When International Trade Law Meets Tax Policy: The Example of Digital Services Taxes

Alice Pirlot and Henri Culot[1]

With the rise of digital services taxes (DSTs) all over the world, questions have arisen regarding their compatibility with international trade law. Between 2019 and 2021, the United States initiated investigations into several DSTs and published observations on the DSTs adopted by Austria, France, Italy, India, Spain, Turkey and the United Kingdom. In addition to the argument that these taxes violate international tax principles, the U.S. considers that they are discriminatory. This article uses this claim as a basis to analyse the likelihood for DSTs to be incompatible with WTO law. First, it provides an overview of the unilateral, regional and multilateral tax proposals to mitigate the challenges of the digitalised economy. Second, it discusses the main legal issues that could arise under the law of the WTO, focusing on legal issues under the GATS. While recognising that there may be good tax policy reasons to oppose DSTs, this paper concludes that arguments based on WTO law provide, if at all, a weak justification to oppose such taxes.

Keywords: Digital Service Taxes (DST); GATS; Unilateral taxes; Digitalised economy; Destination-based taxes; National treatment; Most-favoured-nation principle; non-discrimination of services and service providers.

In March 2018, more than 110 countries, grouped into a so-called 'Inclusive Framework', agreed to cooperate in order to mitigate the 'tax challenges arising from digitalisation' that had been identified by the OECD and the G20 in the base erosion and profit shifting project.[2] As no consensus could be reached immediately, unilateral measures were adopted by a number of countries, including some EU Member States and the United Kingdom, as an alternative to a multilateral solution. These taxes – often called 'Digital Services Taxes' (DST) – are imposed on a portion of the revenues of major enterprises of the digitalised economy, which is supposed to reflect the value generated by these enterprises thanks to users located on the national territory of the implementing country.

These unilateral tax reforms have been received with some criticisms, both from tax and trade lawyers. From a tax perspective, some authors underline that it is insufficient to design specific rules to target the digitalised economy in order to fix the corporate income tax system. According to these authors, wider tax reforms, not limited to the digitalised sector, would be necessary given the fundamental weaknesses of the existing regime, which is based on artificial criteria, such as the residence of a company.[3] Other authors consider that these taxes are poorly designed and potentially incompatible both with double tax treaties

[1] Dr Alice Pirlot is a Research fellow in Law at the Oxford University Centre for Business Taxation (UK). She can be contacted at Alice.Pirlot@sbs.ox.ac.uk. Henri Culot is a Professor at the UClouvain (Belgium). He can be contacted at henri.culot@uclouvain.be.

[2] OECD/G20 Base Erosion and Profit Shifting Project, Interim Framework on BEPS, Tax Challenges Arising from Digitalisation - Interim Report 2018, 16 March 2018.

[3] See Michael Devereux & John Vella, *Debate: Implications of Digitalization for International Corporate Tax*, 46(6/7) Intertax 550 (2018); Michael P. Devereux & John Vella, *Taxing the Digitalised Economy: Targeted or System-Wide Reform*?, 4 British Tax Review 387 (2018); Michael P. Devereux et al., *Taxing Profit in a Global Economy* (OUP 2020).

and with European law.[4] From a trade law perspective, some authors point out that these taxes, if not carefully drafted, could violate the law of the World Trade Organization (WTO).[5]

The taxes that have been proposed often seem to be primarily targeted against certain companies (mostly U.S. companies). This might explain why the United States has repeatedly opposed the unilateral move that has been initiated by many countries. As a reaction, the United States Trade Representative (USTR) launched investigations based on Section 301 of the US Trade Act against many countries' DST.[6] In December 2019, the Office of the USTR issued its report against France' DST, concluding that the French tax discriminates against American companies.[7] The United States announced retaliatory tariffs on specific French goods.[8] This retaliatory action was however suspended, first for a 180-day period, then indefinitely.[9] In June 2020 the Office of the USTR initiated investigations with respect to DSTs from a number of other countries. Reports on the DST adopted by Austria, India, Italy, Spain, Turkey and the United Kingdom were published in January 2021.[10]

In July 2021, the OECD/G20 Inclusive Framework reached an agreement on a 'two-pillar solution to address the tax challenges arising from the digitalisation of the economy'.[11] Part of the agreement provides that the introduction of new international tax rules should lead to the removal of all DSTs.[12] In principle, countries should define the details of the two-pillar plan by October 2021, which explains why the EU postponed the publication of its digital levy proposal until October 2021[13]. According to the U.S., countries where DSTs have already been introduced should remove them. Yet, at the time of writing[14], DSTs are still

[4] On the potential conflicts between DST, EU law and tax treaty law, see, among others, Daniela Hohenwarter, Georg Kofler, Gunter Mayr & Julia Sinnig, *Qualification of the Digital Services Tax Under Tax Treaties*, 47(2) Intertax 140 (2019); Roland Ismer & Christoph Jescheck, *Taxes on Digital Services and the Substantive Scope of Application of Tax Treaties: Pushing the Boundaries of Article 2 of the OECD Model?*, 46(6&7) Intertax 573 (2018); Ruth Mason & Leopoldo Parada, *Digital Battlefront in the Tax Wars,* 92(1183) Tax Notes International 1183 (2018); Ruth Mason & Leopoldo Parada, *The Legality of Digital Taxes in Europe*, 40(1) Virginia Tax Review 175 (2020).

[5] See Andrew D. Mitchell, Tania Voon & Jarrod Hepburn, *Taxing Tech: Risks of an Australian Digital Services Tax under International Economic Law* 20(1) Melbourne Journal of International Law 88 (2019); Chris Noonan & Victoria Plekhanova, *Taxation of Digital Services Under Trade Agreements,* 23 Journal of International Economic Law 1015 (2020); Chris Noonan & Victoria Plekhanova, *Digital Services Tax: Lessons from the Section 301 Investigation*, 1 British Tax Review 83 (2021).

[6] The investigation and report on the French DST can be found on the following webpage: Office of the United States Representative, *Section 301 – France's Digital Services Tax*, https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-frances-digital-services-tax. The investigations and reports on other DSTs can be found on the following webpage: Office of the United States Representative, *Section 301 – Digital Services Taxes*, https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-digital-services-taxes.

[7] Office of the United States Trade Representative, *Report on France's Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974,* 2 December 2019.

[8] Office of the United States Representative, *Notice of Action in the Section 301 Investigation of France's Digital Services Tax,* USTR-2019-0009, Federal Register, Vol. 85, No. 137, 16 July 2020, p. 43292.

[9] *Ibid.* See also Office of the United States Trade Representative, *Notice of Modification of Section 301 Action: Investigation of France's Digital Services Tax*, USTR-2019-0009, Federal Register, Vol. 86, No. 7, 7 January 2021, p. 2479; Office of the United States Trade Representative, *Suspension of Tariff Action in France Digital Services Tax Investigation*, 1 January 2021.

[10] Notices of actions imposing additional duties of 25% on some products have been published for these countries on 7 June 2021, but they provide for a suspension period ending on 29 November 2021. Among others, see Office of the United States Representative, *Notice of Action in the Section 301 Investigation of Austria's Digital Services Tax*, Federal Register, Vol. 86, No. 107, 7 June 2021, p. 30361.

[11] OECD/G20 Inclusive Framework on BEPS, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, 1 July 2021.

[12] *Ibid.,* p. 3.

[13] Alan Rappeport, *E.U. Delays Digital Levy as Tax Talks Proceed*, NY Times, 12 July 2021.

