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Appendix A
Tables for Figures

Table A.1 Change in real GDP of the United States and selected major economies, annual, 2020–22
Change in percentage. Table corresponds to figure 1.1.

Economy	2020	2021	2022
World	-2.8	6.3	3.5
Japan	-4.3	2.2	1.0
United States	-2.2	5.8	1.9
China	2.2	8.4	3.0
Mexico	-8.0	4.7	3.0
Canada	-5.1	5.0	3.4
EU	-5.6	5.5	3.7
UK	-11.0	7.6	4.1
India	-5.8	9.1	7.2

Source: International Monetary Fund (IMF), World Economic Outlook, April 11, 2023, 142–147 and July 25, 2023, 4. USDOC, BEA, "National Data, National Income and Product Accounts", October 26, 2023, Table 1.1.1 "Percent Change From Preceding Period in Real Gross Domestic Product".

Table A.2 Change in consumer prices in the United States and selected major economies, annual, 2020–22
Change in percentage. Table corresponds to figure 1.2.

Economy	2020	2021	2022
World	3.2	4.7	8.7
EU	0.7	2.9	9.3
UK	0.9	2.6	9.1
United States	1.3	4.7	8.0
Mexico	3.4	5.7	7.9
Canada	0.7	3.4	6.8
India	6.2	5.5	6.7
Japan	0.0	-0.2	2.5
China	2.5	0.9	1.9

Sources: IMF, *World Economic Outlook Database*, “Inflation, average consumer prices, percent change,” April 7, 2023. IMF, *World Economic Outlook*, April 2023, 149–153.

Table A.3 Manufacturing output growth for the United States and major trading partners, annual, 2020–22
In percentages. EU data exclude the UK. Table corresponds to figure 1.3.

Country	2020	2021	2022
Mexico	-9.3	8.6	5.3
India	-12.9	13.8	3.9
Canada	-9.6	4.7	3.6
United States	-6.3	5.9	3.1
China	0.8	12.4	3.1
EU average	-7.6	8.8	2.2
Japan	-10.6	5.5	0.1
UK	0.2	9.6	-4.7

Source: UNIDO, “Seasonally Adjusted Quarterly Index of Industrial Production Database,” accessed April 17, 2023.
Note: EU average represents a simple unweighted average manufacturing output growth across 27 member countries.

Table A.4 Percentage change in global manufacturing output, by ISIC industry 2-digit division codes, annual, 2021–22

In percentages. ISIC = the International Standard Industrial Classification; n.e.c. = not elsewhere classified. Table corresponds to figure 1.4.

ISIC code	Sector description	Percentage change in 2021–22
27	Electrical equipment	7.8
26	Computer, electronic and optical	5.7
11	Beverages	5.2
30	Other transport equipment	4.8
34	Motor vehicles, trailers, and semitrailers	4.7
14	Wearing apparel	4.7
B	Mining and quarrying	3.9
33	Repair and installation of machinery/equipment	3.7
15	Leather and related products	3.6
E	Water supply, sewerage, and waste management	3.4
29	Machinery and equipment n.e.c.	3.2
C	Total manufacturing	2.9
21	Pharmaceuticals, medicinal chemicals, etc.	2.8
D	Electricity, gas, steam & air conditioning	2.8
32	Other manufacturing	2.6
19	Coke and refined petroleum products	2.0
10	Food products	1.6
18	Printing and reproduction of recorded media	1.6
20	Chemicals and chemical products	1.4
25	Fabricated metal products, except machinery	0.5
24	Basic metals	0.1
23	Other nonmetallic mineral products	0.0
12	Tobacco products	-0.2
16	Wood products, excluding furniture	-0.5
17	Paper and paper products	-0.8
22	Rubber and plastics products	-0.8
31	Furniture	-1.5
13	Textiles	-2.5

Source: UNIDO, “Seasonally Adjusted Quarterly Index of Industrial Production Database,” April 17, 2023.

Table A.5 FDI inflows, by the world and selected major economies, annual, 2020–22

In billions of dollars. European Union (EU) data exclude the United Kingdom (UK). Table corresponds to figure 1.5.

Economy	2020	2021	2022
World	962.0	1,478.1	1,294.7
United States	95.9	387.8	285.1
China	149.3	181.0	189.1
Canada	26.9	65.7	52.6
India	64.1	44.8	49.4
Mexico	28.2	31.5	35.3
Japan	10.7	24.7	32.5
UK	58.2	-71.2	14.1
EU	115.6	152.4	-124.9

Source: UNCTAD, *World Investment Report 2023*, July 5, 2023, 196–199.

Table A.6 Global merchandise trade, annual, 2020–22

In trillions of dollars. This table represents two-way trade, which is the overall total exports and general imports combined. Table corresponds to figure 1.7.

	2020	2021	2022
Global two-way trade	35.5	45.0	50.5

Source: WTO, “International Trade Statistics, Merchandise Trade Value, Annual,” accessed April 12, 2023.

Table A.7 Global merchandise trade, quarterly, 2008 Q1 – 2022 Q4

In trillions of dollars. Table corresponds to figure 1.8.

Year	Q1	Q2	Q3	Q4
2008	7.9	8.8	8.7	7.0
2009	5.5	5.9	6.5	7.1
2010	7.0	7.5	7.7	8.4
2011	8.6	9.3	9.4	9.3
2012	9.1	9.2	9.1	9.4
2013	9.1	9.4	9.4	9.7
2014	9.3	9.6	9.6	9.3
2015	8.1	8.3	8.2	8.2
2016	7.4	8.1	8.1	8.4
2017	8.3	8.7	9.0	9.5
2018	9.5	9.8	9.8	9.9
2019	9.3	9.5	9.5	9.7
2020	8.7	7.5	9.0	9.9
2021	10.1	11.0	11.2	12.2
2022	12.1	12.8	12.7	12.3

Source: WTO, “International Trade Statistics, Merchandise Trade Value, Quarterly,” accessed April 12, 2023.

Table A.8 Merchandise exports by the global top five exporters, annual, 2021–22

In billions of dollars; EU data exclude intra-EU trade and the UK. Table corresponds to figure 1.9.

Economy	2021	2022
China	3,358.2	3,593.6
EU	2,577.8	2,703.7
United States	1,757.8	2,065.2
Japan	756.0	746.9
South Korea	644.4	683.6

Sources: WTO, “WTO Stats, International Trade Statistics, Merchandise Trade Value, Annual,” accessed April 12, 2023; USITC DataWeb/Census, total exports, accessed July 5, 2023.

Table **A.9** Merchandise imports by the global top five importers, annual, 2021–22

In billions of dollars. EU data exclude intra-EU trade and the UK. Table corresponds to figure 1.10.

Economy	2021	2022
United States	2,828.9	3,242.5
EU	2,509.5	3,154.7
China	2,686.7	2,716.0
Japan	769.0	897.2
UK	694.6	823.9

Sources: WTO, ”WTO Stats, International Trade Statistics, Merchandise Trade Value, Annual,” accessed April 12, 2022; USITC DataWeb/Census, general imports, accessed July 5, 2023.

