TAXING TECH: RISKS OF AN AUSTRALIAN DIGITAL SERVICES TAX UNDER INTERNATIONAL ECONOMIC LAW

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Along with many other countries, Australia is considering implementing a tax on digital services to try to capture more of the revenues of digital businesses, which may operate without a substantial physical presence in the country. Although traditional approaches to tax may need wholesale revision to adjust to the digitalisation of the global economy, these changes are best pursued through a multilateral process, which is already ongoing through the Organisation for Economic Co-operation and Development and the G20, and in which Australia is participating. An interim Australian digital services tax risks breaching Australia's obligations under international economic law: namely international trade law and international investment law. The relevant trade and investment rules contain certain flexibilities, including some specific references to taxation, that might assist in justifying such a tax. However, the overarching problem that may lead to a breach of at least some of the relevant treaties is that an Australian digital services tax is likely to burden United States businesses disproportionately, particularly if smaller businesses are exempt as is envisaged. In the current global economic and political climate, provoking retaliation of the US or further closure of national economies through the imposition of an Australian digital services tax is undesirable.

CONTENTS

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I INTRODUCTION

Digital flows have contributed significantly to world GDP growth since 2005, while growth in traditional trade and foreign direct investment has faltered since 2011.[1] Yet the digital economy poses major challenges for tax around the world, particularly in the context of services. For example, internet advertising has rapidly expanded and can be supplied without a substantial physical or commercial presence in a given territory[2] and therefore without significant tax liability in that jurisdiction under traditional tax models.[3] Digital intermediation services (or platforms) provided by remote suppliers may also escape tax. These platforms 'are websites and mobile applications that facilitate the exchange of goods or services between third parties', typically relying on 'active user participation and indirect network effects to create a virtual market place',[4] such as online services for sharing or exchanging transport (eg Uber) or accommodation (eg Airbnb).[5]

Members of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS), including Australia, have agreed to try to come to a consensus

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1 Gary Clyde Hufbauer and Zhiyao (Lucy) Lu, 'Can Digital Flows Compensate for Lethargic Trade and Investment?', *Trade and Investment Policy Watch, Peterson Institute for International Economics* (Blog Post, 28 November 2018) <https://piie.com/blogs/trade-investment-policy-watch/can-digital-flows-compensate-lethargic-trade-and-investment>, archived at <https://perma.cc/J5PV-QLGC>.

2 Organisation for Economic Co-operation and Development, *Tax Challenges Arising from Digitalisation: Inclusive Framework on BEPS* (Interim Report, 2018) 185 [440] ('*Tax Challenges Arising from Digitalisation*').

3 See Joseph Bankman, Mitchell Kane and Alan O Sykes, 'Collecting the Rent: The Global Battle to Capture MNE Profits' (Working Paper No 527, John M Olin Program in Law and Economics, Stanford Law School; Working Paper No 18–38, NYU Center for Law, Economics and Organization, New York University School of Law, 25 October 2018) 2 <https://ssrn.com/abstract=3273112>, archived at <https://perma.cc/9ZVM-993G>.

4 *Tax Challenges Arising from Digitalisation* (n 2) 186 [443].

5 On other digital business models, see, eg, Wolfgang Schön, 'Ten Questions about Why and How to Tax the Digitalized Economy' (Working Paper 2017–11, Max Planck Institute for Tax Law and Public Finance, December 2017) 8–10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3091496>, archived at <https://perma.cc/A9SC-XBKP>.

by 2020 as to whether and how the international tax system should be changed, including with respect to the digital economy.[6] This process involves fundamental questions about how taxing rights are allocated between different jurisdictions (nexus rules) and what share of the profits of a multinational corporation are subject to taxation (profit allocation rules).[7]

Australia is now considering whether to introduce an interim digital services tax while a global consensus-based approach on these broader systemic questions is pending. In late 2018, the Australian Treasury launched consultations as to the desirability and design of such a tax ('Treasury Discussion Paper').[8] The consideration of a digital services tax as an interim measure in Australia arises from a number of factors linked to the digital economy, including 'the increasing importance to production of intangible capital (such as intellectual property, goodwill or "brand names")',[9] 'the integration of production in global value chains'[10] and the 'global reach of multinational enterprises'.[11]

Various forms of interim digital services tax have already been announced or proposed in several other jurisdictions, including the United Kingdom[12] and the European Union respectively.[13] The UK has announced, from April 2020, 'a narrowly-targeted 2% tax on the UK revenues of digital businesses that are considered to derive significant value from the participation of their users'.[14] The tax is payable only by businesses meeting certain thresholds, including global annual revenues of at least GBP500 million from 'in-scope business activities'.[15] The European Commission has expressed concern that 'digital business models

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6 See, eg, Organisation for Economic Co-operation and Development, *Inclusive Framework on BEPS: Progress Report July 2016 – June 2017* (Report, 5 July 2017) 25 <http://www.oecd.org/tax/beps/beps-inclusive-framework-progress-report-june-2016-july-2017.htm>, archived at <https://perma.cc/EV3B-69ME>.

7 *Tax Challenges Arising from Digitalisation* (n 2) 167–8 [378].

8 The Treasury, Australian Government, 'The Digital Economy and Australia's Corporate Tax System' (Discussion Paper, The Treasury, October 2018) <https://treasury.gov.au/consultation/c2018-t306182/>, archived at <https://perma.cc/P6HW-SLDD> ('Treasury Discussion Paper').

9 The Treasury, Australian Government, *Risks to the Sustainability of Australia's Corporate Tax Base* (Scoping Paper, July 2013) 15 [54] <https://treasury.gov.au/publication/scoping-paper-on-risks-to-the-sustainability-of-australias-corporate-tax-base/>, archived at <https://perma.cc/U5F4-YFKA>.

10 Ibid.

11 Ibid 16 [58].

12 See, eg, HM Treasury, UK Government, 'Corporate Tax and the Digital Economy: Position Paper Update' (Position Paper, HM Treasury, March 2018) 2–3, 24–9 <https://www.gov.uk/government/consultations/corporate-tax-and-the-digital-economy-position-paper>, archived at <https://perma.cc/PXC7-3RA3>; HM Treasury, UK Government, 'Budget 2018: Digital Services Tax' (Policy Paper, HM Treasury, 2018) <https://www.gov.uk/government/publications/digital-services-tax-budget-2018-brief>, archived at <https://perma.cc/MJ5Y-HNYL>.

13 See, eg, European Commission, Directorate-General for Taxation and Customs Union, *Communication from the Commission to the European Parliament and the Council: Time to Establish a Modern, Fair and Efficient Taxation Standard for the Digital Economy*, Doc No COM/2018/0146, 21 March 2018, 9 ('*Time to Establish a Modern, Fair and Efficient Taxation Standard for the Digital Economy*').

14 HM Treasury and HM Revenue & Customs, *Digital Services Tax: Consultation* (Consultation Paper, November 2018) 4 [1.17] <https://www.gov.uk/government/consultations/digital-services-tax-consultation>, archived at <https://perma.cc/RCS5-2KG6>.

15 Ibid 5 [1.18].

pay less than half the tax rate of businesses with traditional business models'.[16] As an interim measure, the Commission proposed a digital services tax 'at a rate of 3% on gross annual revenues in the EU derived from specific digital services, due in the Member State(s) where the users involved are located'.[17] The services covered would be (i) 'the placement of advertising on digital interfaces' and (ii) 'intermediary digital interfaces or marketplaces whose main purpose is to facilitate the direct interaction between users (such as peer-to-peer sales apps or sites)', again subject to minimum thresholds.[18] The Commission's broad proposal appears to have been abandoned, with France and Germany proposing instead a narrower tax on internet advertising.[19] India and Hungary have already introduced taxes on digital advertising revenues (in India's case, applicable to non-Indian residents only).[20]

The digitalisation of the economy (the Fourth Industrial Revolution) raises difficult questions, including about the distinction between goods and services in international trade law[21] and the characterisation of contractual rights and intellectual property as investments under international investment law.[22] These two branches of international economic law also impose constraints on the ability of countries such as Australia to introduce a tax on digital services. Australia's international trade and investment obligations arise from its membership of the World Trade Organization and from the various preferential trade agreements ('PTAs') and bilateral investment treaties ('BITs') to which it is a party. The EU proposal came under heavy criticism, including in relation to

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16 *Time to Establish a Modern, Fair and Efficient Taxation Standard for the Digital Economy* (n 13) 4.

17 Ibid 9.

18 Ibid.

19 Brett Fortnam, 'France, Germany Punt on European Digital Services Tax Proposal', *Inside US Trade* (online, 4 December 2018) <https://insidetrade.com/daily-news/france-germany-punt-european-digital-services-tax-proposal>, archived at <https://perma.cc/B723-YXDZ>; Mehreen Khan and Jim Brunsden, 'France and Germany Abandon Plans for EU Digital Tax', *Financial Times* (online, 5 December 2018) <https://www.ft.com/content/fc7330d4-f730-11e8-af46-2022a0b02a6c>, archived at <https://perma.cc/7277-XFJ8>.

20 'Treasury Discussion Paper' (n 8) 23–4, citing *Tax Challenges Arising from Digitalisation* (n 2) 142, 145.

21 See generally James Munro, *Emissions Trading Schemes under International Economic Law* (Oxford University Press, 2018); Tania Voon, *Cultural Products and the World Trade Organization* (Cambridge University Press, 2007).

22 See below Part IV(A).

World Trade Organization ('WTO') law[23] and particularly its disproportionate impact on 'a handful of Chinese and US online e-commerce services'.[24]

In practice, if Australia introduces a digital services tax that is not consistent with international economic law, that non-compliance could be challenged by another WTO member in a WTO dispute, by a treaty partner in a PTA or BIT dispute (with respect to trade or investment) or by a foreign investor through investor-state dispute settlement ('ISDS') pursuant to one of Australia's BITs or through the investment chapter of one of its PTAs that allows for such a claim. Although the risks under international investment law are highest and most direct where an ISDS claim is possible, a breach of Australia's international obligations would also arise from any measure inconsistent with Australia's investment treaty obligations. Such a breach entails Australia's state responsibility under international law, whether or not responsibility is invoked by any affected party.[25]

The risk of international litigation makes it imperative for Australia to ensure that any digital services tax it decides to impose is carefully and cautiously designed to comply with the rules to which it has agreed under international economic law. In this article, we identify several possible breaches of international trade law and international investment law that could arise from such a tax. These potential breaches and disputes point to more fundamental difficulties with taking an interim, unilateral approach to resolving tax problems in the digital age, contrary to Australia's customarily open economy and support for a rules-based system of international trade and investment.

In Part II, we show that a digital services tax risks breaching Australia's non-discrimination obligations as a WTO member by imposing a greater burden on services and service suppliers of other WTO members, contrary to the WTO's *General Agreement on Trade in Services* ('*GATS*').[26] We indicate that the general exceptions in that agreement are unlikely to shield some forms of digital services tax.

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[23] See, eg, Gary Clyde Hufbauer and Zhiyao (Lucy) Lu, *The European Union's Proposed Digital Services Tax: A de Facto Tariff* (Policy Brief No 18–15, June 2018) 8–10 <https://piie.com/publications/policy-briefs/european-unions-proposed-digital-services-tax-de-facto-tariff>, archived at <https://perma.cc/9SPK-3Q2R> ('*The EU's Proposed Digital Services Tax*'); Brett Fortnam, 'US Groups Claim European Digital Tax Proposals Violate GATS Commitments', *Inside US Trade* (online, 31 October 2018) <https://insidetrade.com/daily-news/us-groups-claim-european-digital-tax-proposals-violate-gats-commitments>, archived at <https://perma.cc/974X-U5WP>; Nivedita Sen, 'Trade Law Analysis of EU's Digital Tax Proposal', *Linklaters* (Web Page, 3 September 2018) <https://www.linklaters.com/en/insights/blogs/tradelinks/trade-law-analysis-of-eus-digital-tax-proposal>, archived at <https://perma.cc/73JN-D6BA>.

[24] Hosuk Lee-Makiyama, 'The Cost of Fiscal Unilateralism: Potential Retaliation against the EU Digital Services Tax (DST)' (ECIPE Occasional Paper No 05/2018, European Centre for International Political Economy, November 2018) 3 <https://ecipe.org/publications/the-cost-of-fiscal-unilateralism/>, archived at <https://perma.cc/V4JY-52DC>.

