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Implications of International Economic Law for an Australian Digital Services Tax

Submission to the Australian Government Treasury Consultation on the Digital Economy and Australia's Corporate Tax System

29 November 2018

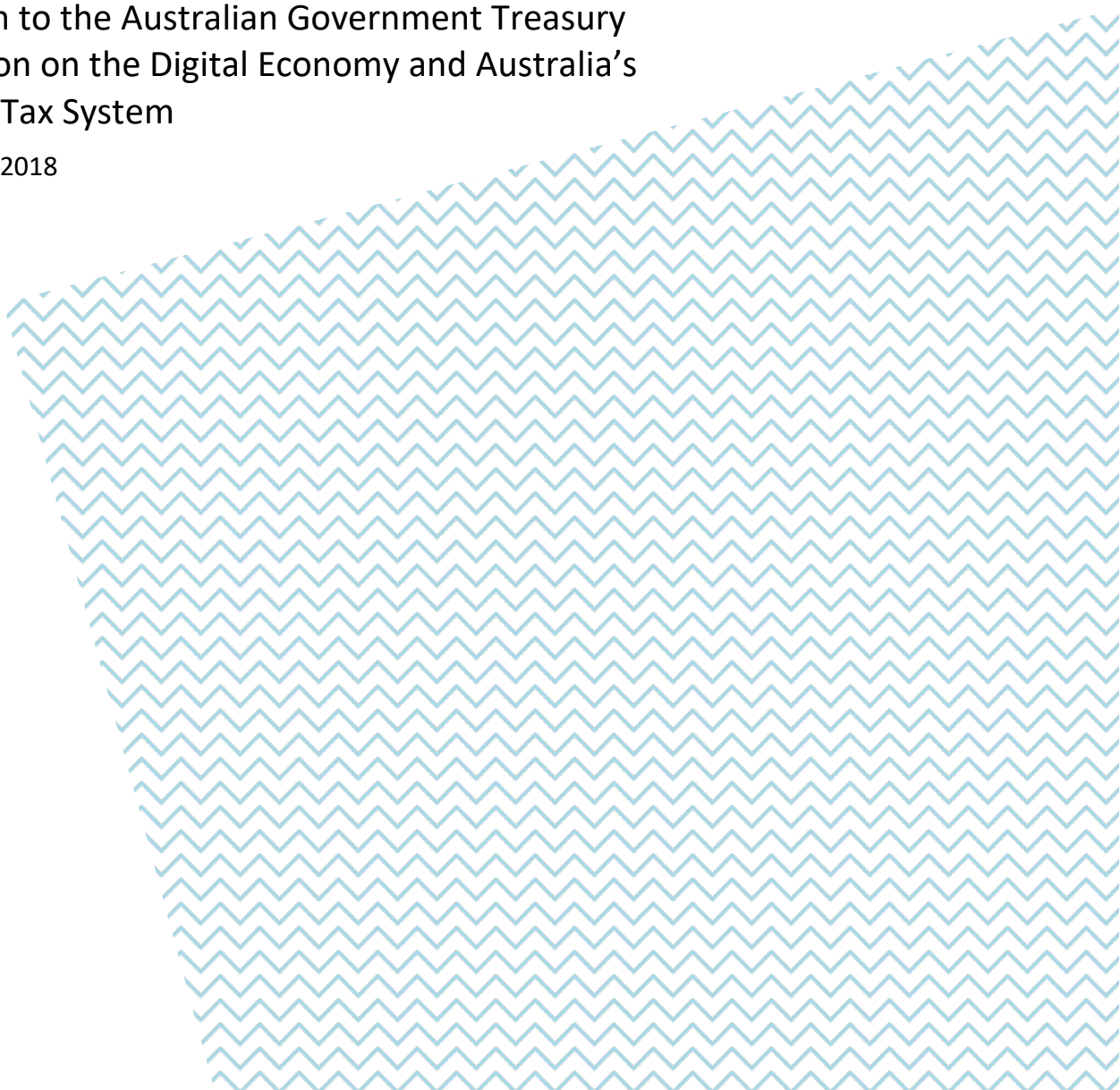

Table of Contents

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Global Economic Law Network

This submission was prepared by members of the Global Economic Law Network (GELN), a Research Centre at Melbourne Law School, the University of Melbourne. GELN activities include holding workshops and seminars and encouraging research and collaboration in GELN's focus areas, which include international trade law, international investment law, international finance law, and international arbitration.

The aims and objectives of GELN are to:

- provide a venue for academics and those working in GELN's focus areas to keep abreast of new developments in their fields;
- encourage closer dialogue between academics, practitioners and government in relation to GELN's focus areas;
- provide training and capacity building services to governments and other bodies in GELN's focus areas;
- provide a regular forum for policy and scholarly discussion of GELN's focus areas; and
- facilitate research collaboration amongst academics and other interested groups on international economic law.

Tables

Executive Summary

1. **An Australian 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 GATS.**
    a. A digital services tax may breach Australia's obligation to accord **national treatment** to services and service suppliers of other WTO Members under GATS Art XVII, by providing less favourable treatment, in sectors in which Australia has made national treatment commitments, to:
        i. foreign digital services and service suppliers than to like Australian non-digital services and service suppliers, for example by applying to digital advertising but not competitive print advertising; and/or
        ii. foreign digital services and service suppliers than to like Australian digital services and service suppliers, for example by applying only to service suppliers above a high income or turnover threshold.
    b. A digital services tax may breach Australia's obligation to accord **MFN treatment** to services and service suppliers of other WTO Members under GATS Art II, by providing less favourable treatment to digital services and service suppliers of particular WTO Members such as the US than to like digital or non-digital services and service suppliers of other WTO Members, for example by targeting digital services and service suppliers that are in practice more likely to be from the US than from other WTO Members.
    c. Although **general exceptions** are available under GATS Art XIV for measures in connection with tax and non-tax objectives, none of these exceptions would clearly apply to prevent these potential breaches of Australia's non-discrimination obligations.
    d. A digital services tax runs contrary to the **WTO Declaration on Global Economic Commerce**, which may affect the interpretation of Australia's GATS obligations and international standing.

