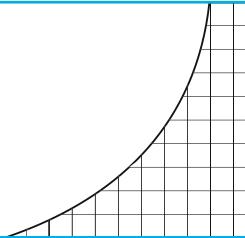


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How Do US-Asia Trade Agreements Affect DSTs, FDDEI and VAT?



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On October 26, the US announced trade agreements with Cambodia and Malaysia and framework agreements with Thailand and Vietnam. Although the agreements primarily impact bilateral trade between these countries and the US, and particularly the rate of customs duties imposed, various provisions and statements focus on other tax issues.

Digital Services Taxes

The Cambodian and Malaysian agreements specifically prohibit Cambodia and Malaysia from imposing Digital Service Taxes, or similar taxes, that discriminate, in law or in fact, against US companies. This commitment is included in the framework agreement with Thailand, but not at this stage with Vietnam.

What DSTs are prohibited? The definition of prohibited DST is conjunctive, i.e., a tax measure will only be prohibited if it both (1) is a DST or similar tax, and (2) discriminates against US companies. The agreements do not define DSTs and hence do not address questions such as whether a streaming tax should be considered a DST. They also do not address the potentially complex issue of how to determine whether a tax “in fact” discriminates against US companies—i.e., what constitutes discrimination or what data would be used to make this assessment.

Trade, not tax. It is notable that these clauses have been included in trade agreements not tax treaties where they would fit more naturally. Though it is also notable that the US does not have a tax treaty with either Cambodia or Malaysia and that tax treaties have not prevented other countries from imposing DSTs on US companies. This also highlights a difference in how the US is approaching negotiations on Pillar Two, conducted by US Department of the Treasury within the OECD/G20 Inclusive Framework, and DSTs, addressed as part of trade negotiations led by the Office of the US Trade Representative.

Cambodia, Malaysia, and Thailand. Although these countries do not have European-style DSTs, the trade agreements prevent them from imposing DSTs or similar measures that discriminate against US companies in the future. Malaysia does have a Service Tax on Digital Services that applies to the provision * [Alistair Pepper](#) is a managing director and [Michael Plowgian](#) is a principal in KPMG LLP's Washington National Tax Group. [Conrad Turley](#) is KPMG's Global Head of Tax Policy. The authors thank [Sue Lynn Ng](#), KPMG Malaysia's Head of Indirect Tax, for her comments.

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of some digital services. The Malaysian Ministry of Investment, Trade, and Industry released a [Frequently Asked Question \("FAQ"\) document](#) indicating that its agreement with the US does not require it to abolish the Service Tax on Digital Services. The document also asserts that "the agreement does not limit Malaysia's taxing powers; it mainly seeks to ensure transparency in its implementation".

Vietnam. Vietnam has provisions for the taxation of cross-border e-commerce and digital economic activity (albeit, not a European-style DST). The US-Vietnam framework agreement does not, at this stage, include a commitment on DSTs or Vietnam's existing e-commerce tax. Instead, an agreement on "digital trade" is still to be finalized.

Relevance for other negotiations. Whether these agreements could be used as a framework for the US to achieve the rollback of DSTs with other countries, such as Austria, France, Italy, Spain, and the UK is unclear. The initial agreements reached by the US with the EU and UK did not include a similar commitment to eliminate DSTs, suggesting that further negotiations with the relevant countries will be required.

Foreign-Derived Deduction Eligible Income

The European Commission has previously asserted that the US's Foreign Derived Intangible Income regime (renamed FDDEI by the [One Big, Beautiful Bill Act](#)) is likely an export subsidy that is incompatible with US commitments under the World Trade Organization.

The Cambodian and Malaysian agreements seek to head off any potential challenge by providing that those countries shall not contest "any measure adopted by the United States to rebate or to refrain from imposing direct taxes in relation to exports from the United States."

The commitment in the Cambodian agreement is one-sided, whereas the Malaysian agreement is two-sided, with the US agreeing to refrain from contesting a similar measure if introduced by Malaysia.

Value-Added Taxes

Cambodia has a Value-Added Tax, and Malaysia currently has a sales tax and service tax, but not a VAT.

The Cambodian and Malaysia agreements commit both countries not to "impose value-added taxes that discriminate against US companies in law or in fact".

This commitment raises the interesting question of whether VAT regimes do, in fact, discriminate against US companies.

A previously issued [Memorandum on Reciprocal Trade and Tariffs](#) indicates that the current US administration considers VAT to be discriminatory. However, as has been widely reported, most tax specialists do not consider VAT to be discriminatory because it applies equally to foreign imports and domestic producers.

Monitoring whether the Cambodian government feels compelled to make changes to their existing VAT regime in response to this trade agreement with the US will be important.

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