[25] See *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 6th Comm, 56th sess, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002) annex, art 1: 'Every internationally wrongful act of a State entails the international responsibility of that State.'

[26] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1B ('*General Agreement on Trade in Services*') ('*GATS*').

For similar reasons to those applying under the *GATS*, we show in Part III that a digital services tax risks breaching Australia's non-discrimination obligations under the chapters on services and electronic commerce in PTAs. While reservations with respect to taxation measures could protect the tax under some of these PTAs, others lack these reservations or subject them to non-discrimination principles that the tax might not fulfil.

Finally, in Part IV, we explain how a digital services tax also risks breaching Australia's investment obligations under its BITs and the investment chapters of its PTAs (collectively, 'investment treaties'), in particular, the national treatment or fair and equitable treatment ('FET') obligations. Although some of these treaties contain exceptions for taxation measures, these exceptions do not always apply to exclude the most relevant ISDS claims that could be made by foreign investors. Furthermore, sophisticated multinational investors could potentially rely on one of Australia's older investment treaties that do not contain such exceptions.

Not all of Australia's PTAs include an ISDS mechanism.[27] Unusually for a United States PTA, the *Australia–United States Free Trade Agreement* ('*AUSFTA*')[28] does not contain a traditional ISDS clause, yet a US investor is perhaps the most likely to be adversely affected and therefore raise an ISDS claim against Australia. Two investors have already attempted to pursue arbitrations against Australia under *AUSFTA*,[29] but the chances of success are low given the terms of the treaty. *AUSFTA* art 11.16.1 merely allows a party to request consultations with the other party regarding the possibility of allowing an ISDS claim in view of 'a change in circumstances affecting the settlement of [investment] disputes'. Nevertheless, US businesses with affiliates in other jurisdictions, such as Hong Kong or Singapore, could seek to rely on Australia's treaties with those jurisdictions — which do contain consent to ISDS — to bring an ISDS claim against Australia. Although in some instances such corporate

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[27] Australia's PTAs in force with the United States and New Zealand do not include investor-state dispute settlement ('ISDS') mechanisms. For further details of ISDS clauses in Australia's investment treaties, see Andrew D Mitchell, Elizabeth Sheargold and Tania Voon, *Regulatory Autonomy in International Economic Law: The Evolution of Australian Policy on Trade and Investment* (Edward Elgar, 2017) 165–81 ('*Regulatory Autonomy in International Economic Law*'). For ISDS clauses in Australia's bilateral investment treaties ('BITs'), see especially at 165–71. For ISDS clauses in Australia's PTAs, see especially at 171–81.

[28] *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) ('*AUSFTA*').

[29] See Jarrod Hepburn, 'US Investors Mired in Australian Dispute Contend That State-to-State Consultations, If Launched, Must Be Followed by Investor-State Arbitration', *Investment Arbitration Reporter* (online, 1 December 2015) <https://www.iareporter.com/articles/us-investors-mired-in-australian-dispute-contend-that-state-to-state-consultations-if-launched-must-be-followed-by-investor-state-arbitration/>, archived at <https://perma.cc/GG7X-NE4R>; Jarrod Hepburn, 'A Second US Investor Tries to Arbitrate under Australia–US FTA, despite Absence of an Investor-State Arbitration Mechanism', *Investment Arbitration Reporter* (online, 24 April 2017) <https://www.iareporter.com/articles/a-second-us-investor-tries-to-arbitrate-under-australia-us-fta-despite-absence-of-an-investor-state-arbitration-mechanism/>, archived at <https://perma.cc/TX28-MQ4M>. However, in relation to one of these proceedings, *The Guardian* has recently reported that Australia 'no longer considers the proceedings to be on foot': Christopher Knaus, 'US Company's Attempt to Sue Australian Government Collapses', *The Guardian* (online, 20 April 2019) <https://www.theguardian.com/australia-news/2019/apr/20/us-companys-attempt-to-sue-australian-government-collapses>, archived at <https://perma.cc/BT7A-5JD5>.

manoeuvring for the purposes of ISDS will fail,[30] the potential for a successful claim remains depending on the circumstances and the tribunal's reasoning.

II AUSTRALIA'S WTO OBLIGATIONS

In this part, we first introduce the longstanding WTO declaration that supports electronic commerce by precluding the imposition of customs duties on electronic transmissions, which could have interpretative and normative implications for an Australian digital services tax. The remainder of this part is dedicated to Australia's *GATS* obligations, where we show the potential for a digital services tax to violate the core non-discrimination obligations of national treatment and most-favoured nation ('MFN') treatment, as well as the problems Australia would have in justifying such a tax under one of the general exceptions in *GATS* art XIV.

A *WTO Declaration on Global Electronic Commerce*

On 20 May 1998, the WTO Ministerial Conference in Geneva adopted the *Declaration on Global Electronic Commerce*, in which WTO members agreed to 'continue their current practice of not imposing customs duties on electronic transmissions'.[31] Subsequent ministerial conferences have extended this undertaking.[32] At the most recent Ministerial Conference in 2017, more than 40 WTO members (including Australia, the EU and the US) issued a joint statement recognising 'the important role of the WTO in promoting open, transparent, non-discriminatory and predictable regulatory environments in facilitating electronic commerce' and 'the benefits of electronic commerce for businesses and consumers across the globe'.[33] In January 2019, Australia joined nearly 50 members in a *Joint Statement on Electronic Commerce*, confirming their 'intention to commence WTO negotiations on trade-related aspects of electronic commerce' and 'encourag[ing] all WTO Members to participate in order to further enhance the benefits of electronic commerce for businesses, consumers and the global economy'.[34]

While ministerial declarations and statements by WTO members may be characterised as soft law in the WTO, they 'may nevertheless have practical effect and … prove legally relevant'.[35] The *Declaration on Global Electronic Commerce*, in particular, might be relevant to the interpretation of the *GATS*, for

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30 See, eg, *Philip Morris Asia Ltd v Australia (Award on Jurisdiction and Admissibility)* (UNCITRAL Arbitral Tribunal, Case No 2012-12, 17 December 2015) 185 [588]. See also Tania Voon, Andrew Mitchell and James Munro, 'Legal Responses to Corporate Manoeuvring in International Investment Arbitration' (2014) 5(1) *Journal of International Dispute Settlement* 41.

31 *Declaration on Global Electronic Commerce*, WTO Doc WT/MIN(98)/DEC/2 (25 May 1998, adopted on 20 May 1998).

32 For the most recent ministerial conference, see *Work Programme on Electronic Commerce*, WTO Docs WT/MIN(17)/65 and WT/L/1032 (18 December 2017) (Ministerial Decision of 13 December 2017): 'We agree to maintain the current practice of not imposing customs duties on electronic transmissions until our next session which we have decided to hold in 2019.'

33 *Joint Statement on Electronic Commerce*, WTO Doc WT/MIN(17)/60 (13 December 2017).

34 *Joint Statement on Electronic Commerce*, WTO Doc WT/L/1056 (25 January 2019).

35 Mary E Footer, 'The (Re)turn to "Soft Law" in Reconciling the Antinomies in WTO Law' (2010) 11(2) *Melbourne Journal of International Law* 241, 247 (citations omitted).

example in shedding light on the 'object and purpose' of the treaty or the 'ordinary meaning' of treaty terms, in accordance with art 31(1) of the *Vienna Convention on the Law of Treaties* ('*VCLT*'),[36] or as a 'subsequent agreement'[37] or 'subsequent practice' regarding the interpretation of the treaty under *VCLT* art 31(3). To the extent relevant to the interpretation of a particular *GATS* term, the *Declaration on Global Electronic Commerce* could also constitute an authoritative interpretation pursuant to art IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization*.[38]

Customs duties (or import tariffs) are not generally applicable to services, because they do not cross the border in the same way that goods do. A tax on digital services, particularly if it burdens foreign services more than Australian-supplied services, could be characterised as a customs duty on electronic commerce in the form of digital services trade. The imposition of such a tax by Australia could be perceived as contrary to the 1998 *Declaration on Global Electronic Commerce* and against the spirit of the joint statements to which Australia was a party in 2017 and 2019.

B *The General Agreement on Trade in Services*

One of the key international trade law questions about a digital services tax is its compatibility with Australia's non-discrimination obligations as a member of the WTO, specifically under the *GATS*. The *GATS* is the WTO agreement relating to trade in services, applying to all WTO members. The *GATS* applies to

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[36] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1). See also *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*Understanding on Rules and Procedures Governing the Settlement of Disputes*') art 3.2 ('*DSU*'):

> The Members recognize that [the WTO dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

[37] See, eg, Appellate Body Report, *United States — Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R (16 May 2012, adopted 13 June 2012) [372]; Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R (4 April 2012, adopted 24 April 2012) [262]–[268] ('*US — Clove Cigarettes*'). See also Panel Reports, *Australia — Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (28 June 2018) [7.2409]. Two of the panel reports are currently under appeal by Honduras and the Dominican Republic: *Australia — Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging — Notification of an Appeal by Honduras under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review*, WTO Doc WT/DS435/23 (25 July 2018); *Australia — Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging — Notification of an appeal by the Dominican Republic under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review*, WTO Doc WT/DS441/23 (28 August 2018).

[38] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995). Cf Appellate Body Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/AB/R (n 37) [251]–[255], [259].

'measures by Members affecting trade in services',[39] excluding services 'supplied in the exercise of governmental authority'.[40] Below, we consider in turn the *GATS* non-discrimination obligations of national treatment and MFN treatment. Essentially, these obligations require that Australia treat services and service suppliers of other WTO members no less favourably than Australia's own services and service suppliers (national treatment) and no less favourably than the services and service suppliers of other WTO members (MFN treatment). An Australian digital services tax, if not carefully designed and applied, could breach both of these obligations. We also explain the difficulties Australia would face in attempting to defend such a tax under the general exceptions in *GATS* art XIV. We begin this section by explaining the way in which services may be traded, as relevant to a tax on trade in digital services.

1 *Modes of Supplying Services*

Under the *GATS*, 'trade in services is defined as the supply of a service' by one of four modes, including:

- Mode 1 (cross-border supply) — 'from the territory of one Member into the territory of any other Member';[41]
- Mode 2 (consumption abroad) — 'in the territory of one Member to the service consumer of any other Member';[42] and
- Mode 3 (commercial presence) — 'by a service supplier of one Member, through commercial presence in the territory of any other Member'.[43]

These three modes are particularly relevant to the digital economy. Mode 1 is perhaps most relevant because a non-Australian service supplier operating outside Australia might supply services to consumers in Australia (eg by way of a website or mobile phone app). Mode 2 may also be relevant in this context, as online consumption via the internet, for example, might be seen as taking place outside Australian territory.[44] Mode 3 is relevant if a foreign service supplier has established a commercial presence (eg a subsidiary) in Australia to supply digital services in Australia.

Thus, the fact that a multinational enterprise operates through a subsidiary in Australia does not mean that it escapes the scope of 'trade in services' as defined in the *GATS*. Similarly, in the WTO, whereas an imported good is distinguished from a locally produced good by the place it was created, the nationality of a service supplier is more complex.[45] Under the *GATS*, a 'service of another Member' means a service supplied 'from or in the territory of that other Member' or, in the case of Mode 3, 'by a service supplier of that other

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39 *GATS* (n 26) art I:1.
40 Ibid art I:3(b).
41 Ibid art I:2(a).
42 Ibid art I:2(b).
43 Ibid art I:2(c).
44 See, eg, *Cross-Border Supply (Modes 1 & 2)*, WTO Doc S/C/W/304 (18 September 2009) (Background Note by the Secretariat) [9].
45 Werner Zdouc, 'WTO Dispute Settlement Practice Relating to the GATS' (1999) 2(2) *Journal of International Economic Law* 295, 324–31.

Member',[46] being a 'natural person or a juridical person'[47] that supplies a service.[48] The question of discrimination discussed below therefore applies even though a digital services tax might apply to both Australian companies and foreign-owned companies in Australia (Mode 3),[49] in addition to circumstances where services are provided from foreign territories (Mode 1 or 2).

2 *The Obligation to Accord National Treatment*

With respect to measures affecting the supply of services, *GATS* art XVII:1 prohibits Australia from according less favourable treatment to services or service suppliers of other WTO members than to Australia's own 'like' services and service suppliers. Under *GATS* art XVII:1, the national treatment obligation applies only to service sectors listed in Australia's *Schedule of Specific Commitments* ('Australia's *GATS Schedule*'),[50] and subject to any limitations listed in that *Schedule*. As discussed further below, Australia's *GATS Schedule* does extend to several service sectors that are relevant to a digital services tax.

