism is in place, ASEAN governments should adopt a moratorium on any new digital trade rules.

Postscript

On 1 July 2021, 130 of the 139 members of the Inclusive Framework announced high-level in principle agreement on the new regime for taxing the digitalised economy.[116] The new approach diverged significantly from the October 2020 Blueprints, following alternatives proposed by the G7 and the US Biden administration.[117] The scope was broadened, so it no longer targeted digital multinationals, with a threshold of turnover and profit that would limit it to a small number of MNEs. Details were to be decided over two years. Any State signing onto the arrangement would have to remove all digital services taxes and similar measures on all companies, thereby accepting a much more limited digital tax regime. It remains to be seen how the substantive rules and implementation will continue to conflict with digital trade rules, especially in relation to digital MNEs. However, the US can be expected to continue threatening or conducting Section 301 investigations where it considers a country's implementation constitutes unfair trade practices, including in relation to the GATS and e-commerce agreements. The implications of these developments will be explored in the published version of this paper.

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[1] Steven Mnuchin, US Treasury Secretary (2019), Letter to Jose Angel Gurria, Secretary General of the OECD, on DSTs 3 December, 2019. Available at: *https://www.orbitax.com/news/archive.php/U.S.-Treasury-Secretary-Sends--40283*.

[2] Contrast Chapter 14 of the Trans-Pacific Partnership Agreement (TPPA), signed 4 February 2016, with Chapter 12 of the Regional Comprehensive Economic Partnership (RCEP), signed 15 November 2020.

[3] India withdrew from RCEP in November 2019 just prior to its conclusion.

[4] Jane Kelsey, John Bush, Manuel Montes, Joy Ngubai (2020), *How 'Digital Trade' Rules would Impede Taxation of the Digitalised Economy in the Global South,* Penang, Third World Network.

[5] For discussion of the moratorium on customs duties on electronic transmissions see chapter X by Dr Manuel Montes.

[6] UNCTAD (2018), *Trade and Development Report 2018. Power, Platforms and the Free Trade Delusion*, UNCTAD, Geneva, Chapter III.

[7] Sol Picciotto (2018), 'International tax, regulatory arbitrage and the growth of transnational corporations', *Transnational Corporations,* 25(3), pp.27–53 at pp.40–43. Available at https://unctad.org/en/PublicationChapters/diaeia2018d5a3_en.pdf

[8] The arm's length principle treats the parties to a transaction as separate equal and independent entities and assumes that entities that are 'related via management, control or capital in their controlled transactions should agree the same terms and conditions which would have been agreed between non-related entities for comparable uncontrolled transactions'. See: https://transferpricingasia.com/what-is-tp/arms-length/. The principle is enshrined in Article 9 of the OECD Model Tax Convention. This seemingly neutral proposition allows for broad

interpretation and has enabled MNEs to shift profits to low-tax jurisdictions. The complex ownership structures and operations of digital MNEs have facilitated intra-firm tax-related arrangements of that kind.

[9] See: https://www.oecd.org/tax/beps/

[10] OECD, Action 1. Tax challenges arising from digitalisation. Available at: https://www.oecd.org/tax/beps/beps-actions/action1/.

[11] Steven Mnuchin (2019), Jose Angel Gurria, Secretary General of the OECD, Response Letter to Steven Mnuchin, US Treasury Secretary, 4 December 2019. Available at: https://www.oecd.org/newsroom/Letter-from-OECD-Secretary-General-Angel-Gurria-for-the-attention-of-The-Honorable-Steven-T-Mnuchin-Secretary-of-the-Treasury-United-States.pdf. Steven Mnuchin, US Treasury Secretary (2020), Letter to the Ministers of Finance of the French Republic, Spain and the Italian Republic and the Chancellor of the Exchequer of the United Kingdom, 12 June 2020. Available at: https://www.politico.eu/wp-content/uploads/2020/06/CLEAN-US-letter-DST-120620201.pdf.

[12] Remarks by Angel Gurría, Secrretary General, OECD to the 11th Meeting of the Inclusive Framework on BEPS, Paris, 27 January 2021. Available at: http://www.oecd.org/about/secretary-general/oecd-sg-at-meeting-of-the-inclusive-framework-on-beps-27-january-2021.htm.