2. **For similar reasons to those applying under the GATS, an Australian digital services tax risks breaching Australia's non-discrimination obligations under the Services and Electronic Commerce Chapters of its PTAs.**
    a. Australia's PTAs contain **non-discrimination** obligations for **cross-border service** supply, covering the same or more service sectors than Australia's GATS obligations. Most of these PTAs impose at least national treatment obligations on taxation measures to a similar extent to GATS.
    b. Almost all of Australia's PTAs contain an Electronic Commerce Chapter including a **non-discrimination** obligation with respect to **digital products**.
    c. In addition to general exceptions, most of Australia's PTAs contain **reservations** to protect taxation measures that are aimed at ensuring the equitable or effective imposition or collection of taxes. Although Australia could invoke these reservations to justify a digital services tax, in at least some of these PTAs they are subject to non-discrimination principles that such a tax might not fulfil.

3. **An Australian digital services tax risks breaching Australia's investment obligations under its BITs and the Investment Chapters of its PTAs.**
    a. Even where foreign digital businesses have no physical presence in Australia, an investment treaty tribunal may hold that the businesses have made a protected investment in Australia, creating jurisdiction for the tribunal to hear an ISDS claim under one of Australia's investment treaties.
    b. If not carefully justified, a digital services tax may breach Australia's obligation to accord **national treatment** to foreign investors in like circumstances, for example by applying only to foreign investors above a certain income or revenue threshold, or by applying to digital businesses but not traditional businesses.
    c. A digital services tax may breach Australia's obligation to accord **fair and equitable treatment** to foreign investors, by interfering with legal and regulatory stability or (if not carefully justified) by operating in an arbitrary manner.
    d. Although Australia's investment treaty obligations are sometimes subject to **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 investors could potentially rely on one of Australia's investment treaties that do not contain taxation exceptions.
    e. 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.

1. Background, Scope and Purpose of the Submission

Australia, along with many other countries, is considering whether its tax system is suitable for today's digital economy. Members of the **OECD/G20 Inclusive Framework on BEPS**, including Australia, have agreed to try to come to a consensus by 2020 as to whether and how the international tax system should be changed. At the same time, Australia is considering whether to introduce a digital services tax while a global consensus-based approach is pending. Various forms of interim digital services tax have already been proposed or announced in several other jurisdictions, including the EU[1] and the UK.[2]

Taxes on the digital economy raise several **legal and non-legal issues**. The non-legal issues include economic questions, such as the efficiency of singling out particular business models or taxing revenues rather than profits. The legal issues include data-protection, privacy, and competition law. An Australian digital services tax would also need to be consistent with the country's obligations under international law, including with respect to international tax, international trade, and international investment.

This submission examines the compatibility of a digital services tax, described as an '**interim measure**' in the Treasury Discussion Paper, with Australia's obligations under **international trade law and international investment law.** The Treasury Discussion Paper does not advocate a particular model for a digital services tax. Therefore, this submission necessarily deals with the international trade and investment law issues at a high level. Further analysis will be required when and if a more detailed Australian proposal is announced. The submission does not consider Australia's international obligations under its tax treaties or other parts of international law; nor does the submission consider the implications of any longer-term changes to the nexus or profit attribution rules in Australia's corporate tax system.

Australia's international trade and investment obligations arise from its membership of the **WTO**, and from the various **PTAs and BITs** to which it is a party. Compliance with these obligations is important for Australia as it: is an open economy; is a strong supporter of a rules-based system of international trade and investment; and takes seriously its adherence to obligations under international law. Moreover, non-compliance could be challenged, for example, by another WTO Member in a WTO dispute, by a treaty partner in a PTA or BIT dispute, or by a foreign investor through ISDS pursuant to one of Australia's PTAs or BITs.

2. The Nature and Characterisation of Digital Services

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"', 'the integration of production in global value chains', and the 'global reach of multinational enterprises'.[3] In international economic law, these shifts raise questions about the distinction between goods and services,[4] and the characterisation of contractual rights and intellectual property as investments (as discussed further below).

Internet advertising is one activity that may be the target of a digital services tax, given the rapid expansion of this form of advertising and the ability for it to be provided without a physical presence in the relevant territory.[5] **Digital intermediation services** (or platforms) are another growing form of business, often provided remotely, that might be targeted by a digital services tax. These platforms 'are websites or 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',[6] such as online services for sharing or exchanging transport or

[1] See, eg, European Commission, 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, EU Doc COM(2018) 146 final (21 March 2018).
[2] See, eg, HM Treasury, *Corporate Tax and the Digital Economy: Position Paper Update* (March 2018); HM Treasury, *Digital Services Tax: Budget 2018 Brief* (29 October 2018).
[3] Australian Treasury, *Risks to the Sustainability of Australia's Corporate Tax Base: Scoping Paper* (July 2013) [54], [58].
[4] See generally, eg, 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).
[5] OECD Interim Report, [440].
[6] OECD Interim Report, [443].

accommodation.[7] **Financial services** and **telecommunications services** also play an important role in digital services but often involve additional regulatory considerations and dedicated legal provisions; financial services and telecommunications services are therefore not considered in depth in this submission.

3. International Trade Law

3.1. Australia's GATS Obligations

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 'measures by Members affecting trade in services',[8] excluding services 'supplied in the exercise of governmental authority'.[9] 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). We explain that an Australian digital services tax, if not carefully designed and applied, could breach both of these obligations. We also identify the difficulties Australia would face in attempting to defend such a tax under the GATS general exceptions. But first we turn to the way in which services may be traded, as relevant to a tax on trade in digital services.

3.1.1. 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';
- **Mode 2** (consumption abroad) – 'in the territory of one Member to the service consumer of any other Member'; and
- **Mode 3** (commercial presence) – 'by a service supplier of one Member, through commercial presence in the territory of any other Member'.

