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국제학석사학위논문

# **Digital Tax under the WTO Trade Agreement:**

Analysis on Digital Tax Non-Compliance with GATS

WTO 통상협정하에서의 디지털세:  
디지털세의 GATS 저촉성에 관한 연구

2021 년 8 월

서울대학교 국제대학원

국제학과 국제통상전공

권 여 리

Master's Thesis

**Digital Tax under the  
WTO Trade Agreement:**

Analysis on Digital Tax Non-Compliance with GATS

August 2021

Graduate School of International Studies

Seoul National University

International Commerce major

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2021 년 8 월

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## **Abstract**

### **Digital Tax under the WTO Trade Agreement: Analysis on Digital Tax Non-Compliance with GATS**

The game-changing phenomenon that shifted the world into the current fourth industrial revolution would be 'Digitalization'. The world has just begun its journey into the new digitalized world, and it will continuously evolve into a more intricate and integrated one. In a transitional period where everything is uncertain and new, opportunities for multilateral negotiations arise, which would help the world coordinate and cooperate to face the unknown digitalized future. Such negotiations allow the international society to implement better rules and policies, ensuring equitable opportunities on a level playing field. In this context, the 'digital economy and trade' is one of many fields where international cooperation and coordination are critically needed. Everything that used to be conducted manually, physically, and tangibly is now being conducted automatically, remotely, and intangibly. Goods and services have become digitally available and electronically transmittable, a phenomenon that calls for significant changes not only in the economy and trade but also in the surrounding rules, norms, and policies.

Currently, the OECD is leading important and timely negotiations on ways to govern the digitalized economy and trade. One of the first agendas is to draw up a consensus-based agreement concerning the effective international tax measures for the digitalized economy and trade, which would prevent base erosion and profit shifting. However, due to the delayed negotiations, unilateral measures are beginning to arise. This paper aims to first, introduce the aspects of the digitalized economy and trade. Second, outline the current efforts of negotiations to come up with a unified international tax system fit for the digitalized economy and trade. Third, analyze how potential unilateral digital tax measures could face non-compliance with existing WTO trade agreements. Lastly, draw out implications on how international organizations and society should cooperate and coordinate to better prepare for the digitalized future.

**Keywords:** Digital Economy and Trade, International Tax System, Digital Tax, Digital Services Tax (DST), GATS

**Student-ID:** 2019-26967

## Abbreviation

<b>ASDEA</b>	Australia – Singapore Digital Economy Agreement
<b>BEPS</b>	Base Erosion and Profit Shifting
<b>B2B</b>	Business to Business
<b>B2C</b>	Business to Consumer
<b>C2C</b>	Consumer to Consumer
<b>CFC</b>	Controlled Foreign Company rules
<b>CIT</b>	Corporate Income Tax
<b>COVID-19</b>	Coronavirus Disease 2019
<b>CPC</b>	Central Product Classification
<b>CPTPP</b>	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
<b>DEPA</b>	Digital Economy Partnership Agreement
<b>DST</b>	Digital Service Tax
<b>EC</b>	European Council
<b>ECON</b>	European Parliament’s Committee on Economic and Monetary Affairs
<b>EPS</b>	Electronic Payment System
<b>EU</b>	European Union
<b>FDII</b>	Foreign Derived Intangible Income
<b>GATS</b>	General Agreement on Tariffs and Services
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>GDP</b>	Gross Domestic Product
<b>GILTI</b>	Global Intangible Low Tax Income
<b>GST</b>	Goods and Services Tax
<b>GLOBE</b>	Global Anti-Base Erosion
<b>GVC</b>	Global Value Chain
<b>G#</b>	Group of #
<b>ICT</b>	Information Communication Technologies
<b>IF</b>	Inclusive Framework
<b>IMF</b>	International Monetary Fund

<b>IoT</b>	Internet of Things
<b>IP</b>	Internet Protocol
<b>ITA</b>	Information Technology Agreement
<b>ITFA</b>	Internet Tax Freedom Act
<b>MC#</b>	Ministerial Conference #
<b>MFN</b>	Most Favored Nation
<b>MNC</b>	Multinational Corporation
<b>OECD</b>	Organization for Economic Cooperation and Development
<b>PE</b>	Permanent Establishment
<b>PTA</b>	Preferential Trade Agreement
<b>R&amp;D</b>	Research and Development
<b>TBA</b>	To Be Announced
<b>US</b>	United States
<b>USJDTA</b>	United States – Japan Digital Trade Agreement
<b>UK</b>	United Kingdom
<b>USMCA</b>	United States – Mexico – Canada Agreement
<b>USTR</b>	United States Trade Representatives
<b>UN</b>	United Nations
<b>VAT</b>	Value Added Tax
<b>WTO</b>	World Trade Organization



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# **Chapter 1. Introduction**

## **1.1 Background and Purpose of Study**

The world we live in today has transformed into an intricate, sophisticated yet an efficient digitalized one. With the proliferation of the internet, the world transformed into a technology-driven digital bundle, where nearly everything can be produced, paid, sent, and used digitally. This phenomenon called ‘Digitalization’ infiltrated into the existing industry, causing an industrial paradigm shift into the fourth one. Everything that used to be conducted manually, physically, and tangibly is now conducted automatically, remotely, and intangibly. Goods and services have become digitally available and electronically transmittable, bringing significant changes to the environment of international trade. The cross-border electronic transmissions of goods and services, i.e. digital trade, revolutionized trade by minimizing costs and diversifying the scope of trade.

Nevertheless, specific components of digital trade have yet to be agreed upon. Among many barriers to cross-border trade, the implementation of customs duties and internal taxation on cross-border electronic transmissions of goods and services is becoming a new type of barrier and burden without any concrete agreement among the international societies. Despite the ongoing negotiations and attempts to reach a consensus on the taxation issue, given the complexity of calculation and implementation, a delayed agreement seems to be inevitable.

Since 1998, WTO members have been agreeing on the moratorium on imposing customs duties on electronic transmissions and have been renewing it every two years. The last moratorium extension was agreed to hold until the 12th Ministerial Conference,

scheduled in Kazakhstan in June 202. However, due to the COVID-19 pandemic, the 12th Ministerial conference had been rescheduled to November 2021. Along with the customs duty issue, heated debate on the digital internal taxation issue is taking place simultaneously. The OECD has been making efforts to reach an international agreement on taxing digital trade, nevertheless has not been successful yet. With the delay in reaching a consensus, an increasing number of countries are beginning to implement unilateral taxation measures to digital trade, which is becoming burdensome to many multinational corporations engaging in cross-border trade.

With this backdrop, this paper aims to address the taxation issue of digital trade by analyzing potential inconsistencies under the WTO trade agreement, to suggest possible policy implications in the digital trade era. Chapter two will define what Digital Economy and Trade are and give an overview of several multilateral and bilateral agreements on digital trade. Chapter three will sketch upon the characteristics of the digital tax and describe current developments and implementations of the digital tax around the world. Chapter four will analyze several inconsistencies of the proposed digital tax regime, namely the European Union's Digital Service Tax (DST) with GATS. Finally, Chapter five will discuss possible policy implications on how the international organizations and society should cooperate to better support the digital trade era.

## Chapter 2. Digital Economy and Trade

### 2.1 Dimensions of the Digital Economy and Trade

#### 2.1.1 Definitions

Many attempts have been made to define a rather ambiguous concept of ‘Digital Economy’. In the 2012 OECD Hearing on The Digital Economy, panelists defined digital economy as:

*“comprised of markets based on digital technologies that facilitate the trade of goods and services through e-commerce. The expansion of the digital sector has been a key driver of economic growth in recent years, and the shift towards a digital world has had effects on society that extend far beyond the digital technology context alone”<sup>1</sup>*

According to Dahlman et al. (2016) at the OECD Development Centre, the digital economy is defined as:

*“the amalgamation of several general purpose technologies (GPTs) and the range of economic and social activities carried out by people over the Internet and related technologies. It encompasses the physical infrastructure that digital technologies are based on (broadband lines, routers), the devices that are used for access (computers, smartphones), the applications they power (Google, Salesforce), and the functionality they provide (IoT, data analytics, cloud computing)”.*

The above definitions seem to precisely capture the essence of the digital economy. The digital economy began developing in the 1990s when the Internet started to emerge. The Internet became the foundation and driving force changing the world economy forever. During the 2000s and 2010s, Information and Communication Technologies (ICTs), such as the Internet of things (IoT), smartphones, tablets, 3D printers, cloud computing, digital platforms, and services, infiltrated the economy further transforming it into a highly

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<sup>1</sup> OECD. (2012). “The Digital Economy”. DAF/COMP(2012)22, 2/7/2013, pg.5

digitalized economy. The current phase of the digital economy critically depends on data and the utilization of data, such as analysing big data, decision-making based on algorithms, and developing technologies related to automation and robotics.<sup>2</sup>

The definition of ‘Digital Trade’, although there has yet to be an officially recognized one, the WTO Work Programme in 1998, declared that “*the term ‘electronic commerce’ is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means*”<sup>3</sup> The OECD recognized an increasing consensus on the definition of digital trade, which can be summarized as “*digitally-enabled transactions of trade in goods and services that can either be digitally or physically delivered*”, involving consumers, firms, and governments. It should be noted that although digital trade is fundamentally enabled by digital technologies, some transactions are still physically delivered, for example, a book ordered online being physically delivered. There are many important factors in the digital trade but one of the most important factors that cannot be left out when discussing digital trade is how data is utilized and moved. In the current digital trading environment, data itself is an asset that can be traded while being a means of production, organization of global value chains, and delivery of services.<sup>4</sup>

As definitions naturally reflect trends, the meaning of ‘Digital Economy’ and ‘Digital Trade’ is likely to evolve continuously in the future. However, in the meantime, this paper will base its discussion on the context of the definitions introduced in this section.

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<sup>2</sup> Bukht and Heeks. (2017). “Defining, Conceptualizing and Measuring the Digital Economy”. Manchester Centre for Development Informatics Working Paper 68, pg.2

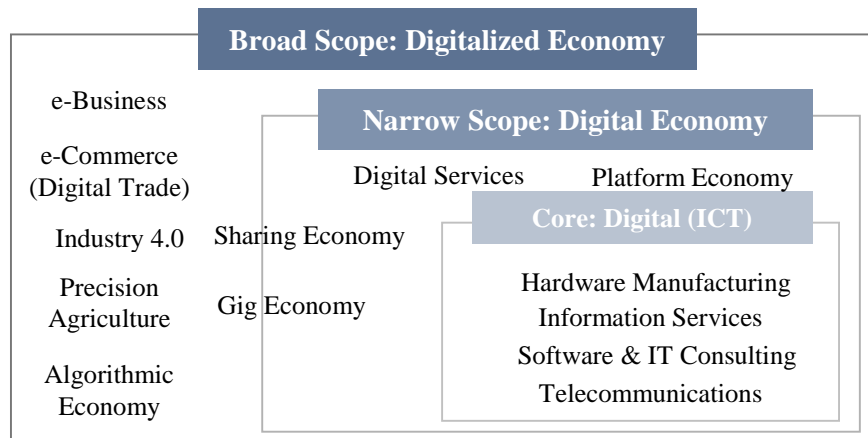
<sup>3</sup> WTO. (1998). “Work Programme on Electronic Commerce”, WT/L/274, pg.1

<sup>4</sup> OECD. (2019). “Trade in the Digital Era”. OECD Going Digital Policy Note, OECD, Paris, [www.oecd.org/going-digital/trade-in-the-digital-era.pdf](http://www.oecd.org/going-digital/trade-in-the-digital-era.pdf).for Analysis

### 2.1.2 Scope

As the digital economy infiltrates into the traditional economy, the current economy can no longer be described using concepts within the traditional boundaries. The digital economy not only encompasses the digital sector but also encompasses a much wider scope that covers a wide range of digitally-enabled economic activities, making it harder to distinguish between the boundaries of the traditional and the digital economy. The appropriate term to describe this new form of the economy would be the “Digitalized Economy”. The scope of the digitalized economy contains e-business (business transactions using ICT) and its subset of business transactions, such as e-commerce or digital trade (external business transactions using ICT), business decision-making using algorithms, and production and application of digital technologies in producing goods and services.<sup>5</sup> A visualized scope of the digital economy is shown in Figure 1.

**Figure 1. Scope of the Digital Economy**



(Source: Bukht and Heeks (2017))

<sup>5</sup> Bukht and Heeks. (2017). “Defining, Conceptualizing and Measuring the Digital Economy”. Manchester Centre for Development Informatics Working Paper 68, pg.11-12



Changes in the scope of the digital economy automatically bring changes to the sub-sectors of the framework of the digital economy. Among many sectors, the trade sector is one of the most affected, where changes in cross-border trade can be divided into three phases. First is the ‘Traditional Trade’ phase, where mostly tangible final goods and services were traded with reduced cost in cross-border transportation and communication, opening up a new era of trade globalization. Second is the ‘GVC Trade’ phase, where productions were fragmented and distributed all over the world to gain locational comparative advantages for each intermediary goods and services. The most recent phase is the ‘Digital Trade’ phase, where trade is no longer confined to tangible goods and services. The digitalization of trade is not only changing *how* the world trades but also *what* the world trades.

The digital economy gave rise to new business models, such as digital platforms that provide better connections between firms and consumers, allow an increase in smaller trade units, and enable intangible goods and services trade. This is largely due to the development of new digital technologies that enable the world to trade in previously non-tradeable areas, especially in services. This phenomenon opens enormous opportunities for trade growth but at the same time raises unsolved issues, such as classifications of goods and services, as digital products and their means of delivery blur the boundary and concept of traditional goods and services.<sup>6</sup>

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<sup>6</sup> López González, J. and M. Jouanjean (2017-07-27), “Digital Trade: Developing a Framework for Analysis”, OECD Trade Policy Papers, No. 205, pg.7-9

**Table 1. Stages of International Trade Evolution**

	Traditional Trade	GVC Trade	Digital Trade
<b>Trading Cost</b>	Reductions in Transportation & Communication costs	Reductions in Manufacturing Transaction costs	Reductions in Information & data sharing costs
<b>Production &amp; Trade</b>	Separation of cross-border production & consumption enabled	Fragmentation & production relocation towards emerging economies	Previously non-tradable cross-border services enabled
<b>Goods &amp; Services</b>	Broader access to new & price-competitive products mostly tangible final goods & services	Intermediate tangible goods & services	Larger quantities of smaller & lower-value goods & digital services
<b>Trade Policy</b>	Mainly concerning market access of tangible goods & services	Trade facilitation of tangible goods & services (eliminating trade barriers)	Market access & regulation of digital goods & services

(Source: Rearranged by author based on *Baldwin 2016, Gonzalez & Jouanjean 2017, WTO*)

### 2.1.3 Business models

The digital economy creates numerous new business and revenue models. With the advancement of ICT, nearly all new business and revenue models utilize, produce, or provide digital technologies. The new business and revenue models resemble the traditional business models, but at the same time modified to suit the new digitalized world. It would be crucial to understand the new business and revenue models to fully grasp the concept of the digital economy and how it operates before we talk about regulations, policies, and laws regarding the digital economy.

**Table 2. Types of Business & Revenue Models in the Digital Economy**

Types of Models		Operation	
<b>Business Models</b>	E-Commerce	B2B / B2C	Providing (in)tangible goods & services to businesses or consumers online (e.g. logistics, software application, etc.)
		C2C	Intermediaries helping individual consumers to sell or rent their assets online and facilitating transactions (e.g. online bidding, file sharing, etc.)
	Payment Services	Cash payment solutions	Offering secure purchases & payments online using barcodes or payment codes
		Cyber wallets	Alternative to credit cards, which uses previously charged credits
		Mobile payment solutions	Encompassing all types of technologies that enable payment using mobile or smartphones (e.g. in-app payments)
	App Stores		Providing central retail platforms, accessible via consumer's devices that lets them browse, view information, purchase, download, and install applications
	Online Advertising		Using Internet as a medium to target and deliver marketing messages to customers - players include web publishers, advertisers, and advertising network intermediaries (e.g. search engines) - contents are frequently offered for free to ensure a large enough audience
	Cloud Computing	Infrastructure	Most basic model offering computers and other fundamental computing resources (e.g. IP, VLANs, firewalls, etc.)
		Platform	Providing a computing platform and programming tools as a service for software developers
		Software	Provider allowing the user to access an application from various devices through a client interface such as a web browser
		Content	Rights are obtained and software is provided to allow content to be embedded by purchasers, content can be purchased
		Data	Granting controlled access of aggregated & managed data to entities

	Participative Networked Platforms	Intermediary enabling users to collaborate and contribute to developing, extending, rating, commenting on, and distributing user-created contents (e.g. social networking applications)
<b>Revenue Models</b>	Advertising based revenue	Offering free or discounted digital content to users in exchange for viewing of paid-for advertising
	Digital content purchases or rentals	Pay per item of download (e.g. e-books, movies, games, music, etc.)
	Selling of goods	Offering free or discounted introductory products or purchasable access to additional contents or virtual items in exchange for advertising opportunities
	Subscription-based revenue	e.g. Annual payments for 'premium delivery' with online retailers, monthly payments for digital content, etc.
	Selling of Services	Offering services online, such as legal, financial, consultancy services in exchange for advertising opportunities
	Licensing content and technology	Typically including access to specialist online contents (e.g. publications), algorithms, software, cloud based OS
	Selling of user data	e.g. ISPs (Internet Service Providers), data brokers, data analytics firms, etc.