(a) Australia's National Treatment Commitments

As noted above, Australia's national treatment obligation under *GATS* art XVII applies only to the extent that Australia has made national treatment commitments in respect of particular service sectors in Australia's *GATS Schedule*. In Australia's *GATS Schedule*, Australia has made full national treatment commitments for Modes 1–3, without limitations, in the following service sectors that could be caught by a digital services tax: advertising services (subject to qualifications mentioned below);[51] computer and related services (including data processing services);[52] news agency services;[53] and tourist guide services.[54] Australia has also made full national treatment commitments for Modes 2–3 with respect to hotel services, travel agencies and tour operator services.[55] The exclusion of Mode 1 national treatment commitments from these service sectors might protect an Australian digital services tax, at least with respect to cross-border supply of these services. Other service sectors in which Australia has made *GATS* commitments include, for example, telecommunications services[56] and financial services,[57] but not audiovisual services.

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46 *GATS* (n 26) art XXVIII(f) (definition of 'service of another Member').
47 Ibid art XXVIII(j) (definition of 'person').
48 Ibid art XXVIII(g) (definition of 'service supplier').
49 Cf Ruth Mason and Leopoldo Parada, 'Digital Battlefront in the Tax Wars' (2018) 92 *Tax Notes International* 1183, 1189, 1191.
50 *Australia — Schedule of Specific Commitments*, WTO Doc GATS/SC/6 (15 April 1994).
51 Ibid 14–15.
52 Ibid 10–11.
53 Ibid 41.
54 Ibid 40.
55 Ibid.
56 *Australia — Schedule of Specific Commitments — Supplement 3*, WTO Doc GATS/SC/6/Suppl.3 (11 April 1997) 2–4.
57 *Australia — Schedule of Specific Commitments — Supplement 4*, WTO Doc GATS/SC/6/Suppl.4 (26 February 1998) 2–7.

One question that may arise with respect to some of these service sectors and commitments is the extent to which they cover digital service provision. The better view is that WTO members' *GATS* schedules extend to services that were not necessarily technically feasible or commercially available at the time the commitments were made. Otherwise, *GATS* commitments would be gradually and unintentionally eroded by technological progress.[58] In the WTO dispute *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, brought by the US against China, the WTO Appellate Body rejected China's contention that the Mode 3 national treatment commitments in China's *GATS* schedule for 'Audiovisual Services: Sound recording distribution services'[59] did not cover electronic distribution of sound recordings, despite China's argument that such distribution had not been technically feasible or commercially available when it made those commitments.[60]

Accordingly, even if Australia did not intend to cover in its *GATS* national treatment commitments, say, online news agency services, those services might nevertheless be covered. Australia's *GATS* commitments with respect to news agency services are specified as covering the United Nations *Provisional Central Product Classification* ('*CPC (1991)*') 962,[61] which covered services not only 'to printed media businesses' but also to 'radio stations', 'television stations' and 'other mass-media businesses, such as motion picture companies'.[62] Today's equivalent is *Central Product Classification (2015)* ('*CPC (2015)*') 844, which covers both '[n]ews agency services to newspapers and periodicals' and '[n]ews agency services to audiovisual media'.[63] This context may suggest that Australia's news agency services extend to both digital and non-digital services.

With respect to advertising services, Australia's national treatment commitments cover

> services by advertising agencies in creating and placing advertising in periodicals, newspapers, radio and television for clients; outdoor advertising; media representation ie sale of time and space for various media; distribution and

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58 See Tania Voon, 'China and Cultural Products at the WTO: WTO Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China — Publications and Audiovisual Products)*, WT/DS363/AB/R (circulated 21 December 2009, adopted 19 January 2010)' (2010) 37(3) *Legal Issues of Economic Integration* 253, 256–7.

59 *The People's Republic of China — Schedule of Specific Commitments*, WTO Doc GATS/SC/135 (14 February 2002) 21.

60 Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (21 December 2009, adopted 19 January 2010) [408], [416(a)] ('*China — Publications and Audiovisual Products*').

61 Statistical Office of the United Nations, Department of International Economic and Social Affairs, *Provisional Central Product Classification*, UN Doc ST/ESA/STAT/SER.M/77 (1991) 90 ('*CPC (1991)*'); *Australia — Schedule of Specific Commitments*, WTO Doc GATS/SC/6 (n 50) (i). See also *Services Sectoral Classification List*, GATT Doc MTN.GNS/W/120 (10 July 1991) (Note by the Secretariat) 7.

62 *CPC (1991)*, UN Doc ST/ESA/STAT/SER.M/77 (n 61) 90.

63 Statistics Divisions, Department of Economic and Social Affairs, United Nations, *Central Product Classification (CPC): Version 2.1*, UN Doc ST/ESA/STAT/SER.M/77/Ver.2.1 (2015) 499 ('*CPC (2015)*').

> delivery of advertising material or samples. Does not include production or broadcast/screening of advertisements for radio, television or cinema.[64]

Australia could contend that the exclusion in the last sentence relating to radio, television and cinema extends by analogy to online advertising. However, radio and television (as well as 'various media') are also mentioned earlier in this passage. Australia's intention appears to have been, in the context of radio and television, to make commitments with respect to services supplied by advertising agencies involving the placement of clients' advertisements on radio and television, but not with respect to the production of advertisements, or the broadcast/screening of advertisements by radio stations or television channels. However, that distinction does not appear to address whether this entry should be read as extending to online advertising.

In the online world, Australia might be seen as having committed to provide national treatment with respect to services supplied by advertising agencies to place advertisements in online media, as well as services supplied by online platforms enabling the placement of advertising in online media (noting the reference in the quoted passage above to 'sale of time and space for various media'). Australia's *GATS Schedule* indicates that it does not cover the whole of *CPC (1991)* 87120 (which covers the '[p]lanning, creating and placement services of advertisements to be displayed through the advertising media'),[65] presumably as a result of the clarification/exclusion regarding radio, television or cinema noted above. However, the inclusion in Australia's commitment of *CPC (1991)* 87190, for '[o]ther advertising services not elsewhere classified', may suggest residual coverage of all advertising services within that classification that are not specified as being excluded. Today, *CPC (2015)* covers '[s]ale of Internet advertising space (except on commission)' (83633), 'sale or leasing of advertising time or space, on commission' (83620) and 'placement of advertisements in media' (83611), which may also suggest a broad scope of advertising services.[66]

(b) De Facto and de Jure Discrimination

Importantly, less favourable treatment could arise even if an Australian measure affecting the supply of services accorded other members' services or service suppliers 'formally identical treatment' (*GATS* art XVII:2). In other words, the national treatment obligation prevents discrimination both de jure (in law) and de facto (in fact). Thus, an Australian measure that applied equally to all services and service suppliers, regardless of their nationality/origin, might still breach the national treatment obligation if, in practice, the measure imposed a disproportionate burden on services or service suppliers of another WTO member (or members) compared to Australian services or service suppliers. In identifying less favourable treatment, the focus of the analysis is on whether the measure 'modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any

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64 *Australia — Schedule of Specific Commitments*, WTO Doc GATS/SC/6 (n 50) 15.

65 *CPC (1991)*, UN Doc ST/ESA/STAT/SER.M/77 (n 61) 72–3; *Australia — Schedule of Specific Commitments*, GATS Doc GATS/SC/6 (n 50) (i), 14.

66 *CPC (2015)*, UN Doc ST/ESA/STAT/SER.M/77/Ver.2.1 (n 63) 487–8.

other Member' (*GATS* art XVII:3).[67] The national treatment obligation thus 'requires a Member to refrain from upsetting or distorting the existing market conditions and opportunities in favour of domestic services and service suppliers'.[68]

(c) Like Services and Service Suppliers

Whether services or service suppliers are 'like' for the purposes of *GATS* art XVII depends on factors such as the nature of the service, its classification (as discussed further below with respect to Australia's *GATS Schedule*), end-uses and consumer preferences regarding the service.[69] Thus, based on the evidence before it, a WTO Panel might regard digital (or online) and non-digital (or offline) versions of services as 'like'. For example, advertising services for news websites might be like advertising services for physical newspapers, because both provide forms of advertising, which consumers may perceive in a similar manner and which may be similarly classified (as discussed further below). Conversely, Australia could argue against this likeness analysis on the basis that the nature of the advertising provided is different (physical versus virtual forms of advertising). That argument loses some force for publications that are produced in both printed and electronic form.

In any case, the WTO Appellate Body has most recently emphasised that the concept of likeness under the *GATS* with respect to non-discrimination is primarily 'concerned with the competitive relationship of services and service suppliers',[70] which is a 'holistic analysis' examining considerations of both services and service suppliers together.[71] Therefore, a key consideration in assessing likeness of digital services such as advertising is the extent to which these advertising services and service suppliers compete in practice, which would need to be established by relevant evidence. The more competition exists between digital and non-digital advertising services in Australia, the greater the chance that these types of services would be regarded as like.

(d) Less Favourable Treatment

A digital services tax could apply,

> for example, to a website provider that charges other websites for promoting links to their site or where a product manufacturer pays an advertising agency or social media platform for placing an advertisement for that product on the platform.[72]

If the suppliers of digital advertising services subject to such a tax were predominantly foreign, while the suppliers of non-digital advertising services not

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67 See also Appellate Body Report, *Argentina — Measures Relating to Trade in Goods and Services*, WTO Doc WT/DS453/AB/R (14 April 2016, adopted 9 May 2016) [6.106] ('*Argentina — Financial Services*').

68 Ibid [6.145].

69 Ibid [6.30]–[6.32]; Tania Voon, 'Discrimination in International Mobile Roaming Regulation: Implications of WTO Law' (2013) 16(1) *Journal of International Economic Law* 91, 104.

70 Appellate Body Report, *Argentina — Financial* Services, WTO Doc WT/DS453/AB/R (n 67) [6.25]. See also at 32 [6.34].

71 Ibid [6.29].

72 *Tax Challenges Arising from Digitalisation* (n 2) 185 [441].

subject to the tax were predominantly Australian, this distinction is likely to breach the national treatment obligation. The tax would be seen as modifying the conditions of competition in favour of Australian suppliers of advertising services if they were overall less likely to be caught by the digital services tax. Traditionally, the focus of this analysis would be on the group of Australian services and service suppliers, in contrast to the group of services and service suppliers from one or more other WTO members.[73] The regulatory objective of the measure is not relevant in identifying less favourable treatment under *GATS* art XVII,[74] although it is relevant to the *GATS* general exceptions as discussed further below.[75] Moreover, the fact that a foreign service supplier may not be subject to certain domestic taxes (eg Australian corporate income tax based on residence) would not reverse any less favourable treatment with respect to the challenged digital services tax.

The Treasury Discussion Paper considers the inclusion of an income or turnover threshold, above which a digital services tax would be imposed, to avoid disadvantaging 'start-ups and small business'.[76] A greater burden is likely to be imposed on foreign services and service suppliers if the threshold above which a digital services tax is imposed in Australia is set high enough, at a point at which the services and service suppliers most likely to be subject to the tax are foreign (eg most notably from the US[77] or perhaps China) as opposed to Australian. The inclusion of any threshold below which service suppliers are exempt from the tax enhances the risk of a breach of Australia's national treatment obligation, particularly because the comparison here in terms of likeness would be between digital service suppliers below the threshold and digital service suppliers above the threshold (rather than between digital and non-digital services). Australia could argue that the service suppliers below the chosen threshold are, for that reason, not like the service suppliers above the threshold. However, the relevance of criteria such as the size of suppliers in

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73 In the context of trade in goods, see, eg, Appellate Body Reports, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (22 May 2014, adopted 18 June 2014) [5.117] ('*EC — Seal Products*'). In the context of technical barriers to trade, see, eg, Appellate Body Report, *United States — Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Recourse to Article 21.5 of the DSU by Mexico*, WTO Doc WT/DS381/AB/RW (20 November 2015, adopted 3 December 2015) [7.27] ('*US — Tuna II (Mexico)*'). See also Lothar Ehring, '*De Facto* Discrimination in World Trade Law: National and Most-Favoured-Nation Treatment — or Equal Treatment?' (2002) 36(5) *Journal of World Trade* 921, 923–8; Nicolas F Diebold, 'Standards of Non-Discrimination in International Economic Law' (2011) 60(4) *International and Comparative Law Quarterly* 831, 842–3.