[14] This paper was accepted for publication in January 2021 and updated in the summer 2021.

in place in many jurisdictions, and it is unclear when (and whether) they will be removed. In some countries, DSTs' legal regime includes a sunset clause providing for their repeal after the adoption of an international tax agreement on the digitalised economy.[15] However, in some other countries, the legal provisions introducing DSTs do not include explicit language on their repeal.[16]

This article focuses on the trade law aspects of DSTs by assessing their risk of being found incompatible with the General Agreement on Trade in Services (GATS). Some tax experts might consider that this discussion will soon lose its relevance if all countries repeal their DSTs. We disagree with this view. First, it is uncertain that DSTs will full disappear in the short term. Second, and more importantly, WTO law is often used to oppose the adoption of new taxes.[17] By illuminating the trade law implications of the taxation of the digitalised economy, our intention is to contribute to the better understanding of the interactions between tax and international trade law. Some authors might also argue that our analysis will have no practical impact, in part due to the dysfunction of the WTO dispute settlement body.[18] Current and future disputes might not be handled efficiently – at least at the appellate stage – before new members are appointed to the Appellate Body. So far, however, the United States has blocked the appointment process. Yet, it is wrong to believe that WTO law is 'dead'. Panels can still handle disputes, which implies that WTO members cannot ignore their WTO commitments. Moreover, the EU and other World Trade Organization members have established 'contingency appeal arrangements' to mitigate the current absence of appellate body at the WTO level.[19] Therefore, this discussion might have some practical implications beyond its academic interest.

The article is structured as follows. Section 1 gives an overview of the design of the unilateral, regional and multilateral tax proposals to mitigate the challenges of the digitalised economy. On that basis, Section 2 discusses the main legal issues that could arise under the law of the WTO for such proposals, focusing on the legal issues that would arise in relation to DSTs. Finally, Section 3 concludes.

1. Multilateral and unilateral approaches to the taxation of the digitalised economy

It is not the purpose of this section to analyse the details of each of the digital tax proposals that have been discussed and/or adopted so far nor to provide a complete comparative analysis of these proposals. Other tax scholars have already published extensive analysis on the topic.[20] Instead, the purpose of this

[15] IBFD, *Italy, Corporate taxation, Country Tax guides, Miscellaneous indirect taxes (last reviewed on the 15 April 2021),* section 14.6.4.1.

[16] See, for example, Miguel Pérez and David López, *Spanish digital services tax: another interim measure without a sunset clause*, European Tax Blog (2020), https://www.europeantax.blog/post/102g0cc/spanish-digital-services-tax-another-interim-measure-without-a-sunset-clause.

[17] See, for example, Alice Pirlot, *Don't Blame It on WTO Law: An Analysis of the Alleged WTO Law Incompatibility of Destination-Based Taxes*, 23(1) Florida Tax review 432 (2019).

[18] See Robert Goulder, *The Futility of Challenging DSTs Under International Law*, Tax Notes International 1443(2020).

[19] See European Commission, *EU and 15 World Trade Organization members establish contingency appeal arrangement for trade disputes* (27 March 2020), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2127.

[20] For an overview of the tax literature, see, among others, Reuven Avi-Yonah & Nir Fishbien, *The Digital Consumption Tax*, 48(5) Intertax 538 (2020); Yariv Brauner and Pasquale Pistone, *Adapting Current International Taxation to New Business Models: Two*

section is to explain the distinguishing features of the main tax proposals in relation to the digitalised economy, with a special focus on those that have been criticised from a WTO law perspective. This descriptive analysis will then be used as a basis for the evaluation of DSTs under international trade law.

There are many ways to classify the different proposals that have been discussed and/or introduced in respect to the taxation of the digitalised economy. For the purpose of this article, we use a two-fold distinction, based on the consensus-based or unilateral nature of the proposals. By consensus-based, we refer to proposals that would reform part of the international tax system and thus require the agreement of the many countries involved. By unilateral, we refer to new ad hoc taxes that have been proposed or adopted unilaterally with no direct modification of the international tax system. The main reason for this classification is that the risk for a WTO law dispute is significantly higher for unilateral proposals than for multilateral ones.

1.1. Consensus-based approach

The first category of reform proposals includes proposals to act at the multilateral (or regional) level, which – in practice – makes them less likely to be problematic under WTO law but also more difficult to enact. The main purpose of these proposals is to reform the international tax framework by allocating part of the profits of non-resident companies to the jurisdictions where users are located (the so-called 'market' or 'users jurisdictions'). As mentioned before, double tax treaties traditionally allow countries to tax the profits of non-resident companies when they have some form of physical presence on their territory (a so-called 'permanent establishment').[21] Therefore, under traditional tax rules, non-resident 'digital' companies are not taxed in the countries where they have users, unless they also have a particular form of physical presence in these countries.

Both the EU and the OECD/G20 inclusive framework have made proposals that would allow market jurisdictions to tax part of the profits of these companies. The OECD/G20 inclusive framework proposes to create a 'new nexus' that would complement traditional tax rules in order to allocate part of the residual

Proposals for the European Union, 71(12) Bulletin for International Taxation (2017); Wei Cui, The *Superiority of the Digital Services Tax over Significant Digital Presence Proposals* 72(4) National Tax Journal 839 (2019); Eva Escribano, A *Preliminary Assessment of the EU Proposal on Significant Digital Presence: A Brave Attempt That Requires and Deserves Further Analysis*, in *Combating Tax Avoidance in the EU. Harmonization and Cooperation in Direct Taxation* 559 (José Manuel Almudi Cid et al. eds., Wolters Kluwer 2019); Young Ran (Christine) Kim, *Digital Services Tax: A Cross-Border Variation of the Consumption Tax Debate,* 72(1) Alabama Law Review 131 (2020); Georg Kofler, Gunter Mayr, and Christoph Schlager, *Taxation of the Digital Economy: 'Quick Fixes' or Long-Term Solution?*, 57(12) European Taxation (2017); Marie Lamensch, *European Union – Digital Services Tax: A Critical Analysis and Comparison with the VAT System*, 59(6) European Taxation (2019); Bob Michel, *France – The French Crusade to Tax the Online Advertisement Business: Reflections on the French Google Case and the Newly Introduced Digital Services Tax,* (59) 11 European Taxation (2019); Belema R. Obuoforibo, *United Kingdom – A Critical Examination of the Proposed UK Digital Services Tax*, 59(11) European Taxation (2019); Raffaele Petruzzi and Vasiliki Koukoulioti, *European Union – The European Commission's Proposal on Corporate Taxation and Significant Digital Presence: A Preliminary Assessment,* 58(9) European Taxation (2018); Wolfgang Schön, *International/OECD – Ten Questions about Why and How to Tax the Digitalized Economy*, 72 (4/5) Bulletin for International Taxation (2018); Dario Stevanato, *Italy/European Union/OECD – A Critical Review of Italy's Digital Services Tax*, 74(7) Bulletin for International Taxation (2020).

[21] OECD Model Tax Convention on Income and on Capital (condensed version 2017), Arts. 5 and 7.

profits to market jurisdictions.[22] The EU proposal to reform corporate tax rules pursued a similar objective by using the concept of 'significant digital presence' or 'virtual permanent establishment'.[23] If they had been adopted, these proposed EU rules would have meant that digital platforms that meet certain thresholds would have been deemed to have a 'digital presence' that opens a right to taxation.[24]

1.2. Unilateral approach

The second category of reform proposals are not aimed at modifying traditional international tax rules. Faced with the difficulties of reaching an international agreement but willing to move forward on this matter, some countries are inclined to act unilaterally and create a new ad hoc tax on the revenues derived from certain digital activities.[25] As they are not allowed to modify unilaterally the rules of international tax law, which are enshrined in a set of bilateral tax treaties, they turn to another method, i.e. the adoption of a new tax not subject to double tax treaties.[26]

These proposals have been justified on different grounds. First, they have often been justified as an interim response pending a solution at the international level. Second, with the COVID-19 crisis that has tremendously damaged the economy, ad hoc taxes on the digitalised sector are seen as a suitable way of raising revenue in order to help mitigate the economic costs of the crisis.[27] 'Digital taxes' would serve as specific taxes on companies that are deemed either to have benefited from the COVID-19 crisis due to the higher demand for online goods and services or to have suffered less than companies in other sectors.[28] Unilateral proposals for DSTs include a series of common features, although they obviously also present national specificities.[29]

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[22] See OECD/G20 Base Erosion and Profit Shifting Project, *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*, 29-30 January 2020; OECD/G20 Inclusive Framework on BEPS, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, 1 July 2021. See also the FAQs under the following OECD webpage: *OECD invites public input on the Secretariat Proposal for a "Unified Approach" under Pillar One*, https://www.oecd.org/tax/oecd-invites-public-input-on-the-secretariat-proposal-for-a-unified-approach-under-pillar-one.htm.