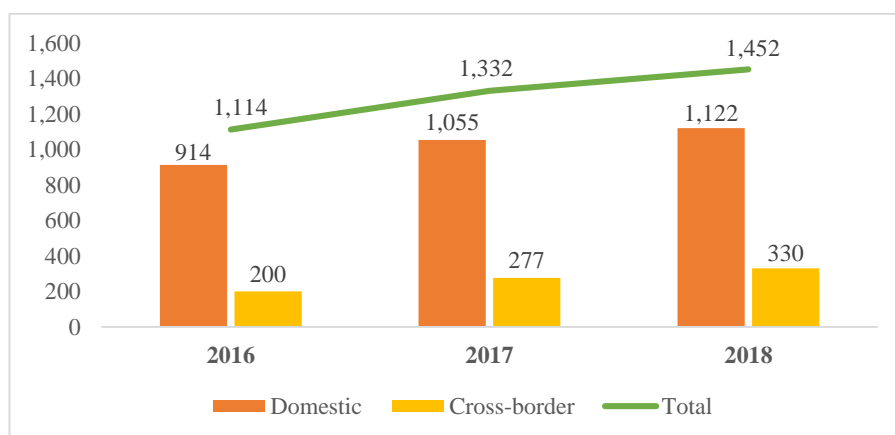
(Source: Arranged by author based on *OECD 2014*)

#### 2.1.4 Trends

The worldwide e-commerce sales in 2018, reached \$25.6 trillion, which is approximately 30% of global Gross Domestic Product (GDP). Business-to-business (B2B) transactions represent 83% of the total, which is about US\$21 trillion, and business-to-consumer (B2C) transactions take up US\$4.4 trillion, which is a 16% increase from 2017. The cross-border B2C e-commerce grew over 7% in 2018, amounting to US\$404 billion. The world top e-commerce economies are known to be US (\$8,640 billion, 42% of GDP), Japan (\$3,280 billion, 66% of GDP), China (\$2,304 billion, 17% of GDP), Korea (\$1,364 billion, 84% of the GDP), UK (\$918 billion, 32% of GDP) followed by France, Germany,

Italy, Australia, and Spain. It is estimated that 1.45 billion people participated in online purchasing, China having the largest number of shoppers. Among the online shoppers, 23% are approximated to be cross-border online shoppers.<sup>7</sup>

**Figure 2. Global Online Shoppers (million)**



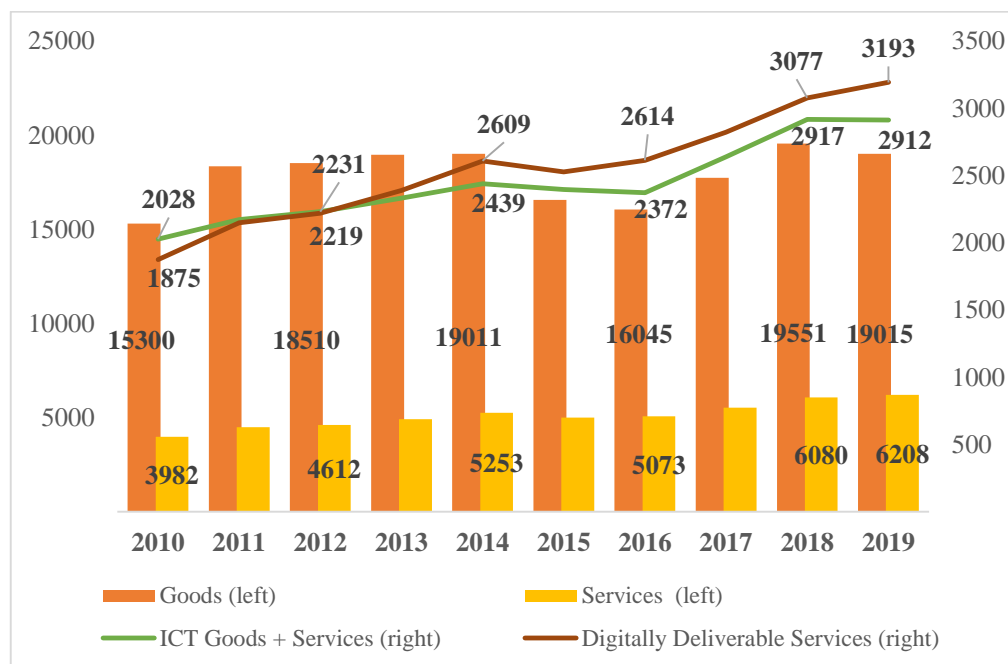
(Source: UNCTAD 2020)

Trade in services has been continuously increasing over the past decade. According to WTO's estimation, the share of services trade of total trade, currently around 20%, is expected to increase up to 25% by 2030. Within the services trade, growth in digitally deliverable services is especially notable, which is largely due to technological advancements followed by the spread of the digital economy and trade. Trade in the Information and communication technology (ICT) sector, which is one of the core sectors

<sup>7</sup> UNCTAD, 'Global e-Commerce hits \$25.6 trillion – latest UNCTAD estimates', 27 April 2020, available at <https://unctad.org/press-material/global-e-commerce-hits-256-trillion-latest-unctad-estimates>

that lead the development of the digital economy and trade, also displays a growing position within the world trade in goods and services.<sup>8</sup>

**Figure 3. World Trade in Goods & Services (billion \$)**



(Source: UNCTAD STAT)

## 2.2 International Agreements on Digital Trade

In 1998, with a rising recognition of the need for global digital trade governance, the general council of the WTO declared its plans to establish a comprehensive work programme. The work programme aimed to identify important issues about international digital trade.<sup>9</sup> Adopted in September 1998, the work programme was composed of four

<sup>8</sup> WTO (2018), 'World Trade Report 2018: The Future of World Trade', available at [https://www.wto.org/english/res\\_e/publications\\_e/wtr18\\_e.htm](https://www.wto.org/english/res_e/publications_e/wtr18_e.htm)

<sup>9</sup> WTO, 'Ministerial Declaration on Global E-Commerce', WT/MIN (98)/DEC/2, 20 May 1998

bodies of the WTO,<sup>10</sup> and among the four bodies, the Council for Trade in Services was assigned with the most diverse issues that needed review under the GATS legal framework, including the modes of supply, MFN, domestic regulation, protection of privacy, market-access commitments, national treatment, classification issues, and much more.<sup>11</sup>

Although the WTO made a head start in the discussions concerning digital trade, the lack of progress in actionable measures is rather disappointing. Failure to establish a permanent agreement on the moratorium on e-commerce and the procrastination to reach consensus on rules and commitments governing electronically traded services have caused nothing but confusion and setback to advance the WTO digital trade rules. Currently, several different agreements regulate different components of the digital trade. Absence of a uniform agreement specifically for digital trade, currently, digital trade is regulated by the General Agreement on Trade in Services (the ‘GATS’).

**Table 3. WTO Agreements related to Cross-Border Digital Trade**

Type	Goods & Services	Related WTO Agreement					
		GATTS	GATS	TRIPS	TFA	ITA	TBT
Digital Trade	Online Order of Goods	○			○	○	
	Entertainment : Music, Games, etc.		○	○			
	Telecommunications : Network, E-mail, etc.		○				
	Retail Service & Management : Online Platform, etc.	○	○		○		
	Financial Service		○				

<sup>10</sup> Council for Trade in Services (under GATS), Council for Trade in Goods (under GATT), Council for TRIPs, Committee for Trade and Development

<sup>11</sup> WTO, ‘Work Programme on Electronic Commerce’, WT/L/274, 30 September 1998

	: Payment Systems, etc.						
	Others : Social Media, Data Storage, Clouds, etc.	○	○	○	○	○	
Technology Related Services	Domain			○			○
	Internet Protocol (IP) Address			○			○
	Software			○			○
	Internet Protocol (TCP/IP)			○			○
Infrastructure Related Services	Submarine/Land Cable System	○	○			○	○
	Satellite/Wireless Network	○	○			○	○
	Internet Exchange Point (IXP)						○
	Digital Device : Computer, Smartphone, etc.	○		○	○	○	○

(Source: KIEP 2021)

Lacking any concrete provision or agreement that regulates digital trade in general, individual countries and regions have been entering into bilateral and regional agreements exclusively for digital trade. As the date of the WTO 12th Ministerial Conference has been set to take place on 30th November 2021 in Geneva, which was originally scheduled to take place in June 2020, but postponed due to the COVID-19 pandemic, progress on discussing digital trade is highly anticipated. This section aims to review some of the significant multilateral and bilateral digital trade agreements.

### 2.2.1 Moratorium on Customs Duties on Electronic Transmissions

Along with the 1998 declaration to establish a work programme on global digital trade, ‘Moratorium on Customs Duties on Electronic Transmissions’ (‘the Moratorium’) was also



declared<sup>12</sup> and since then the Moratorium has been regularly extended up until 2017 at the eleventh WTO Ministerial Conference in Buenos Aires (MC11)<sup>13</sup>. The Moratorium was set to expire in 2019 when agreement to extend the Moratorium failed at the MC11. Digital trade was facing possibilities of unilateral actions of imposing duties, as more and more countries were expressing concerns of revenue losses due to the Moratorium. However, when the twelfth Ministerial Conference ('MC12') was postponed, due to the outbreak of the COVID-19 pandemic, the General Council announced that the WTO members have agreed to extend the Moratorium until the MC12<sup>14</sup>, thus extinguishing any imminent threats of unilateral imposition of tariff on digital trade.

Nonetheless, the postponement of the Moratorium should be considered only as a temporary solution since unresolved issues would be open for discussion in the future not so far. Questions regarding the coverage of the Moratorium, that is whether the transmission itself or the content of the transmission is covered and whether electronic transmissions should be identified as goods or as services, are continuously being raised and debated.<sup>15</sup> Additionally, with the significant increase in digital trade, some of the WTO members, such as India and South Africa, have been raising concerns on revenue loss implications following the Moratorium.<sup>16</sup> On the other hand, members such as the US and

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<sup>12</sup> See *supra*, 'Ministerial Declaration on Global E-Commerce'

<sup>13</sup> Except for the Ministerial Conferences in Seattle 1999 and Cancun 2003, the Moratorium has regularly been extended. (Wunsch-Vincent, 2006)

<sup>14</sup> WTO, 'Work Programme on Electronic Commerce General Council Decision', WT/L/1079, 11 December 2019.

<sup>15</sup> Andrenelli & Gonzalez (2019), 'Electronic Transmissions and International Trade – Shedding New Light on the Moratorium Debate', OECD Trade Policy Papers, No. 233, pg.10.

<sup>16</sup> WTO, 'Work Programme on Electronic Commerce: Moratorium on Customs Duties on Electronic Transmissions: Need for a Re-think'. Communication from India and South

the EU have advocated non-imposition of customs duties on electronic transmissions.<sup>17</sup> A study conducted by Banga (2019) shows that when calculated using MFN tariffs, the losses of tariff revenue caused by the Moratorium, up until 2017, could have amounted up to 8 billion USD for developing countries and 212 million USD for developed countries.<sup>18</sup> However, using the same study, estimation shows that the share of imports of “digitized and digitizable goods” only takes up about 1.2% of total trade, therefore, the amount of tariff loss on electronic transmissions would be relatively small compared to other tariff-imposable trade.<sup>19</sup>

### 2.2.2 GATS

WTO lacks regulations and agreements, other than the General Agreement on Trade in Services (the ‘GATS’), when it comes to governing digitally traded goods and services,<sup>20</sup>. As previously mentioned, besides the work programme established in 1998, there has not

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Africa, WT/GC/W/747, 12 July 2018.

<sup>17</sup> WTO, ‘Joint Statement on Electronic Commerce’, INF/ECOM/2, 5, 25, 33, 34, 2019.

<sup>18</sup> Banga, R. (2019), ‘Growing Trade in Electronic Transmissions: Implications for the South’, *UNCTAD Research Paper*, No. 29, pg.19.

<sup>19</sup> See *supra*, ‘Electronic Transmissions and International Trade – Shedding New Light on the Moratorium Debate’, pg.17.

<sup>20</sup> The first-ever multilateral agreement on trade in services. “The GATS establishes a regulatory framework within which WTO Members can undertake and implement commitments for the liberalization of trade in services. The GATS covers measures of Members affecting trade in services. ‘Services’ includes any service in any sector except services supplied in the exercise of governmental authority. The supply of services includes the production, distribution, marketing, sale and deliver of a service. Trade in services is defined in Article I:2 of the GATS as the supply of a service: (1) from the territory of one Member into the territory of any other Member (cross-border supply); (2) in the territory of one Member to a service consumer of any other Member (consumption abroad); (3) by a service supplier of one Member, through a commercial presence in the territory of any other Member (supply through a commercial presence); and (4) by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member (supply through the presence of natural persons)”. (Van den Bossche & Zdouc, 2017)

been any commitments nor any established agreements specifically for digital trade. Any agreements related to trade in digital goods and services besides the GATS would be the Information Technology Agreement (the 'ITA').

The ITA was reached in 1996 through a ministerial declaration<sup>21</sup> that announced tariff liberalization on the IT sector covering high-tech products, such as computers, telecommunication equipment, semiconductors, semiconductor manufacturing, software and so on. ITA covers 81 WTO members that account for roughly 97% of the world trade of IT products.<sup>22</sup> Although this agreement could be considered to have played a significant role in the liberalization of digital trade, it does not extend beyond the tariff liberalization and classification of digital products. Therefore, at this point, the only agreement regulating the act of digital trade itself is the GATS. In the progress report adopted by the council for trade in services in 1999, the scope of the GATS concerning the “electronic delivery of services” is written as follows:

*“It was the general view that the electronic delivery of services falls within the scope of the GATS, since the Agreement applies to all services regardless of the means by which they are delivered, and that electronic delivery can take place under any of the four modes of supply. Measures affecting the electronic delivery of services are measures affecting trade in services in the sense of Article I of the GATS and are therefore covered by GATS obligations. It was also the general view that the GATS is technologically neutral in the sense that it does not contain any provisions that distinguish between the different technological means through which a service may be supplied. Some delegations expressed a view that these issues were complex and needed further examination.”*

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<sup>21</sup> WTO, ‘Ministerial Declaration on Trade in Information Technology Products’, WT/MIN(96)/16, 13 December 1996.

<sup>22</sup> WTO official website, [https://www.wto.org/english/tratop\\_e/inftec\\_e/itaintro\\_e.htm](https://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm)

Although the report stipulates that the scope of GATS would cover the electronic delivery of services, several important issues such as technological neutrality, distinctions among modes of supply, and classification of goods and services were left undiscussed for further examination.<sup>23</sup> The fact that WTO trade rules were designed in the era where most international trades depended on physical goods and services delivered in person lets us presume how problems and confusion would arise when dealing with the current form of digital trade.<sup>24</sup> Wunsch-Vincent & Hold (2012) pointed out that despite the GATS succeeding in closing some gaps related to digital trade, “several important unresolved digital trade matters, such as an agreement on a clear and permanent duty-free moratorium, the applicability of general GATS rules, and specific commitments, classification of electronically traded services as either mode 1 or mode 2, application of GATS Article XIV regarding general exceptions, remain”. Yet, in 2021, most of these important issues remain unsolved, and the outdatedness and the lack of clarification in GATS only aggravate confusion to the already confusing state of the digital trade.

### 2.2.3 Preferential Trade Agreements

In the recent few years, many countries participated in plurilateral and bilateral preferential trade agreements (PTAs), either with chapters specifically dedicated to digital trade and economy or a separate agreement wholly dedicated to digital trade and economy. Among many PTAs, the Comprehensive and Progressive Agreement for Trans-Pacific

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<sup>23</sup> WTO, ‘Work Programme on Electronic Commerce Progress Report to the General Council Adopted by the Council for Trade in Services’, S/L/74, 27 July 1999.

<sup>24</sup> Zheng, W. (2020), ‘The Digital Challenge to International Trade Law’, *New York University Journal of International Law and Politics*, 52(2), pg. 547.

Partnership (‘CPTPP’)<sup>25</sup>, the agreement between the United States of America and Japan concerning Digital Trade (‘USJDTA’)<sup>26</sup> and United States-Mexico-Canada Agreement (‘USMCA’)<sup>27</sup> are some of the most recent and significant agreements that entered into force. Chapter 14 of the CPTPP is dedicated to e-commerce that includes important provisions such as exempting customs duty for electronic transmissions of digital products, internal taxes on digital products, treating digital products without discrimination, protecting personal information, allowing cross-border transfer of information but not including the transfer of source codes or the location of computing facilities. Chapter 19 (e-commerce chapter) of the USMCA closely resembles the CPTPP. Key provisions also include “customs duty exemption for digital products transmitted electronically, internal taxes permitted for digital products, non-discriminatory treatment of digital products, personal information protection”, and so on. Although the two agreements lack several provisions and specific details, compared to more recent ones, they are considered ‘model agreements’ that set the general framework of digital trade. Digital trade agreements and provisions drafted after 2019 base their framework on the CPTPP and USMCA, further building on them.