74 Appellate Body Report, *Argentina — Financial Services*, WTO Doc WT/DS453/AB/R (n 67) [6.106]. See also Andrew D Mitchell, David Heaton and Caroline Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Edward Elgar, 2016) 27–8, 119–20.

75 Appellate Body Report, *Argentina — Financial Services*, WTO Doc WT/DS453/AB/R (n 67) [6.115].

76 'Treasury Discussion Paper' (n 8) 28. See also *Tax Challenges Arising from Digitalisation* (n 2) 188 [452].

77 United Nations Conference on Trade and Development, *World Investment Report 2017: Investment and the Digital Economy*, UN Doc UNCTAD/WIR/2017 (2017) 174: 'Most digital MNEs are from developed countries, in particular the United States. The share of digital MNEs based in the United States is high, at almost two thirds.' See also, eg, *The EU's Proposed Digital Services Tax* (n 23) 5–6, 8–9.

determining their likeness remains uncertain,[78] particularly if the two groups are in competition, as mentioned above.

The imposition of a threshold above which a digital services tax applies is one example of providing an exemption: below the threshold, service suppliers are exempt from the tax. Any other exemption for particular services or service suppliers would similarly need to be justified and supported by evidence. Exemptions are likely to involve drawing distinctions between like services and service suppliers, increasing the chance of treating services and service suppliers of other WTO members less favourably than like Australian services and service suppliers, contrary to the national treatment obligation.

3 *The Obligation to Accord MFN Treatment*

Under *GATS* art II:1, WTO members must 'accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country'. This obligation applies across all services and not just to those services in which a member has made national treatment or other *GATS* commitments, pursuant to its schedule. A member may nevertheless maintain measures inconsistent with this requirement to the extent that they are listed in the member's list of MFN exemptions (*GATS* art II:2). Australia now maintains MFN exemptions only with respect to audiovisual services, in connection with audiovisual co-productions and '[m]easures taken to respond to any unreasonable measures imposed on Australian services or service suppliers by another Member'.[79] Neither of these exemptions is likely to be relevant in general to an Australian tax on digital services. Therefore, Australia needs to ensure that any digital services tax does not provide less favourable treatment to any services or service suppliers of another WTO member, including with respect to audiovisual services, financial services,[80] computer services, telecommunications services, tourism services and news agency services.

The analysis of likeness and less favourable treatment is similar under *GATS* art II (MFN treatment) and *GATS* art XVII (national treatment), in both cases extending to de jure and de facto discrimination. The main difference is that the comparison for the purpose of Australia's MFN obligation is between services and service suppliers of one WTO member with services and service suppliers of one or more other WTO members. In particular, if the burden of a digital services tax fell particularly on services or service suppliers of the US, this would likely entail less favourable treatment of US services and service suppliers

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78 See, eg, Zdouc (n 45) 332–4; Mireille Cossy, 'Some Thoughts on the Concept of "Likeness" in the GATS' in Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds), *GATS and the Regulation of International Trade in Services* (Cambridge University Press, 2008) 327, 336–7. But see *The Applicability of the GATS to Tax Measures*, GATT Doc MTN.GNS/W/210 (1 December 1993) (Note by the Secretariat).

79 *Australia — Final List of Article II (MFN) Exemptions*, WTO Doc GATS/EL/6 (15 April 1994) 2. See also *Australia — List of Article II (MFN) Exemptions — Supplement 1*, WTO Doc GATS/EL/6/Suppl.1 (26 February 1998).

80 An exception applies for prudential measures: *GATS* (n 26) annex ('*Annex on Financial Services*') art 2. See generally Andrew D Mitchell, Jennifer K Hawkins and Neha Mishra, 'Dear Prudence: Allowances under International Trade and Investment Law for Prudential Regulation in the Financial Services Sector' (2016) 19(4) *Journal of International Economic Law* 787, 789–90.

in comparison with the treatment of services and service suppliers of other WTO members, contrary to Australia's MFN obligation. Again, the imposition of a threshold exempting smaller suppliers from the tax would increase this risk if suppliers of WTO members other than the US are more likely to be exempt.

4 *General Exceptions to GATS Obligations*

If an Australian digital services tax was inconsistent with the MFN or national treatment obligations under the *GATS*, Australia could nevertheless avoid breach if it met the requirements of the general exceptions in *GATS* art XIV, which relevantly provides:

> 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;
>
> …
>
> (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement …
>
> (d) inconsistent with Article XVII [national treatment], 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 [MFN], provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.[81]

(a) GATS Article XIV(a): Public Morals and Public Order

Beginning with *GATS* art XIV(a) (which corresponds generally to art XX(a) of the *General Agreement on Tariffs and Trade 1994* ('*GATT*')),[82] WTO case

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[81] *GATS* (n 26) art XIV (citations omitted).

[82] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') ('*GATT*').

law makes clear that the notion of public morals (and public order)[83] is quite broad.[84] However, the specific references to taxation in the broader context of *GATS* art XIV may make it harder to argue that a tax measure is necessary to protect public morals or maintain public order, particularly if such a tax is primarily directed at increasing or maintaining tax revenue. In *Brazil — Certain Measures concerning Taxation and Charges*, a WTO Panel found that the objective of a Brazilian program exempting accredited companies from paying certain taxes related to digital television equipment (with accreditation requirements skewed towards Brazilian sales and products) fell within the scope of 'public morals' under *GATT* art XX(a), on the basis of a Brazilian concern 'to bridge the digital divide and promote social inclusion'.[85] However, the Panel rejected Brazil's defence under art XX(a) because 'the discriminatory aspects of the … programme do not … bear any relation to bridging the digital divide, or social inclusion'.[86] Those aspects were therefore not 'necessary' to protect public morals within the meaning of art XX(a).[87]

(b) GATS Article XIV(e): Double Taxation Agreements and Other International Arrangements

GATS art XIV(e) (which exempts only MFN breaches) is also unlikely to apply to a digital services tax of the kind proposed by the Treasury Discussion Paper, given that this tax is by definition an interim Australian measure in the absence of a more comprehensive international solution. A digital services tax of this kind would not flow from tax avoidance provisions in an international agreement or arrangement. Similarly, therefore, *GATS* art XXII:3, which precludes members from alleging national treatment violations in WTO disputes with respect to measures 'within the scope of an international agreement between them relating to the avoidance of double taxation', would also not apply.

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83 See, eg, Panel Report, *European Union and Its Member States — Certain Measures Relating to the Energy Sector*, WTO Doc WT/DS476/R (10 August 2018) [7.1156], [7.1202], [7.1208], [7.1224], [7.1239]–[7.1240] ('*EU — Energy Package*'). The panel report is currently under appeal by the European Commission and the Russian Federation: *European Union and Its Member States — Certain Measures Relating to the Energy Sector — Notification of an Appeal by the European Union under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review*, WTO Doc WT/DS476/6 (25 September 2018); *European Union and Its Member States — Certain Measures Relating to the Energy Sector — Notice of an Other Appeal by the Russian Federation under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 23 of the Working Procedures for Appellate Review*, WTO Doc WT/DS476/7 (28 September 2018).

84 See, eg, Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (7 April 2005, adopted 20 April 2005) [296]; Appellate Body Report, *China — Publications and Audiovisual Products*, WTO Doc WT/DS363/AB/R (n 60) [243]. With respect to the *GATT* art XX(a), see, eg, Appellate Body Report, *Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear*, WTO Doc WT/DS461/AB/R (7 June 2016, adopted 22 June 2016) [5.85], [5.89]; Appellate Body Reports, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (n 73) [5.199]–[5.201].

85 Panel Reports, *Brazil — Certain Measures concerning Taxation and Charges*, WTO Docs WT/DS472/R and WT/DS497/R (30 August 2017, adopted 11 January 2019) [7.568].

86 Ibid [7.571]. See also at [7.575].

87 Ibid [7.622].

(c) GATS Article XIV(c): Securing Compliance with WTO-Consistent Regulations

GATS art XIV(c) (corresponding with *GATT* art XX(d)) might more readily apply to a digital services tax. In *Argentina — Measures Relating to Trade in Goods and Services*, with respect to one of Argentina's challenged measures,

> the Panel found that, by taxing the profits earned from certain financial services supplied by service suppliers of non-cooperative countries at a higher rate than like services from service suppliers of cooperative countries, this measure contributes to protecting the tax base because it discourages the undeclared outflow of capital and the false payment of interest.[88]

This finding was rendered moot on appeal because the Appellate Body reversed the Panel's findings on the underlying non-discrimination obligations, and Panama did not appeal this finding. Panama did appeal certain other aspects of the Panel's reasoning on *GATS* art XIV(c), but the Appellate Body rejected these parts of Panama's appeal.[89]

For a digital services tax to be justified under *GATS* art XIV(c), Australia would need to show that the tax was '"necessary" to secure compliance with' other Australian laws or regulations that were themselves consistent with WTO law.[90] As this tax appears to be directed at tax avoidance only in a very general sense, rather than targeting conduct that is presently unlawful in Australia, a defence under art XIV(c) is unlikely to succeed.

(d) GATS Article XIV(d): Direct vs Indirect Taxes

GATS art XIV(d) might also apply to a digital services tax, depending on its design and operation (including relevant concepts in Australian law, pursuant to the interpretative clarification in footnote 6 of the *GATS*).[91] However, this exception applies only to the national treatment obligation (ie not excusing an MFN violation) and only to direct rather than indirect taxes. The *GATS* defines 'direct taxes' as

> all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from 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.[92]

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88 Appellate Body Report, *Argentina — Financial Services*, WTO Doc WT/DS453/AB/R (n 67) [6.231].

89 Ibid [6.200]–[6.201], [6.218], [6.241].

90 Ibid [6.202]–[6.204].

91 See *Taxation Issues Related to Article XIV(d)*, GATT Doc MTN.GNS/W/178/Add.1 (30 November 1993) (Note by the Secretariat — Addendum).

92 *GATS* (n 26) art XXVIII(o). For further discussion of the distinction between direct and indirect taxes in the WTO and WTO disputes relating to taxation, see Michael Daly, 'Is the WTO a World Tax Organization? A Primer on WTO Rules for Tax Policymakers' (Technical Notes and Manuals No 2016/03, Fiscal Affairs Department, International Monetary Fund, March 2016) <https://www.imf.org/en/Publications/TNM/Issues/2016/12/31/Is-the-WTO-a-World-Tax-Organization-A-Primer-for-WTO-Rules-for-Policy-Makers-43822>, archived at <https://perma.cc/A7TM-E65Q>.

A digital services tax applicable to each digital service transaction, similar to Australia's GST or an excise tax,[93] would likely be characterised as an indirect rather than direct tax. In contrast, a digital services tax imposed on a proportion of a service supplier's income (eg that portion attributable to the supply of digital services in Australia) would be more likely to qualify as a tax on 'elements of income' and therefore to be regarded as 'aimed at ensuring the equitable or effective imposition or collection of direct taxes' within the meaning of the exception in *GATS* art XIV(d) (as elaborated in *GATS* footnote 6).[94]

(e) GATS Article XIV Chapeau

To benefit from the exception, Australia would also need to show that the measure meets the stringent requirements of the 'chapeau' of art XIV, ie that it is not applied in a manner constituting 'arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services'.[95] A measure that applied particularly to foreign service suppliers (eg US service suppliers), for example, through the inclusion of a threshold that tended to separate Australian from foreign suppliers (as discussed above), is likely to be seen as entailing trade discrimination or restriction contrary to the chapeau. Australia would need to provide sufficient evidence that this distinction had a legitimate rationale linked to the overarching purpose of the measure,[96] yet the exemption for smaller suppliers appears to run counter to the purpose of ensuring tax coverage of digital services.

III AUSTRALIA'S OBLIGATIONS UNDER PREFERENTIAL TRADE AGREEMENTS[97]

Australia currently has 11 PTAs in force that cover services trade.[98] Australia has also signed four additional PTAs that are not yet in force.[99] In this part we

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93 See *Tax Challenges Arising from Digitalisation* (n 2) 178 [406].

94 Cf Daniela Hohenwarter et al, 'Qualification of the Digital Services Tax under Tax Treaties' (2019) 47(2) *Intertax* 140.