[23] Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, Brussels, 21 March 2018, COM(2018) 147 final.

[24] See the following webpage: European Commission, DG Taxud, *Fair Taxation of the digital economy*, https://ec.europa.eu/taxation_customs/business/company-tax/fair-taxation-digital-economy_en.

[25] *See,* among others, France, Italy, the UK, Austria. See Elke Asen, *What European OECD Countries Are Doing about Digital Services Taxes*, Tax Foundation (2020), https://taxfoundation.org/digital-tax-europe-2020/.

[26] The question of whether a DST would fall under double tax treaties nevertheless remains controversial. See, among others, Ismer & Jescheck, *supra* n. 4.

[27] Samuel Stolton, *Gentiloni: Virus crisis highlights importance of digital tax* (7 April 2020) https://www.euractiv.com/section/digital/news/gentiloni-virus-crisis-highlights-importance-of-digital-tax/; European Commission, *Inception Impact Assessment on the Digital Levy, Ares(2021)312667 - 14/01/2021* (2021), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12836-Digital-Levy. See also Richard Collier, Alice Pirlot & John Vella, *COVID-19 and Fiscal Policies: Tax Policy and the COVID-19 Crisis*, 48(8/9) Intertax 794, 798-799 (2020).

[28] On the role of e-commerce during the COVID-19 pandemic, see WTO, *Information Note, E-commerce, trade and the COVID-19 pandemic* (4 May 2020).

[29] The purpose of this article is not to explain the specific features of each DST. In the next paragraphs, we explain DST's common features by reference to the examples of the European DST proposal as well as the French, Italian and UK DSTs. For a detailed comparison of the French and UK DSTs, see Noonan & Plekhanova, *Digital Services Tax: Lessons from the Section 301 Investigation, supra* n. 5, 88-96.

First, DSTs have a limited scope of application. They are imposed on a limited number of businesses that meet certain revenue-related thresholds. The French DST only targets companies whose worldwide annual revenues linked to digital services reach 750 million euros and whose yearly revenues realised in France in relation to digital services are over 25 million euros.[30] The UK tax uses thresholds of respectively 500 million and 25 million pounds.[31] The Italian DST has a worldwide annual revenues threshold of 750 million euros (but it is not limited to revenues from qualifying digital services) and a national annual revenues threshold of 5.5 million euros.[32] The initial EU DST proposal, which the Commission described as an interim solution before the adoption of a comprehensive tax reform as the one mentioned above (in section 1.2), had a worldwide annual threshold of 750 million euros (not limited to revenues from qualifying digital services) and an EU-wide annual threshold of 50 million euros.[33] For all these taxes and tax proposals, the thresholds apply at the group level.[34] The revenue-related thresholds have been justified on different grounds. For example, the EU puts forward the following justifications for the worldwide-revenue threshold. First, this threshold 'limits the application of the tax to companies of a certain scale, which are those which have established strong market positions that allow them to benefit relatively more from network effects and exploitation of big data and thus build their business models around user participation'.[35] Second, it is aimed at targeting larger companies as they have more opportunities to engage in aggressive tax planning.[36] Third, the worldwide revenue threshold is explained by the need to limit compliance costs for small businesses.[37] Regarding the EU-wide threshold, it has been justified as a way to limit the tax to 'cases where there is a significant digital footprint at Union level'.[38] In France, both thresholds have been justified by reference to the objective of targeting 'multinational enterprises with significant digital footprint'.[39] The intention for the new EU digital levy proposal was apparently to drop

[30] France: Art. 299, III of the General Code on Taxes ('Code général des impôts'), inserted by the Law of 24 July 2019 (Loi n° 2019-759 du 24 juillet 2019 portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés). On the French tax, see also France, Rapport fait au nom de la Commission des finances, de l'économie générale et du contrôle budgétaire sur le projet de loi, après engagement de la procédure accélérée, portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés, Assemblée nationale, n° 1838, 3 avril 2019.

[31] UK: Finance Act 2020, Section 46. See also John Vella, *Legislative Comment: Finance Act 2020 Notes: Part 2 Sections 39-72: the UK's digital services tax,* 4 British Tax review 469 (2020). For a thorough comparison of the French and UK DST, see Noonan & Plekhanova, *Digital Services Tax: Lessons from the Section 301 Investigation, supra* n. 5, 88-96.

[32] IBFD, *Italy, Corporate taxation, Country Tax guides, Miscellaneous indirect taxes (last reviewed on the 15 April 2021).*

[33] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, Brussels, 21 March 2018, COM(2018) 148 final [hereafter 'EU DST Proposal']. The Commission has announced that it would withdraw this proposal as well as its other proposal on the significant digital presence (European Commission, Communication from the Commission to the European Parliament and the Council, Business Taxation for the 21st Century, Brussels, 18 May 2021, COM(2021) 251 final, footnote 20).

[34] See, e.g. UK: Finance Act, sections 39(3)(d) and 57 (which defines the notion of 'group'); France: Art. 299, III, which refers to Arts. 233-16 of the Commercial Code ('Code de commerce'); EU DST Proposal, *supra* n. 33, Arts. 2(2) and 4(6).

[35] EU DST Proposal, *supra* n. 33, p. 10. See also European Commission, Commission Staff Working Document, Impact Assessment Accompanying the document, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence and Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, Brussels, 21 March 2018, SWD(2018) 81 final/2, pp. 67-69.

[36] *Ibid*.

[37] *Ibid*.

[38] *Ibid*.

[39] France, Assemblée nationale, Rapport fait au nom de la Commission des Finances, de l'Économie générale et du contrôle budgétaire sur le projet de loi, après engagement de la procédure accélérée, portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés, n° 1838, p. 32-33.

the 750-million threshold.[40] This would significantly widen the scope of application of the tax. Many European companies would be affected, and they would probably constitute the majority of taxpayers. Such a tax would thus be less likely to be considered problematic.

Second, in addition to the revenue-related thresholds, the scope of the tax is limited to certain digital activities. Indeed, the tax is imposed on the revenues generated from the supply of specific digital services. For example, under the initial EU DST proposal, three main activities were covered: (a) the placing on a digital interface of advertising targeted at users of that interface; (b) the making available to users of a multi-sided digital interface which allows users to find other users, to interact with them, and agree on the sale of goods or the provision of services between users; (c) the transmission of data collected about users and generated from users' activities on digital interfaces.[41] Although the formulations vary, the French, Italian and UK proposals apply to similar types of activities.[42] The objective is to target companies that derive revenues from their user base. According to the EU Commission, 'the services falling within the scope of the DST are those where the participation of a user in a digital activity constitutes an essential input for the business carrying out that activity and which enable that business to obtain revenues therefrom'. [43] The idea is to tax 'the revenues obtained from the monetisation of the user input, not the user participation in itself'.[44]

Third, revenues generated from certain types of activities are explicitly excluded from the scope of the DST. In France, such exclusions apply to revenues derived from the supply of financial services; revenues derived by an entity that operates an interface that supplies digital contents, communication services or payment services (e.g. skype; zoom); the *direct* supply of goods or services (e.g. exclusion of the revenues derived by Amazon from the sale of its 'own' goods but inclusion of Amazon's revenues derived from the sales made on Amazon by independent sellers).[45] These exclusions have been justified by reference to the fact that businesses undertaking these activities 'do not derive significant benefits from users'.[46]

Fourth, the tax applies to the revenues of digital activities mentioned above when they arise in connection with activities linked to users located in the jurisdiction.[47] Revenues can be attributable to users in the jurisdiction for many reasons. For example, in the UK, 'online marketplace revenues' will be attributable to the UK when they 'arise in connection with online advertising for particular services, goods or other property' and 'the advertising is paid for by a UK user'.[48] For 'online advertising revenues', revenues could