Table A.10 Commercial services exports, by services trade category, annual, 2020–22
In billions of dollars. Table corresponds to figure 1.11.

Category	2020	2021	2022
Other commercial services	3,525	4,073	4,202
Travel	564	638	1,116
Transport	866	1,198	1,481
Goods-related services	200	226	245
Total	5,155	6,135	7,043

Source: WTO, "WTO Stats, International Trade in Commercial Services, by Main Sector, Preliminary Annual Estimates," accessed July 25, 2023.

Table A.11 Commercial services exports, by the global top five exporters, annual, 2021–22
In billions of dollars; EU data exclude intra-EU trade and the UK. Table corresponds to figure 1.12.

Economy	2021	2022
EU	1,254.4	1,377.0
United States	801.1	928.5
UK	452.4	492.1
China	390.6	422.3
India	239.7	308.7

Sources: WTO, WTO Stats portal, International Trade Statistics, Trade in Commercial Services, by Main Sector, Annual, accessed July 25, 2023; USDOC, BEA, International Transactions, International Services, and International Investment Position Tables, table 2.2, "U.S. Trade in Services, by Type of Service and by Country or Affiliation," June 22, 2023.

Table A.12 Commercial services imports, by the global top five importers, annual, 2021–22
In billions of dollars; EU data exclude intra-EU trade and the UK. Table corresponds to figure 1.13.

Economy	2021	2022
EU	1,113.9	1,222.5
United States	559.2	696.7
China	438.1	461.5
UK	256.3	312.5
Singapore	242.6	258.4

Sources: WTO, WTO Stats portal, International Trade Statistics, Trade in Commercial Services, by Main Sector, Annual, accessed July 25, 2023; USDOC, BEA, International Transactions, International Services, and International Investment Position Tables, table 2.2, "U.S. Trade in Services, by Type of Service and by Country or Affiliation," June 22, 2023.

Table A.13 Number of active section 337 proceedings and new section 337 investigations, by year, 2012–22
Table corresponds to figure 2.1.

Year	Active proceedings	New investigations
2012	127	40
2013	109	42
2014	110	39
2015	88	36
2016	122	54
2017	128	47
2018	131	50
2019	128	57
2020	122	48
2021	127	52
2022	140	59

Source: USITC calculations.

Table A.14 Share of Trade Adjustment Assistance (TAA) petitions certified by the USDOL, by industry in FY 2022

In percentages; “Other” includes all industry sectors where fewer than 10 petitions were certified in FY 2020. Table corresponds to figure 2.2.

Industry	Share of total
Manufacturing	79.2
Information	11.9
Wholesale trade	2.4
Mining, quarrying, and oil and gas extraction	1.8
Finance and insurance	1.8
Other	3.0

Source: USDOL, ETA, email message to USITC staff, April 24, 2023.

Table A.15 U.S. merchandise trade with major trading partners and the world, annual, 2018–22

In billions of dollars. EU data exclude the UK. Table corresponds to figures 6.1, 6.3, 6.5, 6.7, 6.9, 6.11.

Trading partner	Trade flow	2018	2019	2020	2021	2022
EU	Total exports	252.0	268.2	232.9	272.3	350.8
EU	General imports	426.2	451.7	415.4	490.6	553.3
EU	Merchandise trade balance	-174.2	-183.5	-182.6	-218.3	-202.5
UK	Total exports	66.5	69.1	58.5	61.7	76.2
UK	General imports	60.7	63.3	50.3	56.3	64.0
UK	Merchandise trade balance	5.8	5.8	8.3	5.4	12.3
Mexico	Total exports	266.0	256.7	212.5	277.1	324.3
Mexico	General imports	343.7	356.1	323.5	382.6	454.8
Mexico	Merchandise trade balance	-77.7	-99.4	-111.0	-105.5	-130.5
Canada	Total exports	299.7	292.8	256.2	309.6	356.5
Canada	General imports	318.6	318.6	270.0	357.3	436.6
Canada	Merchandise trade balance	-18.8	-25.8	-13.8	-47.7	-80.1
China	Total exports	120.3	106.5	124.6	151.4	154.0
China	General imports	538.5	449.1	432.5	504.3	536.3
China	Merchandise trade balance	-418.2	-342.6	-308.0	-352.9	-382.3
Japan	Total exports	75.2	74.5	64.0	74.7	80.2
Japan	General imports	142.2	143.6	119.5	134.8	148.1
Japan	Merchandise trade balance	-67.1	-69.1	-55.5	-60.1	-67.9
India	Total exports	33.2	34.2	27.1	40.0	47.2
India	General imports	54.2	57.9	51.3	73.3	85.5
India	Merchandise trade balance	-21.1	-23.7	-24.2	-33.3	-38.4

Source: USITC DataWeb/Census, accessed July 5, 2023.

Table A.16 U.S. total services trade with major trading partners and the world, annual, 2018–22
In billions of dollars. EU data exclude the UK. Table corresponds to figures 6.2, 6.4, 6.6, 6.8, 6.10, 6.12.

Trading partner	Trade flow	2018	2019	2020	2021	2022
EU	Exports	269.3	284.8	182.5	202.6	241.2
EU	Imports	197.7	209.7	108.6	131.5	170.0
EU	Services trade balance	71.6	75.0	73.8	71.2	71.2
UK	Exports	78.6	77.7	61.7	68.3	82.0
UK	Imports	63.0	64.7	54.8	62.5	73.5
UK	Services trade balance	15.6	13.0	6.9	5.8	8.5
Mexico	Exports	32.9	32.9	23.5	31.1	37.7
Mexico	Imports	28.2	30.5	17.5	28.3	38.3
Mexico	Services trade balance	4.6	2.4	5.9	2.8	-0.6
Canada	Exports	68.3	68.7	52.7	57.1	71.3
Canada	Imports	38.3	38.9	33.3	37.1	44.6
Canada	Services trade balance	30.0	29.8	19.4	20.0	26.6
China	Exports	58.5	59.5	41.2	39.4	41.5
China	Imports	18.9	19.8	16.1	21.4	26.6
China	Services trade balance	39.5	39.7	25.1	18.0	14.9
Japan	Exports	46.7	49.5	37.9	36.6	38.3
Japan	Imports	35.2	36.3	32.5	31.5	40.8
Japan	Services trade balance	11.4	13.3	5.3	5.2	-2.4
India	Exports	22.6	23.7	16.3	18.5	25.9
India	Imports	29.7	29.6	26.2	29.0	33.2
India	Services trade balance	-7.1	-5.9	-9.9	-10.5	-7.4

Source: USDOC, BEA, “International Transactions,” June 22, 2023, Table 1.3 “U.S. International Transactions, Expanded by Area and Country.”