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<sup>25</sup> Plurilateral trade agreement entered into force as of 30 December 2018, including signatories of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam. The UK has formally applied to join the agreement on 1 February 2021. (Text available at the WTO RTAs Database)

<sup>26</sup> Bilateral trade agreement between Japan and The United States of America entered into force as of 1 January 2020. (Text available at the USTR website)

<sup>27</sup> Plurilateral trade agreement entered into force as of 1 July 2020, including signatories of Canada, Mexico, and the United States of America. (Text available at the WTO RTAs Database)

The USJDTA parallels the USMCA while having a more comprehensive inclusion than the CPTPP. “Prohibition on applying customs duties to digital products, providing non-discriminatory treatment of digital products, ensuring cross-border transfer of data, prohibition of data localization that restrict data storage, protection of personal information” are some of the provisions similar to the CPTPP. However, provisions regarding the prohibition of transferring or accessing source codes, algorithms, or financial data, prohibition of discriminatory internal taxation, prohibition of transferring, accessing, or requiring the usage of technology related to cryptography in ICT goods, enabling access to government data, are some of the provisions that extend beyond the CPTPP.<sup>28</sup>

Along with the USJDTA, the Australia-Singapore Digital Economy Agreement (‘ASDEA’)<sup>29</sup> and the Digital Economy Partnership Agreement (‘DEPA’)<sup>30</sup> are some of the more recent and more elaborate digital trade agreements. Unlike the CPTPP or the chapters in the USMCA and USJDTA, ASDEA and DEPA are the first trade agreements exclusively dedicated to digital trade. While all three agreements, ASDEA, DEPA, and CPTPP, share similar objectives to minimize barriers to digital trade, achieve harmonization in standards and regulation, cooperate in capacity-building mechanisms, ensure online cross-border consumer protection, strengthen transparency, and so on,

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<sup>28</sup> KITA, ‘미일 무역협정의 주요 내용과 시사점’, 통상리포트 2019 Vol. 03, pg.9-10.

<sup>29</sup> A bilateral trade agreement between Australia and Singapore entered into force as of 8 December 2020. (Text available at the Australian Government Department of Foreign Affairs and Trade website)

<sup>30</sup> Plurilateral trade agreement entered into force on 28 December 2020, including signatories of Singapore, Chile, and New Zealand. (Text available at the Singapore Ministry of Trade and Industry website)

ASDEA and DEPA build onto CPTPP. DEPA especially aims to provide a ‘modular solution’ by narrowly focusing on specific issues that can be used in future digital trade agreements.<sup>31</sup>

**Table 4. Comparison of digital trade provisions in recent PTAs**

Digital Trade Provisions	USMCA	USJDTA	ASDEA	DEPA	CPTPP
Commitments to facilitate digital trade	✓	✓	✓	✓	✓
Prohibition of customs duties on electronic transmissions	✓	✓	✓	✓	✓
Permission to impose internal taxes, fees, charges	✓	✓	✓	✓	✓
Non-discrimination of digital products	✓	✓	✓	✓	✓
ICT products that use cryptography <sup>32</sup>	X	✓	✓	✓	X
Domestic electronic transactions framework <sup>33</sup>	✓	✓	✓	✓	✓
Electronic authentication and signatures	✓	✓	✓	X	✓
Paperless trading	✓	X	✓	✓	✓
Electronic invoicing	X	X	✓	✓	X
Electronic payments	X	X	✓	✓	X
Express shipments	X	X	✓	✓	X
Transparent measures <sup>34</sup>	X	X	✓	✓	X
Online consumer protection	✓	✓	✓	✓	✓
Cooperation on competition policy	X	X	✓	✓	X
Personal information protection	✓	✓	✓	✓	✓
Cybersecurity & Online safety and security	✓	✓	✓	✓	✓
Principles on access and use of internet	✓	X	✓	✓	✓
Unsolicited commercial electronic messages	✓	✓	✓	✓	✓

<sup>31</sup> WEF (2020), ‘Advancing Digital Trade in Asia’, Community Paper by Global Future Council on International Trade and Investment, October 2020, pg. 9-10

<sup>32</sup> Prohibition to impose or maintain technical regulation or conformity assessment procedure related to ICT products using cryptography

<sup>33</sup> Frameworks being consistent with the principles of the UNCITRAL Model Law on Electronic Commerce adopted in 1996 or the United Nations Convention on the Use of Electronic Communications in International Contracts adopted in 2005, in order to encourage avoidance of unnecessary regulatory burdens.

<sup>34</sup> Prompt publishing or making publicly available its laws, regulations, procedures and administrative rulings

Submarine telecommunications cable systems	X	X	✓	X	X
Cross-border transfer of information	✓	✓	✓	✓	✓
Location of computing facilities	✓	✓	✓	✓	✓
Location of computing facilities for financial services <sup>35</sup>	X	✓	✓	X	X
Data innovation	X	X	✓	✓	X
Open government data	✓	✓	✓	✓	X
Government Procurement	X	X	X	✓	X
SMEs cooperation	X	X	✓	✓	✓
Source code	✓	✓	✓	X	✓
Digital identities	X	X	✓	✓	X
Digital inclusion	X	X	X	✓	X
Standards & conformity assessment for digital trade	X	X	✓	X	X
Artificial intelligence	X	X	✓	✓	X
Fintech and Regtech cooperation	X	X	✓	✓	X
Interactive computer services	✓	✓	X	X	X
Prudential Exception	X	✓	X	X	X
Dispute settlement	X	X	✓	✓	✓

(Source: Rearranged by author based on *World Economic Forum 2020* and Agreement texts)

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<sup>35</sup> Recognition of the importance of submarine telecommunications cable systems, expeditious and efficient installation, maintenance and repair of the systems, connectivity, etc.



## Chapter 3. Taxation on Digital Trade

### 3.1 Background and Scope of Digital Tax

As discussed in the previous chapter, the digital economy has brought changes in the ways we engage in economic activities. The scopes and types of goods and services traded have broadened, and new business and revenue models have appeared. These changes enabled businesses to engage in a higher degree of cross-border trade of goods and services since they rely less on tangibles but more on intangibles. In the recent decade, debates on whether reform is needed in the international tax regime have increased.<sup>36</sup> At one end of the debate, many argue that the traditional tax regime was built in the “bricks and mortar” era and call for reform.<sup>37</sup> On the other side of the debate, some argue that although the digital economy contains a somewhat distinctive characteristic, “the digital economy should not be ‘ring fenced’ from the rest of the economy” since there is not a single sector of the economy that is unaffected by digitalization.<sup>38</sup> However compelling each side of the debate is, the groups and organizations, i.e. G20 and OECD<sup>39</sup>, that have significant influence on forming a ‘consensus-based international framework for taxation’ are pushing for a new set of multilateral agreements that would overarch the current digital economy. Nonetheless, as the consensus on this matter is being delayed due to different views and interests, countries are increasingly beginning to take matters into their own hands by

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<sup>36</sup> Schön (2017), ‘Ten Questions about Why and How to Tax the Digitalized Economy’, Max Planck Institute for Tax Law and Public Finance Working Paper 2017-11, pg.1-5

<sup>37</sup> Cite collection of related papers and reports

<sup>38</sup> Cite collection of related papers and reports

<sup>39</sup> G20 2012, OECD Action plan on BEPS 2013

coming up with unilateral policies. This chapter aims to address some of the multilateral efforts to come up with a consensus-based taxation framework and some of the unilateral measures taken by individual countries or regions to grasp the current stage of development in the ‘digital taxation framework’.

Before delving further into the taxation of the digital economy, it would be necessary to point out some of the distinctive characteristics that distinguish the digital economy from the traditional economy, to understand why a separate set of tax policies might be needed if needed at all. There are several traits of the digital economy viewed as a challenge to the current taxation system. The first is the benefit gains by multinational corporations (‘MNCs’) resulting from operating in multiple jurisdictions. The spread of the global value chain has made it more difficult to identify the taxable location of each operation related to the production of goods and services. Digitalization has enabled many operations to be done remotely in the most suitable locations. For example, the R&D, marketing, and sales of a good or service can each be conducted in different countries, thus making the allocation of taxable profit extremely difficult.<sup>40</sup> Although there is nothing new about this kind of problem, digitalization aggravates the existing problems and will continue to do so as the digital economy matures. Second is convenient profit shifting caused by increased transactions of intangible goods and services. For example, let’s suppose there is a multinational enterprise running a platform business that streams music. If this company strategically partners with musicians living in low tax jurisdictions, exclusively offer their

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<sup>40</sup> Devereux & Vella (2017), ‘Digital Revolutions in Public Finance: Chapter 4. Implications of Digitalization for International Corporate Tax Reform’, International Monetary Fund, pg.95.

music through the platform, then pay copyright royalty to the musicians, it becomes possible for a portion of the profit to be taxed in a jurisdiction with a lower tax rate or sometimes with a zero-tax rate (i.e. tax havens). There could be many more ways to minimize tax by shifting profits through intangible assets, as the profit of the digital economy relies heavily on intangible assets. The third is the convenience of making cross-border profits without being physically present. The most important rule for tax treaties in the traditional economy was to identify a permanent establishment, where profit was generated and allocated. In a digitalized world, unlike the traditional one, it is becoming highly convenient to make cross-border profits without having a permanent establishment, since a large portion of the goods and services provided are intangible. Also, with diversified revenue models, such as revenues from advertisement and personal data, it is getting harder to pinpoint a single tax jurisdiction of a source country.<sup>41</sup>

As identified above, several distinctive traits of the digital economy establishing the basis for an international tax policy reform exists. Delayed action on such matters will bring further tax revenue losses, an up rise of international standards that compete and interfere with the current set of standards currently in the process of agreement, and worst of all unilateral measures to tax the digital economy.<sup>42</sup>

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<sup>41</sup> Cockfield (2020), 'Tax Wars: How to End the Conflict Over Taxing Global Digital Commerce', Berkeley Business Law Journal Issue2, Vol.17, pg.6

<sup>42</sup> OECD (2013), 'Action Plan on Base Erosion and Profit Shifting', pg.10-11

## 3.2 Types of Digital Tax

Several types of tax policies related to digital trade exist that are already proposed or waiting for implementation. To provide a better understanding, this section aims to sketch upon some of the tax policies being widely discussed and adopted, before looking further into the implementation of the current digital taxation.

### 3.2.1 Indirect Tax

Indirect tax is generally imposed by the government, on producers or retailers in the supply chain. The tax is passed on to the consumer by including the tax amount in the purchase price. Therefore, the one ultimately paying for the tax becomes the consumer.<sup>43</sup>

The VAT (Value Added Tax)<sup>44</sup> is the most common type of indirect tax, which is subject to the category of consumption tax. This type of tax is known as the main principle when taxing cross-border transactions of goods and services, especially intangibles. The main objective of the VAT is to impose a tax on consumption, which is the final consumption of household consumers. However, in many cases, VAT is imposed on businesses when it should be imposed only on private consumers.

The OECD VAT/GST Guidelines, which provide several principles to reduce uncertainty and risks of double taxation or no taxation, are generally accepted as a basis for each countries VAT policy. VAT is imposed as a margin, i.e. the ‘value added’ portion of

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<sup>43</sup> Kagan, ‘What is an Indirect Tax?’, May 25, 2020, available at <https://www.investopedia.com/terms/i/indirecttax.asp>

<sup>44</sup> Also known as the Goods and Services Tax (GST). This paper will use the term VAT when referring to any internal tax that shows characteristics of a value-added tax.

production and distribution, of each part of the supply chain, thus relieving businesses from the tax burden. Nearly all OECD jurisdictions use the ‘invoice-credit method’, in simpler terms, “imposing tax at every stage of the economic process and allow deduction of taxes on purchases by all but the final consumer”. This characterizes the VAT as an “economically neutral tax”, as the deducting right of the input tax applies to all products, the distribution chain structure, and the delivery.<sup>45</sup>

The fundamental issue of the VAT, when it comes to application, is whether it should be levied based on the “jurisdiction of origin or the destination”. Under the origin principle, various value-added jurisdictions are taxed, which means that only the imports are taxed in the same way as domestic suppliers, while exports are exempted. On the contrary, the destination principle taxes the final consumption within the taxing jurisdiction.<sup>46</sup> Traditionally the destination principle was widely accepted as a norm in international trade, however, with increasing cross-border digital trade in services and intangibles, it is becoming difficult to identify where final consumption occurs. As companies engaging in digital trade often lack a physical presence in the destination country, many countries are requiring companies to register in the destination countries and collect data from consumers to identify the destination for VAT purposes. This arising issue may impose serious challenges to companies engaging in cross-border digital trade since the compliance costs

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<sup>45</sup> OECD (2017), ‘International VAT/GST Guidelines’, pg.14-15

<sup>46</sup> Budak (2017), ‘The Transformation of International Tax Regime: Digital Economy’, Inonu University Law Review 8, no.2, pg.306

for implementing a necessary reporting system would be tremendous, which could lead to companies passing on the burden to consumers.<sup>47</sup>

The Digital Services Tax (DST) is a more recently proposed and implemented tax policy levying tax on revenues of multinational corporations ('MNCs') that base their business on certain digital services linked to user-based activities of residents, such as advertising fees and user data transactions. There are controversies on whether the DST should be categorized as an indirect tax, a direct tax, or a hybrid tax, since the DST is levied on services provided but at the same time imposed on the revenue of companies. Some view DST as a "proxy for corporate taxation", which is categorized as a direct tax, since it was derived from the concerns that the existing CIT does not properly capture the taxable revenues related to digital activities without any physical presence.<sup>48</sup>

The currently proposed DST levies tax on online advertising, digital intermediation, and user data transmission. For the DST to be an indirect tax certain standards are required to be met. 1) Specific categories of digital services and service suppliers should be subject to tax. 2) A fixed-rate should be tax based on specific services in 1), rather than net income or income. 3) Other types of relief on income tax should not be allowed on the same payment. 4) Tax should be levied on the location where services are supplied (i.e. for online advertising, the location where end users access or view the advertising, and for digital intermediation services, the place where customers pay commission for intermediation

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<sup>47</sup> Bunn, Asen & Enache (2020), *Digital Taxation Around the World*, Tax Foundation, pg. 8-15

<sup>48</sup> *Ibid.*, pg.16

services or tax.<sup>49</sup> The DST is being proposed unilaterally by the European Commission (EC) and several individual countries mainly within the European Union (EU).<sup>50</sup> The delayed agreement on the OECD Inclusive Framework has triggered many countries to take unilateral implementations, such as the DST.

### 3.2.2 Direct Tax

Direct tax is imposed by an entity, on a person or organization that directly pays the entire amount of tax to that entity. Examples include income tax or property tax levied on individual taxpayers.<sup>51</sup>

The Corporate Income Tax (CIT) is one of the main taxation policies that represent direct taxation on revenues generated from digital trade. CIT is a tax levied on the net profit (revenue minus cost) arising from various business activities of corporations, where the asset is owned instead of the location of the consumer. In 2021, the global corporate tax rate is 23.65%, and the regional average for Africa 27.46%, Americas 27.19%, Asia 21.43%, EU 20.71%, and Europe 18.88%. Although the range of the average CIT does not seem to vary that much, there are individual countries with, particularly low or high CIT rates. Countries with zero or low CIT rate would be Bahamas, Bermuda and Cayman Islands with 0%, Hungary 9%, Cyprus, and Ireland 12.5%, whereas Brazil and Venezuela have a 34%

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<sup>49</sup> Noonan & Plekhanova (2020), 'Taxation of Digital Services Under Trade Agreements', *Journal of International Economic Law*, Vol.23, Issue4, pg.1023-1024

<sup>50</sup> Lowry (2019), 'Digital Services Taxes (DSTs): Policy and Economic Analysis', Congressional Research Service.

<sup>51</sup> Kagan, 'What is a Direct Tax?', March 24, 2021, available at <https://www.investopedia.com/terms/d/directtax.asp>

CIT rate and Sudan with a 35% rate.<sup>52</sup> Often problems arise when companies try to evade or minimize taxes by manipulating the tax-advantage opportunities offered by countries with zero or low CIT rates, known as “tax havens” and this problem seems to be arising more pervasively with the growth of digital trade.

A few underlying principles should be understood before going further into the issues regarding the CIT and possibly the DST since tax is levied on corporate revenue. According to the 2017 OECD Model Tax Convention, ‘Income and Capital tax’ is intended to be levied on the ‘residents’ of a contracting state, which can be determined by the “domicile residence, place of management, or any other criterion of a similar nature” (Article 4.1). Also, the business profit, as the convention states, “shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein” (Article 7.1). Therefore, a country should mainly tax the residents and tax nonresidents only under the condition where nonresident companies have a “Permanent Establishment (PE)”.