95 *GATS* (n 26) art XIV.

96 See, eg, Panel Report, *EU — Energy Package*, WTO Doc WT/DS476/R (n 83) [7.1244], 336 [7.1251], [7.1253]–[7.1254]; Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WR/DS381/AB/RW (n 73) [7.316]; Appellate Body Reports, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (n 73) [5.306]; Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (3 December 2007, adopted 17 December 2007) [228]; Tania Voon and Hope Johnson, 'Sustainable Healthy Food Choices: Dietary Guidelines and International Economic Law' (2018) 18(1) *QUT Law Review* 45, 54–6.

97 See generally Mitchell, Sheargold and Voon (n 27) 84–5, 114–15.

address the 15 PTAs that have been signed and for which the agreed text is available. Of these 15, the *ANZCERTA Services Protocol* excludes taxation measures from its scope[100] and therefore would not raise problems for an Australian digital services tax and is not discussed further in this article. The other 14 PTAs have more limited exceptions for taxation discussed below and otherwise impose non-discrimination obligations (national treatment and MFN treatment) similar to the *GATS* with respect to cross-border service supply, as well as distinct obligations concerning electronic commerce. A digital services tax in Australia could breach some of these different obligations, even though most Australian PTAs provide an exception that goes beyond that in *GATS* art XIV(d), to protect the equitable or effective imposition or collection of taxes.

A *Non-Discrimination Obligations for Mode 1 Service Supply*

In this section, we show how several of Australia's PTAs impose non-discrimination obligations with respect to cross-border (Mode 1) supply of services that could apply to a digital services tax. We begin by explaining the different structure of obligations in different Australian PTAs, according to a 'negative list' or 'positive list', all nevertheless largely leaving intact the non-discrimination obligations identified above under the *GATS*. Next, we show how

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98 *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010), as amended by *First Protocol to Amend the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 26 August 2014, [2015] ATS 14 (entered into force 1 October 2015) ('*AANZFTA*'); *Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations — Trade Agreement*, signed 18 August 1988, [1988] ATS 20 (entered into force 1 January 1989) ('*ANZCERTA Services Protocol*'); *AUSFTA* (n 28); *Australia–Chile Free Trade Agreement*, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009) ('*ACLFTA*'); *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) ('*ChAFTA*'); *Agreement between Australia and Japan for an Economic Partnership*, signed 8 July 2014, [2015] ATS 2 (entered into force 15 January 2015) ('*JAEPA*'); *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014) ('*KAFTA*'); *Malaysia–Australia Free Trade Agreement*, signed 22 May 2012, [2013] ATS 4 (entered into force 1 January 2013) ('*MAFTA*'); *Singapore–Australia Free Trade Agreement*, signed 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003), as amended from 24 February 2006, 13 February 2007, 11 October 2007, 2 September 2011 and 1 December 2017 ('*SAFTA*'); *Australia–Thailand Free Trade Agreement*, signed 5 July 2004, [2005] ATS 2 (entered into force 1 January 2005) ('*TAFTA*'); *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018, [2018] ATS 23 (entered into force 30 December 2018) ('*CPTPP*'). The *CPTPP* entered into force for Australia, Canada, Japan, Mexico, New Zealand and Singapore on 30 December 2018 and for Vietnam on 14 January 2019. See also *Trans-Pacific Partnership Agreement*, signed 4 February 2016, [2016] ATNIF 2 (not in force) ('*TPP*'). Article 1 of the *CPTPP* incorporates the provisions of the *TPP* with some exceptions: *CPTPP* (n 98) art 1.1. All references to the *CPTPP* provisions in this paper should be understood as references to the *TPP* operating through art 1.1 of the *CPTPP*.

99 *Pacific Agreement on Closer Economic Relations Plus*, signed 14 June 2017, [2017] ATNIF 42 (not yet in force) ('*PACER Plus*'); *Free Trade Agreement between Australia and the Republic of Peru*, signed 12 February 2018, [2018] ATNIF 5 (not yet in force) ('*PAFTA*'); *Free Trade Agreement between Australia and Hong Kong, China*, signed 26 March 2019, [2019] ATNIF 20 (not yet in force) ('*A–HKFTA*'); *Indonesia–Australia Comprehensive Economic Partnership*, signed 4 March 2019, [2019] ATNIF 17 (not yet in force) ('*IA–CEPA*').

100 *ANZCERTA Services Protocol* (n 98) art 15: 'The provisions of this Protocol shall not apply to any taxation measure.'

some of Australia's newer PTAs have restricted these obligations by shifting to a focus on 'like circumstances' rather than 'like service suppliers', which could allow greater flexibility for an Australian digital services tax under those treaties. Finally, we identify the various restrictions imposed on non-discrimination obligations under Australia's PTAs with respect to taxation measures, which apply in addition to the identification of 'non-conforming' taxation measures as discussed further below.

1 *Negative and Positive Listing in Australia's PTAs*

As indicated in Table 1, all of Australia's 12 signed services PTAs that do not exclude taxation measures altogether[101] impose a national treatment obligation similar to that in *GATS* art XVII, extending at least to the cross-border supply of services (Mode 1). Most of these PTAs also include an MFN treatment obligation similar to that in *GATS* art II. These obligations are structured in different ways, some pursuant to a negative list (as with *GATS* art II, applying except to the extent non-conforming measures are listed, as discussed further below) and some pursuant to a positive list (as with *GATS* art XVII, applying only to the extent that the relevant party makes commitments in that service sector). The exclusion of the MFN obligation from some of Australia's PTAs removes the risk of a breach of that obligation through a digital services tax with respect to those PTAs. However, Australia provides essentially the same national treatment commitments in these PTAs as in the *GATS* in sectors relevant to a digital services tax, such as news agency services, advertising services and tourist guide services.[102] In addition, the conversion from a positive list to a negative list for national treatment in several of Australia's PTAs increases the risk of a breach of national treatment compared to Australia's *GATS* obligations, except to the extent that taxation measures are excluded by a restriction, exception or non-conforming measure ('NCM') in those PTAs, as discussed further below.

Table 1: Non-Discrimination Obligations in Australia's PTAs

PTA	Entry into Force	National Treatment	MFN Treatment
AUSFTA[103]	2005	negative list	negative list
TAFTA[104]	2005	positive list	×
AANZFTA[105]	2009	positive list	×
ACLFTA[106]	2009	negative list	negative list
MAFTA[107]	2013	positive list	×

101 As noted above, the *ANZCERTA Services Protocol* excludes taxation measures: see above n 100 and accompanying text.
102 *AANZFTA* (n 98) annex 3; *MAFTA* (n 98) annex 3; *PACER Plus* (n 99) annex 7-A; *TAFTA* (n 98) annex 8.
103 *AUSFTA* (n 28) art 10.6.
104 *TAFTA* (n 98) art 810.1.
105 *AANZFTA* (n 98) ch 8 art 3.1.
106 *ACLFTA* (n 98) art 9.7.
107 *MAFTA* (n 98) art 8.3.1.

PTA	Entry into Force	National Treatment	MFN Treatment
KAFTA[108]	2014	negative list	negative list
ChAFTA[109]	2015	negative list (Australia)	negative list (Australia)
JAEPA[110]	2015	negative list	negative list
SAFTA[111]	2003, as amended 2017	negative list	negative list
CPTPP[112]	30 December 2018	negative list	negative list
PACER Plus[113]	TBC	positive list	negative list
PAFTA[114]	TBC	negative list	negative list
A–HKFTA[115]	TBC	negative list	negative list
IA–CEPA[116]	TBC	negative list	negative list

2 *Like Circumstances vs Like Services and Service Suppliers*

The *CPTPP*, *PAFTA* and *SAFTA* provide some additional flexibility with respect to a digital services tax by conditioning non-discrimination obligations on services and service suppliers in 'like circumstances' rather than 'like services and service suppliers', with a footnote clarification that the assessment of like circumstances 'depends on the totality of the circumstances, including whether the relevant treatment distinguishes between services or service suppliers on the basis of legitimate public welfare objectives'.[117] This kind of clarification on the core non-discrimination obligations could reduce the likelihood of a finding of like circumstances and less favourable treatment, compared to the analysis discussed above with respect to the *GATS*.

3 *Restrictions on Non-Discrimination for Taxation Measures*

Subject to qualifications discussed below with respect to exceptions and NCMs, non-discrimination obligations in Australia's PTAs could pose problems for an Australian digital services tax for the same reasons as explained above with respect to the *GATS* non-discrimination obligations. However, several of Australia's PTAs, in addition to including general exceptions and taxation exceptions, restrict the application of national treatment and MFN treatment

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108 *KAFTA* (n 98) art 7.6.

109 *ChAFTA* (n 98) art 8.9. See generally Colin B Picker, Heng Wang and Weihuan Zhou (eds), *The China–Australia Free Trade Agreement: A 21st-Century Model* (Hart Publishing, 2018).

110 *JAEPA* (n 98) art 9.7.

111 *SAFTA* (n 98) ch 7 arts 7.1–7.2.

112 *CPTPP* (n 98) arts 10.7.1–10.7.2. See generally Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar, 2013).

113 *PACER Plus* (n 99) ch 7 arts 6.1, 3.2.

114 *PAFTA* (n 99) arts 9.7.1–9.7.2.

115 *A–HKFTA* (n 99) art 7.7.

116 *IA–CEPA* (n 99) art 9.7.

117 *CPTPP* (n 98) arts 10.3.1, 10.4; *PAFTA* (n 99) arts 9.3.1, 9.4; *SAFTA* (n 98) ch 7 arts 4.1, 5.

obligations, as indicated in Table 2. These restrictions limit Australia's non-discrimination obligations with respect to the cross-border (Mode 1) supply of a service, but they still leave scope for some application to a digital services tax in some PTAs.

Table 2: Restrictions on Australia's Non-Discrimination Obligations in PTAs for Taxation Measures Affecting Cross-Border Service Supply

PTA	Restrictions on Non-Discrimination for Taxation Measures
AANZFTA	National treatment applies only to the extent of *GATS* art XVII.[118]
ACLFTA	National treatment applies only where the taxation measure is an indirect tax or alternatively where it is a direct tax that relates to the purchase or consumption of particular services. MFN obligation applies only where the taxation measure is an indirect tax.[119]
A–HKFTA	National treatment and MFN treatment apply only to the extent of the *GATS*.[120]
AUSFTA	National treatment applies to taxation measures on income or the taxable capital of corporations that relate to the purchase or consumption of particular services. MFN obligation does not apply to taxation measures on income or the taxable capital of corporations.[121]
ChAFTA	National treatment and MFN treatment apply only to the extent of the *GATS*.[122]
CPTPP	National treatment applies to taxation measures on income or the taxable capital of corporations that relate to the purchase or consumption of particular services. MFN obligation does not apply to taxation measures on income or the taxable capital of corporations.[123]
IA–CEPA	National treatment and MFN treatment apply only to the extent of the *GATS*.[124]
JAEPA	National treatment applies to taxation measures, but MFN obligation applies only where the taxation measure is an indirect tax.[125]
KAFTA	National treatment applies to taxation measures, but MFN obligation applies only where the taxation measure is an indirect tax.[126]
MAFTA	National treatment applies only to the extent of *GATS* art XVII.[127]

118 *AANZFTA* (n 98) ch 15 art 3.2(a). *AANZFTA* contains no MFN obligation for Mode 1 service supply.
119 *ACLFTA* (n 98) arts 22.3.4(a)–(b).
120 *A–HKFTA* (n 99) art 19.5.3(a).
121 *AUSFTA* (n 28) arts 22.3.4(a)–(b).
122 *ChAFTA* (n 98) art 16.4.3.
123 *CPTPP* (n 98) arts 29.4.6(a)–(b).
124 *IA–CEPA* (n 99) art 17.4.3(a).
125 *JAEPA* (n 98) arts 1.8.2(c)–(d).
126 *KAFTA* (n 98) arts 22.3.2(b)–(c).
127 *MAFTA* (n 98) art 18.3.2(a). *MAFTA* contains no MFN obligation for Mode 1 service supply.