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.[10] 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.

3.1.2. 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 services 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 services sectors listed in **Australia's Schedule of Commitments**,[11] and subject to any limitations listed in that Schedule. As discussed further below, Australia's Schedule does extend to several service sectors that may be relevant to a digital services tax.

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

[7] On other digital business models see, eg, Wolfgang Schön, *Ten Questions about Why and How to Tax the Digitalized Economy* (Max Planck Institute for Tax Law and Public Finance, Working Paper 2017–11, December 2017) 8–10.
[8] GATS Art I:1.
[9] GATS Art I:3(b).
[10] See, eg, WTO Council for Trade in Services, *Cross-Border Supply (Modes 1 & 2): Background Note by the Secretariat*, WTO Doc S/C/W/304 (18 September 2009) [9].
[11] GATS, *Australia – Schedule of Specific Commitments*, GATS/SC/6 (15 April 1994).

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 other Member' (GATS Art XVII:3).[12] 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'.[13]

Whether services or service suppliers are '**like'** for the purposes of GATS Art XVII may be affected by 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.[14] Thus, digital (or online) and non-digital (or off-line) versions of services might be '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 might 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 may lose 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 GATS with respect to non-discrimination is primarily 'concerned with the **competitive relationship** of services and service suppliers',[15] which is a 'holistic analysis' examining considerations of both services and service suppliers together.[16] Therefore, a key consideration in assessing likeness of digital services such as advertising may be 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.

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'.[17] If the suppliers of digital advertising services subject to such a tax were predominantly foreign, while the suppliers of non-digital advertising services not subject to the tax were predominantly Australian, this distinction might breach the national treatment obligation. The tax might 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.[18] The regulatory objective of the measure is not relevant in identifying less favourable treatment under GATS Art XVII,[19] although it may be relevant to the GATS general exceptions as discussed further below.[20]

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[12] See also Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services* ('*Argentina – Financial Services*'), WTO Doc WT/DS453/AB/R (circulated 14 April 2016, adopted 9 May 2016) [6.106].
[13] Ibid [6.145].
[14] Ibid [6.31]–[6.32]; Tania Voon, 'Discrimination in Mobile Roaming Regulation: Implications of WTO Law' (2013) 16(1) *Journal of International Economic Law* 91, 104.
[15] *Argentina – Financial Services* (n 14) [6.25] (emphasis added); see also [6.34].
[16] Ibid [6.29].
[17] OECD Interim Report, [441].
[18] See, eg, in the context of trade in goods, Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* ('*EC – Seal Products*'), WTO Docs WT/DS400/AB/R, WT/DS401/AB/R (circulated 22 May 2014, adopted 18 June 2014) [5.117]. See, eg, in the context of technical barriers to trade, 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* ('*US – Tuna II (Mexico) (Article 21.5 – Mexico)*'), WTO Doc WT/DS381/AB/RW (circulated 20 November 2015, adopted 3 December 2015) [7.27]. 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; Nicolas F Diebold, 'Standards of Non-Discrimination in International Economic Law' (2011) 60 *International and Comparative Law Quarterly* 831.
[19] *Argentina – Financial Services* (n 14) [6.106].
[20] Ibid [6.115]. See also Andrew Mitchell, David Heaton and Caroline Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Edward Elgar, 2016) 27–28, 119–120.

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'.[21] 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)[22] as opposed to Australian. The inclusion of a threshold below which service suppliers are exempt from the tax may therefore enhance 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 determining their likeness remains uncertain,[23] 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.

3.1.3. Australia's National Treatment Commitments in Relevant Service Sectors

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 its GATS Schedule. In its Schedule, Australia has made full national treatment commitments for Modes 1-3, without limitations, in service sectors that could be caught by a digital services tax: **computer and related services** (including data processing services); **advertising services** (subject to qualifications mentioned below); **news agency services**; and **tourist guide services**. Australia has also made full national treatment commitments for Modes 2-3 with respect to **hotel services**, **travel agencies**, and **tour operator services**. 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[24] and financial services,[25] but not audiovisual services).

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 may 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.[26] In the WTO dispute *China – Publications and Audiovisual Products*, brought by the United States against China, the WTO Appellate Body rejected China's contention that the Mode 3 national treatment commitments in its GATS Schedule for 'Audiovisual Services: Sound recording distribution services'[27] did not cover electronic distribution of sound

[21] Treasury Discussion Paper, 28. See also OECD Interim Report, [452].

[22] UNCTAD, *World Investment Report 2017: Investment and the Digital Economy* (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, Gary Clyde Hufbauer and Zhiyao (Lucy) Lu, *The European Union's Proposed Digital Services Tax: A De Facto Tariff* (Peterson Institute for International Economics, Policy Brief, June 2018) 5–6, 8–9.

[23] See, eg, Werner Zdouc, 'WTO Dispute Settlement Practice Relating to the GATS' (1999) *Journal of International Economic Law* 295, 333; 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, 336–337. But see Group of Negotiations on Services, *The Applicability of the GATS to Tax Measures: Note by the Secretariat*, MTN.GNS/W/210 (1 December 1993).

[24] GATS, *Australia – Schedule of Specific Commitments: Supplement 3*, WTO Doc GATS/SC/6/Suppl.3 (11 April 1997).

[25] GATS, *Australia – Schedule of Specific Commitments: Supplement 4*, WTO Doc GATS/SC/6/Suppl.4 (26 February 1998).

[26] See Tania Voon, 'China and Cultural Products at the WTO' (2010) 37(3) *Legal Issues of Economic Integration* 253, 256–257.