EXHIBIT 68

ArtI.S8.C3.2 Meaning of Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

While the etymology of the word "commerce" suggests that "merchandise," or goods for sale, was integral to its original meaning,[1] Chief Justice John Marshall in *Gibbons v. Ogden* interpreted the Commerce Clause broadly.[2] *Gibbons* concerned whether the New York legislature could grant a monopoly to Aaron Ogden to operate steamships on New York waters and thereby prevent Thomas Gibbons from operating a steamship between New York and New Jersey pursuant to a license granted by Congress.[3] In defending his New York-granted steamship monopoly, Ogden argued that transporting passengers did not constitute "commerce" under the Commerce Clause. Finding New York's grant of a steamship monopoly violated the Commerce Clause, Chief Justice Marshall reasoned that commerce encompassed not only buying and selling but also, more generally, intercourse and consequently navigation. The Chief Justice wrote:

> The subject to be regulated is commerce. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse.[4]

Marshall further noted the general understanding of the meaning of commerce, the Article I, Section 9 prohibition against Congress granting any preference "by any regulation of commerce or revenue, to the ports of one State over those of another," and Congress's power to impose embargoes.[5]

In *Gibbons*, Marshall qualified the word "intercourse" with the word "commercial," thus retaining the element of monetary transactions.[6] Initially, the Court viewed activities covered by Congress's interstate commerce clause power narrowly. Thus, the Court held the Commerce Clause did not reach mining or manufacturing regardless of whether the product moved in interstate commerce;[7] insurance transactions crossing state lines;[8] and baseball exhibitions between professional teams traveling from state to state.[9] Similarly, the Court held that the Commerce Clause did not apply to contracts to insert advertisements in periodicals in another state[10] or to render personal services in another state.[11]

Later decisions treated the Commerce Clause more expansively. In 1945, the Court held in *Associated Press v. United States* that a press association gathering and transmitting news to client newspapers to be interstate commerce.[12] Likewise, in 1943, the Court held in *American Medical Association v. United States* that activities of Group Health Association, Inc., which serve only its own members, are "trade" and capable of becoming interstate commerce.[13] The Court also held insurance transactions between an insurer and insured in different states to be interstate commerce.[14] Most importantly, the Court held that manufacturing,[15] mining,[16] business transactions,[17] and the like, which occur antecedent or subsequent to a move across state lines, are part of an integrated commercial whole and covered by the Commerce Clause. As such, Supreme Court case law on the meaning of "commerce" in "interstate commerce" covers movements of persons and things, whether for profit or not, across state lines;[18] communications; transmissions of intelligence, whether for commercial purposes or otherwise;[19] and commercial negotiations that involve transportation of persons or things, or flows of services or power, across state lines.[20]

Footnotes

1. ^ The Oxford English Dictionary: "com- together, with, + merx, merci- merchandise, ware."
2. ^ 22 U.S. (9 Wheat.) 1 (1824).
3. ^ Act of February 18, 1793, 1 Stat. 305, entitled "An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same."
4. ^ Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824).
5. ^ *Id.* at 190–94.
6. ^ *Id.* at 193.
7. ^ Kidd v. Pearson, 128 U.S. 1 (1888); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923); United States v. E. C. Knight Co., 156 U.S. 1 (1895); *see also* Carter v. Carter Coal Co., 298 U.S. 238 (1936).
8. ^ Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869); see also the cases to this effect cited in United States v. Se. Underwriters Ass'n, 322 U.S. 533, 543–545, 567–568, 578 (1944).
9. ^ Fed. Baseball League v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200 (1922). When pressed to reconsider its decision, the Court declined, noting that Congress had not seen fit to bring the business under the antitrust laws by legislation having prospective effect; that the business had developed under the understanding that it was not subject to these laws; and that reversal would have retroactive effect. Toolson v. N.Y. Yankees, 346 U.S. 356 (1953). In Flood v. Kuhn, 407 U.S. 258 (1972), the Court recognized these decisions as aberrations, but thought the doctrine was entitled to the benefits of *stare decisis*, as Congress was free to change it at any time. The same considerations not being present, the Court has held that businesses conducted on a multistate basis, but built around local exhibitions, are in commerce and subject to, *inter alia*, the antitrust laws, in the instance of professional football, Radovich v. Nat'l Football League, 352 U.S. 445 (1957), professional boxing, United States v. Int'l Boxing Club, 348 U.S. 236 (1955), and legitimate theatrical productions, United States v. Shubert, 348 U.S. 222 (1955).
10. ^ Blumenstock Bros. v. Curtis Publ'g Co., 252 U.S. 436 (1920).
11. ^ Williams v. Fears, 179 U.S. 270 (1900). *See also* Diamond Glue Co. v. U.S. Glue Co., 187 U.S. 611 (1903); Browning v. City of Waycross, 233 U.S. 16 (1914); General Ry. Signal Co. v. Virginia, 246 U.S. 500 (1918). *But see* York Mfg. Co. v. Colley, 247 U.S. 21 (1918).
12. ^ Associated Press v. United States, 326 U.S. 1 (1945).
13. ^ Am. Med. Ass'n v. United States, 317 U.S. 519 (1943). *Cf.* United States v. Or. Med. Society, 343 U.S. 326 (1952).
14. ^ United States v. Se. Underwriters Ass'n, 322 U.S. 533 (1944).
15. ^ NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
16. ^ Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940). *See also* Hodel v. Va. Surface Mining and Reclamation Ass'n, 452 U.S. 264, 275–283 (1981); Mulford v. Smith, 307 U.S. 38 (1939) (agricultural production).
17. ^ Swift & Co. v. United States, 196 U.S. 375 (1905); Stafford v. Wallace, 258 U.S. 495 (1922); Chi. Bd. of Trade v. Olsen, 262 U.S. 1 (1923).

18. ^ In many later formulations, crossing of state lines is no longer the *sine qua non*; wholly intrastate transactions with substantial effects on interstate commerce may suffice.
19. ^ *E.g.*, United States v. Simpson, 252 U.S. 465 (1920); Caminetti v. United States, 242 U.S. 470 (1917).
20. ^ The Court stated: “Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information.” United States v. Se. Underwriters Ass’n, 322 U.S. 533, 549–50 (1944).

EXHIBIT 69

OFFICE *of the* UNITED STATES TRADE REPRESENTATIVE

EXECUTIVE OFFICE OF THE PRESIDENT

Section 301 Investigation

Report on Vietnam's Acts, Policies, and Practices Related to Currency Valuation

January 15, 2021

Contents

Report on Vietnam's Acts, Policies, and Practices Related to Currency Valuation Prepared in the Investigation under Section 301 of the Trade Act of 1974

I. Executive Summary

On October 2, 2020, the U.S. Trade Representative initiated an investigation under section 302(b)(1)(A) of the Trade Act of 1974, as amended, of Vietnam's acts, policies, or practices relating to the valuation of its currency. The *Initiation Notice* explained that the available evidence indicated that Vietnam's currency had been undervalued for the past three years, and that the State Bank of Vietnam's interventions in foreign exchange (FX) markets in the form of net purchases of FX contributed to undervaluation of its currency during 2019. The *Initiation Notice* described the initial focus of the investigation, which was "whether Vietnam's interventions—through the [State Bank of Vietnam]—in exchange markets and other related actions that contribute to the undervaluation of Vietnam's currency are unreasonable or discriminatory and burden or restrict United States commerce."