This concept of PE, thus, plays a critical role in determining whether a company can be levied with CIT, especially in the digital economy. As mentioned previously, concerns that CIT ineffectively captures taxable income have led to the implementation of the DST, where such concerns are due to the increase in the expansion of digital trade that lacks the traditional concept of presence subject to taxation in the taxable jurisdiction.<sup>53</sup> The

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<sup>52</sup> KPMG Corporate Tax Rates Table available at <https://home.kpmg/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html>.

<sup>53</sup> Budak (2017), ‘The Transformation of International Tax Regime: Digital Economy’, Inonu University Law Review 8, no.2, pg.303-304



following section will expand discussions regarding the physical presence and the permanent establishment.

### 3.2.3 Expansion of PE

The term permanent establishment ('PE') is considered one of the most crucial concepts when discussing international taxation. In the 2017 OECD Model Tax Convention Article 5.1 and 5.2, 'permanent establishment' is defined as a "fixed place of business through which the business of an enterprise is wholly or partly carried on". The permanent establishment includes a) a place of management; b) a branch; c) an office; d) a factory; e) a workshop and a mine, an oil or gas well, a quarry, or any other place of extraction.<sup>54</sup> Since the majority of the modern tax treaties use the model tax convention as a basis and many countries adopt this concept into their internal tax law, the PE is considered as a decisive concept in determining the taxing jurisdiction of foreign companies engaging in cross-border business.<sup>55</sup>

The PE concept in the digital economy is becoming obsolete since more and more multinational corporations leading the digital economy conduct cross-border business without any physical presence. For example, Company Y in Country A sells items through an online platform to customers in country B, and Company Y does not need to be physically present nor need a permanent establishment, whether it be in the form of a remote server or other ICT infrastructures. This situation can lead to two differently alleged

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<sup>54</sup> OECD (2017), 'Model Tax Convention on Income and on Capital'

<sup>55</sup> Skaar (2020), 'Permanent Establishment: Erosion of a Tax Treaty Principle', Kluwer Law International BV, pg.2

problems; first, a difficulty in profit allocation due to the loss in taxable bases, and second, intentional avoidance of a PE to pay less or no tax.<sup>56</sup> In order to address such concerns, OECD has made proposals to redefine the PE concept through the BEPS action plan. Also, several countries have been unilaterally proposing and implementing the concept of a ‘Virtual or Digital Permanent Establishment’ so that the tax base would expand to encompass the profit of Multinational Corporations. However, rash unilateral measures might worsen the situation by creating additional problems, such as double taxation.<sup>57</sup> Conceptual details of the virtual or digital PE will be further discussed in the following sections.

### 3.3 Actions on Digital Tax

Various efforts are being made to find ways to tax cross-border trade. A consensus-based framework is actively discussed at the OECD. The UN and the G24 have also been discussing digital tax in recent years. Despite these collaborative efforts, the EU and several other individual countries are also implementing unilateral measures. Unilateral measures, in most cases, rarely provide a solution to resolve issues. Instead, confusion and chaos are created in the process. For this reason, the existing international principle for taxation should act as a basis in dealing with the digital trade taxation issue. The ‘1998 Ottawa Taxation Framework Condition’<sup>58</sup> provides widely accepted general tax principles that

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<sup>56</sup> Li (2018), ‘Protecting the Tax Base in a Digital Economy’, Osgoode Legal Studies Research Paper No.78 Vol.13 Issue. 17, pg. 501-504

<sup>57</sup> Bunn, Asen & Enache (2020), Digital Taxation Around the World’, Tax Foundation, pg.28-29

<sup>58</sup> A report (SG/EC(98)14/FINAL) presented by the Committee on Fiscal Affairs to Ministers at the OECD Ministerial Conference on 8 October 1998 in Ottawa, where “plans to promote the development of global electronic commerce were articulated. OECD governments recognized the

emphasize Neutrality, Efficiency, Certainty, Simplicity, Effectiveness, Fairness, and Flexibility when implementing tax policies<sup>59</sup> For a smooth transition into the digital economy, tax principles for the digital economy should be based on the existing basic international principles. This section aims to introduce some of the multilateral and unilateral actions taken on digital tax.

### 3.3.1 OECD

The OECD's motivation to take actions on base erosion and profit shifting ('BEPS') practices was formed when the current rules of the international tax system showed gaps and frictions that grew over time. The 'Action Plan on BEPS' also known as the 'OECD/G20 Inclusive Framework ('IF')', initiated in 2013 at its St. Petersburg Summit, focusing on ways to deal with profit shifting practice from multiple jurisdictions, where profit-generating activities occur, to certain other jurisdictions where no or low taxation was allowed. It should be noted that the emphasis of the action plan is on the 'profit shifting practice' rather than the 'no or low taxation'. A country's taxation policy is a matter of sovereignty, but the practice of intentionally separating taxable income from activities that created the income, which in most instances result in no taxation everywhere, is a matter of bringing down the international tax system. Moreover, the widespread of the digital

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importance of collaboration among governments, and with business, labor, and consumers in the development and use of electronic commerce, and the need for cooperative approaches to its application across sectors and national borders". The Electronic Commerce: Taxation Framework Conditions report sets out "the taxation principles that should apply to electronic commerce and outlines the agreed conditions for a taxation framework and endorsed the proposals on how to take forward the work contained within it".

<sup>59</sup> See OECD 'Electronic Commerce: Taxation Framework Conditions' for a detailed description of each general tax principle, available at <https://www.oecd.org/ctp/consumption/1923256.pdf>

economy adds to the existing gaps and frictions due to its ambiguity in identifying the jurisdictions of value creation. This is mainly due to the transaction of intangible assets and the appearance of new business models, resulting in the relocation of taxing rights where low or no taxation may occur.<sup>60</sup>

The initial action plan in 2013 suggested 15 specific action plans categorized into four different categories. In January 2020, a statement made by the Inclusive Framework Working Parties announced that the action plan would adopt a two-pillar approach. The statement also set the timeline to reach a consensus-based conclusion in 2020 for Pillar one.<sup>61</sup> However, at the end of 2020, due to the COVID-19 pandemic, the timeline to successfully conclude the two pillars was rescheduled until mid-2021.<sup>62</sup> Currently, more than 139 countries are participating and showing support for the OECD negotiation and anticipating a successful round of negotiations in 2021.

**Table 5. OECD Action Plan on BEPS**

	<b>Main Issues</b>	<b>Action Plans</b>
<b>BEPS</b>		<b>Action 1:</b> Identify the main difficulties of applying international tax rules in the digital economy and develop ways to address them using both direct and indirect taxation
	Establishing International Coherence of Corporate Income Taxation	<b>Action 2:</b> Develop model treaty provisions for domestic rules to neutralize effects of hybrid mismatch effects (e.g. double non-taxation, double deduction, long-term deferral)
		<b>Action 3:</b> Develop recommendations for controlled foreign company rules (CFC)

<sup>60</sup> OECD (2013), ‘Action Plan on Base Erosion and Profit Shifting’, pg.9

<sup>61</sup> OECD (2020), ‘Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy’.

<sup>62</sup> OECD (2020), ‘Cover Statement by the Inclusive Framework on the Reports on the Blueprints of Pillar One and Pillar Two’.

		<b>Action 4:</b> Develop recommendations that ensure best practice to prevent base erosion using interest expense	
		<b>Actions 5:</b> Revise frameworks to better counter harmful tax practices (e.g. preferential regimes) to ensure transparency	
	Restoring the full effects and benefits of international standards	<b>Action 6:</b> Develop model treaty provisions to prevent treaty abuse	
		<b>Action 7:</b> Revise the definition of PE to prevent the artificial avoidance of a PE status concerning BEPS (abuse of transfer pricing and ALP)	
		Align transfer pricing outcomes with value creation	<b>Action 8:</b> Develop rules to prevent BEPS from using intangibles
			<b>Action 9:</b> Develop rules to prevent BEPS by transferring risks or allocating excessive capital
	<b>Action 10:</b> Develop rules to prevent BEPS by engaging in transactions between third parties		
	Ensuring transparency while promoting increased certainty and predictability	<b>Action 11:</b> Develop indicators that show the scale and economic impact of BEPS and ensure tools are available to monitor and evaluate actions taken to address BEPS	
		<b>Action 12:</b> Require mandatory rules to disclosure aggressive tax planning arrangements	
		<b>Action 13:</b> Develop rules for transfer pricing documentation to enhance transparency while considering compliance costs	
		<b>Action 14:</b> Develop dispute resolution mechanisms (e.g. MAP)	
	From Agreed policies to tax rules: the need for a swift implementation of the measures	<b>Action 15:</b> Develop multilateral instrument to provide an innovative approach to international tax matters	

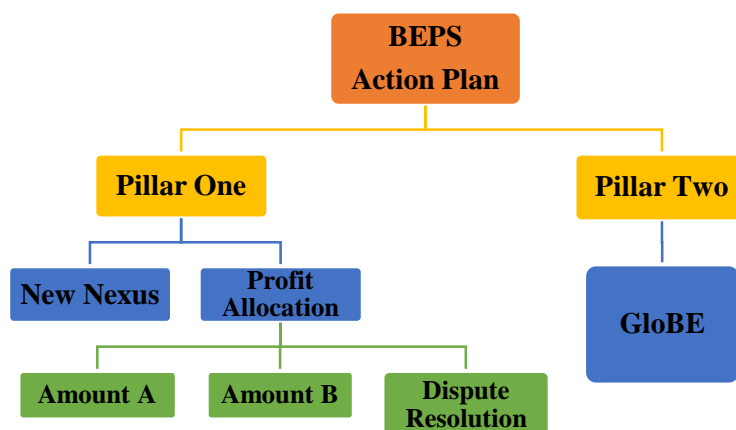
(Source: Compiled by Author using 2013 OECD Action Plan on BEPS)

The main focus of Pillar 1<sup>63</sup> is “to revise the profit allocation and nexus rules applying to business profits for the international tax system to adjust to digital trade and economy”.

<sup>63</sup> There are three components consisting Pillar 1: **Amount A**, which is a new taxing right for market jurisdictions that would apply to MNCs with consolidated revenue that exceeds a certain revenue threshold; **Amount B**, which is a fixed return for certain baseline marketing and distribution

To achieve this, taxing rights of market jurisdiction should expand, whether businesses are conducted with a physical presence or not. Also, tax certainty should improve by developing a dispute resolution mechanism. The ultimate goal of Pillar 1 is the elimination of the existing unilateral measures.<sup>64</sup> Pillar 2 is in the process of discussion and development on a set of rules that needs further attention. So far, the main focus of Pillar 2 is “to develop a set of rules to deal with the tax avoidance by MNCs through corporate tax planning”. Currently, the Global Anti-Base Erosion (GloBE) is suggested, which aims to apply a global minimum tax rule to a broad range of MNCs.<sup>65</sup>

**Figure 4. Two Pillars of the BEPS Action Plan**



(Source: OECD 2020)

activities that takes place in a market jurisdiction; and processes to improve tax certainty through effective dispute prevention and resolution mechanisms, which would be achieved through introducing measures such as Amount A, Amount B, and panel mechanisms.

<sup>64</sup> OECD (2020), ‘Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS’, pg.11-14

<sup>65</sup> Deloitte (2020), ‘BEPS 2.0 International Tax Overhaul’ available at <https://www2.deloitte.com/content/dam/Deloitte/ru/Documents/tax/It-in-focus/english/2020/23-12-2020e.pdf>

### 3.3.2 EU

In March 2018, The European Commission ('EC') made two separate proposals to incorporate a unified tax system for the digital economy in the European Union ('EU'). The proposals were motivated by "the mismatch between the place of profit taxation and the place of value creation" and with the assessment that the OECD BEPS project would face challenges reaching an international agreement. The first proposal focuses on establishing a 'significant digital presence', also known as a 'Digital Permanent Establishment'. This proposal enables Member States to impose a corporate tax on the profit generated in their territory, regardless of a physical presence, using the concept of a significant digital presence.<sup>66</sup> The second proposal focuses on implementing a unified taxation system, the Digital Services Tax ('DST'), that impose tax on revenues generated from certain digital services. The main target is to tax the revenues of digital services with significant user value creation.<sup>67</sup>

Currently, there are heated debates around the EU DST proposal, as the EU is attempting to introduce a supposedly 'harmonized approach on an interim solution'. However, the 'interim solution' does not seem so interim since the European Parliament's Committee on Economic and Monetary Affairs ('ECON') voted, on March 23, 2021, to go

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<sup>66</sup> EU: EC, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, March 21, 2018, COM(2018) 147 final, available at [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/proposal\\_significant\\_digital\\_presence\\_21032018\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/proposal_significant_digital_presence_21032018_en.pdf)

<sup>67</sup> EU: EC, Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, March 21, 2018, COM(2018) 148 final, available at <https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-148-F1-EN-MAIN-PART-1.PDF>

forward with the proposed digital economy resolutions, aside from supporting the OECD proposed Action Plans on BEPS. The resolution calls for immediate action as it invites the EC to present a legislative proposal on digital tax by June 2021, which sets the timeline of introduction no later than 1<sup>st</sup> January 2023. The resolution stresses that regardless of whether the OECD negotiations succeed, the EU should be ready to introduce its digital tax proposal by the end of 2021, since governments need a large amount of resources for the COVID-19 crisis recovery and also for a long-term stable source of income. Furthermore, the resolution urges the European Council and related institutions to adopt the proposal without delay,<sup>68</sup> since the initial proposal in 2018 failed to reach a consensus when the Council did not agree with EC’s proposal to tax revenue instead of profit, and several countries, including Sweden, Denmark, and Ireland, vetoed for economic and political concerns.<sup>69</sup>

**Table 6. EC Proposals for Digital Tax Thresholds**

	Description	Threshold / Criteria
<b>Proposal 1</b>	Enables the Member States to impose a corporate tax to companies with a ‘ <b>Significant Digital Presence</b> ’ if one of three thresholds is fulfilled	(Article 4: <b>Significant Digital Presence</b> ) 1) Portion of total annual revenues exceeds €7million in a Member State 2) Number of digital services users in a Member state exceeds 100,000 3) Number of business contracts for digital services in a Member state exceeds 3,000

<sup>68</sup> European Parliament, Resolution of 29 April 2021 on digital taxation: OECD negotiation, tax residency of digital companies and a possible European Digital Tax (2021/2010(INI)), available at [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0147\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0147_EN.pdf)

<sup>69</sup> Khan & Brunsden (2018), ‘EU states fail to agree on plans for digital tax on tech giants’, Financial Times, 6 November, available at <https://www.ft.com/content/75eb840a-e1bc-11e8-a6e5-792428919cee>



<b>Proposal 2</b>	Establishes a unified taxation system, the <b>Digital Services Tax</b> ('DST'), imposing tax on revenues generated from certain digital services in a Member State	(Article 3: <b>Taxable Revenue</b> ) 1) Placing advertisements on digital intermediation to target users 2) Providing multi-sided digital intermediation to users, in which the users interact with each other 3) Transmitting data provided by users
		(Article 4: <b>Taxable Person</b> ) : Applied if both conditions are met 1) Total annual worldwide revenues exceeding €750million 2) Total annual taxable revenues exceed €50million within the Union
		(Article 8: <b>Rate</b> ) DST rate of 3%

(Source: Compiled by Author using EC Proposals 2018)

### 3.3.3 Individual Countries

Individual countries have begun to take actions unilaterally due to the delay in the agreement of the OECD BEPS Action Plans. Many countries have already announced, proposed, or implemented specific plans for DST, but most are currently on hold until mid-2021, where OECD talks are scheduled to take place. Currently, the European countries are taking the lead on DST by basing their model on the EU DST. Although support for unilateral measures exists, especially for developing countries that need tax revenue for sustainable development and the public good<sup>70</sup>, they are more often criticized. Among many that criticize, the US most strongly opposes, since not many European companies would fulfill the DST threshold other than Criteo (French online advertising service),

<sup>70</sup> Kelsey, Bush, Montes & Ndubai (2020), 'How 'Digital Trade' Reules would Impede Taxation of the Digitalised Economy in the Global South', Third World Network, pg.141.

Spotify (Swedish music streaming service), and Zalando (German e-commerce service), but instead include a large number of US companies. Measures such as the unilateral DSTs that arbitrarily exclude or include certain companies subject to tax, should be avoided as they are prone to more loss than gain as a result of retaliation from other countries and at the same time potentially violates international agreements such as the WTO GATS.<sup>71</sup> Below is an updated table of countries that have either announced, proposed, or implemented DSTs or similar tax measures as of May 2021.