[13] Jefferson VanderWolk et al. (2021), 'The Biden Administration's international tax proposals', *Tax Journal,* 6 May. Available at: https://www.taxjournal.com/articles/-the-biden-administration-s-international-tax-proposals-will-they-fly-.

[14] Office of the USTR, Ambassador Robert E. Lighthizer (2019), 'Report on France's Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974', 2 December 2019. Available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/conclusion-ustr%E2%80%99s-investigation

[15] Sergei Klebnikov (2020), 'U.S. Threatens New Tariffs on Cars in Response to France's Digital Tax', *Forbes,* 22 January 2020. Available at: https://www.forbes.com/sites/sergeiklebnikov/2020/01/22/us-threatens-auto-tariffs-in-response-to-frances-digital-tax/#65fd20f911a1; Patrick Hatch (2018), 'Amazon reopens US site to Australian shoppers after 'Amazon Tax'', *Sydney Morning Herald,* 22 November 2018. Available at: https://www.stuff.co.nz/business/world/108779793/amazon-reopens-us-site-to-australian-shoppers-after-amazon-tax.

[16] Office of the US Trade Representative, Docket No. USTR-2020-0022, Initiation of Section 301 Investigations of Digital Services Taxes, 2 June 2020. Available at: https://www.federalregister.gov/documents/2020/06/05/2020-12216/initiation-of-section-301-investigations-of-digital-services-taxes. See also Andres Schwarzenberg (2020), 'Section 301 Investigations: Foreign Digital Services Taxes (DSTs)', Congressional Research Service, 31 August 2020. Available at: https://crsreports.congress.gov/product/pdf/IF/IF11564.

[17] USTR, 'Section 301 Investigation. Report on India's Digital Services Tax', 6 January 2021. Available at: https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-digital-services-taxes.

[18] USTR, 'Virtual hearing regarding the proposed action in the Section 301 Investigation of the Digital Services Tax adopted by India', 10 May 2021. Available at: https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-digital-services-taxes/digital-services-taxes-virtual-hearing-regarding-dst-adopted-india-may-10.

[19] USTR, 'Notice of Action in the Section 301 Investigation of India's Digital Services Tax', Federal Register, Vol. 86., no.107, 7 June 2021, 30356-30358 (FR 86/107, 7 June 2021)

[20] USTR, 'Section 301 Investigations. Status Update on Digital Services Tax Investigations of Brazil, the Czech Republic, The European Union, and Indonesia', 13 January 2021. Available at: https://ustr.gov/sites/default/files/files/Press/Releases/StatusUpdate301InvestigationsBEUIndCR.pdf

[21] USTR, 'Termination of Section 301 Digital Services Tax investigations of Brazil, the Czech Republic, the European Union, and Indonesia', 86 FR 16828, 31 March 2021. Available at: https://www.federalregister.gov/documents/2021/03/31/2021-06612/termination-of-section-301-digital-services-tax-investigations-of-brazil-the-czech-republic-the

[22] See KPMG (2021), *Taxation of the digitalized economy. Developments summary,* 22 February 2021, 16-54. Available at: https://tax.kpmg.us/content/dam/tax/en/pdfs/2021/digitalized-economy-taxation-developments-summary.pdf. The following governments were also recorded as having announced they were investigating such taxes: Cambodia (22-23), China (23), New Zealand (40).

[23] See KPMG (2021), pp.65–122.

[24] The Australian Treasurer announced on 20 March 2019 that they would not proceed with an interim measure to tax the digital economy. Andrew Maslaris, 'France's Digital Services Tax', 9 August 2019, Parliament of Australia. Available at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2019/August/Digital_Services_Taxation

[25] The US Tax Foundation, a tech industry think tank, describes 'gross-based withholding taxes' as taxes 'used by some countries instead of corporate taxes or consumption taxes to tax revenue of digital firms in connection to transactions within a jurisdiction. As gross income taxes, these policies do not substitute for income or consumption taxation.' The Tax Foundation sees permanent establishment rules as redefining what constitutes a permanent establishment to include digital companies that have no physical presence within a jurisdiction. These virtual or digital permanent establishments are usually defined using specific criteria including engagement with the local market. Available at: https://taxfoundation.org/digital-tax/

[26] Australia, Brunei Darussalam, Japan, Malaysia, New Zealand, Viet Nam.