The information obtained in this investigation, including the written public comments and witness testimony during the public hearing, indicates that Vietnam manages its exchange rate based on its interest in achieving certain economic goals; that the acts, policies, and practices it has chosen with respect to the exchange rate have contributed to undervaluation of the exchange rate; that Vietnam uses FX market interventions as a key tool to manage the exchange rate in a manner that has contributed to persistent undervaluation; and that this undervalued exchange rate is accompanied by substantial current account and trade imbalances (including with the United States).

It is a widely-accepted norm, as evidenced in international agreements and U.S. law, that acts, policies, and practices related to currency valuation should not be undertaken to gain an unfair competitive advantage in international trade. Such acts, policies, or practices should not artificially enhance a country's exports and restrict its imports in ways that do not reflect the underlying competitiveness. Similarly, existing U.S. and international norms indicate that exchange rates should reflect underlying economic and financial conditions, and that exchange rate action should not prevent balance of payments adjustment. These principles are based on the premise that, when a government engages excessively in FX market interventions or other actions to lower the value or suppress appreciation of its currency, this artificially distorts market-based competition, promoting domestic production and exports, and suppressing imports, in ways that do not reflect the productivity of economies or competitiveness of traded goods.

The specific facts and circumstances examined in this investigation, when considered in light of these principles, support a finding that Vietnam's acts, policies, and practices related to currency valuation, including excessive foreign exchange market interventions and other related actions, taken in their totality, are unreasonable. These facts and circumstances include the persistent undervaluation of its currency over a course of several years; Vietnam's more recent, rapid, and significant purchases of FX, which have contributed to undervaluation; and the conditions surrounding Vietnam's FX market interventions including current account and goods trade surpluses (including with the United States). An affirmative finding is also consistent with a report by the Department of the Treasury that Vietnam has recently engaged in currency manipulation during the twelve-month period of July 2019 through June 2020. Furthermore, as explained in this Report, purported justifications for Vietnam's recent FX market interventions do not undermine the basis for finding actionability.

Vietnam's acts, policies, and practices that contribute to currency undervaluation through excessive foreign exchange market interventions and other related actions burden or restrict U.S. commerce within the meaning of section 301 of the Trade Act. First, currency undervaluation effectively lowers the price of exported products from Vietnam into the United States. This makes Vietnamese imports into the United States less expensive than they would otherwise be, which undermines the competitive position of firms in the United States that are competing with lower-priced Vietnamese imports. Second, currency undervaluation raises the local currency price of U.S. exports to Vietnam. This undermines the competitive position of U.S. firms in the Vietnamese market.

Third, excessive FX market intervention undertaken while a country has a significant current account surplus also undermines U.S. export opportunities. For example, a current account surplus may result from net exports, suggesting that domestic production exceeds domestic consumption. Without FX market intervention, the value of Vietnam's currency would tend to appreciate in the context of a current account surplus, enhancing domestic consumption in a manner more favorable to U.S. exports.

In sum, the findings in this investigation support that Vietnam's acts, policies, and practices with respect to currency valuation, including excessive foreign exchange market interventions and other related actions, taken in their totality, are unreasonable and burden or restrict U.S. commerce, and are thus actionable under section 301 of the Trade Act.

II. BACKGROUND

On October 2, 2020, the U.S. Trade Representative initiated an investigation into Vietnam's acts, policies, and practices related to the valuation of its currency under section 302(b)(1)(A) of the Trade Act of 1974, as amended (Trade Act).[1]

This investigation involves a determination of whether the acts, policies, and practices at issue, namely, whether Vietnam's government intervention in foreign exchange (FX) markets and other related actions that contribute to the undervaluation of Vietnam's currency, are actionable under section 301 of the Trade Act, and if so, what action to take, if any, under section 301. This Report provides findings relevant to a determination of actionability under section 301.

A. RELEVANT ELEMENTS OF SECTION 301

Section 301 sets out three types of acts, policies, or practices of a foreign country that are actionable: (i) trade agreement violations; (ii) acts, policies, or practices that are unjustifiable (defined as those that are inconsistent with U.S. international legal rights) and burden or restrict U.S. commerce; and (iii) acts, policies, or practices that are unreasonable or discriminatory and burden or restrict U.S. commerce.[2] The third category of conduct is the one relevant to this investigation.

Section 301 defines "discriminatory" to "include, when appropriate, any act, policy, and practice which denies national or most-favored nation treatment to United States goods, services, or investment."[3] An "unreasonable" act, policy, or practice is one that "while not necessarily in violation of, or inconsistent with, the international legal rights of the United States is otherwise unfair and inequitable."[4] The statute further provides that in determining if a foreign country's practices are unreasonable, reciprocal opportunities in the United States for foreign nationals and firms "shall be taken into account, to the extent appropriate."[5]

If the Trade Representative determines that the Section 301 investigation "involves a trade agreement," and a mutually acceptable resolution is not reached within a certain period of time, USTR may request proceedings under the formal dispute settlement procedures under the trade agreement. Otherwise, USTR will conduct the investigation without recourse to formal dispute settlement.

If the Trade Representative determines that the act, policy, or practice falls within any of the three categories of actionable conduct under Section 301, USTR must also determine what action, if any, to take. If the Trade Representative determines that an act, policy or practice is unreasonable or discriminatory, that it burdens or restricts U.S. commerce, and that action by the United States is appropriate:

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[1] *Initiation of Section 301 Investigation: Vietnam's Acts, Policies, and Practices Related to Currency Valuation*, 85 Fed. Reg. 63,637 (U.S. Trade Rep., Oct. 8, 2020) (hereinafter *Initiation Notice*).
[2] 19 U.S.C. § 2411(a)-(b).
[3] 19 U.S.C. § 2411(d)(5).
[4] 19 U.S.C. § 2411(d)(3)(A).
[5] 19 U.S.C. § 2411(d)(3)(D).

> [T]he Trade Representative shall take all appropriate and feasible action authorized under [Section 301(c)], subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice.[6]

Actions specifically authorized under Section 301(c) include: (i) suspending, withdrawing or preventing the application of benefits of trade agreement concessions; (ii) imposing duties, fees, or other import restrictions on the goods or services of the foreign country for such time as deemed appropriate; (iii) withdrawing or suspending preferential duty treatment under a preference program; (iv) entering into binding agreements that commit the foreign country to eliminate or phase out the offending conduct or to provide compensatory trade benefits; or (v) restricting or denying the issuance of service sector authorizations, which are federal permits or other authorizations needed to supply services in some sectors in the United States.[7] In addition to these specifically enumerated actions, USTR may 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."[8]

B. CONSULTATIONS

On the date this investigation was initiated, USTR requested consultations with the Government of Vietnam.[9] Vietnam's Minister of Trade and Industry accepted the request for consultations in an October 14, 2020 letter.[10] Consultations were held on December 23, 2020.