**Table 7. Unilateral Digital Tax Measures Announced/Proposed/Implemented**

Country	Tax Rate	Scope	Revenue Threshold		Status
			Global	Domestic	
Argentina	30% 5~15%	All Digital Services Online Gambling	-	-	Implemented (Dec 2019 / Dec 2020)
Austria	5%	DST on Online Ads on Digital Intermediation	€750million	€25million	Implemented (Jan 2020)
Belgium	3%	DST on Online Ads Sales User Data Sales Digital Intermediation Digital PE	€750million	€50million	Proposed (2019) → Delayed until 2023
Brazil	1~5%	DST on Online Ads Digital Intermediation User Data Transfer	R\$3billion	R\$100million	Proposed (2020)
Cambodia	TBA	DST	TBA	TBA	Announced (Jan 2020)
Canada	3%	DST on Ad Service based on User data Digital Intermediation	C\$1billion	C\$40million	Announced (2020) → Delayed until 2022

<sup>71</sup> Lee-Makiyama (2018), ‘The Cost of Fiscal Unilateralism: Potential Retaliation Against the EU Digital Services Tax (DST), ECIPE Occasional Paper, No.05/2018, pg.7~22.

China	TBA	DST	TBA	TBA	Announced (Dec 2020)
Costa Rica	TBA	Tax on Tourist Rental Services via digital platforms	TBA	TBA	Implemented (Nov 2019)
Czech Republic	7%	DST on Targeted Ads Digital Intermediation User Data	€750million	CZK 100million	Proposed (2020) → Delayed Until 2021
Denmark	TBA	DST	TBA	TBA	Announced (Jan 2020)
Egypt	TBA	TBA	TBA	TBA	Announced (Sept 2019)
Finland	TBA	TBA	TBA	TBA	Announced (Jun 2018) → Delayed until 2021
France	3%	DST on Digital Intermediation Targeted Ads	€750million	€25million	Implemented (Jan 2019) → Delayed (Dec 2020)
Hungary	7.5%	DST on Digital Advertising	HUF 100million	-	Implemented (Jul 2017) → 0% until 2022
India	6% 2% -	Online Ads (Equalization Levy) Digital Trade (Equalization Levy) Digital PE	-	Rs.2crores	Implemented (2016/2020/2022)
Indonesia	TBA	Digital PE DST on Digital Trade	TBA	TBA	Implemented (Mar 2020)
Israel	3~5% -	TBA Digital PE	TBA	TBA	Announced Implemented (2019 / 2016)
Italy	3%	DST on Online Ads Digital Intermediation User Data	€750million	€5.5million	Implemented (Jan 2020)
Kenya	1.5%	DST on Digital Marketplace	TBA	TBA	Implemented (Jan 2021)
Latvia	TBA	TBA	TBA	TBA	Announced (Dec 2019)

Malaysia	-	Withholding Tax on Digital Trade	-	-	Implemented (May 2019)
Mexico	-	Withholding Tax on digital services by nonresidents	-	-	Implemented (Jun 2020)
New Zealand	2~3%	DST on Digital Intermediation Social Media Platforms Content Sharing Search Engines User Data	€750million	NZ\$3.5 million	Announced (Sept 2019)
Nigeria	-	Digital PE	-	NGN 25million	Implemented (May 2020)
Norway	TBA	TBA	TBA	TBA	Announced (Jan 2020)
Pakistan	5%	Withholding Tax on digital services by nonresidents	-	-	Implemented (Jul 2018)
Paraguay	4.5%	Income from digital services by nonresidents	-	-	Implemented (Jan 2021)
Poland	1.5%	DST on Online Streaming	TBA	TBA	Implemented (Jul 2020)
Romania	TBA	Digital PE DST	TBA	TBA	Announced (May 2018)
Russia	TBA	DST	TBA	TBA	Announced (Oct 2019)
Slovakia	5% TBA	Withholding Tax on foreign digital platform without PE DST	TBA	TBA	Implemented (Jan 2018) Announced (Jan 2019)
Slovenia	TBA	DST	TBA	TBA	Announced (2019) → delayed
Spain	3%	DST on Digital Intermediation Online Ads User Data	€750million	€3million	Proposed → rejected (2019) → Implemented (Jan 2021)
Sweden	TBA	DST	TBA	TBA	Announced (Jun 2018) → Delayed until 2021

Taiwan	-	Withholding Tax on Online Ads & Digital Services	-	-	Implemented (Jan 2017)
Thailand	5%	Withholding Tax on Digital Trade	-	-	Proposed (May 2019)
Tunisia	3%	DST on Sale of Computer application and digital services By nonresidents	-	-	Implemented (Jan 2020)
Turkey	7.5%	DST on Digital Services	€750million	TRY 20million	Implemented (2019 / 2020)
	15%	Withholding Tax on Advertising Services	-	-	
UK	2%	Social media platforms Search Engines Online Marketplace	£500million	£25million	Implemented (Apr 2020)

(Source: Reorganized by Author based on Tax Foundation 2019 / KPMG 2020 & 2021 ‘Taxation of the Digitalized Economy’)

### 3.3.4 US

The US has been reluctant to impose tax on digital transactions, concerning that such taxation would prevent the development of related industries. To this end, A framework for global digital trade in 1997 was introduced, which emphasized ‘tax neutrality’ for e-commerce.<sup>72</sup> This led to the 1998 Internet Tax Freedom Act (ITFA; P.L.105-277) that was enacted to prevent state and local governments from “taxing internet access or imposing multiple or discriminatory taxes on digital trade” for three years. After extending the ITFA eight times, the Trade Facilitation and Trade Enforcement Act of 2015 (P.L. 114-125)

<sup>72</sup> Hernandez-Lopez (2001), ‘Trade in Electronic Commerce Services under the WTO: The Need to Clearly Classify Electronic Transmissions as Services and Not Tariff-Liable’, Journal of World Intellectual Property 4, No.4, July 2001, pg.571.

extended the ITFA permanently.<sup>73</sup> One of the distinctive features of the US measures on digital trade is the implementation of subsidy-like tax regimes, such as the Foreign Derived Intangible Income (FDII)<sup>74</sup> and the Global Intangible Low Tax Income (GILTI)<sup>75</sup>. These tax regimes subject US-based companies, regardless of their location of the business, to the same corporate tax rate on intangible assets, which acts as a disincentive to shift IP and related profits out of the US.<sup>76</sup>

The US has been taking unilateral action on digital taxation seriously, especially the unilateral DSTs. Upon French implementation of the DST in July 2019, the US immediately opened a Section 301 Investigation<sup>77</sup> that lasted until December 2019. The United States Trade Representatives (USTR) concluded that the French DST “discriminates against major US digital companies and acts inconsistently with prevailing international tax policy principles”. Although the investigation determined an additional tariff of 25% on

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<sup>73</sup> Stupak, ‘The Internet Tax Freedom Act: In Brief’, Congressional Research Service Report, April 13, 2016, available at <https://fas.org/sgp/crs/misc/R43772.pdf>; also see U.S.Code Title 47. Telecommunications.

<sup>74</sup> FDII “reduces the effective tax rate on income derived from the use of intellectual property in the US to create exports of goods and services. The effective tax rate on such income is around 13.125%, compared to the statutory corporate income tax rate of 21%, which acts as an indirect subsidy for goods and services created using IP”.

<sup>75</sup> GILTI “provides a 10.5~13.125% tax rate on earnings that exceed a 10% return on a business’s invested foreign assets. Profits exceeding 10% return are automatically assumed to be connected to the returns to IP or profit shifting”.

<sup>76</sup> Bunn, Asen & Enache (2020), *Digital Taxation Around the World*, Tax Foundation, pg.26

<sup>77</sup> Section 301 of the Trade Act of 1974 “grants the office of the United States Trade Representatives (USTR) a range of responsibilities and authorities to investigate and take action to enforce US rights under trade agreements and respond to certain foreign trade practices”. Until the Trump Administration, Section 301 was primarily “used to build cases and pursue dispute settlements at the WTO”. However, the Trump Administration utilized Section 301 to act unilaterally to promote, claimed by the Trump Administration, a ‘free, fair and reciprocal’ trade. (CRS Report, ‘Section 301 of the Trade Act of 1974: Origin, Evolution, and Use’, December 14, 2020, available at <https://fas.org/sgp/crs/misc/R46604.pdf>)

\$1.3 billion worth of French imports, the US delayed implementation until 6th January 2021, in case any bilateral or multilateral discussions develop to resolve the situation. However, due to the postponement of the OECD talks and additional unilateral DSTs by countries other than France, the US decided to suspend Section 301 tariffs indefinitely and run additional investigations on countries, such as Austria, India, Italy, Spain, Turkey, and the UK. Currently, another set of investigations on Brazil, the Czech Republic, the EU, and Indonesia are ongoing.<sup>78</sup>

Recently, on 5<sup>th</sup> April 2021 at the G20 virtual meeting, Janet Yellen (President Joe Biden's treasury secretary and a former head of the Federal Reserve) called for countries to agree on a global minimum corporate tax rate of 21% for large companies, hoping to push the OECD agreement on Pillar 2, ensuring a "level playing field and to end a 30-year race to the bottom".<sup>79</sup> Ireland, the Czech Republic, and Hungary voiced concerns about the proposal emphasizing state sovereignty on tax systems, whereas France and Germany backed the 21% rate.<sup>80</sup> The 21% proposal, however, was re-proposed at a lowered rate of 15% a month later.<sup>81</sup> The world is anticipating the outcome of the negotiations that will take place in mid-2021. Whether the world will come to agreements on the years-long

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<sup>78</sup> CRS Report, 'Section 301 Investigations: Foreign Digital Services Taxes (DSTs)', 1 March 2021, available at <https://crsreports.congress.gov/product/pdf/IF/IF11564>

<sup>79</sup> The Economist, 'Janet Yellen calls for a global minimum tax on companies. Could it happen?', 8 April, 2021, available at <https://www.economist.com/finance-and-economics/2021/04/06/janet-yellen-calls-for-a-global-minimum-tax-on-companies-could-it-happen>

<sup>80</sup> Ali, 'EU Countries Balk at Accepting 21% Global Minimum Tax Rate (1)', Bloomberg Tax, 29 April 2021, available at <https://news.bloombergtax.com/daily-tax-report/eu-countries-balk-at-accepting-21-global-minimum-tax-rate>

<sup>81</sup> Mohsin & Davison, 'U.S. Floats 15% Global Minimum Tax on Corporate Profits', Bloomberg, 21 May 2021, available at <https://www.bloomberg.com/news/articles/2021-05-20/u-s-treasury-proposes-15-global-minimum-tax-on-corporations>

OECD Inclusive Framework negotiation and finally move on towards building a harmonized digital economy, will be known very soon.



## **Chapter 4. Digital Tax Non-compliance with GATS**

Although the implementation of internal tax policies is a country's sovereign right, each country should take international norms, rules, and agreements into consideration when implementing internal tax policies to minimize possible negative impacts that would affect the rest of the world. In this sense, the digital taxes discussed in this paper are good examples that show how internal tax policies may have amplified effects on the world economy and trade. Since the objective of the digital tax is to impose tax on cross-border services of digital trade, this section aims to discuss how such taxation measures, mainly focusing on the DST, potentially acts as "a barrier to digital trade" by analyzing the potential non-compliant aspects with existing WTO agreement, the GATS.

Some commonalities exist in the unilateral digital services tax policies discussed. First, companies with highly digitalized business models are the main targets of taxation. Second, the proposed DSTs plan to expand the tax base by including companies without a physical presence in the taxing jurisdiction. Third, DSTs are imposed based on the destination, where consumers and suppliers are located, instead of where the business is located. Fourth, certain thresholds based on revenue, users, and transactions are adopted to decide whom to tax. Fifth, tax is imposed on revenue instead of profits.<sup>82</sup> These characteristics of the DSTs form non-compliance issues with GATS in ways that would discriminate certain Members of the WTO. There are several different forms of DSTs, nonetheless, this paper will use the EU DST proposal to discuss the potential non-compliance issues. The EU represents 27

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<sup>82</sup> Okanga (2020), 'Testing for Consistency: Certain Digital Tax Measures and WTO Non-discrimination', *Journal of World Trade*, Vol.55, Issue1, pg. 7

member countries where more than half of them currently have proposed or implemented DSTs. Moreover, if the EU DST is agreed upon, the rest of the EU members will eventually adopt the measure and potentially have a spillover effect on the rest of the world, serving as a ‘Model DST’.

#### 4.1 National Treatment Under GATS

***Article XVII: National Treatment***

1. *In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.*
2. *A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.*
3. *Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.*

GATS Article XVII:1 “prohibits Members from according ‘less favorable’ treatment to services or service suppliers of other WTO members than to its own ‘like services and service suppliers’. “Less favorable” treatment is considered to be the “modification of conditions of competition in favor of services or service suppliers”. GATS Article XVII:1, sets out four criteria to test the consistency; 1) whether a “*national commitment* was made in respect of relevant services sector and relevant mode of supply”, 2) whether “the measure at issue is a *measure affecting services trade*, that is a measure to which GATS applies”, 3) whether “the foreign and domestic services and service suppliers are *like services and service suppliers*”, 4) whether “the foreign services and service suppliers are accorded

*treatment no less favourable*".<sup>83</sup> In order to discuss whether EU DST potentially violates the National Treatment, the obligations and applicability will be first examined, then move on to examine the rest of the criteria.

#### 4.1.1 National Treatment Obligations and Applicability

##### 4.1.1.1 Obligations: Specific Commitments in the Schedule

The GATS provides a framework that regulates cross-border trade in services, where WTO Members undertake commitments. The supply of services includes production, distribution, marketing, sales, and delivery of services, categorized into four 'modes of supply'. The obligations under GATS can be categorized into either a 'general obligation' applying to all members and sectors or 'specific commitment' applying to certain sectors laid out in a member's schedule of commitments.

**Table 8. GATS Modes of Supply**

<b>Modes</b>	<b>Description</b>	<b>Example</b>
<b>I Cross-border Supply</b>	Supply of service from the territory of one Member into the territory of another Member	A UK architect with a physical presence in the UK remotely working for a client in Korea
<b>II Consumption Abroad</b>	Supply of service where a service consumer moves into the territory of another Member to receive service	A Canadian tourist visiting France stays in a Hotel booked online

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<sup>83</sup> Bossche & Zdouc (2017), 'The Law and Policy of the World Trade Organization', Cambridge University Press, pg.402.

<b>III Commercial Presence</b>	Supply of service of a service supplier through commercial presence in the territory of another Member.	A US tech company opening a branch office in Brazil to provide advertising
<b>IV Presence of Natural Person</b>	Supply of service by a service supplier through the presence of natural persons in the territory of another Member	A Korean dentist traveling to Spain to offer a training course on wisdom teeth removal

(Source: WTO)

Members are free to modify the scopes of specific commitments by providing guarantees and limitations on the modes of supply in certain services. Therefore, to analyze whether the EU DST complies with GATS under national treatment, identifying whether the EU has made specific commitments in the schedule is necessary. The scope of the services and service suppliers of the EU DST includes; 1) advertisement on digital intermediation (e.g. Facebook, Google, Instagram, etc.), 2) multi-sided digital intermediation (e.g. Airbnb, Uber, etc.) and 3) transmission of user data. In the EU schedule of specific commitments, the EU Member States have made full commitments, in other words, no exceptions or limitations, in both market access or national treatment in the areas of interest, including online intermediary (Central Product Classification (CPC) 844)<sup>84</sup>,

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<sup>84</sup> Online intermediary service means “providing users with multi-sided digital interface that allows users to find and interact with each other. Facilitating direct transactions of goods or services between users is also included”.

data processing (CPC 843)<sup>85</sup>, and advertising services (CPC 871)<sup>86</sup>. This sets the ground for further analysis under the National Treatment.<sup>87</sup>

#### 4.1.1.2 Applicability I: Technological Neutrality

In the previous section, we have discussed the National Treatment obligations and identified that the EU has made specific commitments for services covered by the EU DST under the schedule. Although this allows us to examine the taxation measure under the GATS, questions may arise on whether the ‘digital services’ and GAT is in the applicable nexus. This section aims to look into the applicability in terms of “technological neutrality” to show that the digital services covered by the EU DST qualify for examination.

The term technological neutrality gives a fundamental basis for trade rules to be applied to cross-border digital services without exceptions based on the method of supply. In other words, trade rules should be applied to traditional services as well as newer forms of services, i.e. digital services.<sup>88</sup> A consensus has yet to be reached on the definition and the use of technological neutrality, however, through many commentators, reports, and case

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<sup>85</sup> Data processing service means “transmitting data collected about users and data generated by users from activities on digital interfaces”.

<sup>86</sup> Advertising service means “placing advertisements on a digital interface that specifically targets the users of that interface”.