[27] GATS, *The People's Republic of China: Schedule of Specific Commitments*, WTO Doc GATS/SC/135 (14 February 2002) 20.

recordings, despite China's argument that such distribution had not been technically feasible or commercially available when it made those commitments.[28]

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 CPC 962 (pursuant to the 1991 provisional version),[29] 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'. Today's equivalent is CPC 844 (Version 2.1, 2015), which covers both 'News agency services to newspapers and periodicals' (8441) and 'News agency services to audiovisual media' (8442). 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 i.e. sale of time and space for various media; distribution and delivery of advertising material or samples. Does not include production or broadcast/screening of advertisements for radio, television or cinema.[30]

Australia might 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. 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 provided by advertising agencies to place advertisements in online media, as well as services provided 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 Schedule indicates that it does not cover the whole of CPC 87120 (1991) ('Planning, creating and placement services of advertisements to be displayed through the advertising media'), presumably as a result of the clarification/exclusion regarding radio, television or cinema noted above. However, the inclusion in Australia's commitment of CPC 87190 (1991), for 'Other 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 'Sale 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.

3.1.4. 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 in those services in which the 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 (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'.[31] 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

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

[29] See also GATS, *Services Sectoral Classification List: Note by the Secretariat*, MTN.GNS/W/120 (10 July 1991).

[30] GATS, *Australia – Schedule of Specific Commitments*, GATS/SC/6 (15 April 1994) 15.

[31] GATS, *Australia – Final List of Article II (MFN) Exemptions*, GATS/EL/6 (15 April 1994). See also WTO, *Australia – List of Article II (MFN) Exemptions: Supplement 1*, WTO Doc GATS/EL/6/Suppl.1 (26 February 1998).

suppliers of another WTO Member, including with respect to audiovisual services, financial services,[32] 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 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 might increase this risk if suppliers of WTO Members other than the US are more likely to be exempt.

3.1.5. General Exceptions to GATS Obligations

If an Australian digital services tax was inconsistent with the MFN or national treatment obligations under GATS, Australia might nevertheless avoid breach if it met the requirements of the general exceptions in GATS Art XIV, which relevantly provides:[33]

> 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;[5] …
>
> (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[6] 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.

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[5] The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

[6] Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which: … (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures … Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.

Beginning with **GATS Art XIV(a)** (which corresponds generally to GATT Art XX(a)), WTO caselaw makes clear that the notion of public morals (and public order)[34] may be quite broad.[35] However, the specific references to taxation

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[32] An exception applies for prudential measures, pursuant to the GATS Annex on Financial Services. 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 *Journal of International Economic Law* 787.

[33] GATS Art XIV (emphasis added).

[34] See, eg, Panel Report, *European Union and its Member States – Certain Measures Relating to the Energy Sector* ('*EU – Energy Package*'), WTO Doc WT/DS476/R (circulated 10 August 2018, not yet adopted) [7.1156], [7.1202], [7.1208], [7.1224], [7.1239]–[7.1240] (Panel Report under appeal).

[35] See, eg, Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (circulated 7 April 2005, adopted 20 April 2005) [296]; *China – Publications and Audiovisual Products* (n 28) [243]. See also, with respect to GATT Art XX(a), eg, Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WTO Doc WT/DS461/AB/R (circulated 7 June 2016, adopted 22 June 2016) [5.85], [5.89]; *EC – Seal Products* (n 18) [5.199]–[5.201].

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 – Taxation* (currently under appeal), 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'.[36] However, the Panel rejected Brazil's defence under Art XX(a) because the 'the discriminatory aspects of the programme do not … bear any relation to bridging the digital divide, or social inclusion'; [37] those aspects were therefore not 'necessary' to protect public morals within the meaning of Art XX(a).[38]

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.

GATS Art XIV(c) (corresponding with GATT Art XX(d)) might more readily apply to a digital services tax. In *Argentina – Financial 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 and 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.[39]

This finding was rendered moot on appeal because the Appellate Body reversed the Panel's findings on the underlying non-discrimination obligations, and Panel 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.[40]

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.[41] 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.

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 as set out above).[42] 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.[43]

A digital services tax applicable to each digital service transaction, similar to Australia's GST or an excise tax,[44] 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)

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[36] Panel Report, *Brazil – Certain Measures Concerning Taxation and Charges*, WTO Docs WT/DS472/R, WT/DS497/R (circulated 30 August 2017, not yet adopted) [7.568].
[37] Ibid [7.571]; see also [7.575].
[38] Ibid [7.622].
[39] *Argentina – Financial Services* (n 12) [6.231].
[40] Ibid [6.200], [6.201], [6.218], [6.241].
[41] Ibid [6.202]–[6.204].
[42] See also Group of Negotiations on Services, *Taxation Issues Related to Article XIV(d): Note by the Secretariat – Addendum*, MTN.GNS/W/178/Add.1 (30 November 1993).
[43] GATS 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* (IMF, Fiscal Affairs Department, March 2016).
[44] See OECD Interim Report, [406].

might qualify as a tax 'on elements of income' and therefore might 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).

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'.[45] 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), might 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,[46] yet the exemption for smaller suppliers appears to run counter to the purpose of ensuring tax coverage of digital services.

3.2. WTO Declaration on Global Economic Commerce

On 20 May 1998, the WTO Ministerial Conference adopted a Declaration on Global Electronic Commerce, in which WTO Members agreed to 'continue their current practice of not imposing customs duties on electronic transmissions'.[47] Subsequent Ministerial Conferences have extended this undertaking.[48] 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 a facilitating electronic commerce' and 'the benefits of electronic commerce for businesses and consumers across the globe'.[49]

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.'[50] The Declaration on Global Electronic Commerce, in particular, might be relevant to the interpretation of the GATS, for example in shedding light on the 'object and purpose' of the treaty or the 'ordinary meaning' of treaty terms, in accordance with VCLT Art 31(1),[51] or as a 'subsequent agreement'[52] or 'subsequent practice' regarding the interpretation of the treaty under VCLT Art 31(3). To the extent relevant to interpretation of a particular GATS term, the Declaration might also constitute an authoritative interpretation pursuant to Marrakesh Agreement Art IX:2.[53]

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 services traded by way of Modes 1 to 3 more than locally 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

[45] GATS Art XIV.