C. INPUT FROM THE PUBLIC

USTR provided interested persons with opportunities to present their views and perspectives on the issues involved in this investigation. The *Initiation Notice* invited written comments by November 12, 2020.[11] Interested persons filed 66 written submissions in the public docket for this investigation.[12]

In the *Hearing Notice* published on November 25, 2020, USTR announced further opportunities for public input.[13] In particular, the *Hearing Notice* announced that USTR and the interagency Section 301 Committee would hold a virtual public hearing on December 29,

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[6] 19 U.S.C. § 2411(b).
[7] In cases in which USTR determines that import restrictions are the appropriate action, preference is given to the imposition of duties over other forms of action. 19 U.S.C. § 2411(c).
[8] 19 U.S.C. § 2411(b)(2).
[9] *See* Annex.
[10] *See* Letter from Minster of Industry and Trade Tran Tuan Anh to Ambassador Robert E. Lighthizer (Oct. 14, 2020) (on file with USTR).
[11] *Initiation Notice*, 85 Fed. Reg. at 63,637-63,638.
[12] The submissions can be viewed on the Federal eRulemaking Portal, https://www.regulations.gov.
[13] *Notice of Public Hearing in Section 301 Investigation of Vietnam's Acts, Policies, and Practices Related to Currency Valuation*, 85 Fed. Reg. 75,397 (Nov. 25, 2020).

2020.[14] The *Hearing Notice* also announced that interested persons could submit post-hearing comments, addressed to any matter raised in the hearing testimony or prior written submissions, by January 7, 2021. In response to an inquiry from certain interested persons, USTR confirmed that post-hearing comments may address the December 16, 2020, Department of the Treasury (Treasury) report on *Macroeconomic and Foreign Exchange Policies of Major Trading Partners of the United States*.[15] A total of 21 witnesses appeared at the hearing. A transcript of the hearing has been placed on the public docket and on USTR's website.[16] Interested persons filed 18 post-hearing written submissions. The post-hearing submissions are posted on the public docket.

III. RELEVANT FACTS REGARDING VIETNAM'S EXCHANGE RATE REGIME

This section of the Report provides background on the operation of Vietnam's exchange rate regime and the role of Vietnam's central bank in setting exchange rates, Vietnam's recent interventions in FX markets in the form of net purchases of FX reserves, Vietnam's valuation of its currency, and Vietnam's current account and trade balances over the past several years. These topics are discussed in subsections A through D below, respectively.

A. VIETNAM'S EXCHANGE RATE REGIME AND THE ROLE OF THE STATE BANK OF VIETNAM

Vietnam's official currency is the dong (VND). Vietnam's central bank is the State Bank of Vietnam. The State Bank of Vietnam is a ministerial agency of the Government of Vietnam.[17] The International Monetary Fund (IMF) has explained that:

> Unlike other countries that have modernized monetary policy, the Vietnamese economy still features characteristics of a centrally planned economy, where the central bank is an integral component of the State (IMF 2017) and therefore follows government guidelines when formulating monetary policy.
>
> . . .
>
> Central bank operational independence helps bring credibility to monetary policy and is the backbone of inflation-targeting regimes. Relative to other emerging market inflation

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[14] *Id.*

[15] The letter is available on the Federal eRulemaking Portal, https://www.regulations.gov and on USTR's website, https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-vietnam/vietnams-currency-valuation-virtual-public-hearing-december-29.

[16] The transcript is available on the Federal eRulemaking Portal, https://www.regulations.gov and on USTR's website, https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-vietnam/vietnams-currency-valuation-virtual-public-hearing-december-29.

[17] *Law on the State Bank of Vietnam*, No. 46/2010/QH12, art. 2(1) (June 16, 2010) (hereinafter *Law on the State Bank of Vietnam (2010)*), http://congbao.chinhphu.vn/noi-dung-van-ban-so-46-2010-qh12-60; *see also* "Major Responsibilities," State Bank of Vietnam, https://www.sbv.gov.vn/webcenter/portal/en/home/sbv/aboutsbv/major?_afrLoop=5383626188985297#%40%3F_afrLoop%3D5383626188985297%26centerWidth%3D80%2525%26leftWidth%3D20%2525%26rightWidth%3D0%2525%26showFooter%3Dfalse%26showHeader%3Dfalse%26_adf.ctrl-state%3D14fo9gd0jj_162. An unofficial English translation of the *Law on the State Bank of Vietnam (2010)* is available at https://sites.google.com/a/ecolaw.vn/luat-tieng-anh/1-bo-luat-luat/-law-on-the-state-bank-of-vietnam.

> targeters, the [State Bank of Vietnam] features low central bank independence and accountability as public policy decisions are centralized, and the [State Bank of Vietnam's] mandate is influenced by the government's political goals. The [State Bank of Vietnam] lacks both political independence—given that the [State Bank of Vietnam] Governor is a cabinet member—and operational independence. As the [State Bank of Vietnam] moves to inflation-targeting, the critical reform is to grant operational independence to the [State Bank of Vietnam] (IMF 2017). In Vietnam, the [State Bank of Vietnam's] operational independence is not clearly established, unlike in most central banks in the world, because the [State Bank of Vietnam] Governor legally shares responsibility with the Prime Minister on the use of the monetary policy toolkit.[18]

The tasks and powers of the State Bank of Vietnam, as elaborated upon in the *Law on the State Bank of Vietnam (2010)* include, but are not limited to, the following:

- "To conduct operations for the purpose of currency stability; to assure the safety for banking operations and the systems of credit institutions; to assure the safety and effectiveness of the national payment system; and to contribute to accelerating socio-economic development along the socialist orientation."[19]

- "To participate in the elaboration of national socio-economic strategies and plans."[20]

- "To perform the state management of foreign exchange, foreign exchange and gold trading activities."[21]

- "To manage state foreign exchange reserves."[22]

To implement the national monetary policy, the Governor of the State Bank of Vietnam is empowered to "decide on the use of tools for the implementation of the national monetary policy, including re-financing, interest rates, exchange rates, compulsory reserves, open-market operations and other tools and measures as prescribed by the Government."[23] To that end, the State Bank of Vietnam administers the exchange rate regime in Vietnam and announces exchange rates.[24] According to Vietnamese law, "[e]xchange rates of Vietnam dong shall be

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[18] *Vietnam: Staff Report for the 2019 Article IV Consultation*, 64-65, International Monetary Fund (June 4, 2019) (hereinafter *2019 IMF Article IV Consultation Staff Report)*, https://www.imf.org/en/Publications/CR/Issues/2019/07/16/Vietnam-2019-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-the-47124.
[19] *Law on the State Bank of Vietnam (2010)*, art. 4(1); *see also* "Major Responsibilities," State Bank of Vietnam, https://www.sbv.gov.vn/webcenter/portal/en/home/sbv/aboutsbv/major?_afrLoop=7566645824170224#%40%3F_afrLoop%3D7566645824170224%26centerWidth%3D80%2525%26leftWidth%3D20%2525%26rightWidth%3D0%2525%26showFooter%3Dfalse%26showHeader%3Dfalse%26_adf.ctrl-state%3D15abqrm9is_133.
[20] *Law on the State Bank of Vietnam (2010)*, art. 4(2).
[21] *Id.* at art. 4(17).
[22] *Id.* at art. 4(18).
[23] *Id.* at art. 10.
[24] *Id.* at art. 13(2) (the State Bank of Vietnam "announce[s] exchange rates and decide[s] on the exchange rate regime and management mechanisms").

determined on the basis of the foreign currency supply and demand in the state-regulated market."[25]