[27] E.g. US Japan Digital Trade Agreement 2019; EU Japan Economic Partnership Agreement 2019; Japan Mongolia Free Economic Partnership Agreement 2016.

[28] E.g. Australia Singapore Digital Economy Agreement 2020.

[29] E.g. Singapore New Zealand Closer Economic Partnership upgrade 2019; Australia Singapore Digital Economy Agreement 2020.

[30] E.g. Digital Economic Partnership Agreement 2020 between New Zealand, Singapore and Chile.

[31] WTO Ministerial Conference, Joint Statement on Electronic Commerce, WT/MIN(17)/60, 13 December 2017.

[32] There is no formal list of participants and some Members have joined or submitted documents since the original statement: WTO, Joint Statement on Electronic Commerce, WT/L/1056, 25 January 2019. Asian countries who have had some involvement in the plurilateral e-commerce negotiations are: Australia, Brunei, Cambodia, China, Hong Kong SAR, Indonesia, Japan, Lao, Malaysia, Myanmar, New Zealand, Philippines, Singapore, Republic of Korea, Thailand, Taiwan,

[33] WTO, Joint Statement on Electronic Commerce. Communication from China, INF/ECOM/32, 9 May 2019.

[34] 'The Legal Status of 'Joint Statement Initiatives' and Their Negotiated Outcomes. Paper circulated at the request of India and South Africa', General Council 1–2 March 2021, WT/GC/W/819, 19 February 2021. South Africa, India, Indonesia and Egypt declined to sign the 'Osaka Declaration on Digital Economy initiated by Japan as the chair of the G20 in June 2019. See Graham Greenleaf (2019), 'G20 Makes Declaration of 'data Free Flow with Trust': Support and Dissent', 160 *Privacy Laws and Business International Report*, 18–19. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3514407

[35] India withdrew from the RCEP in November 2019 before negotiations were concluded.

[36] Chapter 12, Regional Comprehensive Economic Partnership, signed 15 November 2020. For a comparison with the TPPA see Jane Kelsey (2020), 'Important differences between the RCEP

electronic commerce chapter and the TPPA and lessons for e-commerce in the WTO'. Available at: https://www.bilaterals.org/?important-differences-between-the.

[37] RCEP, Annex III Schedule of Reservations and Non-Conforming Measures for Services: Indonesia, 2020.

[38] WTO, Joint Statement on Electronic Commerce. Communication from Indonesia, 22 November 2019, INF/ECOM/47 and WTO, Joint Statement on Electronic Commerce. Communication from Indonesia, 10 February 2020, INF/ECOM/52

[39] Source: KPMG (2021), p.12, p.38, and p.98.

[40] Source: KPMG (2021), p.15, p.54, and p.122.

[41] Viet Nam has a phasing in period for compliance.

[42] This rule is increasingly included as a prohibited Performance Requirement in the investment chapter of FTAs, and prevents governments from capping the royalties paid under certain licensing arrangements between related entities so as to stem the practices of foreign firms that use royalties for tax avoidance and shifting profits offshore. See, for example, TPPA/CPTPP Article 9.10.1(i)(i). Discussion of this rule is beyond the scope of this paper.

[43] Requirements for technology transfer, or training of locals that would transfer proprietary knowledge, are increasingly included in investment chapters as prohibited performance requirements, but are not discussed here.

[44] TPPA/CPTPP Article 14.2.3(b).

[45] 'Legitimate' has been interpreted in the WTO dispute on *Canada – Patent Protection of Pharmaceutical Products* (DS114) to mean widely recognized state practice. Available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds114_e.htm

[46] See Lighthizer (2019), p.10.

[47] TPPA/CPTPP Article 14.11.3(b).

[48] Lighthizer (2019), p.68.

[49] Aaditya Mattoo, (1998) 'Financial Services and the WTO. Liberalization Commitments of Developing and Transition Economies', World Bank, August 1998, Table 4. Available at: https://econpapers.repec.org/paper/zbwwtowps/tisd9803.htm

[50] ASEAN Trade in Services Agreement (ATISA), adopted on October 2020, Article 9.

[51] TPPA, Article 14.7.3(b)

[52] EU Japan Free Trade Agreement, Article 8.4.2(a)

[53] EU proposal for EU Indonesia FTA, Article X.9.2(a)

[54] USMCA Article 19.16.1 covers the source code of software and 'an algorithm expressed in that source code'.