[46] See, eg, *EU – Energy Package* (n 34) [7.1244], [7.1251], [7.1253]–[7.1254]; *US – Tuna II (Mexico) (Article 21.5 – Mexico)* (n 18) [7.316]; *EC – Seal Products* (n 18) [5.306]; Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (circulated 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, 54–56.

[47] WTO, Ministerial Conference, *Declaration on Global Electronic Commerce Adopted on 20 May 1998*, WTO Doc WT/MIN(98)/DEC/2 (25 May 1998).

[48] See, most recently, *Ministerial Decision of 13 December 2017: Work Programme on Electronic Commerce*, WTO Doc WT/MIN(17)/65 (18 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.'

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

[50] Mary Footer, 'The (Re)turn to "Soft Law" in Reconciling the Antinomies in WTO Law' (2010) *Melbourne University Law Review* 1, 7.

[51] See DSU Art 3.2: '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'.

[52] 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 (circulated 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/4 (circulated 4 April 2012, adopted 24 April 2012) [262]–[268]. See also Panel Reports, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, [7.2409]; Panel Report under appeal.

[53] Cf *US – Clove Cigarettes* (n 52) [251]–[255], [259].

Declaration on Global Electronic Commerce and against the spirit of the Joint Statement to which Australia was a party in 2017.

3.3. Australia's PTA Obligations[54]

Australia currently has 10 PTAs in force that cover services trade.[55] Australia has also signed three additional PTAs that are not yet in force[56] and it has also concluded negotiations with Hong Kong and Indonesia on further PTAs that are not yet publicly available, signed or in force. In this section we address the 13 PTAs that have been signed and for which the agreed text is available. Of these 13, the ANZCERTA Services Protocol excludes taxation measures from its scope[57] and therefore would not raise problems for an Australian digital services tax and is not discussed further here. The other 12 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 Mode 1 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.

3.3.1. Non-Discrimination Obligations for Mode 1 Service Supply

As indicated in **Table 1**, all of Australia's 12 signed services PTAs that do not exclude taxation measures altogether[58] 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 services 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 that may be relevant to a digital services tax, such as news agency services, advertising services, and tourist guide services.[59] 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 NCM in those PTAs as discussed further below.

[54] See generally Andrew D Mitchell, Elizabeth Sheargold and Tania Voon, *Regulatory Autonomy in International Economic Law* (Edward Elgar, 2017) 85, 114–115.
[55] AANZFTA; ANZCERTA Services Protocol; AUSFTA; ACLFTA; ChAFTA; JAEPA; KAFTA; MAFTA; SAFTA; TAFTA.
[56] CPTPP; PACER Plus; PAFTA.
[57] ANZCERTA Services Protocol Art 15: 'The provisions of this Protocol shall not apply to any taxation measure'.
[58] As noted above, the ANZERTA Services Protocol excludes taxation measures.
[59] AANZFTA, Annex 3: Australia's Schedule of Specific Services Commitments; MAFTA, Annex 3: Australia – Schedule of Specific Services Commitments; PACER Plus, Annex 7–A: Schedule of Specific Services Commitments (Australia); TAFTA, Annex 8: Schedule of Commitments (Australia).

PTA	Entry into Force	National Treatment	MFN Treatment
AUSFTA	2005	negative list	negative list
TAFTA	2005	positive list	×
AANZFTA	2009	positive list	×
ACLFTA	2009	negative list	negative list
MAFTA	2013	positive list	×
KAFTA	2014	negative list	negative list
ChAFTA	2015	negative list (Australia)	negative list (Australia)
JAEPA	2015	negative list	negative list
SAFTA	2003, as amended 2017	negative list	negative list
CPTPP	30 December 2018	negative list	negative list
PACER Plus	TBC	positive list	negative list
PAFTA	TBC	negative list	negative list

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

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'.[60] 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.

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 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.

[60] CPTPP Arts 10.3.1, 10.4, n 2; PAFTA Arts 9.3.1, 9.4, n 2; SAFTA Ch 7 Arts 4.1, 5, n 3.

PTA	Restrictions on Non-Discrimination for Taxation Measures
AANZFTA	National treatment applies only to the extent of GATS Art XVII.[61]
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.[62]
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.[63]
ChAFTA	National treatment and MFN treatment apply only to the extent of GATS.[64]
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.[65]
JAEPA	National treatment applies to taxation measures, but MFN obligation applies only where the taxation measure is an indirect tax [66]
KAFTA	National treatment applies to taxation measures, but MFN obligation applies only where the taxation measure is an indirect tax.[67]
MAFTA	National treatment applies only to the extent of GATS Art XVII.[68]
PACER Plus	National treatment and MFN treatment apply only to the extent of GATS.[69]
PAFTA	National treatment and MFN treatment apply only to the extent of GATS.[70]
SAFTA	MFN obligation does not apply to taxation measures. National treatment applies only to the extent of GATS Art XVII. [71]
TAFTA	National treatment applies only to the extent of GATS Art XVII.[72]

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

[61] AANZFTA Ch 15 Art 3.2(a). AANZFTA contains no MFN obligation for Mode 1 service supply.
[62] ACLFTA Art 22.3.4(a)–(b).
[63] AUSFTA 22.3.4(a)–(b).
[64] ChAFTA Art 16.4.3.
[65] CPTPP Art 29.4.6(a)–(b).
[66] JAEPA Art 1.8.2(c)–(d).
[67] KAFTA Art 22.3.2(b)–(c).
[68] MAFTA Art 18.3.2(b)–(c). MAFTA contains no MFN obligation for Mode 1 service supply.
[69] PACER Plus Ch 11 Art 5.2(a).
[70] PAFTA Art 28.4.3(a).
[71] SAFTA Ch 17 Art 3.3.
[72] TAFTA Art 1607.1(a). TAFTA contains no MFN obligation for Mode 1 service supply.