State Bank of Vietnam Decision No. 2730 (2015) provides that the State Bank of Vietnam will announce a central exchange rate between the VND and U.S. dollar (USD), as well as the cross-exchange rate between the VND and certain other currencies.[26] The State Bank of Vietnam specifically announces a daily VND/USD central exchange rate[27] on its website.[28] According to the IMF, this central rate is based on: "(i) the previous day's weighted average VND/USD exchange rate; (ii) a weighted average of movements in dong exchange rates vis-à-vis seven other important trading partners' currencies; and (iii) domestic macroeconomic conditions."[29]

Credit institutions that are licensed by the State Bank of Vietnam to conduct FX services in Vietnam are precluded from trading the VND for USD outside the +/- 3 percent band around this central exchange rate.[30] According to the IMF, this band applies only to VND/USD transactions.[31] Credit institutions in Vietnam may set their own exchange rates between the VND and other foreign currencies, and authorized dealers can set their own VND/USD exchange rate in transactions with their clients, provided that the chosen rate is set within the established band around the VND/USD central rate set by the State Bank of Vietnam.[32]

In practice, the State Bank of Vietnam "tightly manage[s]" the value of the VND.[33] Treasury has recently explained that:

> Since January 2016, the official policy of the [State Bank of Vietnam] is to allow the dong to float +/- 3% against a basket of currencies within a previously established trading

[25] *Id.* at art. 13(1).
[26] *Decision on the Announcement of the Official Exchange Rate between Vietnam Dong and US Dollar and the Cross Rate between Vietnam Dong and Other Foreign* Currencies, State Bank of Vietnam Decision No. 2730/QD-NHNN (Dec. 31, 2015) (hereinafter *State Bank of Vietnam Decision No. 2730 (2015)*) (unofficial English translation on file with USTR).
[27] *Id.* at arts. 1, 4(1) (Dec. 31, 2015) (unofficial English translation on file with USTR).
[28] *See Exchange Rate*, State Bank of Vietnam, https://www.sbv.gov.vn/TyGia/faces/ExchangeRate.jspx?_afrLoop=5332232089128224&_afrWindowMode=0&_adf.ctrl-state=zdvedm9u3_4 (last visited Jan. 15, 2021).
[29] *2019 IMF Article IV Consultation Staff Report,* 2.
[30] *Decision Promulgating the Spot Exchange Rate Between Vietnam Dong and Foreign Currency by Permitted Credit Institutions*, State Bank of Vietnam Decision No. 1636/QD-NHNN, art. 1(1) (Aug. 18, 2015) (unofficial English translation on file with USTR).
[31] *Annual Report on Exchange Arrangements and Exchange Restrictions: 2019*, 3722, International Monetary Fund (2020), https://www.elibrary-areaer.imf.org/Documents/YearlyReport/AREAER_2019.pdf.
[32] *Id.*
[33] *Report to Congress: Macroeconomic and Foreign Exchange Policies of Major Trading Partners of the United States*, 52, U.S. Department of the Treasury, Office of International Affairs (Dec. 2020) (hereinafter *Treasury Report to Congress* (Dec. 2020)), https://home.treasury.gov/system/files/206/December-2020-FX-Report-FINAL.pdf; *Report to Congress: Macroeconomic and Foreign Exchange Policies of Major Trading Partners of the United States*, 36, U.S. Department of the Treasury, Office of International Affairs, (Jan. 2020) (hereinafter *Treasury Report to Congress* (Jan. 2020)), https://home.treasury.gov/system/files/136/20200113-Jan-2020-FX-Report-FINAL.pdf.

band, with daily updates to the reference rate. Based on cross rates between the dong and the currencies in the basket, however, the [State Bank of Vietnam] still appears to manage the dong far more closely to the U.S. dollar than to any other reference, and the dong reached the edge of the trading band during trading in very few instances.[34]

According to the IMF, the State Bank of Vietnam:

> sets 4 percent of inflation as a domestic nominal anchor, but in addition to the target inflation rate, the [State Bank of Vietnam] daily announces the target FX rate vis-à-vis US dollar as an external nominal anchor. To keep the FX rates within the predetermined band around the target, the [State Bank of Vietnam] actively intervenes to the FX market through their reserve accumulation/decumulation, in addition to adjusting interest rates in the interbank market.[35]

State Bank of Vietnam Decree No. 70 (2014) takes the position that Vietnam's exchange rate regime is a "managed floating system that the State Bank of Vietnam defines on the basis of a basket of currencies of countries that establish a cooperation of commerce, loaning, debt repayment and investment with Vietnam, which conforms to macroeconomic objectives in each period."[36]

The IMF classifies exchange rate arrangements primarily based on the degree to which the exchange rate is determined by the market rather than by official action. The system distinguishes among four major categories: hard pegs (such as exchange arrangements with no separate legal tender and currency board arrangements); soft pegs (including conventional pegged arrangements, pegged exchange rates within horizontal bands, crawling pegs, stabilized arrangements, and crawl-like arrangements); floating regimes (such as managed floating and free floating); and a residual category, other managed.[37]

In the case of Vietnam, the IMF classifies Vietnam's *de jure* exchange rate arrangement as a managed float, but the *de facto* exchange rate arrangement is classified as a type of soft peg, namely, a "stabilized arrangement."[38] The IMF also indicates that the exchange rate functions as a principal nominal anchor within Vietnam's monetary policy framework.[39]

In a country with a "stabilized arrangement," such as Vietnam, the central bank or monetary authority buys or sells FX to maintain the exchange rate at its predetermined level or within a desired range. In the face of appreciation pressures, the monetary authorities would tend to intervene in the currency market through the purchase of FX (selling domestic currency)

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[34] *Treasury Report to Congress* (Dec. 2020), 52; *see also Treasury Report to Congress* (Jan. 2020), 36.
[35] *See 2019 IMF Article IV Consultation Staff Report*, 51.
[36] *Decree Detailing the Implementation of Several Provisions of the Ordinance and the Amended Ordinance on the Foreign Exchange*, art. 15(2), No. 70/2014/ND-CP (July 17, 2014), http://congbao.chinhphu.vn/noi-dung-van-ban-so-70-2014-nd-cp-3694 (unofficial English translation on file with USTR).
[37] *Annual Report on Exchange Arrangements and Exchange Restrictions*, 1, International Monetary Fund (Aug. 10, 2020), https://www.imf.org/en/Publications/Annual-Report-on-Exchange-Arrangements-and-Exchange-Restrictions/Issues/2020/08/10/Annual-Report-on-Exchange-Arrangements-and-Exchange-Restrictions-2019-47102.
[38] *Id.* at 65; *2019 IMF Article IV Consultation Staff Report*, 2.
[39] *2019 IMF Article IV Consultation Staff Report*, 11.

to keep the domestic currency fixed to the peg or within the given trading band. In the event of depreciation pressures, the monetary authorities would do the opposite, by selling foreign currency.

