

July 15, 2020

**Submission from
Bryan Riley
Director, Free Trade Initiative
National Taxpayers Union Foundation**

**Prepared for
The Office of the U.S. Trade Representative**

**Regarding Docket Number USTR-2020-0022, Initiation of a Section 301
Investigation of Digital Services Taxes**

**Contact Information:
Bryan Riley
National Taxpayers Union and National Taxpayers Union Foundation
122 C Street NW, Suite 650
Washington, DC 20001
briley@ntu.org**

National Taxpayers Union Foundation (NTUF) opposes damaging policies like the discriminatory digital services taxes (DSTs) being proposed by a growing number of countries. Such taxes recently have emerged as a growing threat to an open world trading system.

NTUF supports U.S. objectives for digital trade that are laid out in the “Bipartisan Congressional Trade Priorities and Accountability Act of 2015.” These objectives include ensuring that governments refrain from implementing trade-related measures that impede digital trade, and that measures affecting digital trade are nondiscriminatory.¹

NTUF also agrees with the Office of the U.S. Trade Representative (USTR), which reports in its notice of investigation: “The DST appears to diverge from norms reflected in the U.S. tax system and the international tax system in several respects. These apparent departures include: Extraterritoriality; taxing revenue not income; and a purpose of penalizing particular technology companies for their commercial success.”²

The actions of France and other nations mainly located in Europe to unilaterally impose DSTs of their own certainly complicate efforts at the Organization for Economic Cooperation and Development (OECD) to develop a less discriminatory and less complex framework for international taxation, although OECD’s actions in this area have hardly been exemplary.

This seems especially evident since the COVID-19 crisis, as other nations acting individually and collectively through OECD seem intent on engaging in a massive revenue-raising exercise that could burden the U.S. economy with tens, or even hundreds of billions in new taxes. Thus it is vital that U.S. policymakers carefully evaluate a number of responses to a threat that is multifaceted and evolving.

Options the United States should consider in response to the threat of foreign DSTs that discriminate against U.S. providers or attempt to impose extraterritorial taxation include:

¹ H.R. 2146, “Bipartisan Congressional Trade Priorities and Accountability Act of 2015,” <https://www.govtrack.us/congress/bills/114/hr2146/text/enr>.

² Office of the U.S. Trade Representative, “Initiation of Section 301 Investigations of Digital Services Taxes,” June 5, 2020, <https://www.federalregister.gov/documents/2020/06/05/2020-12216/initiation-of-section-301-investigations-of-digital-services-taxes>.

Lead efforts to establish a consensus policy at OECD. As mentioned above, such leadership is becoming more challenging in the era of COVID-19. Yet, there is still time for thoughtful deliberation. . After all, in its work on taxation of e-commerce, the OECD identified several principles of tax policy.³ DSTs violate nearly all of them:

- Neutrality: Taxation should seek to be neutral and equitable between forms of business activities.
- Efficiency: Compliance costs to business and administration costs for governments should be minimised as far as possible.
- Certainty and simplicity: Tax rules should be clear and simple to understand, so that taxpayers know where they stand.
- Effectiveness and fairness: Taxation should produce the right amount of tax at the right time, while avoiding both double taxation and unintentional non-taxation.
- Flexibility: Taxation systems should be flexible and dynamic enough to ensure they keep pace with technological and commercial developments.

The United States should lead efforts to resolve this issue via OECD negotiations, as suggested in a letter to Treasury Secretary Steven T. Mnuchin from Senate Finance Committee Chair Charles E. Grassley (R-IA) and Ranking Member Ron Wyden (D-OR):

“We are supportive of the United States Treasury Department's active participation in the ongoing negotiations at the OECD regarding these new tax challenges. We urge you and your OECD counterparts to work expeditiously to achieve agreement on a measured and comprehensive approach to how international tax rules might be crafted to address such challenges.”⁴

Nonetheless, hasty action should not be a substitute for expeditious action. In its approach to OECD negotiations, the U.S. must be more emphatic that proceeding with implementation of either Pillar One or Pillar Two of the evolving tax framework, merely for the sake of “having a solution” that happens to raise revenues at the same time is

³ “Fundamental principles of taxation,” *Addressing the Tax Challenges of the Digital Economy*, OECD, 2014,

<https://www.oecd-ilibrary.org/docserver/9789264218789-5-en.pdf?expires=1566506321&id=id&accname=guest&checksum=E9B4B3342B2FEA8F1700348071C87EB8>.

⁴ Letter to Treasury Secretary Steven T. Mnuchin, January 29, 2019,

[https://www.finance.senate.gov/imo/media/doc/2019-01-29%20CEG.%20Wyden%20to%20Treasury%20\(Foreign%20Digital%20Services%20Taxes-OECD\).pdf](https://www.finance.senate.gov/imo/media/doc/2019-01-29%20CEG.%20Wyden%20to%20Treasury%20(Foreign%20Digital%20Services%20Taxes-OECD).pdf).

unacceptable. There are many issues besides DST involved in those Pillars, but DST is definitely a key component.

Explicitly ban tax protectionism in future trade agreements. Most U.S. trade agreements implicitly ban tax protectionism via “national treatment” standards that require governments to treat foreign and domestic companies equally under the law.

The U.S.-Japan [Digital Trade Agreement](#) goes a step further by explicitly providing for non-discriminatory tax treatment of digital products. Similar language should be included in future U.S. trade agreements.