3.3.2. Electronic Commerce Obligations

Australia's nine PTAs in force that cover taxation measures,[73] as well as the CPTPP and PAFTA,[74] contain separate Electronic Commerce Chapters. These chapters contain several important obligations and declarations that may be 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.[75]
- An obligation not to impose **customs duties on electronic transmissions** between a person of a Party and a person of the other Party.[76] 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.[77] 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 Economic 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 territory of the other Party, or … of which the author, performer, producer, developer or owner is a person of the other Party'.[78]

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.[79] 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 Economic Commerce.

3.3.3. 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,[80] though, this exception is explicitly subject to concepts of non-discrimination such as those reflected in the GATS *chapeau*.[81]

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.

[73] AANZFTA Ch 10; ACLFTA Ch 16; AUSFTA Ch 16; ChAFTA Ch 12; JAEPA Ch 13; KAFTA Ch 15; MAFTA Ch 15; SAFTA Ch 14; TAFTA Ch 11. As noted above, the ANZCERTA Services Protocol excludes taxation measures; it also lacks an electronic commerce chapter.
[74] CPTPP Ch 14; PAFTA Ch 13. PACER Plus does not contain an electronic commerce chapter.
[75] See, eg, SAFTA Ch 14 Art 2.1.
[76] See, eg, SAFTA Ch 14 Art 4.1. See also the definition of 'customs duty' in SAFTA Ch 1 Art 2(e).
[77] See, eg, SAFTA Ch 14 Art 4.2.
[78] SAFTA Ch 14 Art 5.1.
[79] See, eg, SAFTA Ch 14 Arts 2.5(a), 2.6, 11.
[80] But see, eg, ACLFTA Art 22.3.4(i), which contains no such explicit qualification.
[81] See, eg, PACER Plus Ch 11 Art 5.3(d) and PAFTA Art 29.4.4(d): 'provided that the taxation measure does not arbitrarily discriminate between persons, goods or services of the Parties'. Cf AUSFTA Art 22.3.4(g): 'as permitted by GATS Article XIV(d) without regard to the limitation in Article XIV(d) to direct taxes'.

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	Art 22.3.4(e)–(g)	Art 22.3.4(h)	Art 22.3.4(i)
AUSFTA	Art 22.3.4(d)–(f)	×	Art 22.3.4(g)
ChAFTA	Art 16.4.4(b)	×	Art 16.4.4(c)
CPTPP	Art 29.4.6(e)–(g)	×	Art 29.4.6(h)
JAEPA	Art 1.8.3(a)–(c)	×	Art 1.8.3(d)
KAFTA	Art 22.3.3(b)–(d)	×	Art 22.3.3(e)
PACER Plus	Ch 11 Art 5.3(a)–(c)	×	Ch 11 Art 5.3(d)
PAFTA	Art 28.4.4(a)–(c)	×	Art 28.4.4(d)
SAFTA	×	×	Ch 17 Art 3.3 n 2

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

Similar provisions may have been considered less necessary for Australia's positive list PTAs (AANZFTA, MAFTA, TAFTA), as they apply only to 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 might still breach these PTAs as well.

3.3.4. General Exceptions in Australia's PTAs

Australia's 12 signed services PTAs that do not exclude taxation measures[82] all incorporate the general exceptions in GATS Art XIV, or part of those exceptions, either by reference or through duplication of similar text.[83] 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).

[82] As noted above, the ANZERTA Services Protocol excludes taxation measures.

[83] AANZFTA Ch 15 Art 1.2; ACLFTA Art 22.1.2; AUSFTA Art 22.1.2; ChAFTA Art 16.2.2; CPTPP Art 29.1.3; JAEPA Art 1.9.2; KAFTA Art 22.1.2; MAFTA Art 18.1.2; PACER Plus Ch 11 Art 1.3; PAFTA Art 28.1.3; SAFTA Ch 7 Art 16; TAFTA Art 16-1.1.

4. International Investment Law

Australia's obligations under international law include commitments that it has made to foreign investors in numerous BITs that it has concluded since at least 1988 (20 of which remain in force),[84] as well as similar commitments made in the Investment Chapters of Australia's 10 PTAs currently in force.[85] Many of these treaties grant foreign investors the possibility 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 Australia's treaties, it is possible that a tribunal would find such a protected investment. The section then examines the investment treaty obligations of non-discrimination, fair and equitable treatment, 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.

4.1. 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. 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 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. As discussed in this section, such businesses could hold contractual rights or intellectual property rights in Australia sufficient to find an 'investment' under a treaty. Furthermore, an investment could be found under the holistic approach often applied by tribunals.

4.1.1. Contractual Rights

Digital businesses often hold rights under contracts with two groups: users and customers. Although users may not pay anything to a digital business, they typically assist that business to generate significant profits from the business' customers.[86] The contractual relationships held by digital businesses with both users and customers could potentially 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 Hong Kong–Australia BIT, for instance, protects 'claims to money or to any performance under contract having an economic value'.[87] 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. 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.

Nevertheless, contracts between private parties have been viewed as protected investments. In *EMV v Czech Republic*, a foreign investor's contract with a Czech partner was 'firmly anchored within the territory of the Czech

[84] Some of Australia's BITs will terminate upon the entry into force of newer PTAs, including CPTPP and PAFTA.
[85] References to Australia's 'investment treaties' in this submission include references to the investment chapters of Australia's PTAs.
[86] See Treasury Discussion Paper, 15.
[87] See similarly Australia–China BIT Art 1(b)(iii).

State' and was held to constitute an investment.[88] The *Mytilineos v Serbia* 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.[89] Similarly, in *Bosca v Lithuania*, a service agreement for the transfer of know-how between the claimant and a Lithuanian company was a protected investment.[90]

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 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'.[91] 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'.[92] 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'.[93]

In *Fedax 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.[94] 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'.[95] This approach has been applied to claimed investments involving contractual rights: in *Nova Scotia Power Inc 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'.[96]

4.1.2. 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. In *Bridgestone v Panama*, a tribunal recently held that a trademark registered in Panama and 'unaccompanied by other forms of investment'[97] was protected under the relevant investment treaty, 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',[98] 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.