In addition to affecting currency valuation, purchases of FX by the central bank add to the central bank's stock of FX reserves, while sales of FX reduce the stock of FX reserves. In order to maintain a stabilized exchange rate, a central bank must be able to fully meet market demand at the exchange rate that it sets. Accordingly, under this framework, a central bank must keep sufficient reserves on hand to credibly and effectively implement the exchange rate peg or band. In contrast, in cases of floating exchange rate regimes, because the central bank has not committed to meet market demand at any specific rate that it must defend, the need for central bank reserves are relatively lower.[40] In the case of Vietnam, in order to maintain the central VND/USD exchange rate, the State Bank of Vietnam actively intervenes in the FX market by accumulating and reducing FX reserves.[41]

B. VIETNAM'S INTERVENTIONS IN FX MARKETS DURING 2019 AND 2020

As discussed above in subsection A, Vietnam – through the State Bank of Vietnam – tightly manages the value of the VND, particularly against the USD, and the State Bank of Vietnam intervenes in FX markets through reserves accumulation and decumulation to maintain the exchange rate that it sets. This subsection describes Vietnam's recent FX market interventions. These recent interventions by the State Bank of Vietnam have predominantly taken the form of sustained net purchases of FX reserves.

As an initial matter, Vietnam does not disclose the extent of its FX market interventions.[42] Therefore, to determine the extent and types of interventions made by the State Bank of Vietnam over 2019 and 2020, publicly available information was examined. This information includes monthly changes in reserves positions compiled by the IMF.[43] As for other aspects of this investigation, USTR consulted with international monetary experts at Treasury.[44]

IMF data indicate that Vietnam's foreign currency reserves rose from just under $49 billion at the end of 2017 to slightly more than $88 billion by September 2020.[45] This

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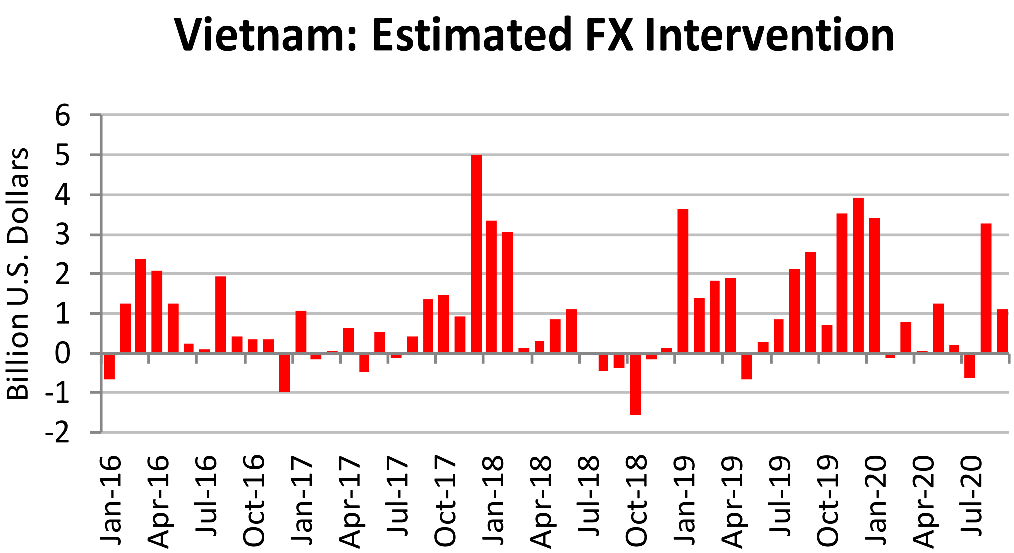
[40] In some cases, including in Vietnam, the authorities also make use of cross-border capital controls to reduce the risks of capital flight. In Vietnam's case, the greatest restrictions on cross-border capital outflows are on individuals, while firms have much wider latitude in the cross-border use of foreign currency. *See Annual Report on Exchange Arrangements and Exchange Restrictions: 2019*, 3726-27, International Monetary Fund (2020), https://www.elibrary.imf.org/view/IMF012/26225-9781498324571/26225-9781498324571/26225-9781498324571.xml?rskey=AQebpV&result=1.
[41] *See 2019 IMF Article IV Consultation Staff Report*, 51; *see also* Cambria Company LLC Public Comments, 3 (Nov. 12, 2020) (on file at regulations.gov).
[42] *Treasury Report to Congress* (Dec. 2020), 53; *see also Treasury Report to Congress* (Jan. 2020), 8, 37.
[43] *See International Liquidity Selected Indicators*, International Monetary Fund (hereinafter IMF Data), https://data.imf.org/regular.aspx?key=61545856 (last visited Jan. 15, 2021) (select country as Vietnam; data pulled from fourth row down ("International Liquidity, Total Reserves excluding Gold, Foreign Exchange, U.S. Dollars").
[44] *See Initiation Notice*, 85 Fed. Reg. at 63,638 ("In conducting its investigation, USTR will consult with the Department of the Treasury as to matters of currency valuation and Vietnam's exchange rate policy").
[45] *See* IMF Data.

considerable growth in Vietnam's FX reserves is attributable primarily to the State Bank of Vietnam's interventions in FX markets. Although Vietnam has in the past intervened "frequently, and in both directions, to maintain a close link to the dollar,"[46] Vietnam evinced a discernable pattern of significant net FX purchases over the course of 2019 and into 2020.

The graph below illustrates Vietnam's estimated interventions since 2016 based on valuation- and earnings-adjusted monthly changes in reserves positions reported to the IMF. Estimated purchases of FX in a particular month are shown as a positive number on the y axis; estimated sales of FX are shown as a negative number on the y axis. As demonstrated in the graph below, Vietnam's estimated interventions in FX markets since the beginning of 2019 have been heavily weighted towards purchases of FX.[47] Since the beginning of 2019, the majority of Vietnam's FX purchases came during the second half of 2019, before the beginning of the COVID-19 pandemic.[48]



Sources: State Bank of Vietnam, U.S. Treasury estimates

Other sources have commented on the extent of Vietnam's net FX purchases during 2019. In December 2019, Prime Minister Nguyen Xuan Phuc was reported in the press as stating that Vietnam's FX reserves had hit almost $80 billion, with $20 billion of reserves alone purchased that same year.[49] This is generally consistent with a recent finding by Treasury, that Vietnam, through the State Bank of Vietnam, undertook net purchases of FX in 2019 totaling approximately $22 billion.[50] Data from the IMF indicates that Vietnam held almost $78 billion

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[46] *Treasury Report to Congress* (Jan. 2020), 8, 37; *Report to Congress: Macroeconomic and Foreign Exchange Policies of Major Trading Partners of the United States*, 8, 36-37, U.S. Department of the Treasury, Office of International Affairs (May 2019) (hereinafter *Treasury Report to Congress* (May 2019)), https://home.treasury.gov/system/files/206/2019-05-28-May-2019-FX-Report.pdf.
[47] *See Treasury Report to Congress* (Dec. 2020), 53.
[48] *Id.* at 49.
[49] *Vietnam's Foreign Exchange Reserves Near Record US$80b*, The Business Times (Dec. 30, 2019), https://www.businesstimes.com.sg/banking-finance/vietnams-foreign-exchange-reserves-near-record-us80b.
[50] Polyethylene Retail Carrier Bag Committee public comments, at Attachment 1 (Nov. 12, 2020) (Letter from Andy Baukol, Principal Deputy Assistant Secretary, International Monetary Policy, Department of the Treasury, to James

in total FX reserves by the end of 2019.[51]