PTA	Restrictions on Non-Discrimination for Taxation Measures
PACER Plus	National treatment and MFN treatment apply only to the extent of the *GATS*.[128]
PAFTA	National treatment and MFN treatment apply only to the extent of the *GATS*.[129]
SAFTA	MFN obligation does not apply to taxation measures. National treatment applies only to the extent of *GATS* art XVII.[130]
TAFTA	National treatment applies only to the extent of *GATS* art XVII.[131]

B *Electronic Commerce Obligations*

Australia's 10 PTAs in force that cover taxation measures, as well as the *A–HKFTA*, *IA–CEPA* and *PAFTA*, contain separate electronic commerce chapters.[132] These chapters contain several important obligations and declarations that are relevant to an Australian digital services tax:

- Recognition of the economic importance of electronic commerce and the need to avoid unnecessary barriers to its use and development.[133]
- An obligation not to impose customs duties on electronic transmissions between a person of a party and a person of the other party.[134] This obligation is subject to a qualification, for greater certainty, that it does not preclude a party from imposing internal taxes on content transmitted electronically as long as they are imposed in a manner consistent with the PTA.[135] This qualification is rather confusing and circular but may raise doubts about the suggestion that a digital services tax could constitute a customs duty on electronic commerce contrary to this obligation and to the WTO *Declaration on Global Electronic Commerce*.
- An obligation of non-discrimination (national treatment and MFN treatment) with respect to digital products (in comparison with 'other like digital products') 'created, produced, published, contracted for, commissioned or first made available on commercial terms in the

128 *PACER Plus* (n 99) ch 11 art 5.2(a).

129 *PAFTA* (n 99) art 28.4.3(a).

130 *SAFTA* (n 98) ch 17 arts 3.2–3.3.

131 *TAFTA* (n 98) art 1607.1(a). *TAFTA* contains no MFN obligation for Mode 1 service supply.

132 *AANZFTA* (n 98) ch 10; *ACLFTA* (n 98) ch 16; *AUSFTA* (n 28) ch 16; *ChAFTA* (n 98) ch 12; *JAEPA* (n 98) ch 13; *KAFTA* (n 98) ch 15; *MAFTA* (n 98) ch 15; *SAFTA* (n 98) ch 14; *TAFTA* (n 98) ch 11; *CPTPP* (n 98) ch 14; *IA–CEPA* (n 99) ch 13; *A–HKFTA* (n 99) ch 13; *PAFTA* (n 99) ch 13. *PACER Plus* does not contain an electronic commerce chapter. As noted above, the *ANZCERTA Services Protocol* excludes taxation measures; it also lacks an electronic commerce chapter: see above nn 100 and accompanying text.

133 See, eg, *SAFTA* (n 98) ch 14 art 2.1.

134 See, eg, ibid ch 14 art 4.1. See also the definition of 'customs duty': at ch 14 art 1.2(c).

135 See, eg, ibid ch 14 art 4.2. See also World Trade Organization, *World Trade Report 2018: The Future of World Trade* (World Trade Organization, 2018) 180–1 <https://www.wto.org/english/res_e/publications_e/wtr18_e.htm>, archived at <https://perma.cc/NLM7-Q57E>.

> territory of the other Party, or … of which the author, performer, producer, developer or owner is a person of the other Party'.[136]

The electronic commerce provisions are subject to the relevant provisions on services (see above) and investment (see below), as well as to the general exceptions and NCMs as discussed in the next sections of this submission.[137] Nevertheless, the non-discrimination obligations applying specifically to digital products create an additional potential risk for an Australian digital services tax, beyond the non-discrimination obligations under the *GATS* and the services chapters of Australia's PTAs. The obligation not to impose customs duties on electronic transmissions may also go beyond the arguably softer instrument of the WTO *Declaration on Global Electronic Commerce*.

C *Non-Conforming Taxation Measures*

In addition to the restrictions on taxation measures with respect to non-discrimination obligations for cross-border (Mode 1) services trade, Australia's negative list PTAs also impose additional exceptions or reservations for non-conforming tax measures. These provisions protect existing NCMs as well as amendments or continuation of these measures, to some extent, as indicated in Table 3. However, an Australian digital services tax would most likely be regarded as a new measure rather than a continuation or amendment of an existing measure. Nevertheless, these PTAs also contain a powerful exception for taxation measures aimed at ensuring the equitable or effective imposition or collection of taxes, which removes the restriction to direct taxes in *GATS* art XIV(d) and could therefore be important in justifying a digital services tax. In several PTAs, though, this exception is explicitly subject to concepts of non-discrimination such as those reflected in the *GATS* chapeau.[138]

PACER Plus contains a positive list for national treatment and a negative list for MFN treatment and the same kinds of exceptions for non-conforming taxation measures, as indicated below.

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136 See, eg, *SAFTA* (n 98) ch 14 art 5.1.

137 See, eg, ibid ch 14 arts 2.5(a), 2.6, 11.

138 See, eg, *PACER Plus* (n 99) ch 11 art 5.3(d); *PAFTA* (n 99) art 28.4.4(d), both of which state that 'provided that the taxation measure does not arbitrarily discriminate between persons, goods or services of the Parties'. Cf *AUSFTA* (n 28) art 22.3.4(g): 'as permitted by *GATS* Article XIV(d) without regard to the limitation in Article XIV(d) to direct taxes'. But see *ACLFTA* (n 98) art 22.3.4(i), which contains no such explicit qualification. The *IA–CEPA* also does not remove the restriction to direct taxes in *GATS* art XIV(d): *IA–CEPA* (n 99) art 17.2.2.

Table 3: Reservations in Australia's PTAs for Non-Conforming Taxation Measures

PTA	Existing NCMs, Continuation or Prompt Renewal, and Amendments That Do Not Decrease Conformity	Replacement of Existing NCM with Substantially Similar Measure to Existing NCM of the Other Party	Taxation Measures Aimed at Ensuring the Equitable or Effective Imposition or Collection of Taxes
ACLFTA	arts 22.3.4(e)–(g)	art 22.3.4(h)	art 22.3.4(i)
A–HKFTA	arts 19.5.4(a)–(c)	✖	art 19.5.4(d)
AUSFTA	arts 22.3.4(d)–(f)	✖	art 22.3.4(g)
ChAFTA	art 16.4.4(b)	✖	art 16.4.4(c)
CPTPP	arts 29.4.6(e)–(g)	✖	art 29.4.6(h)
IA–CEPA	✖	✖	art 17.2.2
JAEPA	arts 1.8.3(a)–(c)	✖	art 1.8.3(d)
KAFTA	arts 22.3.3(b)–(d)	✖	art 22.3.3(e)
PACER Plus	ch 11 arts 5.3(a)–(c)	✖	ch 11 art 5.3(d)
PAFTA	arts 28.4.4(a)–(c)	✖	art 28.4.4(d)
SAFTA	✖	✖	ch 17 art 3.3 n 2

Similar provisions may have been considered less necessary for Australia's positive list PTAs (*AANZFTA*, *MAFTA* and *TAFTA*), as they apply only national treatment obligations (not MFN) and only to the extent of the *GATS*. Nevertheless, for reasons discussed in relation to the *GATS*, an Australian digital services tax still risks breaching these PTAs as well.

D *General Exceptions in Australia's PTAs*

Australia's 12 signed services PTAs that do not exclude taxation measures[139] all incorporate the general exceptions in *GATS* art XIV, or part of those exceptions, either by reference or through duplication of similar text.[140] The above analysis regarding those exceptions applies equally to these PTAs: the general exceptions would be unlikely to justify an Australian digital services tax, unless the tax was a direct tax (eg applicable to total income or elements of income rather than to services transactions).

IV AUSTRALIA'S OBLIGATIONS UNDER INTERNATIONAL INVESTMENT LAW

Australia's obligations under international law include commitments that it has made to foreign investors in numerous BITs concluded since at least 1988

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139 As noted above, the *ANZCERTA Services Protocol* excludes taxation measures: see above nn 100 and accompanying text.

140 *AANZFTA* (n 98) ch 15 art 1.2; *ACLFTA* (n 98) art 22.1.2; *AUSFTA* (n 28) art 22.1.2; *ChAFTA* (n 98) art 16.2.2; *CPTPP* (n 98) art 29.1.3; *JAEPA* (n 98) art 1.9.2; *KAFTA* (n 98) art 22.1.2; *MAFTA* (n 98) art 18.1.2; *PACER Plus* (n 99) ch 11 art 1.3; *PAFTA* (n 99) art 28.1.3; *SAFTA* (n 98) ch 7 art 16; *TAFTA* (n 98) art 1601.2.

(18 of which remain in force),[141] as well as similar commitments made in the investment chapters of Australia's 11 PTAs currently in force (including most recently the *CPTPP*).[142] Many of these treaties grant foreign investors the ability to bring a claim against Australia before an international arbitral tribunal, alleging breach of one of the investment obligations in the treaty.

This section considers first whether a digital business without any physical presence in Australia could be said to hold an 'investment' that is protected under Australia's investment treaties. Given the broad definitions of investment in these treaties, a tribunal might find such a protected investment without much difficulty. The section then examines the investment treaty obligations of non-discrimination, FET and non-arbitrariness. A digital services tax risks breaching these obligations if not carefully limited and justified. While some of Australia's investment treaties contain exceptions for taxation measures (similar to those discussed above in relation to trade obligations), these exceptions would not always prevent claims. In any case, sophisticated investors could potentially rely on one of Australia's older investment treaties, which typically do not contain such exceptions. Lastly, this section observes that, even where an ISDS claim is not possible, a breach of Australia's investment treaty obligations still entails state responsibility for Australia under international law.

A *Jurisdictional Issues: 'Investment'*

Tribunals convened to hear ISDS claims under Australia's investment treaties will have jurisdiction only where the claimant holds an 'investment', as defined in the treaty, in Australia.[143] The viability of any investment treaty claim would thus hinge initially on whether a digital business with no, or only limited, physical presence in Australia could be characterised as holding a protected

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141 For an up-to-date list of Australia's BITs, see 'Australia's Bilateral Investment Treaties', *Department of Foreign Affairs and Trade* (Web Page) <https://dfat.gov.au/trade/investment/pages/australias-bilateral-investment-treaties.aspx>, archived at <https://perma.cc/SKN3-JWKS>. India terminated its BIT with Australia as of 23 March 2017. Australia's BITs with Mexico and Vietnam terminated upon the entry into force of the *CPTPP* for those countries (on 30 December 2018 and 14 January 2019 respectively), pursuant to *CPTPP* side letters. Some ISDS claims may still be brought under these three BITs pursuant to specific survival clauses in the BITs or side letters: see generally 'CPTPP Text and Associated Documents', *Department of Foreign Affairs and Trade* (Web Page) <https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Pages/official-documents.aspx>, archived at <https://perma.cc/5749-T3YB>. Australia's BIT with Peru is expected to terminate upon entry into force of *PAFTA* or Peru's ratification of the *CPTPP*, pursuant to side letters for each treaty: Letter from Steven Ciobo to Lucia Cayetana Aljovin Gazzani, 26 January 2018 <https://dfat.gov.au/trade/agreements/not-yet-in-force/pafta/full-text/Documents/letter-on-termination-of-australia-peru-ippa.pdf>, archived at <https://perma.cc/92MD-DZXG>; Letter from Steven Ciobo to Eduardo Ferreyros Küppers, 8 March 2018 <https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/sl16-australia-peru-rollover-tpp12-treaty-letters.pdf>, archived at <https://perma.cc/7QHK-GQDE>. Australia's BIT with Hong Kong is expected to terminate upon entry into force of the *A–HKFTA*: 'Australia–Hong Kong Free Trade Agreement: Outcomes at a Glance', *Department of Foreign Affairs and Trade* (Web Page) <https://dfat.gov.au/trade/agreements/not-yet-in-force/a-hkfta/a-hkfta-outcomes/Pages/a-hkfta-outcomes-at-a-glance.aspx>, archived at <https://perma.cc/WBT7-9QRM>.

142 See above n 98.

143 See, eg, *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments*, signed 15 September 1993, [1993] ATS 30 (entered into force 15 October 1993) art 10 ('*Australia–Hong Kong BIT*').

investment in Australia. As discussed below, it is possible that a tribunal would adopt this characterisation.