[40] Rappeport, *supra* n. 13.
[41] See EU DST Proposal, *supra* n. 33, Art. 3.
[42] France: General Code on Taxes, Art. 299, II. UK: Finance Act 2020, Section 43.
[43] EU DST Proposal, *supra* n. 33, p. 7.
[44] *Ibid.*
[45] See France, Assemblée nationale, Rapport, *supra* n. 39, p. 137.
[46] John Vella, *Digital Services Taxes: Principle as a Double-Edged Sword*, 72(4) National Tax Journal 821, 828 (2019). See also France, Assemblée nationale, Rapport, *supra* n. 39, p. 116.
[47] For the EU, EU DST Proposal, *supra* n. 33, Art. 5.
[48] UK: Finance Act, Section 41(6).

be attributable to the UK because the advertising is 'viewed or otherwise consumed by UK users'.[49] Different proxies are used to locate users, for example, their IP address.[50]

Fifth, the tax rate is rather low (2-3%), which does not mean that the total tax burden would be negligeable given that the tax applies on revenues and not on profits.[51] The tax rate in the UK is 2%. In France and Italy, the rate is 3%. For the latest EU proposal for a digital levy, the intention was apparently to fix the rate as low as 0.3%.[52]

Sixth, the DST is likely to be considered a deductible expense under the corporate income tax.[53] Under the French DST regime, it has been made explicit that the amount of the DST is deductible from the profits that are subject to the corporate income tax, which is in line with the usual tax rules on deductible expenses.[54] Under UK law, the normal UK corporation tax rules will apply in order to determine whether or not the DST should be an authorised expense. As mentioned in HMRC internal manual, '(…) a company's DST expense is directly related to the earning of its revenues and is a legal obligation of performing that trade. Therefore, in most cases it is likely the expense will have been incurred wholly and exclusively for the purposes of the trade'.[55]

2. Trade implications of the taxation of the digitalised economy

As mentioned in the introduction, concerns have been raised that the DSTs – the group of unilateral taxes discussed above – are incompatible with WTO law.[56] In its impact assessment, the EU explicitly referred to the need to comply with the rules of the World Trade Organisation.[57] Despite this precautionary approach, it is unclear whether the EU proposal and other DSTs fully comply with WTO law. Although the U.S. has not explicitly questioned the compatibility of DSTs with WTO law, its investigations under Section 301 of

[49] UK: Finance Act, Section 41(7).
[50] For example, UK: HHM Revenue & Customs, MRC internal manual, Digital Services Tax Manual, DST33000 – Evidence Identifying a UK User, updated 13 April 2021. France: General Code on Taxes, Art. 299bis, I, 1°.
[51] The rate is slightly higher in Austria (5%), but the tax seems to have a more limited scope.
[52] Rappeport, *supra* n. 13.
[53] See EU DST proposal, *supra* n. 33, preamble (27).
[54] France, Assemblée nationale, Rapport, *supra* n. 39, at pp. 46, 86, 89 and 224. See also p. 34: '(…) pour éviter le plus possible de faire peser sur les redevables de la TSN une charge fiscale trop lourde, surtout s'agissant des entreprises qui acquittent leur juste part d'IS, la TSN sera déductible de l'assiette de ce dernier, conformément au droit commun'.
[55] UK: HHM Revenue & Customs, MRC internal manual, Digital Services Tax Manual, DST47100 – UK CT Deductibility of DST, updated 13 April 2021.
[56] Regarding the EU proposal, see Gary Clyde Hufbauer & Zhiyao Lu, T*he European Union's Proposed Digital Services Tax: A De Facto Tariff* (June 2019) Peterson Institute for International Economics (PIIE); Werner Haslehner, *EU and WTO Law Limits on Digital Business Taxation*, in *Tax and the Digital Economy: Challenges and Proposals for Reform,* 25-48 (Kluwer Law International 2019, Werner Haslehner et al. eds). Regarding the UK DST, see Chris Giles & Jim Pickard, *UK to push on with digital tax in face of US ange*r (2020) Financial Time; Rupert Shiers & Jonathan T. Stoel, *Is the DST compatible with the UK's international obligations?* Tax Journal (2019). See also the contributions mentioned supra n. 5 (analysing these concerns). For an earlier discussion of related issues, see John-ren Chen and Christian Smekal, *Should the WTO deal with e-trade taxation issues* 9(4) Progress in Development Studies 339 (2009).
[57] European Commission, Commission Staff Working Document, Impact Assessment, *supra* n. 35, 55.

the US Trade Act rely on arguments that could be used in a WTO law dispute.[58] The French DST was the first to be accused of discriminating against U.S. companies, but the U.S. reached similar conclusions in the reports on the DSTs adopted in Austria, India, Italy, Spain, Turkey and the United Kingdom.

This section analyses the arguments supporting the discriminatory character of DSTs from the perspective of WTO law. It underlines that the arguments put forward in support of their WTO law incompatibility are not fully convincing. This implies that WTO law arguments are not a sufficient reason to disregard DSTs as a policy option. As mentioned above, other reasons, based on EU, international tax law and tax policy considerations, could however serve as (more) convincing arguments against their adoption.[59] This section is structured into two subsections: the first subsection focuses on the first category of tax reform, which would lead to the allocation of some taxing rights to the market jurisdiction. Although these consensus-based proposals are less likely to be problematic under WTO law, it is worth to briefly review why they might still present some risks. The second subsection focuses on the second category of tax reforms, namely the unilateral adoption of DSTs.

2.1. A preliminary question: would "new nexus" proposals necessarily be compatible with WTO law?

The major difference between "new nexus" proposals and unilateral DSTs is that they would, in principle, be adopted on a multilateral (or regional) basis. This would significantly reduce the risk of a WTO law dispute. Yet, the theoretical question as to whether such proposals would be contrary to WTO law remains. Let us imagine that a country, unilaterally, imposes its corporate income tax on companies that have a virtual presence within their territory. This digital presence would be established on the basis of a threshold, either linked to the user base or the participation of the company to the 'economic life of a country'.[60] Such a unilateral move would violate the double tax conventions binding on the implementing country. But would it also be incompatible with international trade law?

'New nexus' proposals would, necessarily, be targeted at foreign companies. This could point to a discriminatory treatment and a violation of WTO law. However, the non-discriminatory character of the measure appears from the fact that the corporate income tax would be applied both on domestic and foreign companies. In other words, under WTO law, a rule that would extend the notion of permanent establishment to companies with a digital presence would not differ from the traditional permanent establishment rule.

Discrimination could nevertheless arise from the way the profits from companies with a digital presence are taxed. Foreign companies should not be subject to less favourable tax rules. In the hypothesis where

[58] On the interaction between Section 301 investigations and WTO law, see Congressional Research Service, Section 301 Investigations: Foreign Digital Services Taxes (DSTs) (10 December 2020), https://crsreports.congress.gov/product/pdf/IF/IF11564. See also the detailed analysis of Noonan & Plekhanova, 'Digital Services Tax: Lessons from the Section 301 Investigation', *supra* n. 5.

[59] See the references to the tax policy literature mentioned in the introduction, *supra* n. 3, 4, 20. See also Craig Elliffe, *Taxing the Digital Economy. Theory, Policy and Practice* 305-321 (CUP 2021).

[60] See Wolfgang Schön, *One Answer to Why and How to Tax the Digitalized Economy* Max Planck Institute for Tax Law and Public Finance, Working Paper, 15 (2019).

only foreign companies would be taxed on the basis of their consumer base, the tax could look like a tariff (i.e. a tax imposed on foreign goods only, based on their crossing of a state border).[61] Conversely, the non-taxation of domestic companies with export activities could amount to an export subsidy.[62] Ideally, the tax should be calculated in the same way for domestic and foreign companies. Proposals, such as the United Nations proposal that will allow payments in consideration for automated digital services to be taxed in the source country on a gross basis, could thus be problematic under WTO law.[63]

It is worth nothing, though, that some differences in the way domestic and foreign companies are taxed can be justified under the GATS. According to GATS Article XIV(d), differences in treatment 'aimed at ensuring the equitable or effective imposition or collection of *direct taxes* in respect of services or service suppliers of other Members' can be justified as long as they 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'.[64] Footnote 6 to article XIV (d) clarifies the type of tax measures envisaged by this Article.