<sup>87</sup> EC Schedule of Specific Commitments (GATS/SC/31, 15 April 1994), EU Schedule of Specific Commitments (GATS/SC/157, 7 May 2019), available at [https://www.wto.org/english/tratop\\_e/serv\\_e/serv\\_commitments\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm)

<sup>88</sup> Kwak (2019), ‘Digital Trade Liberalization in the Analogue Trading Regime: Three Essays on Digital Trade’, pg.6; Also see literature referred in Kwak (2019) for more definitions on technological neutrality: Pauletto (2008), ‘Comment: Digital Trade: Technology versus Legislators’, pg.531; Chander (2013), ‘The Electronic Silk Road: How the Web Binds the World Together in Commerce’, pg.143; Hu (2014), ‘When Trade Encounters Technology’, pg.75; Zhang (2015), ‘Covered or Not Covered: That Is the Question – Services Classification and Its Implications for Specific Commitments under the GATS’.

laws, the WTO and its members generally view that GATS is technologically neutral, since there are no provisions that distinguish how services are supplied.<sup>89</sup> The World Trade Report published by the WTO acknowledges that problems may arise when the current classification system is insufficient to cover new technologies or when new technologies come under multiple categories of classification.<sup>90</sup> The report goes on about how similar problems have existed throughout the history of WTO, therefore, proper interpretation of the scope should be done using various tools and customary international law and that the definition and coverage of the terms are not “frozen in time” but rather “changes over time” so that such changes may be reflected.<sup>91</sup>

This issue is conveyed in *China – Publications and audiovisual Products (DS363)* WTO dispute settlement case, where China contended that “the interpretation of ‘Sound recording distribution services’ committed under the GATS Schedule should not encompass the distribution by electronic means. Contrary to China’s view, the Appellate Body ruled that the “network music services fell within the scope of China’s commitment by applying the customary rules of treaty interpretation” (*Vienna Convention Article 31*).<sup>92</sup> This case acknowledged that the range of services may expand and diversify with technological advancements, meaning newer forms of services should be included in the

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<sup>89</sup> Willemyns (2018), ‘GATS Classification of Digital Services – Does ‘The Cloud Have a Silver Lining?’’, *Journal of World Trade* 53:1, pg.4.

<sup>90</sup> WTO, ‘World Trade Report 2018 - The future of world trade: How digital technologies are transforming global commerce’, 3 October 2018, pg.168

<sup>91</sup> *Ibid.*, pg.169

<sup>92</sup> Appellate Body Report, ‘China – Measure Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products’, WT/DS363/AB/R, 21 December 2009, paras.340-380.

existing schedule of commitments. Based on the various views and case law examined in this section, the basis for applying technological neutrality should therefore be established.

#### 4.1.1.3 Applicability II: Measure Affecting Services Trade

Examining whether the EU DST affects trade in services, first clarifying the concept of a “measure affecting trade in services” is necessary. In the *Canada – Autos (DS 139)* case, the Appellate Body provided two important issues that can be used to determine whether a measure affects trade in services. First, identifying the existence of ‘*trade in service*’ under GATS Article I:2 (i.e. four modes of supply) and second, identifying whether the measure ‘*affects*’ trade in services as stated in GATS Article I:1.<sup>93</sup>

The EU DST has the potential to affect all four modes of supply in various degrees depending on the type and location of the service. For example, digital intermediation (i.e. online platform) or online advertising may involve several different components, such as Company A (platform service provider, PE in Country A), Company B (Company A’s business manager in Country B), Advertisers in Country B, and users of the platform service in Country B. In this case, service through modes 1,2, and 4 can be established. Also, if a PE of Company B exists, service supplied through mode 3 may exist. This can be established if the EU proposal for the concept of a ‘significant digital presence’, i.e. digital permanent establishment, is accepted.

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<sup>93</sup> Bossche & Zdouc *supra* pg.404.; Appellate Body Report, *Canada –Certain Measure Affecting the Automotive Industry*, WT/DS139,142/AB/R, 31 May 2000, para.155.

In examining whether the measure affects trade in services in GATS Article 1:1, China – Publications and Audiovisual Products can be used as a reference. The Panel stated that the word ‘affect’ does not necessarily mean the measure regulates or governs the supply of services, rather the measure should be seen as affecting trade in services when it has the “potential to influence the conditions of competitions of the supply of a service”, thus should be applied in a broader scope<sup>94</sup> The 3% tax levied on digital service-providing MNCs will face consequences one way or another since the tax burden will affect the conditions of competition in the EU. A higher tax burden, rise in administrative costs for tax obligations, and the cost of collecting necessary information will aggravate the situation for the MNCs.<sup>95</sup>

Moreover, the tax burden arising from DST is likely to be passed on to consumers and related businesses. A report from Deloitte on the French DST predicted that “approximately 55% of the total tax burden would pass on to consumers, 40% to the businesses using digital platforms and only 5% to the MNCs targeted”. This phenomenon of tax burden pass-on would similarly apply to the EU DST. The DST will increase prices of consumer goods and services and profits will reduce for related businesses, which would eventually result in

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<sup>94</sup> Panel Report, ‘China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products’, WT/DS363/R, 8 December 2009, paras.7.970-7.971.

<sup>95</sup> Tovey (2019), ‘Analyzing the EU’s 2018 proposed digital services tax (interim measure) under WTO law’, PwC, pg.9-12, available at <https://thesuite.pwc.com/media/10060/dst-under-wto-law.pdf>.



lower competitiveness of the MNCs. Therefore, the above consequences should be collectively considered as affecting conditions of competition in the supply of services.<sup>96</sup>

#### 4.1.2 Like Services and Suppliers

When assessing potential inconsistencies of the EU DST with GATS XVII, ‘likeness’ between domestic and foreign services and service suppliers should exist, since the national treatment obligation only applies to services and service suppliers that are ‘like’. Also, since definitions or methods that can be used to determine ‘likeness’ are not provided by the WTO, case laws should be utilized. In *Argentina – Financial Services (DS 453)*, several guidelines by the Appellate Body is identified:

1) In the context of trade in both goods and services, ‘likeness’ refers to something that is similar.<sup>97</sup> This point is made by referring to the *EC – Asbestos (DS135)* where the Appellate Body stated that the word ‘like’ refers to something sharing several identical or similar characteristics or qualities.<sup>98</sup>

2) Services are ‘like’ when they are in a competitive relationship with each other. This point is made by closely examining GATS Article XVII:3 that states ‘treatment shall be considered to be less favourable if it modifies the conditions of competition’<sup>99</sup>.

Also, in *China – Electronic Payment Services (DS413)* the Panel noted that ‘a measure

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<sup>96</sup> Pellefigue (2019), ‘The French Digital Services Tax: An Economic Impact Assessment’, Deloitte Taj, pp.20-28, available at <https://taj-strategie.fr/content/uploads/2020/03/dst-impact-assessment-march-2019.pdf>

<sup>97</sup> Appellate Body Report, ‘Argentina – Measures Relating to Trade in Goods and Services’, WT/DS453/AB/R, 14 April 2016, para.6.21.

<sup>98</sup> Appellate Body Report, ‘EC – Measures Affecting Asbestos and Asbestos-Containing Products’, WT/DS135/AB/R, 12 March 2001, para.91.

<sup>99</sup> See ‘Argentina – Financial Services’ *supra*, para.6.22

of a Member can modify the conditions of competition, only if the foreign and domestic services at issue are indeed in a competitive relationship”.<sup>100</sup>

3) The likeness of services and service suppliers should be determined ‘on a case-by-case basis’, considering the specific circumstances of each particular case.<sup>101</sup> This comes from the Appellate Body acknowledging that “a spectrum of degrees of competitiveness or substitutability of products in the marketplace” exists and that the assessment of a competitive relationship should be based on market-based analysis.<sup>102</sup>

4) Services and service suppliers should be considered together when determining likeness. Neither services nor service suppliers should be assessed in isolation, rather it should be considered an integrated element. Therefore, separate findings concerning the likeness of services or service suppliers are not necessary.<sup>103</sup>

The ‘likeness’ between digital services companies affected by the EU DST and those that would not be affected can be examined through a hypothetical list of potentially affected companies. Although the EU DST has yet to be implemented, companies potentially subject to taxation would highly resemble that of the French DST (note that the French DST stems from the EU DST and the EU DST would include a wider range of companies since the French DST levies tax only on the gross revenue generated by services of digital interface and targeted advertising). Among the 26 companies in Table 9, only six

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<sup>100</sup> Panel Report, ‘China-Certain Measures Affecting Electronic Payment Services’, WT/DS413/R, 16 July 2012, para.7.700.

<sup>101</sup> See ‘Argentina – Financial Services’ *supra*, para.6.26

<sup>102</sup> See ‘EC – Asbestos’ *supra*, para.99.

<sup>103</sup> *Ibid.*, para.6.29.

companies are based in the EU, and among the six, only one company is French.

**Table 9. Companies Potentially Affected by French DST**

Services	Companies
Marketplace Goods	Alibaba, Amazon, Apple, eBay, Google, Groupon, Rakuten, Schibsted*, Wish, Zalando*
Digital Interface Services	Amadeus*, Airbnb, Axel Springer*, Booking, Expedia, Match.com, Randstad*, Recruit, Sabre, Travelport, Uber
Digital Advertising	Amazon, Criteo*, eBay, Facebook, Google, Microsoft, Twitter, Verizon

(Source: Developpez / \*Company Based in EU)

Also, Table 10 shows a list of the European top digital services companies, which may or may not be included in the EU DST, that share similar characteristics or qualities with other top global digital services companies outside of the EU, such as Amazon, Expedia, Apple, Uber and so on. The companies listed in Table 10 and many more digital services companies based in Europe has the potential to be excluded from the EU DST because “supplying goods and services for sales through digital interface, solely providing digital interface services (excluding service fees) and payment services on digital interfaces” are carved-out of the scope. By carving out the commonly existing ‘similar features’, which may be the most important feature that characterizes the digital companies, the EU DST strategically designs its measure to mainly capture the MNCs originating outside of the EU. For example, Amazon and ASOS are both e-commerce companies that run their business based on digital interfaces. A similar feature largely contributing to the business is ‘providing the interface to users’ and other related services. However, because Amazon also provides a multi-sided service that allows users to make transactions with each other, there

is a possibility that only Amazon would be included in the EU DST. Many more similar examples would exist, lacking plausible reasons to carve out such services when the digital services companies, regardless of the country-base, are indeed ‘like’.

**Table 10. European Top Digital Services Companies (2020)**

<b>Rank</b>	<b>Company</b>	<b>Revenue (Billion)</b>	<b>Country</b>	<b>Industry</b>
1	Zalando	\$9.7	Germany	E-commerce
2	Spotify	\$9.5	Sweden	Audio Streaming
3	JUSTEAT	\$4.6	UK	Food Delivery
4	ASOS	\$4.6	UK	E-commerce
5	Hello Fresh	\$4.5	Germany	E-commerce
6	Adyen	\$4.4	Netherlands	Financial Services
7	IHS Markit	\$4.3	UK	Financial Services
8	Auto1 Group	\$3.4	Germany	E-commerce
9	Delivery Hero	\$3.0	Germany	Food Delivery
10	takeaway.com	\$2.5	Netherlands	Food Delivery
11	Glovo	\$2.4	Spain	Food Delivery
12	King	\$2.2	Sweden	Video Games
13	Criteo	\$2.1	France	Advertising Services
14	boohoo.com	\$1.7	UK	E-commerce
15	SUPERCELL	\$1.5	Finland	Mobile Game
16	Schibsted	\$1.4	Norway	Media & E-commerce
17	Deliveroo	\$1.1	UK	Food Delivery
18	Klarna	\$1.1	Sweden	Financial Services
19	Veeam	\$1.0	Switzerland	Software
20	Sinch	\$0.9	Sweden	Software

(Source: Compiled by author based on various websites and company annual reports)

The ‘likeness’ between foreign companies and EU companies can also be examined through the competitive relationship they are in. This can be inferred through the impact assessment report written by the commission staff of the EC. The report emphasizes that

revision of the taxation regime, i.e. implementation of the DST, would capture all digital activities for levying tax, which would as a result “remove competitive distortions”. Also, it states that the DST would create “a fair competition between small and large players that would enable the development and growth of digital start-ups and scale-ups in the EU ‘competing’ with large multinational players”.<sup>104</sup> The Report explicitly states that the DST would “particularly benefit small and medium-sized companies” by improving a level-playing between MNCs that engage actively in the cross-border supply of services and smaller companies that do not.<sup>105</sup> Therefore, the evidence suggested in this section would suffice in determining that ‘likeness’ indeed exist between services and service suppliers of EU and non-EU digital service providing companies.

#### 4.1.3 Less Favorable Treatment

As the grounds for applying the National Treatment obligation are established through previous sections, this section will move forward to discuss the potential less favorable treatment of the EU DST. Under the WTO jurisprudence, the prohibition of discrimination can be narrowed down to two aspects; 1) using ‘nationality’ as a criterion for regulation, i.e. formal or de jure discrimination, and 2) using other criteria, seemingly ‘origin neutral’ that has discriminating effects based on nationality, i.e. material or de facto discrimination.<sup>106</sup> Based on the above scope of discrimination, ‘less favorable treatment’

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<sup>104</sup> European Commission, ‘Commission Staff Working Document Impact Assessment’, SWD (2018) 81 final/2, 21 March 2018, pg.41.

<sup>105</sup> *Ibid.*, pg.47

<sup>106</sup> Ortino (2004), ‘WTO Jurisprudence on De Jure and De Facto Discrimination’, in ‘WTO Dispute Settlement System: 1995-2003 (pp. 217 - 262)’, pg. 217.

should be recognized as both de jure and de facto discrimination, as well as indirect and direct discrimination.<sup>107</sup>

Interpretations on discrimination can be further studied through dispute cases such as the *EC – Bananas III (DS27)* and *China – Electronic Payment Services (DS413)*. In the *EC – Bananas III*, the Panel examined the “EC’s design, architecture, and structure of the measures applied” for the importation of Bananas. The Panel, supported by the Appellate Body, concluded that foreign service suppliers were *de facto* granted less favorable treatment although they seemed formally-neutral.<sup>108</sup> In *China – Electronic Payment Services*, the Panel found that “there were requirements, such as requiring all bank cards issued in China to have a certain Chinese EPS’s (Electronic Payment System) logo, interoperability with that ESP’s network, and terminal equipment to be capable of accepting cards of that ESP”. The Panel concluded that such requirements modified the competition conditions of foreign electronic payment service suppliers and gave favorable treatment to the Chinese EPS.<sup>109</sup>

The EU DST will be levied on companies that meet two revenue thresholds; 1) *annual worldwide revenues exceeding 750 million euros (approximately \$915 million)*, and 2) *taxable revenues within the EU exceeding 50 million euros (approximately \$61 million)*. At

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<sup>107</sup> Cottier & Oesch (2011), ‘Direct and Indirect Discrimination in WTO Law and EU Law’, NCCR Trade Regulation Working Paper No.2011/16, April 2011, pg.23.

<sup>108</sup> Panel Report, ‘EC-Regime for the Importation, Sale, and Distribution of Bananas’, WT/DS27/R/ECU, 22 May 1997, paras.7.341,7.353,7.368; WT/DS27/RW/ECU, 12 April 1999, paras.6.126, 6.133 6.134; Appellate Body Report, EC – Regime for the Importation, Sale, and Distribution of Bananas’, WT/DS27/AB/R, 9 September 1997, paras.244, 246, 255.

<sup>109</sup> Panel Report, ‘China-Certain Measures Affecting Electronic Payment Services’, WT/DS413/R, 16 July 2012, paras.7.722- 7.741, .8.1-8.2

a glance, the thresholds may seem to be facially neutral, however, if the thresholds are intentionally high enough so that the majority of the MNCs captured are non-EU companies while excluding EU companies, then the EU DST can be said to treat the non-EU companies ‘less favorably’ or ‘modify the conditions of competition in favor of EU member services and service suppliers’, thus a case of a potential *de facto* discrimination.

[Table 9] shows the rank of the global top digital services companies by revenue. Among the 60 companies listed, there are 35 US companies and 12 Chinese companies, which already occupy nearly 80% of all companies. Only three companies have an EU origin (Germany 2, Sweden 1). Although an accurate calculation of the companies likely to be affected by the EU DST would be difficult, however, a simple scan through the list of the top global digital services companies would offer an idea of who the taxpayers might be. The EU DST does not explicitly distinguish service suppliers based on origin, however, the revenue threshold is used as a proxy to determine the size of MNCs providing digital services that coincidentally contains a large portion of companies from certain countries.