Australia's investment treaties typically have broad definitions of investment. The relevant definitions clause usually specifies that investment includes 'every kind of asset', followed by a non-exhaustive list of illustrative categories. Several categories included in these lists are relevant to the operations of digital businesses.[144] As discussed in this section, such businesses could hold contractual rights or intellectual property rights in Australia sufficient to find an 'investment' under an investment treaty. Furthermore, an investment could be found under the holistic approach often applied by tribunals.[145]

1 *Contractual Rights*

Digital businesses often hold rights under contracts with two groups: users (eg individuals who post notices or profiles on a website free of charge) and customers (eg businesses who pay to advertise on such websites and access user data). Although users may not pay anything to a digital business, they typically assist that business to generate significant profits from its customers.[146] The contractual relationships held by digital businesses with both users and customers could qualify as a protected investment under Australia's investment treaties, even in the absence of a physical presence of the business in Australia.

Some of Australia's investment treaties specifically recognise contractual rights as protected investments. Article 1(e)(iii) of the *Australia–Hong Kong BIT*, for instance, protects 'claims to money or to any performance under contract having an economic value'.[147] Investment tribunals have often held that merely commercial contracts for the sale of goods or services, particularly between private parties, do not qualify as protected investments.[148] Where contractual rights have been treated as protected investments, they have most often involved contracts with the state or state entities, such as mining concession contracts or contracts for public infrastructure.[149]

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144 *TAFTA* (n 98) art 103(l); *Australia–Hong Kong BIT* (n 143) art 1(e).

145 For a discussion of similar issues arising in the characterisation of digital business operations as investments, see Andrew D Mitchell and Jarrod Hepburn, 'Don't Fence Me In: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer' (2017) 19 *Yale Journal of Law and Technology* 182, 217–21; Enikő Horváth and Severin Klinkmüller, 'The Concept of "Investment" in the Digital Economy: The Case of Social Media Companies' (2019) 20(4) *Journal of World Investment and Trade* (forthcoming) 28–9.

146 See 'Treasury Discussion Paper' (n 8) 15.

147 *Australia–Hong Kong BIT* (n 143) art 1(e)(iii). See also *Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, [1988] ATS 14 (signed and entered into force 11 July 1988) art 1(b)(iii).

148 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd ed, 2012) 75–6; *Joy Mining Machinery Ltd v Egypt (Award on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/11, 6 August 2004) [52], [58] ('*Joy Mining*'); *Alps Finance and Trade AG v Slovakia (Award)* (UNCITRAL Arbitral Tribunal, 5 March 2011) [245] ('*Alps Finance*').

149 *SGS Société Générale de Surveillance SA v Paraguay (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/07/29, 12 February 2010) [88]–[90]; *Joy Mining* (n 148) [59]; *Alps Finance* (n 148) [234].

Nevertheless, contracts between private parties have been viewed as protected investments. In *European Media Ventures SA v Czech Republic,* a foreign investor's contract with a Czech partner was 'firmly anchored within the territory of the Czech State'[150] and was held to constitute an investment.[151] The *Mytilineos Holdings SA v Serbia and Montenegro* Tribunal held that there was 'no reason why claims arising from pure commercial activities, such as sales contracts, should be excluded' where the investment treaty contained a broad definition of investment.[152] Similarly, in *Bosca v Lithuania,* a service agreement for the transfer of know-how between the claimant and a Lithuanian company was held to be a protected investment.[153]

Some tribunals have also clarified that services undertaken under contracts do not need to be performed exclusively in the respondent state. Instead, the central requirement is that there be a sufficient connection to the claimed host state. The *LESI SpA v Algeria* Tribunal, for instance, held that '[n]othing prevents investments from being committed in part at least from the contractor's home country but in view of and as part of the project to be carried out abroad'.[154] Indeed, the same considerations leading tax authorities worldwide to posit a nexus between digital businesses and the states in which their users are located may also lead an investment tribunal to find that those businesses have protected investments in those states as well.

Other tribunals have taken the view that the location of an investment is the location of its 'focal point' or 'centre of gravity'.[155] Thus, '[s]ervices may be seen to be located in a State [for the purpose of defining a protected investment] if their *chief impact* is in that State'.[156]

In *Fedax NV v Venezuela*, the Tribunal suggested that the important factor was not whether the investment operations physically occurred in the host state, but whether the host state enjoyed a benefit from the investment.[157] In another case similarly relating to a financial investment, *Abaclat v Argentina,* the Tribunal majority held that 'the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used'.[158] This approach has been

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150 *European Media Ventures SA v Czech Republic (Partial Award on Liability)* (UNCITRAL Arbitral Tribunal, 8 July 2009) [38].

151 Ibid [44].

152 *Mytilineos Holdings SA v Serbia and Montenegro (Partial Award on Jurisdiction)* (UNCITRAL Arbitral Tribunal, Case No 2014-30, 8 September 2006) [109].

153 *Bosca v Lithuania (Award)* (UNCITRAL Arbitral Tribunal, Case No 2011-05, 17 May 2013) [168].

154 *LESI SpA v Algeria (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/05/3, 12 July 2006) [73] [tr authors].

155 *Alpha Projektholding GmbH v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/16, 8 November 2010) [279], quoting *SGS Société Générale de Surveillance SA v Philippines (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/02/6, 29 January 2004) [62], [101]–[112]. See also *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/08/8, 8 March 2010) [124].

156 Christoph H Schreuer et al, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd ed, 2009) 140 [198] (emphasis added).

157 *Fedax NV v Venezuela (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/96/3, 11 July 1997) [41].

158 *Abaclat v Argentina (Decision on Jurisdiction and Admissibility)* (ICSID Arbitral Tribunal, Case No ARB/07/5, 4 August 2011) [374].

applied to claimed investments involving contractual rights: in *Nova Scotia Power Inc (Canada) v Venezuela*, the Tribunal commented that 'intangible assets [such as contractual rights], with no accompanying physical in-country activities, have been accepted as investments for the purposes of bilateral investment treaties by many tribunals'.[159]

2 *Intellectual Property Rights*

A further major component of digital businesses' operations likely includes intellectual property rights. Such rights, sometimes specifically including trade secrets, know-how and goodwill, are contained in the illustrative list of categories of protected investment in Australia's investment treaties.[160] In *Bridgestone Licencing Services, Inc v Panama*, a Tribunal recently held that a trademark registered in Panama and 'unaccompanied by other forms of investment'[161] was protected under the relevant investment treaty,[162] on the grounds that the trademark was being exploited by way of 'activities that, together with the trademark itself, have the normal characteristics of an investment',[163] such as promoting the brand or licensing the use of the trademark.

To the extent that intellectual property rights owned by digital businesses are recognised under Australian law, then, those rights may constitute part of a protected investment.

3 *Holistic Approach*

Apart from identifying individual elements of a digital business' operations that may constitute a protected investment, tribunals have also adopted a 'unity of investment' approach. This approach entails a holistic assessment of the claimant's operations in the host state and may result in finding a protected investment even where each claimed element would not itself qualify. As the Tribunal in *Ceskoslovenska Obchodni Banka, AS v Slovakia* said:

> An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. … [However, jurisdiction will be found] provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.[164]

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159 *Nova Scotia Power Inc (Canada) v Venezuela (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/11/1, 30 April 2014) [130].

160 *TAFTA* (n 98) art 103(1)(iv); *Australia–Hong Kong BIT* (n 143) art 1(e)(iv).

161 *Bridgestone Licensing Services, Inc v Panama (Decision on Expedited Objections)* (ICSID Arbitral Tribunal, Case No ARB/16/34, 13 December 2017) [166].

162 Ibid [198].

163 Ibid [177].

164 *Ceskoslovenska Obchodni Banka, AS v Slovakia (Decision of the Tribunal on Objections to Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/97/4, 24 May 1999) [72].

Similarly, in *Joy Mining Machinery Ltd v Egypt*, the Tribunal observed that 'a given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole'.[165]

Thus, an investment treaty tribunal may review the operations of a digital business overall — including, at least, contractual rights with parties in Australia and intellectual property rights protected under Australian law — to find that the business holds a protected investment.

Naturally, where foreign digital businesses also maintain branch offices for marketing or business development in Australia, or, even more clearly, hold shares in Australian subsidiaries, the likelihood of finding a protected investment is even higher.

B *Non-Discrimination Obligations*

In relation to digital businesses holding protected investments in Australia, a new digital services tax, imposed as an interim measure prior to longer-term changes in Australia's nexus and profit attribution rules, could violate non-discrimination obligations in Australia's investment treaties. Indeed, the Treasury Discussion Paper raises this issue, suggesting that 'any interim measure … would need to apply to both domestic and foreign' investors in order to comply with Australia's international obligations.[166]

Investment treaties typically impose obligations of national treatment (requiring Australia to treat foreign investors from the treaty partner no less favourably than local investors) and MFN treatment (requiring Australia to treat foreign investors from the treaty partner no less favourably than foreign investors from any other country). Both obligations capture discrimination on grounds of nationality; however, the national treatment obligation is most relevant here. This obligation is premised on a comparison between investors in 'like circumstances'.[167]

As discussed in this section, a discriminatory intent is not required, meaning that a digital services tax could violate non-discrimination obligations particularly where the thresholds for applying the tax mostly capture foreign businesses but not local businesses. The risk would be higher if a tribunal adopted a 'cross-sectoral' comparison, comparing treatment of digital businesses with traditional businesses. In both analyses, however, the risk of violation could be reduced by offering a rational justification for the distinctions drawn by the tax.

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165 *Joy Mining* (n 148) [54]. See also *ADC Affiliate Ltd v Hungary (Award of the Tribunal)* (ICSID Arbitral Tribunal, Case No ARB/03/16, 2 October 2006) [331]; *Vestey Group Ltd v Venezuela (Award)* (ICSID Arbitral Tribunal, Case No ARB/06/4, 15 April 2016) [196].

166 'Treasury Discussion Paper' (n 8) 23.

167 See, eg, *ACLFTA* (n 98) art 10.3.1; *SAFTA* (n 98) ch 8 art 4.1. Some of Australia's older BITs do not explicitly impose any requirement of 'likeness' in the comparison: see, eg, *Australia–Hong Kong BIT* (n 143) art 3(1). However, a tribunal would likely imply such a requirement into the national treatment obligation. For a summary of general approaches to discrimination analysis, see *Quiborax SA v Bolivia (Award)* (ICSID Arbitral Tribunal, Case No ARB/06/2, 16 September 2015) [247].

1 *Discriminatory Intent Is Not Required*

Some investment treaty tribunals have suggested that a discriminatory intent is required to breach the national treatment obligation. In *Methanex Corporation v USA*, the Tribunal held that the claimant was required to show that the US '*intended* to favour domestic investors by discriminating against foreign investors'.[168] Similarly, the *Genin v Estonia* Tribunal dismissed a claim of discrimination on the grounds that 'there is no indication that [Estonia] specifically targeted [the claimants] in a discriminatory way' and that the claimants had not proven that Estonia's conduct 'was done with the intention to harm' them.[169]

However, most tribunals have taken the view that a discriminatory effect is sufficient to breach national treatment. The *Siemens AG v Argentina* Tribunal explicitly ruled out the relevance of intention, stating that 'intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment'.[170] More recently, the *Clayton v Canada* Tribunal stated that national treatment 'does not require a demonstration of discriminatory intent'.[171] Commentators appear to agree that this is the prevailing view.[172] Thus, the relevant question is whether the measure imposes a greater burden on foreign investors compared to local investors in like circumstances, even if the measure is neutral on its face.

A digital services tax, applying in addition to any existing tax obligations under Australian law, could raise national treatment concerns, particularly where the tax applied only to businesses above certain turnover or income thresholds. Given that most of the largest digital businesses currently in operation worldwide are US companies, a threshold set at a particular value may have the effect that the tax will apply to US companies but not Australian companies.

2 *Cross-Sectoral Comparison*

A national treatment violation would be even more likely if a tribunal took a different approach to the determination of 'likeness'. Some tribunals have taken the view that, rather than comparing a foreign investor with an identical local investor in the same industry, a broader comparison is appropriate. In *Occidental Exploration and Production Co v Ecuador* ('*Occidental v Ecuador*'), the Tribunal compared the treatment of a foreign investor in the oil industry with

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168 *Methanex Corporation v USA (Final Award of the Tribunal on Jurisdiction and Merits)* (North American Free Trade Agreement Chapter 11 Panel, 3 August 2005) pt IV ch B [12] (emphasis added).

169 *Genin v Estonia (Award)* (ICSID Arbitral Tribunal, Case No ARB/99/2, 25 June 2001) [369]. This discrimination claim was, however, made under a different BIT provision, not a national treatment provision.

170 *Siemens AG v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/8, 6 February 2007) [321].