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[88] *European Media Ventures v Czech Republic* (UNCITRAL), Partial Award on Liability, 8 July 2009 [38].
[89] *Mytilineos Holdings SA v Serbia* (UNCITRAL), Partial Award on Jurisdiction, 8 September 2006 [109].
[90] *Luigiterzo Bosca v Lithuania* (UNCITRAL), Award, 17 May 2013 [168].
[91] *LESI SpA v Algeria* (ICSID Case No ARB/05/3), Decision on Jurisdiction, 12 July 2006 [73].
[92] *Alpha Projektholding GmbH v Ukraine* (ICSID Case No ARB/07/16), Award, 8 November 2010 [279], citing *SGS Société Générale de Surveillance SA v Philippines* (ICSID Case No ARB/02/6), Decision on Objections to Jurisdiction, 29 January 2004 [101]–[112]; see also *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine* (ICSID Case No ARB/08/8), Decision on Jurisdiction, 8 March 2010 [124].
[93] Christoph Schreuer et al, *The ICSID Convention: A Commentary* (2nd ed, Cambridge University Press, 2009) 140 (emphasis added).
[94] *Fedax NV v Venezuela* (ICSID Case No ARB/96/3), Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997 [41].
[95] *Abaclat v Argentina* (ICSID Case No ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011 [374].
[96] *Nova Scotia Power Inc v Venezuela* (ICSID Case No ARB(AF)/11/1), Award, 30 April 2014 [130].
[97] *Bridgestone Licensing Services Inc v Panama* (ICSID Case No ARB/16/34), Decision on Expedited Objections, 13 December 2017 [166].
[98] Ibid [177].

4.1.3. 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 *CSOB v Slovakia* said, '[a]n 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.'[99] Similarly, in *Joy Mining 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'.[100]

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.

4.2. Non-Discrimination

In relation to digital businesses holding protected investments in Australia, a risk arises that any 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.[101]

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'.[102]

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.

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

[100] *Joy Mining Machinery Ltd v Egypt* (ICSID Case No ARB/03/11), Award on Jurisdiction, 6 August 2004 [54]. See also, eg, *ADC Affiliate Ltd v Hungary* (ICSID Case No ARB/03/16), Award of the Tribunal, 2 October 2006 [331]; *Vestey Group Ltd v Venezuela* (ICSID Case No ARB/06/4), Award, 15 April 2016 [196].

[101] Treasury Discussion Paper, 23.

[102] See, eg, ACLFTA Art 10.3.1; SAFTA 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 Art 3(1). However, a tribunal would likely imply such a requirement into the national treatment obligation.

4.2.1. 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 v USA*, the tribunal held that the claimant was required to show that the USA '*intended* to favour domestic investors by discriminating against foreign investors'.[103] 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.[104]

However, most tribunals have taken the view that a discriminatory effect is sufficient to breach national treatment. The *Siemens 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'.[105] More recently, the *Bilcon v Canada* tribunal stated that national treatment 'does not require a demonstration of discriminatory intent'.[106] Commentators appear to agree that this is the prevailing view.[107] 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.

4.2.2. Cross-Sectoral Comparison

The risk of a national treatment violation could be higher if a tribunal took a different approach to 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 v Ecuador*, the tribunal compared the treatment of a foreign investor in the oil industry with 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, flowers and mining companies, amongst others, the tribunal found a national treatment violation.[108] Although some commentators have called this approach 'questionable',[109] others have concluded only that the issue 'remains controversial'.[110]

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.

4.2.3. 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 relevant

[103] *Methanex Corporation v USA* (UNCITRAL), Final Award, 3 August 2005, Part IV, Ch B [12] (emphasis added).
[104] *Alex Genin v Estonia* (ICSID Case No ARB/99/2), Award, 25 June 2001 [369]. This discrimination claim was, however, made under a different BIT provision, not a national treatment provision.
[105] *Siemens AG v Argentina* (ICSID Case No ARB/02/8), Award, 6 February 2007 [321].
[106] *Bilcon v Canada* (UNCITRAL), Award on Jurisdiction and Liability, 17 March 2015 [719].
[107] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd ed, Oxford University Press, 2017) [7.269]; CL Lim, Jean Ho and Martins Paparinskis, *International Investment Law and Arbitration* (Cambridge University Press, 2018) 305; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd ed, Oxford University Press, 2012) 203.
[108] *Occidental Exploration and Production Company v Ecuador* (LCIA Case No UN3467), Final Award, 1 July 2004 [173].
[109] McLachlan, Shore and Weiniger (n 107) [7.284].
[110] Dolzer and Schreuer (n 107) 202; see also Lim, Ho and Paparinskis (n 107) 302.

treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives'.[111] 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.[112]

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.[113]

4.3. 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 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'.[114]

Other tribunals have doubted the strict connection between stability and FET. According to the *EDF 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'.[115] In *Toto 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'.[116]

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.[117] 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.[118] While the *Paushok v Mongolia* tribunal recognised that '[a]n investor … should not be surprised to be hit with tax increases',[119] 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.

[111] See, eg, CPTPP Art 9.4 fn 14; SAFTA Ch 8 Art 4 fn 8.
[112] *Bilcon* (n 106) [720]–[723].
[113] The Treasury Discussion Paper identifies this concern at 23 and 28.
[114] *Occidental* (n 108) [183], citing *Tecnicas Medioambientales Tecmed SA v Mexico* (ICSID Case No ARB(AF)/00/2), Award, 29 May 2003 and *Metalclad Corporation v USA* (ICSID Case No ARB(AF)/97/1), Award, 30 August 2000.
[115] *EDF (Services) Ltd v Romania* (ICSID Case No ARB/05/13), Award, 8 October 2009 [217].
[116] *Toto Costruzioni Generali SpA v Lebanon* (ICSID Case No ARB/07/12), Award, 7 June 2012 [244].
[117] Saluka Investments BV v Czech Republic (UNCITRAL), Partial Award, 17 March 2006 [309].
[118] *LG&E Energy Corporation v Argentina* (ICSID Case No ARB/02/1), Decision on Liability, 3 October 2006 [158].
[119] Sergei *Paushok v Mongolia* (UNCITRAL), Award on Jurisdiction and Liability, 28 April 2011 [305].