2.2. An assessment of DSTs and their potential incompatibility with WTO law

The traditional claim against DSTs concerns their discriminatory character. This part analyses this claim by relying on the arguments listed in the 2019 USTR investigation report on the French DST.[65] These arguments - which are similar to those found in the reports issued in January 2021 on other countries' DST, including Austria, India, Italy, Spain, Turkey and the United Kingdom[66] - might not cover all the possible claims against DST under international trade law.[67] However, as they reflect the traditional claim against DST that they are discriminatory and thus a violation of international trade law, they are a good basis to

[61] See Wolfgang Schön, *Destination-Based Income Taxation and WTO Law: A Note* 3Max Planck Institute for Tax Law and Public Finance Working Paper 10 (2016): "In economic terms, an income tax that would be levied on profits derived from imported goods is nothing but a tariff", quoting Harry Grubert, *Tax Credits, Source Rules, Trade, And Electronic Commerce: Behavioral Margins and the Design of International Tax System* 58 Tax Law Review 149 (2005).

[62] Charles E. McLure & Walter Hellerstein, *Does Sales-Only Apportionment of Corporate Income Violate the GATT?* 9060 Working Paper (2020) (who argue that sales-only apportionment could nevertheless amount to a prohibited export subsidy). *Contra* Schön, *supra* n. 61, 6-7.

[63] See UN, 'Tax treatment of payments for digital services', draft provisions and commentary prepared in accordance with the outcomes of the 20th session of the Committee. See also UN, Committee of Experts on International Cooperation in Tax Matters, Report on the twenty-second session, E/2021/45/Add.2-E/C.18/2021/2, para. 21 and paras. 76-90.

[64] On GATS XIV(d) see Kasper Dziurdz, *Non-discrimination in Tax Treaty Law and World Trade Law* 107-108 (Kluwer Law International 2019). See also Vincent Beyer, *Direct Taxes and the GATS: Substantive and Procedural Defences for Non-compliant Income Tax Measures*, 52(3) Journal of World Trade 351 (2018).

[65] Office of the United States Trade Representative, *Notice of Action in the Section 301 Investigation of France's Digital Service Tax,* Federal Register, Vol. 85, No. 137, 16 July 2020, p. 43292.

[66] The reports on India, Italy and Turkey were issued on January 6, 2021. The reports on Austria, Spain and the United Kingdom were issued on January 14, 2021. They are available on the webpages mentioned *supra* n. 6. Note that, in the case of India, the U.S. also argues that the DST amounts to a *de jure* discrimination because it is 'facially discriminatory'. It applies only to non-resident companies (Office of the United States Trade Representative, *Section 301 Investigation, Report on India's Digital Services Tax*, 6 January 2021, pp. 13-14).

[67] For an analysis of some other arguments, including whether assessment of DSTs under the GATT, see Noonan & Plekhanova, *Taxation of Digital Services Under Trade Agreements, supra* n. *5.* In particular, the compatibility of DSTs with the commitment of WTO members not to impose custom duties on electronic transmissions could also be examined. See WTO, Ministerial Conference, Declaration on Global Electronic Commerce Adopted on 20 May 1998, WT/MIN(98)/DEC/2 and WTO, General Council Decision Adopted on 10 December 2019, WT/L/1079.

analyse the likelihood for DSTs to be problematic under WTO law. According to the U.S., three main aspects of the French DST make it discriminatory against U.S. companies: the selection of services covered; the revenue thresholds; the relationship of the DST to national taxes. Moreover, the U.S. considers that the French authorities intended the tax to primarily target U.S. companies, which also proved its discriminatory character.

The next sections explain how the different aspects of the U.S. arguments would be analysed under WTO law.

2.2.1. Would a DST fall under the scope of WTO law?

The first step to assess the WTO law (in)compatibility of DSTs is to determine which WTO provisions would apply to their case. Given that DSTs apply to digital services and service suppliers, the General Agreement on Trade in Services (GATS) is relevant. Other agreements, including the General Agreement on Tariffs and Trade (GATT), could also apply to DSTs if it can be shown that they might influence trade in goods. Usually, WTO members refer to multiple WTO law provisions to support their claim. However, for the purpose of this article, we focus our analysis on the GATS, given that it would be the main legal basis on which a claim against DSTs would be made.

Two main elements need to be examined to confirm that the GATS is relevant: (1) whether there is 'trade in services' as defined under Article I:2 of the GATS and (2) whether the measure at issue 'affects' such trade in services within the meaning of Article I:1 of the GATS. These two tests are fairly easy to pass: it should not be a problem for the U.S. to prove that the GATS applies to DSTs. The GATS regulates four main 'modes' of services, including cross-border trade (from the territory of one Member into the territory of another Member), consumption abroad (when a service is supplied in a Member to a consumer of another Member), commercial presence (when a service supplier of one Member has a commercial presence in another Member), presence of natural persons (when a service is supplied through the presence of natural persons of a Member in the territory of another member).[68] Digital services subject to the DSTs fall under the category of cross-border trade if the services are supplied purely digitally from the territory of one Member (for example, the U.S.) into the territory of another Member (for example, France). They could also fall under the category of services delivered through 'commercial presence' if the supplier has an office, a branch or a subsidiary in the country where the services are consumed. The fact that the DSTs apply to services delivered through electronic means does not affect the application of the GATS. The WTO Council for Trade in Services recognised in 1999 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'.[69]

[68] GATS, Art. I:2.

[69] WTO, General Council, WTO Agreements and electronic commerce, WT/GC/W/90, 14 July 1998; WTO, Work Programme on electronic commerce, Progress Report to the General Council adopted by the Council for Trade in Services on 19 July 1999, 27 July 1999 S/L/74. See also Ines Willemyns, *The GATS (In)Consistency of Barriers to Digital Services Trade*, Working Paper No. 207 (September 2018), https://ghum.kuleuven.be/ggs/publications/working_papers/2018/wp207-willemyns.pdf.

2.2.2. Would a DST be discriminatory under the GATS?

If DSTs fall under the scope of the GATS, the question arises as to whether they are line with GATS non-discrimination provisions. This section first briefly discusses the most favoured nation and national treatment principles. Second, it analyses the main arguments put forward by the U.S. to claim that DSTs are discriminatory.

a) Non-discrimination principles under the GATS

In WTO law terms, non-discrimination is expressed under two main principles: the most favoured nation principle (GATS Article II:1), which requires WTO members not to discriminate between like services and service suppliers from different WTO members and the national treatment-principle, which prohibits discrimination between domestic services and service suppliers and those of other WTO members (GATS Article XVII).

Under the GATS, both the most-favoured-nation (GATS Article II:2) and the national treatment (GATS Article XVII) principles have a limited scope of application. The most-favoured-national principle applies to measures covered by the GATS under the condition that they have not been explicitly excluded from its scope by the concerned WTO Member (GATS Article II:2). The national treatment principle applies only to 'the sectors inscribed in the [WTO Member's] Schedule of concession'. These limitations imply that the first step to assess whether DSTs might be problematic under the GATS is to verify that the sectors subject to the tax are covered by the GATS non-discrimination principles. France's national treatment commitments are to be found in the European Union's Schedule.[70] With regard to the most favoured nation principle, the EU list of exemptions does not seem to contain any measures that would be relevant for the analysis of DSTs, except with regard to audiovisual services.[71] With regard to the national treatment principle, advertising services undertaken under mode 1 (cross-border trade) are covered, for all Member States, and not subject to any limitations.[72] Similarly, telecommunications services as well as computer and related services are covered at least partially for most Member States under mode 1.[73] In contrast, hotel and restaurant services remain unbound in many Member States.[74] Despite these limitations, the relatively broad scope of DSTs imply that some services will nevertheless be covered by the GATS. Since the EU's limitations do not cover all types of services that would be subject to the French DST, the U.S. could rely on GATS non-discrimination principles to support their claim.

b) Discriminatory treatment between 'like' domestic and foreign digital services

The main claim of the U.S. concerns the difference in treatment between French and U.S. digital services. Such a claim would probably be based on Article XVII of the GATS. However, the U.S. could also rely on

[70] The schedules of specific commitments and lists of Article II exemptions can be found via the following webpage: https://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm.
[71] GATS, European Communities and their Member States, Final List of Article II (MFN) Exemptions, 15 April 1994, GATS/EL/31.
[72] WTO, European Union, Schedule of Specific commitments, 7 May 2019, GATS/SC/157.
[73] *Ibid.*
[74] *Ibid.*

GATS Article II:1. The argument would then go as follows: U.S. digital services are accorded less favourable treatment in comparison to the treatment that France accords to services from France or other WTO Members. Under these two legal bases (GATS Articles II:1 and XVII), two main lines of arguments can support the view that the French DST is discriminatory.