171 *Clayton v Canada (Award on Jurisdiction and Liability)* (North American Free Trade Agreement Chapter 11 Panel, Case No 2009-04, 17 March 2015) [719] ('*Clayton/Bilcon*').

172 Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2nd ed, 2017) 336 [7.269]; Chin Leng Lim, Jean Ho and Martins Paparinskis, *International Investment Law and Arbitration: Commentary, Awards and Other Materials* (Cambridge University Press, 2018) 305; Dolzer and Schreuer (n 148) 203.

that given to local businesses operating in any industry. Since the foreign oil company was not granted tax refunds that were available to local seafood, flower and mining companies, amongst others, the Tribunal found a national treatment violation.[173] Although some commentators have called this approach 'questionable',[174] others have concluded only that the issue 'remains controversial'.[175]

On this reasoning, a national treatment violation might arise where a foreign investor was affected by a digital services tax applying to digital businesses but not to traditional businesses (for instance, if an additional tax applied to revenues from digital advertising but not advertising in print newspapers). However, whether or not a cross-sectoral comparison was adopted, as discussed next, Australia could lessen the risk of violation by demonstrating a rational justification for the distinctions.

3 *Justification of Prima Facie Discrimination*

The national treatment obligation under Australia's investment treaties does allow certain distinctions between local and foreign investors. Many of Australia's recent investment treaties include a clarification that a determination of 'like circumstances' depends on the 'totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives'.[176] Where investment treaties do not explicitly include justificatory language in the national treatment obligation, tribunals are likely to imply a justification step into the discrimination analysis.[177]

Thus, if Australia can demonstrate that a digital services tax has a reasonable nexus to a rational government policy, which explains its greater impact on foreign businesses, a tribunal may find that the foreign digital businesses are therefore not in 'like circumstances' with local digital businesses, or that any prima facie discrimination is justified and not in breach of the national treatment obligation.

Consequently, to avoid a national treatment violation, Australia would need to explain how any threshold set for the tax's application was connected to a rational policy relating, for instance, to tax collection or protection of small businesses and tech start-ups, and was not set purely to prevent Australian digital businesses being subject to over-taxation.[178]

C *Fair and Equitable Treatment and Arbitrariness*

A digital services tax could also raise issues under the FET obligation in Australia's investment treaties, particularly in relation to the stability of the Australian legal system and potential arbitrariness in its operation. Depending on the interpretation taken by a tribunal, a change in Australia's tax system

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173 *Occidental Exploration and Production Co v Ecuador (Final Award)* (UNCITRAL Arbitral Tribunal, Case No UN 3467, 1 July 2004) [173], [179] ('*Occidental*').

174 McLachlan, Shore and Weiniger (n 172) 339 [7.284].

175 Dolzer and Schreuer (n 148) 200. See also Lim, Ho and Paparinskis (n 172) 302.

176 See, eg, *CPTPP* (n 98) art 9.4 n 14; *SAFTA* (n 98) ch 8 art 4 n 8.

177 *Clayton/Bilcon* (n 171) [720]–[723].

178 See 'Treasury Discussion Paper' (n 8) 23, 28.

adversely affecting a particular, largely foreign-owned sector could be viewed as upsetting the regulatory stability demanded by the FET obligation.

Some investment tribunals have taken the view that the FET obligation entails a guarantee of legal and regulatory stability. In *Occidental v Ecuador*, for instance, the Tribunal said that the 'stability of the legal and business framework is thus an essential element of fair and equitable treatment'.[179]

Other tribunals have doubted the strict connection between stability and FET. According to the *EDF (Services) Ltd v Romania* Tribunal, for instance, '[t]he idea that … FET … impl[ies] the stability of the legal and business framework … may not be correct if stated in an overly-broad and unqualified formulation.'[180] In *Toto Costruzioni Generali SpA v Lebanon*, the Tribunal held that 'changes in the regulatory framework [governing taxes and customs duties] would be considered as breaches of the duty to grant … fair and equitable treatment only in case of a drastic or discriminatory change'.[181]

A further element of the FET obligation is non-arbitrariness. This obligation includes substantive arbitrariness, in the sense that state measures that are in substance 'unrelated to some rational policy' may breach FET.[182] FET also entails an inquiry into the process under which state measures were adopted. Measures that affect foreign investors 'without engaging in a rational decision-making process', involving 'consideration of the effect of a measure on foreign investments and a balance of the interests of the State with any burden imposed on such investments', may breach FET.[183] While the *Paushok v Mongolia* Tribunal recognised that '[a]n investor … should not be surprised to be hit with tax increases',[184] tax measures must nevertheless meet requirements of non-arbitrariness to avoid breaching the FET obligation.

Without a careful justification of the need for a digital services tax and the underlying theories on which it is based, an explanation of any divergence from long-standing international taxation practice and the reasons for setting any applicable thresholds at the given values, Australia would risk a finding that the tax breaches the non-arbitrariness element of the FET obligation.

D *Taxation Exceptions*

Australia's investment treaty obligations are sometimes subject to exceptions for 'taxation measures'. Since a digital services tax is highly likely to constitute a 'taxation measure', where these exceptions apply, the imposition of such a tax would not breach an investment treaty.

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179 *Occidental* (n 173) [183]. See also at [185], quoting *Metalclad Corporation v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/97/1, 30 August 2000) [99]; *Técnicas Medioambientales Tecmed SA v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/2, 29 May 2003) [154].

180 *EDF (Services) Ltd v Romania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/13, 8 October 2009) [217].

181 *Toto Costruzioni Generali SpA v Lebanon (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/12, 7 June 2012) [244].

182 *Saluka Investments BV (the Netherlands) v Czech Republic (Partial Award)* (UNCITRAL Arbitral Tribunal, 17 March 2006) [309].

183 *LG&E Energy Corp v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/02/1, 3 October 2006) [158].

184 *Paushok v Mongolia (Award on Jurisdiction and Liability)* (UNCITRAL Arbitral Tribunal, 28 April 2011) [305].

However, the taxation exceptions in Australia's investment treaties vary in their wording, meaning that they will not necessarily prevent claims. Some investment treaties, such as *AANZFTA*, subject taxation measures only to the free transfers and expropriation obligations,[185] which raise fewer concerns for a digital services tax.[186] However, while *ACLFTA* and *KAFTA* contain a general exception for taxation measures, they specify that the national treatment obligation (amongst others) applies to indirect taxes.[187] To the extent that a digital services tax is an indirect tax and raises national treatment concerns,[188] the taxation exception in these and similar investment treaties would not prevent a successful ISDS claim.

Furthermore, Australia's earlier BITs, such as the 1993 *Australia–Hong Kong BIT*, typically do not have taxation exceptions. Any measure relating to taxation would therefore be subject to all the obligations imposed in those investment treaties.

V CONCLUSION

In this article, we have demonstrated the risks of an Australian digital services tax breaching Australia's obligations as a member of the WTO under the *GATS*, as well as its trade and investment obligations in its PTAs and its investment obligations under BITs. As a proponent of a rules-based international order, Australia needs to ensure that any such tax avoids violating its obligations under international trade law and international economic law. Should Australia fail to design and implement such a tax with care, it may face legal challenge in the WTO by a WTO member, or before an arbitral tribunal pursuant to an ISDS claim under one of its investment treaties. In particular, if an Australian desire to protect small businesses translates into the inclusion of an income or turnover threshold below which the tax will not apply, this threshold will increase the chances of the tax operating in a discriminatory manner in practice, contrary to international economic law.

However, these areas of law are complex and different treaties provide varying degrees of flexibility to Australia in relation to taxation measures. It is conceivable that Australia could avoid a breach of the *GATS* or at least some of its PTAs and BITs while still imposing a tax on digital services. If it did so, a WTO member could still consider bringing a 'non-violation' complaint alleging that the tax nullifies and impairs benefits expected under WTO law.[189] An investor could still choose the most protective investment treaty (from the investor's perspective) to launch an ISDS dispute.

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185 *AANZFTA* (n 98) ch 15 arts 3.2(b)–(c).

186 While the imposition of taxation can constitute expropriation, it is unlikely to do so except in egregious cases of discriminatory or excessive taxation, given states' general prerogatives in the area. See, eg, *KAFTA* (n 98) annex 11-I, in which Australia agreed with South Korea that, even if 'a taxation measure that is targeted at investors of a particular nationality' is more likely to constitute expropriation, 'the imposition of taxes does not generally constitute an expropriation'.

187 *ACLFTA* (n 98) arts 22.3.1, 22.3.4(b); *KAFTA* (n 98) arts 22.3.1, 22.3.2(d).

188 See above Part II(B)(4)(d).

189 *GATT* (n 82) art XXIII:1(b). See also Graham Cook, 'The Legalization of the Non-Violation Concept in the GATT/WTO System' (Working Paper, 24 October 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3272165>, archived at <https://perma.cc/D6EH-TC3Y>.

Within Australian courts, only limited opportunities exist for raising non-compliance with Australia's treaty obligations, for example, where a statute mandates compliance with treaties[190] or refers to a treaty,[191] or where a treaty creates legitimate expectations that may be considered as part of procedural fairness in administrative decision-making.[192] These possibilities may not provide an additional avenue for disputes in the context of a digital services tax.

Apart from these legal and dispute settlement issues, Australia must be aware that in the current global economic and political climate, even a digital services tax that does not technically violate international law might still cause harm to one or more of Australia's trade and investment partners. In particular, as the actors most likely to be harmed by such a tax are US companies (especially if it targets large multinational service suppliers), Australia needs to consider the potential for US retaliation. WTO disputes are supposed to be non-contentious,[193] and WTO claims have generally been addressed within the confines of the WTO. Today, the traditional approaches are being upturned and retaliation to a tax that significantly undercuts corporate profits through the imposition of import tariffs by the US (or even other countries) would not be surprising, whether in place of or in addition to a WTO dispute.[194] Until now, among the exporters of steel and aluminium to the US, Australia alone has avoided both US import tariffs and voluntary export quotas for these products.[195] That exemption could easily change.

The potential for US retaliation points to a larger concern about digital services taxes being considered in Australia and elsewhere. Such measures represent an allegedly temporary unilateral response to the tax problems posed by the digital economy, in advance of a more comprehensive and permanent multilateral solution. But unilateral measures of this kind may have unintended and unnecessary consequences, while feeding a shift towards economic nationalism, contrary to the increase in economic openness and integration that has brought significant economic and social benefits to Australia and the world

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190 See, eg, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 371 [31] (Brennan CJ), 385 [81] (McHugh, Gummow, Kirby and Hayne JJ). See also Tania Voon and Andrew Mitchell, 'International Trade Law Implications of Australia's National Broadband Network' (2011) 35(2) *Melbourne University Law Review* 578, 597–8; Donald R Rothwell, 'Quasi-Incorporation of International Law in Australia: Broadcasting Standards, Cultural Sovereignty and International Trade' (1999) 27(3) *Federal Law Review* 527.

191 See, eg, *Acts Interpretation Act 1901* (Cth) s 15AB(2)(d).

192 See, eg, *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287, 291–2 (Mason CJ and Deane J). But see *Re Minister for Immigration and Multicultural and Indigenous Affairs*; *Ex parte Lam* (2003) 214 CLR 1, 20 [61]–[63], 27–8 [81]–[83] (McHugh and Gummow JJ), 45 [140] (Callinan J); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 526–7 [8] (French CJ). See also Matthew Groves, 'Treaties and Legitimate Expectations: The Rise and Fall of *Teoh* in Australia' (2010) 15(4) *Judicial Review* 323.

193 *DSU* (n 36) art 3.10.

194 Compare the ongoing disputes brought by various countries against the US in relation to its steel/aluminium tariffs and the corresponding disputes brought by the US regarding retaliatory tariffs imposed by some of these countries. See Tania Voon, 'The Security Exemption in WTO Law: Entering a New Era' (2019) 113 *AJIL Unbound* 45.

195 Isabelle Hoagland, 'Sources: Australia Averted Section 232 Quotas, Tariffs in Exchange for Weekly Monitoring', *Inside US Trade* (online, 20 August 2018) <https://insidetrade.com/daily-news/sources-australia-averted-section-232-quotas-tariffs-exchange-weekly-monitoring>, archived at <https://perma.cc/M9DZ-687N>.

over several decades. A digital services tax might seem like the obvious answer, but Australia should resist its hasty adoption.