4.4. 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 could not breach an investment treaty.

However, the taxation exceptions in Australia's treaties vary in their wording, meaning that they will not necessarily prevent claims. Some treaties, such as AANZFTA, subject taxation measures only to the free transfers and expropriation obligations,[120] which raise fewer concerns for a digital services tax.[121] 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.[122] To the extent that a digital services tax is an indirect tax and raises national treatment concerns (see above), the taxation exception in these and similar treaties would not prevent a successful ISDS claim.

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

4.5. Investor–State Dispute Settlement

Not all of Australia's investment treaties include an ISDS mechanism.[123] In particular, AUSFTA does not contain a traditional ISDS clause (instead permitting one State to request consultations with the other State following a 'change in circumstances' that suggest that an investor–State tribunal should be established). Nevertheless, two investors have attempted to pursue arbitrations against Australia under AUSFTA.[124]

Even if AUSFTA does not provide a direct path to arbitration, US businesses with affiliates in other jurisdictions – such as Hong Kong or Singapore – could rely on Australian treaties with those jurisdictions, which do contain consent to ISDS, to bring a claim against Australia.

Moreover, although the risks are highest and most direct where an ISDS claim is possible, even if no such claim is possible a breach of Australia's international obligations would still arise from any measure that is not in compliance with investment treaty commitments. Such breach entails Australia's State responsibility under international law, whether or not responsibility is invoked by any affected party.[125]

[120] AANZFTA Ch 15 Art 3.2(b)–(c).

[121] 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 Annex 11-I, in which Australia agreed with 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'.

[122] ACLFTA Art 22.3; KAFTA Art 22.3.

[123] See the tables in Mitchell, Sheargold and Voon (n 54) Ch 5.

[124] See Jarrod Hepburn, 'A Second US Investor Tries to Arbitrate Under Australia-US FTA, Despite Absence of an Investor-State Arbitration Mechanism' (24 April 2017) *Investment Arbitration Reporter* <tinyurl.com/mhh6qzl>.

[125] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, Art 1: 'Every internationally wrongful act of a State entails the international responsibility of that State.'

Abbreviations

Abbreviation	Full Name or Citation
AANZFTA	*Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 27 February 2009 (entered into force 1 January 2010), as amended by the *First Protocol to Amend the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 26 August 2014 (entered into force 1 October 2015)
ACLFTA	*Australia–Chile Free Trade Agreement*, signed 30 July 2008 (entered into force 6 March 2009)
ANZCERTA	*Australia New Zealand Closer Economic Relations Trade Agreement*, signed 28 March 1983 (entered into force 1 January 1983)
ANZCERTA Services Protocol	*Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations—Trade Agreement*, signed 18 August 1988 (entered into force 1 January 1989)
AUSFTA	*Australia–United States Free Trade Agreement*, signed 18 May 2004 (entered into force 1 January 2005)
Australia–China BIT	*Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, signed 11 July 1988 (entered into force 11 July 1988)
Australia–Hong Kong BIT	*Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments*, signed 15 September 1993 (entered into force 15 October 1993)
BEPS	Base Erosion and Profit Shifting
BIT	Bilateral Investment Treaty
ChAFTA	*Free Trade Agreement between Australia and the People's Republic of China*, signed 17 June 2015 (entered into force 20 December 2015)
CPC	United Nations Statistical Office, Central Product Classification Provisional Version ST/ESA/STAT/SER.M/77 (New York, 1991) Version 2.1 ST/ESA/TAT/SER.M/77/Ver.2.1 (New York 2015)
CPTPP	*Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (signed 8 March 2018, ratified by Australia on 31 October 2018, entering into force 30 December 2018)
DSU	Marrakesh Agreement, Annex 2 ('*Understanding on Rules and Procedures Government the Settlement of Disputes*')
EU	European Union
FET	Fair and Equitable Treatment
GATS	Marrakesh Agreement, Annex 1B ('*General Agreement on Trade in Services*')
GATT	Marrakesh Agreement, Annex 1A ('*General Agreement on Tariffs and Trade 1994*')
GELN	Global Economic Law Network

ISDS	Investor–State Dispute Settlement
JAEPA	*Agreement between Australia and Japan for an Economic Partnership*, signed 8 July 2014 (entered into force 15 January 2015)
KAFTA	*Korea–Australia Free Trade Agreement*, signed 8 April 2014 (entered into force 12 December 2014)
MAFTA	*Malaysia–Australia Free Trade Agreement*, signed 22 May 2012 (entered into force 1 January 2013)
Marrakesh Agreement	*Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995)
MFN	Most-Favoured Nation
NCM	Non-Conforming Measure
OECD Interim Report	OECD, *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS* (OECD/G20 Base Erosion and Profit Shifting Project, 2018)
PACER Plus	*Pacific Agreement on Closer Economic Relations (PACER) Plus*, signed 14 June 2017 (not yet in force)
PAFTA	*Peru–Australia Free Trade Agreement*, signed 12 February 2018 (not yet in force)
PTA	Preferential Trade Agreement
SAFTA	*Singapore–Australia Free Trade Agreement*, signed 17 February 2003 (entered into force 28 July 2003), as amended from 24 February 2006, 13 February 2007, 11 October 2007 and 2 September 2011 and 1 December 2017
TAFTA	*Australia–Thailand Free Trade Agreement*, signed 5 July 2004 (entered into force 1 January 2005)
Treasury Discussion Paper	Australian Treasury, *The Digital Economy and Australia's Corporate Tax System* (Discussion Paper, 2 October 2018)
UK	United Kingdom
VCLT	*Vienna Convention on the Law of Treaties*, opened for signature 22 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)
WTO	World Trade Organization

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