Under the first line of argument, the focus is on the scope of the tax: the French DST is alleged to discriminate against U.S. companies because its scope excludes companies that are 'like' the U.S. companies subject to the tax. According to the U.S., 17 out of the 27 company groups expected to be covered by the French DST are based in the U.S.[75] The other companies are based in China (1), France (1) Germany (2), Japan (2), the Netherlands (1) Norway (1), Spain (1) and the UK (1).[76] This could be explained by two main reasons: first, the tax applies only to big companies, meaning that many small (French) companies are exempted.[77] Second, the scope of the tax is allegedly designed to include digital activities predominantly exercised by U.S. companies while excluding other digital activities where French companies are more successful.[78] In other words, the U.S. considers that both the revenue thresholds as well as the limitations of the DSTs to certain types of digital activities artificially distinguish between 'like' companies in an attempt to target U.S. companies only, or at least to avoid targeting domestic ones. This argument focuses on the 'likeness' analysis, namely whether the services and companies that are subject to the tax are 'like' (i.e. sufficiently similar to) those that are not subject to it. If they are considered to be 'like', then, the mere fact that the tax is imposed on companies that are mostly U.S. companies could amount to a *de facto* discrimination contrary to Articles II:1 and XVII of the GATS. The difference in treatment would result from the fact that the measure at stake, although formally applicable to companies established in any country, is designed in such a way that some domestic or foreign companies are not subject to the tax whereas like U.S. companies are.[79]

The concept of 'likeness' under the GATS has been analysed in past case-law. In *China – Electronic Payment Services,* the Panel made clear that 'like services are services that are in a competitive relationship with each other (or would be if they were allowed to be supplied in a particular market'".[80] As under the GATT,

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[75] See Office of United States Trade Representative, *Report on France's Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974*, 2 December 2019, pp. 26-27.

[76] *Ibid.*

[77] See the U.S. argument about the revenue thresholds (Office of United States Trade Representative, *Report on France's Digital Services Tax,* supra n. 75, section IV.A.3, pp. 41-45).

[78] See the U.S. argument about the selection of the covered services (Office of United States Trade Representative, *Report on France's Digital Services Tax,* supra n. 75, section IV.A.2, pp. 35-41).

[79] One should be cautious when linking the origin of a service or the nationality of its provider to the (main) country with which it is generally identified. Large digital service providers such as those targeted by the DSTs are multinational groups of companies composed of affiliates incorporated in many different countries. They provide services from different locations. Under the GATS, the 'nationality' of companies is determined according mainly to the definitions of Art. XXVIII (especially letters (m) and (n)). The origin of the service and the nationality of its provider are separate notions, and the relevant country may differ according to the mode of supply. See also Duy Dinh, *Rules of Origin for Services. From the Early Days of GATS to the Era of Servicification* (Edward Elgar 2020); Aparna Bhattacharya & Sparsha Janardhan, *Rules of Origin in Services: The Nationality Conundrum* 2 CTIL Discussion Paper Series (2019).

[80] Panel Report, *China – Electronic Payment Services*, WT/DS413/R, adopted 31 August 2012, para. 7.700. See Mireille Cossy, *Determining "likeness" under the GATS: Squaring the circle?* WTO Staff Working Paper No. ERSD-2006-08 (2006), http://dx.doi.org/10.30875/d979431e-en accessed 18 August 2021; Mireille Cossy, *Some Thoughts on the Concept of 'Likeness' in the GATS*, in *GATS and the Regulation of International Trade in Services* 327-357 (CUP 2008, Marion Panizzon et al. eds.)

the determination of 'likeness' between services and service suppliers has to be made on a case-by-case basis: 'If it is determined that the services in question in a particular case are essentially or generally the same in competitive terms, those services would, in our view, be 'like' for purposes of Article XVII'.[81] Consequently, in order to assess whether the services and service suppliers subject to the DST are 'like' the ones that are not subject to it, their competitive relationship should be analysed. First, one needs to determine whether 'small' and 'big' digital service companies can be considered the same in competitive terms. Second, one needs to assess whether a competitive relationship exists between the services that fall under the scope of the tax and those that have been excluded from its scope.

Regarding the distinction between small and big companies, the French authorities have explained that the distinction is aimed at targeting companies with a significant digital footprint. This suggests that France considers that small and big digital companies do not compete on the same terms. We agree with this view: the placement of an advertisement on, for example, Facebook cannot be compared to the placement of an advertisement on the website of a small digital company: the impact on consumers will be fundamentally different. Facebook is 'not like' smaller digital companies. Exempting smaller companies can also be justified by a concern to avoid disproportionate administrative burden for the businesses and collection work for the tax authorities. In a note published in 1993 on the 'applicability of the GATS to tax measures', the GATT Secretariat underlined that 'distinctions without a link to national origin would not normally violate national treatment provisions, such as distinctions based on objective criteria like the level of distribution of profits'.[82] This could indicate that a tax imposed differently on companies depending on their size, their turnover or their profitability is not – as such – discriminatory. Yet, as rightly noted by Mitchell, Voon and Hepburn, it remains uncertain whether WTO members are allowed to distinguish between service suppliers based on their size.[83]

Concerning the distinction between in-scope and out-of-scope activities, the competitive relationship between digital and non-digital advertisement services, between a platform serving as an interface (intermediation services) and a platform selling goods or services (online retailing) directly to the public should be examined. Again, this analysis needs to be done on a case-by-case basis. As such, the distinctions between digital and non-digital services and service providers seem less problematic than the ones based on companies' size. For example, internet advertising seems to fundamentally differ from traditional advertising, and it is likely that these services are not in a competitive relationship, and thus cannot qualify as 'like' services.[84] In the case of platforms serving as an interface (such as eBay and Alibaba) and platforms selling goods or services directly to the public (such as Fnac, a large French retail chain selling books and other items), the distinction might not be as clear at first sight. The case of Amazon – which is subject to the DST when it acts as an interface but not when it directly sells products (i.e. acts as an online retailer) – illustrates that some of these companies look as if they were in a competitive relationship. Indeed, it does

[81] Panel Report, *China – Electronic Payment Services*, para. 7.701-7.702. See also AB Report, *Argentina – Financial Services*, WT/DS453/AB/R, adopted 9 May 2016, paras. 6.21-6.25.
[82] GATT, Group of Negotiations on Services, The Applicability of the GATS to Tax Measures, 1 December 1993, MTN.GNS/W/210.
[83] See Mitchell, Voon, Hepburn, *supra* n. 5, p. 11. See also See Noonan & Plekhanova*, Taxation of Digital Services Under Trade Agreements*, *supra* n. 5, p. 18.
[84] See Noonan & Plekhanova, *Taxation of Digital Services Under Trade Agreements*, *supra* n. 5, p. 17; Noonan & Plekhanova, Digital *Services Tax: Lessons from the Section 301 Investigation*, *supra* n. 5, p. 102.