[55] USMCA Article 19.16.2 reads: *Nothing in this article shall preclude a regulatory body or judicial authority of a Party from requiring a person of the other Party to preserve or make available the source code of software, or an algorithm expressed in that source code, to the regulatory body for a specific investigation, inspection, examination enforcement action or judicial proceeding, subject to safeguards against unauthorized disclosure.*

[56] The US, for example, has excluded taxation measures from its MFN obligation in its GATS schedule: GATS/EL/90, 15 April 1994.

[57] ATISA Section IV, especially Articles 14 and 16.

[58] GATT Articles II.2 and III.2.

[59] GATS Article XIV(d).

[60] CETA Article 28.7 has the most comprehensive exceptions for taxation measures to date.

[61] As of 2015 Members relying on the General Exceptions at the WTO had succeeded in only one of 44 disputes. Public Citizen, 'Only one of 44 attempts to use the GATT Art XX/GATS Art XIV General Exception has ever succeeded', August 2015. Available at: https://www.citizen.org/article/only-one-of-44-attempts-to-use-the-wtos-general-exception-to-only-one-of-44-attempts-to-use-the-gatt-article-xx-gats-article-xiv-general-exception-has-ever/

[62] TPPA Article 29.2.
[63] RCEP Article 12.14.3(b) and 12.15.3(b). However, this broad security exception applies only to the movement of data.
[64] *United States – Section 301 – 310 of the Trade Act 1974*, Panel Report, WT/DS152/R (22 December 1999) at [8.1]
[65] United States Council for International Business (USCIB) (2000), 'Comments on Initiation of Section 301 Investigations of Digital Services Taxes. Docket No. USTR-2020-0022', 15 July 2020.
[66] Lighthizer (2019).
[67] KPMG, 'France: Digital Services Tax to be paid in December 2020'. Available at: https://home.kpmg/us/en/home/insights/2020/10/tnf-france-digital-services-tax-to-be-paid-in-december-2020.html
[68] USTR, 'Suspension of Tariff Action in France Digital Services Tax Investigation', 7 January 2021. Available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/january/suspension-tariff-action-france-digital-services-tax-investigation
[69] Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom. Office of the US Trade Representative, Docket No. USTR-2020-0022, Initiation of Section 301 Investigations of Digital Services Taxes, 2 June 2020. Available at: https://www.federalregister.gov/documents/2020/06/05/2020-12216/initiation-of-section-301-investigations-of-digital-services-taxes
[70] Schwarzenburg (2020).
[71] Information Technology and Innovation Foundation (ITIF) (2020), 'Written Comments of the Information Technology and Innovation Foundation on Section 301 Investigations of Digital Services Taxes. Docket No. USTR-2020-0022', 30 June 2020, 2.
[72] https://aicasia.org/statements/
[73] Asia Internet Coalition (AIC) (2020),' Asia Internet Coalition Comments and Recommendations to USTR's Initiative of Section 301 Investigation of Digital Services Taxes (DST), Docket No. USTR-2020-0022], 15 July 2020, 2.
[74] IBM, 'Request for Comments on the initiative of Section 301 investigations with respect to Digital Services Taxes (DSTs) adopted or under considerations by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom', 9 July 2020.
[75] See: http://www.oecd.org/tax/treaties/beps-mli-position-india.pdf. Other countries include Australia, Canada, China, Russia, Singapore.
[76] KPMG, 'Indonesia', https://home.kpmg/xx/en/home/insights/2014/04/indonesia-thinking-beyond-borders.html
[77] For more detail see KPMG, *Taxation of the digitalized economy. Developments summary,* 3 February 2021, 35
[78] Article 6(8).
[79] ITIF (2020), 14.
[80] Silicon Valley Tax Directors' Group (SVTDG) (2020), 'Written Submission in Response to Initiation of Section 301 Investigations of Digital Services Taxes (USTR-2020-0022)', 15 July 2020, p.54.
[81] SVTDG, 55.
[82] SVTDG, 55.
[83] AIC (2020), p.5.
[84] The letter is annexed to USTR, 'Section 301 Investigations. Status Update on Digital Services Tax Investigations of Brazil, the Czech Republic, The European Union, and Indonesia', 13 January 2021. Available at:

https://ustr.gov/sites/default/files/files/Press/Releases/StatusUpdate301InvestigationsBEUIndCR.pdf

[85] USTR, 86 FR 16828, 31 March 2021.

