

USTR Issues Determinations in Digital Services Tax Investigations

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The Office of the U.S. Trade Representative (UST) has issued determinations in the investigations of digital services taxes (DSTs) adopted or considered by India, Italy, and Turkey, [finding](#) that “each of the DSTs discriminates against U.S. companies, is inconsistent with prevailing principles of international taxation, and burden *{s/c}* or restricts U.S. commerce.” Notably, USTR is not taking any specific action at this time, noting that it will “continue to evaluate all available options.” Thus, any action taken in response to these determinations, if any, is likely to be decided and implemented by the Biden Administration and President-Elect Biden’s nominee for the USTR role, [Katherine Tai](#).

These investigations were conducted under Section 301 of the Trade Act of 1974 (19 U.S.C. § 2411). Under the law, the president may direct USTR to remedy violations of bilateral or multilateral trade agreements, or unreasonable, unjustifiable, or discriminatory foreign government practices that burden or restrict U.S. commerce. While the law expressly allows the use of Section 301 action to address violations of agreements, prior U.S. policy has been to address trade agreement violations under the applicable dispute settlement procedures, including through the World Trade Organization (WTO). There have been over 125 cases under Section 301 since the law’s enactment, of which only about 25 percent have been initiated since the WTO’s establishment in 1995. Most investigations have involved government measures affecting trade in goods – especially agricultural goods – such as export restraints, subsidies, or other discriminatory policies.

The completed investigations regarding Indian, Italian, and Turkish DSTs stem from a set of investigations initiated in June 2020 on DST measures or proposals in these three countries, plus Austria, Brazil, the Czech Republic, the European Union, Indonesia, Spain, and the United Kingdom. The subject DSTs apply to revenues that certain companies generate from providing digital services to, or aimed at, users in those jurisdictions. UST has stated that it “USTR expects to announce the progress or completion” of these additional DST investigations “in the near future.”

The president must typically make a determination within 12-18 months of investigation initiation (depending on the practice investigated) if dispute settlement procedures are not invoked. Remedies may include tariffs or other import restrictions, suspension of concessions under a trade agreement, an agreement to end the practice at issue or compensate the United States, or the imposition of fees on or restriction or denial of services. Section 301 also includes a general authorization that permits USTR to take any actions that are “within the President’s power with respect to trade in goods or services, or with respect to any other area of pertinent relations with the foreign country.”

The most well-known and impactful example of recent use of Section 301 has been the Trump Administration’s imposition of tariffs on nearly all imports from China due to Chinese laws and practices related to intellectual property rights and forced technology transfer (we have [written](#) on this a number of times). At the end of 2019, USTR concluded another Section 301 investigation into

France's DST, finding the measure discriminates against (large) U.S. digital companies and is inconsistent with prevailing tax principles. Imposition of tariffs on \$2.4 billion in luxury French imports such as wine, handbags, makeup, and cheese was delayed and has most recently been [suspended](#) for purposes of promoting a coordinated response across all DST cases according to USTR. In October 2020, UST also initiated Section 301 [investigations](#) into Vietnam's importation of illegally harvested timber and currency undervaluation.