not necessarily matter for the end-consumers that the book they buy is sold by Amazon itself or by a third party on the Amazon platform. However, the activities subject to the tax are not the sale to the 'end consumers' (i.e. the sale of a book, the rental of a hotel room, the taxi ride) but the services provided to third parties (i.e. the supply of intermediation services allowing third parties to interact with end-consumers). These activities amount to two different types of services, which each generate revenue streams in a different manner. When someone buys a book on Amazon from a third party, Amazon is not selling a book. Instead, it is providing an interface where the sale can take place. The unlikeness is obvious, especially in this case where the comparison is made between selling a good and providing a service. Similarly, Airbnb and Booking are not providing accommodation, but a service in the nature of an online interface, i.e. a completely different type of service, in the category of advertisement or travel agency, from the supply of accommodation. The 'like' services are the accommodation services provided by the French hotel chains and the services provided by the third parties that operate on Booking's website. Those services, which will not be subject to the tax, should not be assimilated to Booking's own services. Therefore, the argument related to the 'likeness' between the services provided by Airbnb, Booking and those provided by French hotel chains is not convincing from an international trade law perspective. Obviously, this does not imply that the distinction between platform operating as interfaces and those directly involved in the sale of goods or the supply of services makes sense from a tax policy point of view. Tax scholars have criticised the distinction for several reasons, including the potential legal uncertainty for companies with business models at the crossroads between interface and the direct supply of goods or services.[85]

To summarise, the fact that most of the companies subject to the French DST are located in the U.S. does not necessarily mean that the French DSTs is targeted at U.S. companies. Under the assumption that big digital companies are a special group of companies that is to be distinguished on the basis of their activity or business model rather than their nationality, DSTs do not appear discriminatory. Rather, they function as excise taxes, such as excise duties on cigarettes.[86] In the same way as some countries – where no local producer of cigarettes is established – are allowed to impose excise duties on (foreign) companies producing cigarettes, a tax on large digital companies should not be found discriminatory due to the mere fact that most companies subject to the tax are foreign rather than domestic companies. The foreign companies subject to the tax are first and foremost 'cigarette'" or 'big digital' companies; their foreign incorporation is not what distinguishes them.

c) Discriminatory treatment due to the neutralisation of the tax for companies paying domestic CIT

The second line of argument made by the U.S. focuses on the difference in tax treatment that could arise due to the fact that the DST can be partially neutralised for those companies that pay corporate income

[85] See Vella, *supra* n. 46, 828-832.

[86] In a similar way as cigarettes' producers have raised concerns as to the health consequences of their products, large digital companies raise concerns in terms of competition, consumer protection and privacy. On these issues, see United Nations Conference on Trade and Development, Competition issues in the digital economy, Note by the UNCTAD secretariat, 1 may 2019, TD/B/C.I/CLP/54. See also Marcin Szczepański, *Is data the new oil? Competition issues in the digital economy* European Parliamentary Research Service (2020); Noonan & Plekhanova, *Taxation of Digital Services Under Trade Agreements*, *supra* 5, 18 (who also refer to the example of cigarettes and alcohol).

tax in France.[87] Under this argument, the discrimination is not be between 'small' and 'big' – mainly U.S. – companies or between in-scope and out-of-scope companies but between those companies that do not pay corporate income tax in France and those that do. For those subject to corporate income tax, the DST is deductible from the profits, which implies that the payment of the DST will lead to a lower corporate income tax for the companies that need to pay it. This relative 'gain' under the corporate income tax could be seen as an indirect way to accord more favourable treatment to French companies (and foreign companies[88] that pay corporate income tax in France) over (U.S.) companies that are not subject to corporate income tax in France.

According to the case-law, the concept of 'less favourable treatment' refers to the negative impact that a measure can have on the conditions of competition for foreign services and services suppliers. According to the Appellate Body in *Argentina – Financial Services,* 'Article XVII:3 calls for an examination of whether a measure modifies the conditions of competition to *the detriment of* services or service suppliers of any other Member' (emphasis added).[89] Moreover, the Appellate Body explained that 'the standard of 'treatment no less favourable' must be based on the impact on the conditions of competition that *results from* the contested measure' (emphasis added).[90] It is not entirely clear what should be defined as the 'contested measure' in the case of DSTs where part of the tax burden might be neutralised through other measures from the tax system, such as the corporate income tax. The way the 'contested measure' will be defined will influence whether it will be perceived as a discriminatory or as a neutral measure. The contested measure can either be (1) the DST, including the relative 'tax gain' resulting from the assimilation of the DST to a cost that reduce the company's profits subject to the corporate income tax; (2) the DST, regardless of the corporate income tax; (3) the corporate income tax (including the 'tax gain' resulting from the deduction); or (4) the combination of the DST and the corporate income tax (including the 'tax gain').

Under the first option (1), the partial neutralisation of the DST through the French corporate income tax could be described as a way to reduce the impact of the DST on French companies. This narrative supposes that the DST effectively applies to some French companies, and thus incidentally weakens or even annihilates the discrimination argument explained above. In this case, the deductibility of the DSTs as a cost from the profits of a company would be assimilated to the application of a differentiated DST with a lower tax rate on companies paying corporate income tax in France and a higher tax rate on those that are not. The rate of the DST would be of 3% on U.S. companies with no physical presence in France and a DST of 2,25% on French companies and foreign companies paying the corporate income tax in France. Indeed, assuming that the French corporate income tax is of 25%, the tax gain linked to the deductibility of the DSTs would be equal to 25% multiplied by the DST tax rate (3%), namely 0,75%, which would be the difference in tax rate imposed on companies that pay the corporate income tax in France. This would clearly point to a discriminatory treatment.

[87] See the U.S. argument about the relationship between the DST and national taxes (Office of United States Trade Representative, *Report on France's Digital Services Tax*, supra n. 75, section IV.A.4, pp. 47-49).
[88] Including U.S. companies.
[89] AB Report, *Argentina – Financial Services*, para. 6.103.
[90] AB Report, *Argentina – Financial Services*, para. 6.104.

Yet, a counter-narrative can be used to defend the French position. Indeed, the possibility to deduct the DST from a company's profits in order to calculate its corporate income tax can be seen as a regular application of corporate income tax rules[91]. The corporate income tax is a tax on a company's profits, which are calculated by deducting all costs (including taxes paid by the company) from its revenues. Therefore, it is a misconception to consider that the assimilation of the DST as a cost for companies paying French income tax gives them a relative "gain" that puts them in a favourable situation in comparison to companies not subject to the French income tax. Rather, their profit level has been reduced due to the DST, which logically results in them having to pay a lower corporate income tax. Companies subject to the French DST but not to French corporate income tax are not being treated less favourably. All these companies are subject to the same tax, namely a 3% tax rate. Some of them are subject to the French corporate income tax and some others are not: foreign companies are the most likely not to be subject to the French corporate income tax, which cannot be seen as a 'less favourable' treatment. When analysed separately (options (2) and (3) above), neither the DST nor the corporate income tax discriminates against foreign companies. Similarly, when analysed in combination (option (4) above), the DST and the French corporate income tax do not discriminate against foreign companies. Domestic companies and foreign companies subject to the French corporate income tax are treated less favourably than foreign companies not subject to the French income tax, not the opposite. The former are subject to both the DST and the corporate income tax whereas foreign companies with no physical presence in France are only subject to the DST. It is only when the DST is analysed in isolation while taking account of the impact of the deduction of its costs from the profits for the calculation of the French corporate income tax (option (1) above) that foreign companies with no physical presence in France seem to be treated less favourably. However, such analysis does not acknowledge the reason why the deduction is granted in the first place: the reason for the deduction is not the domestic origin of the company but the fact that it is subject to the French corporate income tax. With no tax, the company would not benefit from this so-called 'tax gain'. It is easy to see that foreign companies not paying corporate income tax in France are not discriminated against by this measure: not obtaining a 'benefit' thanks to the fact that they are not paying corporate income tax in France can hardly be described as a 'less favourable treatment'.[92]

In France, as in some other countries, there have been discussions as to the possibility to credit the DST from the corporate income tax itself (instead of just considering the DST as part of companies' cost in order to calculate their profits subject to corporate taxation). In practice, such method would lead to a total neutralisation of the DSTs for those companies paying corporate income tax in France. Consequently, countries would have been able to achieve, at the unilateral level, the goal that they are trying to pursue at the multilateral level, namely the taxation of some foreign 'digital' companies with no physical presence

[91] See Noonan & Plekhanova, *Digital Services Tax: Lessons from the Section 301 Investigation*, *supra* n. 5, pp. 106-107.