**Table 11. Global Top Digital Services Companies (2020)**

Rank	Company	Revenue (Billion)	Country	Industry
1	Amazon	\$386.1	US	E-commerce
2	Apple	\$274.5	US	Computer Hardware
3	Alphabet (Google)	\$182.5	US	Internet
4	Microsoft	\$143.0	US	Software
5	JD.com	\$116.1	China	E-commerce
6	Facebook	\$86.0	US	Social Media
7	Alibaba	\$79.3	China	E-commerce
8	Tencent	\$75.0	China	Internet
9	Suning.com	\$40.1	China	E-commerce
10	ByteDance	\$37.0	China	Social Media
11	Netflix	\$25.0	US	Entertainment

12	PayPal	\$21.5	US	Financial Services
13	Salesforce.com	\$21.3	US	Software
14	Baidu	\$16.4	China	Internet
15	Wayfair	\$14.2	US	E-commerce
16	Rakuten	\$13.4	Japan	E-commerce
17	Adobe	\$12.9	US	Software
18	Coupang	\$12.4	Korea	E-commerce
19	Otto Group	\$12.2	Germany	E-commerce
20	NetEase	\$11.3	China	Internet
21	Uber	\$11.1	US	Transportation
22	Meituan-Dianping	\$10.3	China	E-commerce
23	eBay	\$10.3	US	E-commerce
24	Bloomberg L.P.	\$10.0	US	Financial Services
25	Zalando	\$9.8	Germany	E-commerce
26	Square	\$9.5	US	Financial Services
27	Spotify	\$9.5	Sweden	Audio Streaming
28	Kuaishou	\$9.2	China	Social Media
29	Chewy	\$7.2	US	E-commerce
30	Booking	\$6.8	US	Travel
31	Carvana	\$5.6	US	E-commerce
32	Expedia	\$5.2	US	Travel
33	Epic Games	\$5.1	US	Video Games
34	Flipkart	\$4.7	India	E-commerce
35	Naver	\$4.7	Korea	Internet
36	ASOS.com	\$4.6	UK	E-commerce
37	ServiceNow	\$4.5	US	Software
38	Sea Limited	\$4.4	China	E-commerce
39	Pinduoduo	\$4.1	China	E-commerce
40	Twitter	\$3.7	US	Social Media
41	Kakao	\$3.6	Korea	Internet
42	Workday	\$3.6	US	Software
43	Bet365	\$3.4	UK	Online Gambling
44	Airbnb	\$3.4	US	Lodging
45	Zillow	\$3.3	US	Real Estate
46	GoDaddy	\$3.3	US	Web Hosting
47	Akamai Technologies	\$3.2	US	Cybersecurity
48	Wildberries	\$3.0	Russia	E-commerce
49	Yandex	\$3.0	Russia	Internet
50	Shopify	\$2.9	Canada	E-commerce
51	DoorDash	\$2.9	US	Delivery
52	Compass	\$2.8	US	Internet Real estate
53	Trip.com	\$2.8	China	Travel
54	Rackspace	\$2.7	US	Information Technology
55	EPAM Systems	\$2.7	US	Information Technology
56	Zoom Video	\$2.7	US	Internet Telecommunication



57	Opendoor	\$2.6	US	Internet Real Estate
58	Overstock	\$2.6	US	E-commerce
59	Wish	\$2.5	US	E-commerce
60	Stripe	\$2.5	US	Financial Services

(Source: Compiled by author based on various websites and company annual reports)

Moreover, the EC report of impact assessment includes an analysis that shows how the proposed threshold would minimize the impact on the EU companies. It states that a ‘high threshold’ for the worldwide revenue (the first threshold) would mostly capture non-EU MNCs, namely the ‘dominant market positions’, and to support this the report provides a table showing how the share of foreign-owned companies change when the worldwide revenue threshold increases or decreases. Also, the report refers to the EU revenue threshold (the second threshold) as a “complementary specific threshold”, which would help further limit the affected companies to the most significant and relevant cases. It argues that with the proposed worldwide threshold, there remains a risk of capturing a large proportion of domestic (EU-based) companies, however, with the specific threshold and limitation on the revenue to capture online advertising and marketplaces/intermediary services, would enable the EU DST to capture large companies and but not domestic companies. The report goes on to address the fact that setting the threshold too high, so that all EU companies are excluded, would result in a *de facto* discrimination, therefore, should adjust the threshold accordingly.<sup>110</sup> The evidence addressed in this section shows how the EU DST is designed to treat foreign-based companies less favorably, thus has the potential to cause a *de facto* discrimination.

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<sup>110</sup> See *supra*, EC ‘Commission Staff Working Document Impact Assessment’, pp.67-69.

## 4.2 General Exceptions

Article XIV of GATS provides “a general exceptions provision that allows Members to deviate from obligations and commitments when certain conditions are met”. In the very first case that dealt with this provision, the *US – Gambling (DS285)* case, the Appellate Body stated that “Article XIV affirms the right to pursue objectives identified even if in doing so Members act inconsistently with obligations under GATS”. Also, a ‘two-tier analysis’ should be made, first to examine whether the conditions set out in the provision are satisfied, and second, to examine whether the requirements set out in the chapeaux are also satisfied.<sup>111</sup> This section will examine if the EU DST would potentially be covered by the exceptions, thus be justified for implementing the taxation measure.

### **Article XIV: General Exceptions**

*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:*

- (a) necessary to protect public morals or to maintain public order;*
- (b) necessary to protect human, animal or plant life or health;*
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
  - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;*
  - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;*
  - (iii) safety;**
- (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;*
- (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double*

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<sup>111</sup> Appellate Body Report, ‘US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services’, WT/DS285/AB/R, 7 April 2005, paras.291-292.

*taxation in any other international agreement or arrangement by which the Member is bound.*

#### 4.2.1 GATS Article XIV(a): Protection of Public Morals and Order

Article XIV (a) stipulates that inconsistency will be justified if it is necessary to “*protect public morals or to maintain public order*”. In the *US – Gambling* case, the panel defined ‘public moral’ as “standards of right and wrong conduct maintained by or on behalf of a community or nation” and ‘public order’ as “the preservation of the fundamental interest of a society, as reflected in public policy and law, which may be invoked only where a genuine and sufficiently serious threat is posed”. The Panel also went on saying that “although two different definitions exist, an overlapping concept that ‘seeks to protect largely similar values’ exist”.<sup>112</sup> It would be difficult for the EU DST to argue that the proposed tax is “necessary to protect public morals or maintain public order” since the measure largely aims to capture the appropriate tax base to increase tax revenue, as repeatedly stated in the EC reports and the European Parliament resolution.<sup>113</sup>

The case law of *Brazil – Taxation (DS472)* shows how Brazil implemented a tax exemption program for digital television equipment to protect public morals and order, which would “bridge the digital divide and promote social inclusion”. The Panel did find that the measure fell within the scope of ‘public morals’ under GATT Article XX(a), however, did not agree that the discriminatory measure implemented by Brazil was

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<sup>112</sup> Panel Report, ‘US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services’, WT/DS285/R, 10 November 2004, paras.6.465-6.468.

<sup>113</sup> See related reports and resolution in *supra* footnote 70 and 100.

necessary to “bridge the digital divide or social inclusion”.<sup>114</sup> Note that the *Brazil – Taxation* case was examined under GATT Article XX, however, there exist striking similarities between GATT Article XX and GATS XIV and that GATT Article XX and its jurisprudence provides a basis for interpreting GATS XIV.<sup>115</sup>

Ironically, the EC DST impact assessment report states that the measure should avoid ‘ring-fencing’ the digital economy and the measure should not single out certain activities<sup>116</sup>, as reasoned by Brazil, yet the DST intends to ‘ring-fence’ not only the digital economy but also single out certain digital services and companies that originate outside of the EU. Therefore, the EU DST would not be justified under Article XIV (a). In the following section, Article XIV(c) will be discussed as Article XIV(b) is irrelevant to the EU DST measure.

#### 4.2.2 GATS Article XIV(c): Compliance with Laws and Regulations

Article XIV (c) allows Members to act inconsistently if the measure is “*necessary to secure compliance with laws or regulations* that would prevent deceptive and fraudulent practices, protect individual privacy, and protect safety”. In the *Argentina – Financial Services* case, the Appellate Body stated that “a measure can be said to secure compliance if its design reveals that it secures compliance with specific rules, obligations, or requirements under related laws or regulations”.<sup>117</sup> For the EU DST to be justified, the EU

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<sup>114</sup> Mitchell, Voon & Hepburn (2019), ‘Taxing Tech: Risks of an Australian Digital Services Tax Under International Economic Law’, *Melbourne Journal of International Law* 20(1), pg.104.

<sup>115</sup> See *supra* Bossche & Zdouc (2017) pg.606

<sup>116</sup> See *supra*, EC ‘Commission Staff Working Document Impact Assessment’, pg.44.

<sup>117</sup> See *supra* footnote 93, para.6.203

would need to prove that the design of the DST secures compliance with specific EU rules, obligations, or regulations and also would need to show that it is a WTO-consistent measure. In the EU DST proposal and impact assessment, EC attempts to convince the need of the DST by pointing out that the effective average tax rates of the traditional business model and the digital business model highly differ. According to the report, multinational groups with digital business models have tax rates that are more than 10% lower, of which the gap widens as multinational groups engage in aggressive tax planning. EC argues that “a lower tax burden for digital businesses results in competitive distortions and contributes to a lack of a level playing field between different types of companies”.<sup>118</sup> This only shows how such tax planning practice can have a general effect on businesses, rather than showing how such practice violates specific rules, obligations, or requirements under related laws or regulations. Therefore, it would be unlikely for the EU DST to successfully convince how its measure is necessary to secure compliance with laws or regulations.

#### 4.2.3 GATS Article XIV(d): Effective Imposition of Direct Taxes

GATS Article XIV(d) allows Members to act inconsistently with Article XVII (National Treatment), if the different treatment is “*aimed at ensuring the equitable or effective imposition or collection of direct taxes*”. As mentioned in section 3.2.1 in this paper, there are debating views on whether the DST should be seen as a direct tax or an indirect tax. GATS Article XXVIII(o) defines direct tax as comprising “*all taxes on total income, on total capital or elements of income or of capital, including taxes on gains from*

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<sup>118</sup> See *supra*, EC ‘Commission Staff Working Document Impact Assessment’, pg.18

*the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation”.*

As the EU DST imposes tax only on revenues of certain services, based on the direct tax definition provided by GATS it is unlikely that the EU DST would fall into the category of a ‘direct tax’. Also, the EC impact assessment report clearly states that “given its (preferred) features, this tax would have more elements of an indirect tax, so it would need to be treated as an indirect tax other than turnover taxes and excise duties”.<sup>119</sup> Therefore, relying on the above reasoning, the EU DST would not be covered under the general exceptions provision of Article XIV(d).

#### 4.2.4 GATS Article XIV(e): Avoidance of Double Taxation

Article XIV(e) allows Members to deviate from Article II (Most Favored Nation Treatment, ‘MFN’) if the discriminatory treatment results out of an agreement on double taxation (DTA) to avoid double taxation. Although the MFN treatment is not included in the scope of this paper, it is unlikely that the EU DST is currently covered by any DTAs since it has yet to be implemented. Also, even if the EU DST is enacted, it would still be inappropriate for the DST to be covered by DTAs, since the EU emphasizes it to be a temporary measure until a comprehensive solution, i.e. the OECD Inclusive Framework on BEPS, is adopted.<sup>120</sup> Moreover, the objective of the EU DST is to address the distortions in competition and increase tax revenues, rather than to avoid double taxation. For these

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<sup>119</sup> See *supra*, EC ‘Commission Staff Working Document Impact Assessment’, pg.20.

<sup>120</sup> See *supra* footnote 68 ‘EU: EC proposal for digital services tax’, pg.3

reasons, the ED DST would not be covered under the general exceptions provision of Article XIV(e).

#### 4.2.5 GATS Article XIV Chapeau

The chapeau of Article XIV requires that “a measure does not constitute ‘*arbitrary discrimination*’ or ‘*unjustifiable discrimination*’ or ‘*disguised restriction*’ on trade in services”. Once again, case laws need to be reviewed because the GATS does not provide definitions or methods of interpretation on the above terms. Note that since the language of the chapeau of the GATT Article XX and GATS Article XIV are quite similar, useful lessons can be drawn out. There are many case laws that refer to GATT Article XX when examining cases relating to GATS Article XIV.<sup>121</sup>

In the *US – Gambling*, the Appellate Body stated that “the focus of the chapeau is on the application of the measure and when examining a facially neutral measure, evidence should be presented, such as the overall number of suppliers, patterns of enforcement, or reasons of non-enforcement”. In the *EC – Seal Products (DS401)*, the Appellate Body stated that “it can be discerned whether a measure is applied in a particular manner by examining the ‘design, architecture, and structure’ of the measure”. In the *EU – Energy Package (DS476)*, the Panel stated that “when analyzing whether a measure discriminates arbitrarily or unjustifiably, the primary cause or rationale of the discrimination should be involved”.<sup>122</sup>

Based on these case laws, the EU DST is likely to fall into the category of an arbitrary and unjustifiable measure. This is because the EU DST is arbitrarily enforcement and the design of

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<sup>121</sup> See *supra* Bossche & Zdouc (2017) pg.616.

<sup>122</sup> WTO, ‘WTO Analytical Index: GATS Article XIV (Jurisprudence)’, available at [https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gats\\_art14\\_jur.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art14_jur.pdf)

the measure is likely to be unjustifiable. The EU DST lacks a solid relationship between the measure and the objective. The EU DST proposal states that “ensuring fair taxation of the digital economy is part of the EC’s agenda on a fair and efficient tax system in the EU”. It also states the general objective of the EU DST is 1) “to protect the integrity and proper functioning of the Single Market”, 2) “to make sure the public finances are sustainable and national tax bases are not eroded”, 3) “to ensure the preservation of social fairness and a level playing field for all businesses operating in the Union”, and 4) “to fight against aggressive tax planning”.<sup>123</sup> It is quite questionable whether the EU measure would achieve such objectives by implementing an arbitrary threshold to arbitrarily chosen scope of digital services that would potentially leave out most of the EU digital companies.

The design of the EU DST, as mentioned several times throughout the paper, is facially neutral where a threshold is applied to companies providing certain digital services, regardless of origin. Nonetheless, it is most likely to capture large foreign MNCs that would potentially be an unjustifiable discriminatory measure acting as a disguised restriction on cross-border trade. The design to include only certain taxable revenue while excluding the most fundamental part of the service, and using the ‘user value creation’ as an underlying rationale, show how the EU DST runs contrary to the chapeau. For example, services of providing multi-sided digital interfaces to users, i.e. digital intermediation services, are included in the taxable revenue, however, when determining the subject for taxation, only services of user interaction are included. It can be inferred that the EU DST considers the value of digital interfaces is created when users interact with each other. However, there is an error in such rationale because the

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<sup>123</sup> See *supra* ‘EU: EC proposal for digital services tax’, pp.2-3.



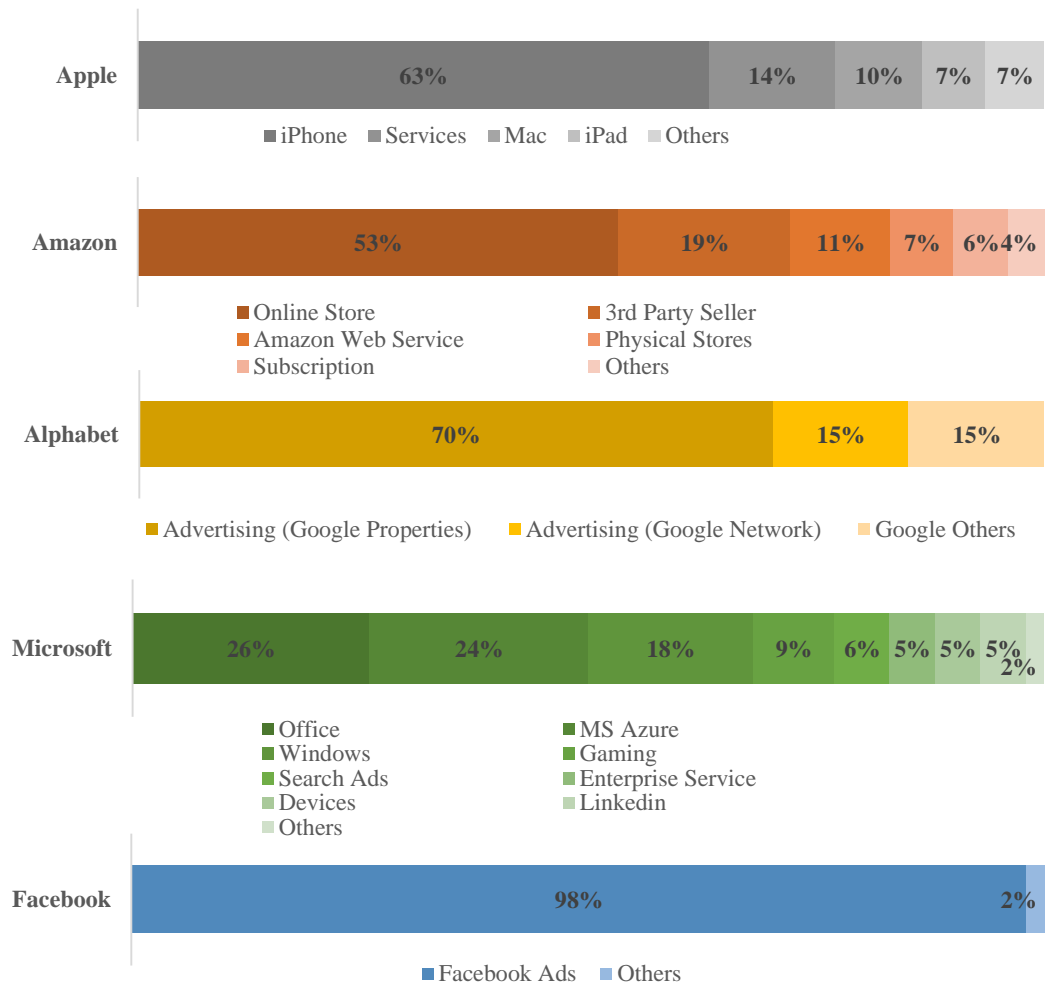
value of multi-sided digital interfaces is not only created by the interactions among users, but also largely created by the digital interface itself the user data provided by the users.<sup>124</sup>

Additionally, subjecting companies to certain taxable revenue without considering the composition of the revenue source is another potentially arbitrary and unjustifiable discrimination. As shown in Table 9 in section 4.1.2, Amazon and Microsoft are predicted to be covered by the EU DST for providing services placing advertising on digital interfaces. Note that as shown in Figure 5, unlike Google or Facebook, for Amazon or Microsoft, the share of revenue rising from advertisements is relatively small compared to other revenue sources. This shows how the EU DST was designed without careful consideration of various aspects while lacking a thorough understanding of the digital services companies. Although the examples and reasons discussed above are only a rough sketch, they would suffice to suggest that the EU DST may potentially have arbitrary and unjustifiable discriminatory features and also act as a disguised restriction on trade.