The United States currently does not have free trade agreements with any of the countries targeted by its Section 301 investigation.⁵ We should aim to negotiate free trade agreements that include coverage for digital trade with each of the named countries.

Pursue a remedy through the WTO. The United States should challenge protectionist digital tax schemes via the World Trade Organization (WTO). DSTs violate WTO members’ commitment to treat domestic and foreign firms equally: “A commitment to national treatment implies that the Member concerned does not operate discriminatory measures benefiting domestic services or service suppliers.”⁶

The United States has a strong track record at the WTO, where we have prevailed in about 91 percent of disputes we have initiated.⁷

In addition, the U.S. should lead efforts to permanently extend the WTO prohibition on tariffs on digital transmissions.⁸

Enforce tax treaties that prohibit extraterritorial taxation and consider targeted tax penalties. NTUF executive vice president Andrew Moylan observed: “Governments

⁵ Office of the U.S. Trade Representative, “Initiation of Section 301 Investigations of Digital Services Taxes,” June 5, 2020, <https://www.federalregister.gov/documents/2020/06/05/2020-12216/initiation-of-section-301-investigations-of-digital-services-taxes>.

⁶ “The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines,” World Trade Organization, https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm.

⁷ Dan Ikenson, “US Trade Laws And The Sovereignty Canard,” March 9, 2017, <https://www.forbes.com/sites/danikenson/2017/03/09/u-s-trade-laws-and-the-sovereignty-canard/#6fc8faeb203f>.

⁸ World Trade Organization, “WTO members agree to extend e-commerce, non-violation moratoriums,” December 10, 2019, https://www.wto.org/english/news_e/news19_e/gc_10dec19_e.htm.

love nothing more than targeting entities with no power at the ballot box for tax collection.”⁹ Fortunately, the United States has treaties with 58 countries ranging from Australia to Venezuela that generally limit the authority of governments to unfairly tax outside of their borders.^{10 11}

Moreover, Section 891 of the U.S. Tax Code permits the president to double the tax rate on the income earned domestically by any individual or corporation of a foreign country that unfairly targets U.S. citizens or businesses with “discriminatory or extraterritorial taxation.” This type of response would allow for targeted pressure to be applied to the discriminating country while sparing American consumers and businesses from additional tariffs and barriers that restrict trade.

Still others have suggested that expanding the existing foreign tax credit in U.S. law to protect American firms from DSTs would be a helpful step. This action would need to be approached with extreme caution. Care must be taken to avoid a policy response that simply encourages, or holds relatively harmless, those governments that decide to pursue reckless tax increases.

Imposing tariffs in response to the threat of DSTs, however, carries risks of its own. New U.S. tariffs may result in retaliatory tariffs being imposed on other U.S. industries that are not directly involved in the DST issue. In contrast to the U.S. record of success challenging trade barriers at the WTO, unilateral U.S. tariffs usually [fail](#) to achieve their stated goals.

The United States should strive to avoid a trade war that would doubly penalize U.S. digital services providers by leaving them subject to foreign taxes while simultaneously disrupting global commerce.

Eliminate “Buy American” laws and regulations that implicitly legitimize other countries’ imposition of “Don’t Buy American” taxes on U.S. digital services providers. When the White House issues executive orders stating: “it is the policy of the United States to buy American and to maximize, consistent with law, the use of

⁹ Andrew Moylan, “Testimony to House Judiciary Committee,” July 25, 2018, National Taxpayers Union Foundation, <https://www.ntu.org/foundation/detail/ntuf-executive-vice-president-andrew-moylan-testimony-to-house-judiciary-committee>.

¹⁰ Michael S. Kirsch, “The Role of Physical Presence in the Taxation of Cross-Border Personal Services,” *Boston College Law Review*, September 2010, https://www.bc.edu/content/dam/files/schools/law/bclawreview/pdf/51_4/03_kirsch.pdf

¹¹ Internal Revenue Service, “List of Tax Treaties,” https://www.irs.gov/pub/irs-uti/Tax_Treaty_Table_3.pdf.

goods, products, and materials produced in the United States,” no one should be surprised when other governments announce it is their policy to maximize the use of goods and services produced locally at the expense of U.S. providers.¹²

Likewise, when the U.S. Trade Representative testifies: “I’m not in favor of reducing tariffs on the things we need. I would be far more in favor of increasing tariffs on the things we need,” it should not come as a surprise when foreign officials respond in kind by trying to tax U.S. digital services while looking to promote their own digital services companies.¹³ NTUF respectfully makes this point out of what we believe to be in the best, long-term interests of American taxpayers.

We hope USTR will consider the notion that a U.S. policy based on “Buy American” requirements can be counterproductive with respect to efforts to eliminate unfair foreign “Buy Local” digital services taxes.

NTUF appreciates the opportunity to comment on this important issue. We look forward to working with you to combat unfair U.S. and foreign trade barriers, including discriminatory and extraterritorial digital services taxes.

¹² The White House, “Executive Order on Maximizing Use of American-Made Goods, Products, and Materials,” July 15, 2019, <https://www.whitehouse.gov/presidential-actions/executive-order-maximizing-use-american-made-goods-products-materials/>

¹³ Amb. Robert Lighthizer, comment at “The 2020 Trade Policy Agenda,” June 17, 2020, U.S. House of Representatives Committee on Ways and Means, <https://waysandmeans.house.gov/legislation/hearings/2020-trade-policy-agenda>.