[92] Note that, in the case *Canada – Autos,* the Panel considered that 'treatment less favourable granted to services supplied outside Canada cannot be justified on the basis of inherent disadvantages due to their foreign character'. With regard to the DST, it is obvious that not being subject to the corporate income tax in France due to their foreign character cannot be seen as an 'inherent disadvantage'; it is rather an 'inherent advantage' due to the current rules in international tax law. Besides, as noted by Noonan & Plekhanova, nothing prevents the U.S. or any other country to correct the alleged discrimination by allowing for the deduction of the DST paid abroad from the taxable income of its resident companies (Noonan & Plekhanova, 'Digital Services Tax: Lessons from the Section 301 Investigation', *supra* n. 5, 106).

on their territory. If they have decided not to follow this path, the main reason is to be found in international tax law rather than international trade law.[93] The credit of the DST from the corporate income tax itself would increase the risk for the DST to be assimilated to a direct tax, which would imply that it falls under the scope of double tax conventions.[94] In their current format, these conventions do not allow for taxes on companies without a physical presence. In contrast, as explained above (2.2.1) under international trade law, if DSTs were to be qualified as direct taxes[95], it would protect them from a violation under the GATS. They could be seen as a tax 'aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members' (GATS Article XIV(d)).

In other words, it is the combined application of international tax and trade law that requires countries to design DSTs as turnover taxes that can only imperfectly pursue their initial objective. It is the combination of international tax and trade law that requires countries to impose DSTs in a non-discriminatory way, including domestic and foreign companies that are already subject to the corporate income tax. It is not surprising that the narrative surrounding DST includes statements that target 'foreign companies', given that the story of DST started as a project to reform the taxation of multinational companies. This does not mean that DSTs are discriminatory: it simply highlights that DSTs are an imperfect solution to a problem that states have not yet been able to solve at the international (tax) level.

d) The role of the legislative intent as evidence of discriminatory treatment

In support of their two line of arguments, the U.S. refers to the intention of the French authorities, which – in their opinion – indicates that their objective was primarily to target U.S. companies.[96] The extent to which the legislative intent should be used as an evidence of the existence or the absence of a discriminatory treatment has been a controversial question under WTO law.[97] Some authors believe that the legislative intent of a measure, its regulatory objective, necessarily influence the assessment of whether a measure is discriminatory, even when the case-law seems to explicitly reject criteria referring to the legislative intent.[98] Others consider that the policy objective of a measure should be disregarded: what matters is how the measure is designed and whether or not it discriminates in practice[99]. The cases

[93] See France, Assemblée nationale, Rapport, *supra* n. 39, p. 172 and following : 'les obstacles juridiques à une imputation sur l'IS ou à une déductibilité renforcée'.
[94] *Ibid.*
[95] It is worth noting that international tax law and WTO law employ their own definition of 'direct taxes', which might lead to inconsistencies. See, however, GATS Article XIV(d), footnote 6: '(…) Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure'.
[96] See Office of United States Trade Representative, *Report on France's Digital Services Tax, supra* n. 75, pp. 31-35.
[97] See, among others, Robert E. Hudec, Science and "Post-Discriminatory" WTO Law26 Boston College International & Comparative Law review 185 (2003); Emily Lydgate, *Sorting out mixed messages under the WTO national treatment principle: a proposed approach,* 15(3) World Trade Review 423 (2016); Stephanie Hartmann, *Comparing the National Treatment Obligations of the GATT and the TBT: Lessons Learned from the EC-Seal Products Dispute*, 40 N.C.J. Int'l L. & Com. Reg. 629, 664-670 (2014) (on the 'conflicted relationship' of the Appellate Body with the 'issue of intent').
[98] On regulatory purpose in the context of the GATT, see Donald H. Regan, *Regulatory Purpose and "Like Products" in Article III:4 of the GATT (With Additional remarks on Article III:2)* 36(3) Journal of World Trade 443 (2002); Robert Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an Aim and Effects Test* 32 Int'l L. 633 (1998).
[99] Hudec, *supra* n. 98, 641.

EC – Bananas III[100] and *Argentina – Financial Services*[101] suggest that this later view should prevail in the context of the WTO and GATS. In *Argentina – Financial Services*, the Appellate Body rejected the panel's interpretation that recognised the relevance of policy objectives to deny that a 'less favourable treatment' had been accorded to foreign services and service suppliers.[102] However, it cannot be derived from this case that the legislative intent is never implicitly used as evidence for 'less favourable treatment'.[103]

If the legislative intent behind a measure is given some weight for its analysis under WTO law, the policy objective pursued by the French authorities could be a crucial element in determining whether the DST violates the GATS. However, it is important to remember that legislative intent is usually equivocal: different actors of the legislative process express a wide variety of views and may in the end agree on a compromise for different kind of reasons that can be in opposition to each other. Moreover, political statements uttered in newspapers and on social media – which are widely quoted by the U.S. in its 301 investigation reports – can hardly be recognised as evidence of legislative intent. Finally, in the specific case of the DSTs, an additional layer of complexity arises due to the difficulty to disentangle legislative intent expressed with regard to the international talks aimed at reforming the taxation of the digitalised economy and legislative intent related to the national debate surrounding DSTs.

3. Conclusion

It is not the first time that WTO law is being invoked as an argument against the adoption of measures departing from traditional tax principles. On numerous occasions in the past, the U.S. had to adapt its tax system because of a violation of WTO law provisions on subsidies.[104] In other occasions, arguments based on WTO law seem to have been used successfully against the adoption of tax reforms.[105] The debate on the DST offers another example where arguments related to international trade law are being used as a legal argument to oppose the adoption of new taxes. Our analysis highlights the weaknesses of this argument. There may be valuable tax policy reasons to oppose DSTs, but arguments based on WTO law do not provide a convincing ground to oppose such taxes.

Based on the analysis of the USTR arguments against the French DST, it is far from clear that DSTs would be considered discriminatory under the GATS. The likeness of the services targeted by the tax to other services that remain outside of its scope is not obvious. The fact that the DST is a deductible expense under

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[100] See AB Report, *EC – Bananans III*, WT/DS27/AB/R, adopted 25 September 1997, para. 241, citing AB Report, *Japan – Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, pp. 18-19.

[101] AB Report, *Argentina-Financial Services*, paras. 6.114 – 6.152.

[102] *Ibid.*

[103] See AB Report, *Argentina-Financial Services,* para. 6.127.

[104] *See* the DISC (L/4422), FSC (DS108) and ETI cases. See, among others, Justus Fischer-Zernin, *DISC and FSC: The Troublesome Relationship between US Tax Law and GATT* 2 Intertax 40 (1986); Justus Fischer-Zernin, *GATT versus Tax Treaties? The Basic Conflicts between International Taxation methods and the Rules and Concepts of the GATT* 21 Journal of World Trade 39 (1987); Yariv Brauner, *International Trade and Tax Agreements May Be Coordinated, but Not Reconciled* 25 Virginia Ta Review 251 (2005); Paul R. McDaniel, *The David R. Tillinghast Lecture Trade Agreements and Income Taxation: Interactions, Conflicts, and Resolutions* 57 Tax Law Review 275 (2004).

[105] *See,* on the destination-based cash flow tax reform proposals in the United States, Jennifer Hillman, *Why the Ryan-Brady Tax Proposal will be found to be inconsistent with WTO Law* (03) IIEL Issue Brief (2017); Schön, *supra* n. 61. *Contra:* Pirlot, *supra* n. 17.

the corporate income tax would not be a cause of discrimination either. The widely shared preoccupation of many different countries, as expressed in the OECD, to adapt international taxation to the digitalised economy also renders discrimination implausible.

The reasoning developed in this article could be extended to the other DSTs that have been being investigated by the USTR. It could also be used to improve the design of such taxes and the justification put forward in the public debates surrounding their enactment. Notwithstanding strong arguments against the discriminatory nature of DST, their proponents should avoid specific features and incautious statements that could be used by the opposing party.