[86] Government of India Ministry of Finance, *Proposal for Equalisation Levy on Specified Transactions,* Report of the Committee on Taxation of e-Commerce, New Delhi, February 2016.

[87] For a more detailed account, see KPMG, *Taxation of the digitalized economy. Developments summary,* 3 February 2021, pp.31–34 (emphasis added).

[88] Section 165A(3)(ii)) Finance Act 2020.

[89] AIC (2020), p.3.

[90] See, for example, Coalition of Services Industries (CSI), 'Coalition of Services Industries Written Comments on the Initiation of Section 301 Investigations of Digital Services Taxes. Office of the USTR, Docket No. USTR-2020-0022', 15 July 2020.

[91] The GATT issues are not addressed in this paper. On the moratorium on customs duties on e-commerce see Chapter x, Manuel Montes.

[92] CSI (2020), p.2.

[93] AIC (2020), p.2.

[94] AIC (2020).

[95] Government of India (2020), 'Response from the Government of India to the request for public comments from the USTR in the matter of initiation of investigation of digital services taxes under Section 301 of the U.S. Trade Act', undated 2020

[96] WT/DS152/R, adopted 27 January 2000.

[97] OECD/G20 BEPS Report, *Addressing the Tax Challenge of the Digital Economy,* Action 1 2015, Final Report, 13 and 276

[98] Quoted in Government of India (2020), p.4.

[99] *South Dakota v Wayfair Inc* 585 U.S.__(2018)

[100] USTR, 86 FR 86/60, 31 March 2021.

[101] USTR, FR 86/107, 7 June 2021.

[102] TechNet (2000), 're: Initiation of Section 301 Investigations of Digital Services Taxes (Docket No. USTR-2020-0022)', 1

[103] AIC (2020), 7. See also USCIB (2020), 4; United States Chamber of Commerce (USCoC) (2020), 'Statement of the United States Chamber of Commerce on Section 301 Investigations of Digital Services Taxes', 15 July 2020; Computer and Communications Industry Association (CCIA) (2020), 'Comments of the Computer and Communications Industry Association in re: Initiation of Section 301 Investigations of Digital Services Taxes. Docket No. USTR-2020-0022', 14 July 2020, 15.

[104] Internet Association, 'Comments of the Internet Association: Initiation of Section 301 Investigations of Digital Services Taxes, and call for comments', undated, p.4.

[105] SVTDG (2020), p.22.

[106] See Jane Kelsey (2018), 'How a TPP-Style e-Commerce Outcome in the WTO would Endanger the Development Dimension of the GATS Acquis (and Potentially the WTO), *Journal of International Economic Law*, 2018, 21, pp.273–95 at pp.290–94.

[107] SVTDG (2020), p.23.

[108] RCEP Article 8.11.

[109] RCEP Article 8.12.

[110] ATISA Articles 11 and 12.

[111] TechNet (2020), p.1.

[112] For more country-specific detail see KPMG (2021), pp.16–54.

[113] The equally fraught possibilty of investor-state dispute is not addressed in this paper.

[114] To date Brunei, Malaysia, Peru and Chile have not yet ratified the CPTPP.

[115] 'India set to resume talks with EU, US', *Business Standard (India),* 21 November 2020. Available at: https://www.business-standard.com/article/economy-policy/india-set-to-resume-talks-on-free-trade-agreements-with-eu-us-120112100594_1.html

[116] OECD, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, 1 July 2021. Available at: https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf. For initial analyses see KPMG Report on OECD/G20 Inclusive Framework Agreement on BEPS 2.0, 2 July 2021. Available at: https://home.kpmg/us/en/home/insights/2021/07/tnf-kpmg-report-oecd-g20-inclusive-framework-agreement-beps.html

[117] Jefferson VanderVolk, A Whole New Ballgame. The Global Tax Policy Negotiations on Pillars One and Two, *Bloomberg,* 13 May 2021, Available at: https://news.bloomberglaw.com/daily-tax-report-international/a-whole-new-ballgame-the-global-tax-policy-negotiations-on-pillars-one-and-two

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