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<sup>124</sup> See *supra* Tovey (2019), pg.15

**Figure 5. Revenue Sources of Global Digital Services Companies (2019)**



(Source: Rearranged by Author based on visualcapitalist.com)

## Chapter 5. Implications

### 5.1 Modification in WTO Trade Agreements

As discussed throughout this paper, especially in chapter 4, most of the trade rules, regulations, and agreements are not quite sufficient or thorough enough to fully embrace the evolving digital economy and trade. Among many issues, the classification issue, in both broad and narrow senses, and the interpretation issue seem to be most pressing.

There are several aspects to the classification issue. First is the mutually exclusive classification of services. Since 1999, a consensus has been established to classify digital trade as services regulated under GATS. However, GATS enables services to be classified only under a single sector. This has become a problem because over the past two decades, new types of digital services offering various forms of services have emerged, which makes the mutually exclusive classification of services ineffective. For example, Google offers computer and related services along with telecommunications and advertising services. Nonetheless, under the current classification system of GATS, services provided by Google can only be classified as a single sector in the schedule of commitments, which causes distortions and arbitrariness. Also, there can be services that do not necessarily belong to a certain sector or mode of supply, such as the internet itself or data flows.<sup>125</sup> Second is the use of an outdated classification system. The current specific schedule of commitments under GATS uses the W/120<sup>126</sup>, based on the UN Central Product Classification (CPC)

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<sup>125</sup> Zheng (2020), 'The Digital Challenge to International Trade Law', New York University Journal of International Law and Politics Vol.52 No.2, pp.548-549.

<sup>126</sup> See Note by the Secretariat of WTO, 'Services Sectoral Classification List', MTN.GNS/W/120, 10 July 1991; W/120 is a sectoral classification list for services that was officially adopted on 28

adopted by the UN Statistical Commission in 1989. Since the classification system used in GATS has not been modified or updated in nearly thirty years, the system is unable to provide a proper classification for digital services.<sup>127</sup> It would be an appropriate time to make necessary adjustments to GATS so that various types of digital services can be appropriately classified into corresponding sectors and also make amendments to the schedule of commitments so that the schedule can encompass newer types of digital services based on the updated CPC Version 2.1.<sup>128</sup>

Additionally, due to the lack of guidelines and definitions, the interpretation under GATS highly relies on the case laws of both GATS and GATT. However, because of the intricacies of services and the limited number of GATS case laws to refer to, confusion in the process of interpretation is inevitable. In order to minimize confusion and disputes arising from misinterpretations, efforts to provide more detailed and thorough guidelines for interpretation and clarification in the definition of the terms and scopes should be provided.

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March 2001, annexed in the ‘Guidelines for the Scheduling of Specific Commitments under the GATS (S/L/92)’.

<sup>127</sup> Adlung (2020), ‘The GATS – A Sleeping Beauty?’, *Trade Law and Development* Vol.12, No.1, pg. 50

<sup>128</sup> UN (2015), ‘Central Product Classification (CPC) Version 2.1’, *Statistical Papers Series M* No.77, Ver.2.1, Department of Economic and Social Affairs Statistics Division;

In order to meet the increasing demand for data related to the information economy, the OECD Working Party on Indicators for the Information Society (WPIIS) came up with sectoral definitions including the ICT sector and the Content and Media sector in 2007, which is based on the International Standard Industrial Classification (ISIC) Rev.4. More recently, WPIIS developed definitions that consist of a guiding principle and a list of products based on CPC Ver.2, which was then updated to CPC Ver.2.1.

## 5.2 Cooperation among International Organizations

Taxation has always been one of the concerns in the WTO. Among the 600 WTO dispute settlement cases since 1995, cases caused by taxation take up about 6% of the entire dispute settlement cases. Both direct tax and indirect tax are subject to WTO rules, even though exceptions on direct taxation exist in certain agreements, such as GATT and GATS. There is a high possibility of WTO-inconsistent taxation measures arising in the future since multilateral and unilateral taxation measures regarding digital economy and trade are being implemented. Therefore, WTO rules should not be neglected, rather should be considered as an important aspect in discussing international taxation policies.<sup>129</sup>

The world is preparing to incorporate a new set of international tax policies. Currently, digital tax policies are being negotiated mainly by the OECD. In general, WTO does not interfere with taxation matters unless it is related to tariffs, thus, WTO Members are free to adopt internal tax policies. However, in cases where certain international policies have the potential to act inconsistently with existing international regulations, for instance, the digital services tax policy, WTO would need to interfere at some point.

It has become increasingly complex when it comes to identifying and agreeing upon solutions to address international challenges because the world is interconnected more than ever. A higher degree of international cooperation is inevitable to incorporate a stable and predictable rule-based international system, which would prevent unnecessary costs,

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<sup>129</sup> Daly (2016), 'Is the WTO a World Tax Organization?', IMF Fiscal Affairs Department, pg.2.

frictions, and barriers.<sup>130</sup> Multilateral cooperation and coordination among the WTO, the OECD, and other related organizations should take place so that a comprehensive solution that is fair and reasonable for everyone, can be implemented in the era of digital economy and trade.<sup>131</sup>

### 5.3 Coordination among International Societies

Political, economic, and legal issues are inevitable when multilateralism is incorporated into a world comprised of many sovereign states. Nonetheless, multilateralism has been the basis that kept international systems in place.<sup>132</sup> The UN, OECD, WTO, IMF, and many other international organizations have been functioning on a broad range of cooperation and coordination among international societies. Keohane (1986) characterizes this act of cooperation as a “diffuse reciprocity” where countries conform to widely accepted norms and standards for the sake to protect collective interest and security. Keohane explains that to achieve a higher level of cooperation, “contributing one’s share” or “behaving well toward others” are necessary to gain satisfactory overall results as a whole, achieved through mutual obligations.<sup>133</sup> The international rules and policies of digital tax should be approached in the same way as any other international rules and policies, through

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<sup>130</sup> OECD/WTO (2019), ‘Facilitating Trade through Regulatory Cooperation: The Case of the WTO’s TBT/SPS Agreements and Committees’, pg.3

<sup>131</sup> Lee, ‘New Rules for the Digital Economy and Multilateral Cooperation’, KIEP Opinions, 18 March 2020, available at [https://www.kiep.go.kr/gallery.es?mid=a10105050000&bid=0008&act=view&list\\_no=5304&cg\\_code=](https://www.kiep.go.kr/gallery.es?mid=a10105050000&bid=0008&act=view&list_no=5304&cg_code=)

<sup>132</sup> Oudenaren, ‘What is “Multilateral”?’’, Hoover Institution Policy Review, 1 February 2003, available at <https://www.hoover.org/research/what-multilateral>

<sup>133</sup> Keohane (1986), ‘Reciprocity in International Relations’, International Organization Vol.40 No.1, pg.4, available at <https://www.jstor.org/stable/2706740>

international cooperation and coordination while considering and avoiding two main aspects.

First, the implementation of unilateral measures should be avoided. The EU, among many individual countries, should set an example by making efforts to avoid implementing unilateral measures that will likely disrupt international cooperation and coordination. Lee-Makiyama (2018) points out that the discriminatory aspect of the DST, aside from violating WTO agreements, has “a high risk of retaliation against EU services exports”, especially from the US and China. Lee-Makiyama also points out that adopting the concept of a ‘digital commercial presence’ would risk the potential loss of market access, thus pointing out that “the EU and its Member States have more to lose from unilateral measures”.<sup>134</sup> In December 2020, the EU and the High Representative proposed a new forward-looking transatlantic agenda, emphasizing a transatlantic alliance mainly between the EU and the US, based on shared values, history, and interest. The main objective and goal for the new transatlantic agenda are to build a stronger partnership that will provide prosperity, stability, peace, and security for citizens across the continents and around the world.<sup>135</sup> Both countries plan to achieve this by “responding to global challenges and contributing to the expansion of world trade and closer economic relations”.<sup>136</sup> The EU DST is likely to go against the transatlantic agenda since it will give rise to various risks that would harm the

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<sup>134</sup> Lee-Makiyama (2018), ‘The Cost of Fiscal Unilateralism: Potential Retaliation Against the EU Digital Services Tax (DST)’, ECIPE Occasional Paper, No.05/2018, pp.7-22

<sup>135</sup> EC, ‘EU-US: A New Transatlantic Agenda for Global Change’ Press Release, 2 December 2020, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_2279](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2279)

<sup>136</sup> EC, ‘The New EU-US Agenda for Global Change Factsheet’, 2 December 2020, available at [https://ec.europa.eu/commission/presscorner/detail/en/fs\\_20\\_2285](https://ec.europa.eu/commission/presscorner/detail/en/fs_20_2285)

relationship between the two. The unilateral measure of EU would also be detrimental to the international relation as a whole because of the high risk of a ‘spill over effect’, where several individual countries currently maintaining a neutral stance toward implementing unilateral actions will likely be affected by the EU DST and adopt it as a model DST. Consequently, a chaotic situation leading to a breakdown in international cooperation and coordination would result.

Second, neglecting developing countries or non-OECD countries in the process of reaching an international agreement regarding digital tax should be avoided. Digitalization is especially challenging for developing countries due to their lack of related infrastructure and technology. Moreover, in many cases, technological and regulatory developments at an international level leave developing countries as ‘takers’ without reflecting their position or perspectives. This gives rise to a potential risk of developing countries falling even more behind in their development of digitalization and implementation of related policies.<sup>137</sup>

The current Inclusive Framework on BEPS is led by the OECD and the G20, while the US and EU being the major negotiating players. In such a situation, it is difficult for developing countries to actively participate in negotiations. In order to draw out participation of developing countries, equitable rights should be ensured by evenly allocating taxing rights over digital MNCs, among developed and developing countries. Also, with proper international partnership and cooperation, resource mobilization should be made available in developing countries. Sustainable financing to improve capacity to

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<sup>137</sup> Dahlman, Mealy & Wermelinger (2016), ‘Harnessing the Digital Economy for Developing Countries’, OECD Development Centre Working Paper No.334, pg.9



collect tax from digital trade would be needed, since developing countries may not have the proper resources to implement digital tax policies and handle high compliance costs.<sup>138</sup>

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<sup>138</sup> Kelsey et al. (2020), 'How Digital Trade Rules Would Impede Taxation of the Digitalised Economy in the Global South', Third World Network, pg.5-14, available at <https://www.twn.my/title2/latestwto/general/News/Digital%20Tax.pdf>

## Chapter 6. Conclusion

Recently, negotiations for the digital tax framework are gaining strong momentum as the global leaders are moving at a rapid pace than ever. Just after two months, since the US proposed a 21% global minimum corporate tax rate, the G7 finance leaders, on 5<sup>th</sup> June 2021, agreed on setting a new global minimum corporate tax rate of at least 15%, regardless of the corporate headquarter location. The G7 also agreed on imposing an additional tax on certain technology MNCs, where they would need to pay taxes to countries where sales occur, regardless of a physical presence.<sup>139</sup> Moreover, on July 1st, 130 countries at an OECD virtual meeting, agreed to the proposed new minimum tax rate and the reallocation of the taxing rights to the location of sales. Also, countries agreed to refrain from unilateral tax measures regarding digital services.<sup>140</sup>

However, there is still a long way to go before the OECD Inclusive Framework can be implemented globally. Agreement on the method of imposing digital tax and the scope of the MNCs are likely to face some challenges since potentially taxable technology giants are concentrated in only a handful of countries. Nonetheless, a broad agreement was reached at the 3rd Finance Ministers and Central Bank Governors Meeting held during July 9-10<sup>th</sup>, which means a final deal at the G20 Summit, scheduled to take place in October 2021, awaits.

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<sup>139</sup> Rappeport, 'Finance Leaders Reach Global Tax Deal Aimed at Ending Profit Shifting', The New York Times, 5 June 2021, available at <https://www.nytimes.com/2021/06/05/us/politics/g7-global-minimum-tax.html>.

<sup>140</sup> The Economist, 'A Global Corporate-Tax Deal Takes Shape', 2 July 2021, available at <https://www.economist.com/finance-and-economics/2021/07/02/a-global-corporate-tax-deal-takes-shape>

This paper has provided a sketch of the changing economy and trade environment in the digital era and discussed potential problems focusing on the digital tax issue. The world is facing a historic moment where international tax policies are being set for the new digital paradigm that has taken place, which will play a critical role in reshaping the environment for international trade. The WTO and its members should pay close attention and actively participate in ongoing digital tax negotiations that would immensely affect international digital trade. At the same time, WTO should restart and newly open digital trade negotiations, while making necessary amends to the existing trade rules and agreements so that various aspects of digital trade can be discussed. The long halt in digital trade talks since the Ministerial Declaration on Global E-Commerce in 1998, should be reopened since the current world trade system needs effective governance over international digital trade. In order to achieve a smooth transition into a fully digitalized trade era, the international society as a whole should strive for cooperation and coordination without taking unilateral measures. The International society should keep in mind that well-adapted and flexible trade rules and policies in the digital era are fundamental for a sustainable multilateral international trade system.

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## 국문초록

‘디지털화 (Digitalization)’는 4 차산업으로의 패러다임 전환을 이끌어 준 중요한 역할을 하였다. 새로운 디지털 시대로의 진입은 시작에 불과할 뿐만 아니라 앞으로 끊임 없는 진화를 거듭하며 훨씬 더 복잡적이며 융합된 형태로 발전할 것이다. 지금과 같이 모든 것이 새롭고 불확실한 과도기적 시기의 가장 큰 이점은 세계가 협력하여 새로운 디지털 시대를 마주할 수 있도록 협상의 기회를 제공 한다는 것이다. 이를 통해 모두에게 공정하고, 변화하는 환경에 맞는 통상 규범과 정책들이 확립되기를 기대해 볼 수 있다.

마찬가지로 디지털 경제 및 통상으로의 전환에 있어서도 국제적 협력이 절실히 필요하다. 기존의 아날로그 시대에서는 유형(tangible)의 재화 및 서비스를 수동적이며 물리적으로 거래했다면, 현재의 디지털화 된 시대에서는 무형(intangible)의 재화 및 서비스를 자동으로 그리고 원격으로 거래하고 있다. 재화 및 서비스가 디지털화 되고 전자적으로 전송이 가능해지면서 국제 경제 및 통상 환경에 큰 변화를 가져오고 있을 뿐만 아니라 이를 둘러싸고 있는 규범과 정책에도 막대한 영향을 미치고 있다.

현재 OECD 에서는 디지털 경제 및 통상 환경을 효과적으로 관리하기 위한 중요하면서도 시의 적절한 이슈를 다루고 있는데 그 중의 하나가 바로 디지털 경제 및 통상에 대한 과세, 즉 ‘디지털세 (Digitl Tax)’에 대한 국제적 협상이다. 2013 년부터 OECD 는 디지털 시대에 맞는 국제조세체계의 도입이 불가피 하다는 공동의 의견을 바탕으로 포괄적 이행체계 (Inclusive Framework)에 착수하였다. 다국적 기업의 세원 잠식을 통한 조세 회피를 방지(BEPS)하기 위해 G20 및 세계 139 개국과 협의 중이지만 협상에 진전이 더디 일방적 혹은 단독적(unilateral) 디지털세 도입을 추진하려는 움직임이 일어나고 있다.

이러한 흐름 가운데, 디지털세에 대한 시의적절 한 연구의 필요성이 있어 본 논문에서는 첫째, 디지털 경제 및 통상에 대한 여러 측면들을 소개하고, 둘째, 디지털 시대에 걸맞는 통합 국제조세체계의 개편 및 수립을 위한 노력들을 살펴볼 것이며, 셋째, 합의 없이 일방적 혹은 단독적으로 디지털세를 부과하는 행위의 잠재적 WTO 협정 저촉성에 대해 분석해 볼 것이다. 이를 바탕으로 국제기구와 국제사회가 디지털 시대를 위기가 아닌 기회로 맞이하기 위해 어떠한 노력과 협의가 필요한지에 대한 시사점을 도출할 것이다.

주요어: 디지털 경제 및 통상, 국제조세제도, 디지털세, 디지털서비스세(DST), GATS  
학번: 2019-26967