As illustrated in the graph above, Vietnam intervened largely in one direction at the outset of 2020 as well, purchasing FX reserves. Net purchases of FX then declined in early-to-mid 2020 as global financial conditions tightened amid the COVID-19 pandemic. Data from the IMF shows that, by April 2020, Vietnam's FX reserves were over $81 billion.[52] During April 2020, then-State Bank of Vietnam Governor Le Minh Hung was reported in the press as having claimed that Vietnam's FX reserves were at a "record high of US$84 billion."[53] According to Treasury, the Vietnamese authorities had credibly conveyed to that agency that Vietnam's net FX purchases between July 1, 2019, and June 30, 2020 amounted to $16.8 billion.[54]

IMF data further shows that Vietnam's FX reserves rose to approximately $87.8 billion by August 2020,[55] although some news outlets separately reported that Vietnam's FX reserves amounted to $92 billion by that month.[56] IMF data shows Vietnam's FX reserves as just over $88 billion by September 2020.[57] Internal U.S. Government estimates indicate that, adjusting for the effects of exchange rate valuations and earnings, that net FX market intervention by the State Bank of Vietnam year-to-date as of September 2020 (latest available) totaled approximately $9 billion.[58] In early November 2020, the State Bank of Vietnam was reported in the press as having purchased another $1.29 billion in foreign currencies from commercial banks.[59]

C. AVAILABLE EVIDENCE INDICATES THAT THE VND HAS BEEN UNDERVALUED FOR SEVERAL YEARS, AND THE STATE BANK OF VIETNAM'S MORE RECENT FX MARKET INTERVENTIONS HAVE CONTRIBUTED TO THAT UNDERVALUATION

Available evidence indicates that Vietnam's currency has been undervalued for several years, and that Vietnam's recent, rapid, and significant FX reserves accumulation contributed to the undervaluation of the VND on a real effective exchange rate (REER) basis and bilaterally against the USD in 2019. The State Bank of Vietnam continued to take FX market interventions that put downward pressure on the value of the VND in 2020 through September.

Maeder, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, Department of Commerce, at cover letter, 1 (Aug. 24, 2020), https://access.trade.gov/login.aspx (hereinafter Treasury 2019 Currency Undervaluation Finding)).

[51] *See* IMF Data.

[52] *See id.*

[53] Ngoc Thuy, *Vietnam's Record High Forex Reserves Help Ensure Economic Stability: SBV Governor*, Hanoi Times (Apr. 11, 2020), http://hanoitimes.vn/vietnam-record-high-forex-reserves-help-ensure-economic-stability-cbank-governor-311708.html.

[54] *Treasury Report to Congress* (Dec. 2020), 49, 53.

[55] *See* IMF Data.

[56] *Vietnam's Forex Reserves at All-Time High of $92bn: Government*, Tuoitre News (Sept. 8, 2020), https://tuoitrenews.vn/news/business/20200908/vietnams-forex-reserves-at-alltime-high-of-92bn-govt/56634.html; *see also Vietnam's Forex Reserve Sets New Record*, Nhan Dan (Sept. 10, 2020), https://en.nhandan.org.vn/business/item/9063802-vietnam%E2%80%99s-forex-reserve-sets-new-record.html.

[57] *See* IMF Data.

[58] *See Treasury Report to Congress* (Dec. 2020), 67, n.30.

[59] Minh Son, *Central Bank Buys $1.3 Bln in Foreign Currencies*, VN Express International (Nov. 19, 2020), https://e.vnexpress.net/news/business/economy/central-bank-buys-1-3-bln-in-foreign-currencies-4193866.html.

Vietnam has tightly managed the VND at an undervalued level against the USD since 2016.[60] Since 2017, the IMF has consistently assessed that Vietnam's external position is substantially stronger than warranted by fundamentals and desirable policies and that the VND has been undervalued on a real effective basis.[61] In its 2017 Article IV consultation with Vietnam, the IMF determined that the VND was undervalued by 10.3 percent during 2016.[62] In its subsequent consultation, the IMF observed that the VND was undervalued by 7.0 percent during 2017.[63] In its latest Article IV consultation, which covered 2018, the IMF found that the VND was undervalued by 8.4 percent .[64] As of the time of this Report, the IMF has not publicly disclosed a more recent assessment of the VND's valuation.[65]

The IMF's assessments of currency valuation rely in part on a suite of models (or approaches) that analyze external balances and real exchange rates. Various IMF models indicate VND undervaluation or overvaluation in 2016, 2017, and 2018. For this Report, USTR has relied on the assessments of IMF staff in their Article IV consultation reports for Vietnam. For example, in the consultation covering 2017, IMF staff noted that the equilibrium real exchange rate approach pointed to a "substantial overvaluation" of 31.5 percent for that year.[66] However, IMF staff judged that "the fit is poor" and instead assessed the VND to be 7.0 percent undervalued in 2017 based on the adjusted results of the current account approach.[67] Similarly, in the most recent Article IV consultation report, IMF staff noted that the equilibrium real exchange rate approach showed a "substantial overvaluation" of 15.2 percent during 2018.[68] Again, IMF staff judged that the model's "fit is poor," and staff assessed the VND to be 8.4 percent undervalued in 2018 based on the results of the current account approach.[69]

USTR consulted with exchange rate experts at Treasury regarding the valuation of the VND during 2019.[70] To estimate the valuation of the VND, Treasury utilized its Global Exchange Rate Assessment Framework (GERAF) model. The GERAF model "provides a

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[60] *Treasury Report to Congress* (Dec. 2020), 3.
[61] *Vietnam: Staff Report for the 2017 Article IV Consultation*, 6, 20, 44-45, International Monetary Fund (July 5, 2017) (hereinafter *2017 IMF Article IV Consultation Staff Report*), https://www.imf.org/en/Publications/CR/Issues/2017/07/05/Vietnam-2017-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-the-45045; *Vietnam: Staff Report for the 2018 Article IV Consultation*, 5, 20, 38-39, International Monetary Fund (July 10, 2018) (hereinafter *2018 IMF Article IV Consultation Staff Report*), https://www.imf.org/en/Publications/CR/Issues/2018/07/10/Vietnam-2018-Article-IV-Consultation-Press-Release-and-Staff-Report-46064; *2019 IMF Article IV Consultation Staff Report*, 7, 20, 35-36.
[62] *2017 IMF Article IV Consultation Staff Report*, 44-45.
[63] *2018 IMF Article IV Consultation Staff Report*, 39.
[64] *2019 IMF Article IV Consultation Staff Report*, 36.
[65] IMF staff completed its 2020 Article IV mission to Vietnam, but the IMF staff report remains under preparation as of the time of this Report. *See IMF Staff Completes 2020 Article IV Mission to Vietnam*, International Monetary Fund (Nov. 17, 2020), https://www.imf.org/en/News/Articles/2020/11/17/pr20342-vietnam-imf-staff-completes-2020-article-iv-mission#:~:text=Thanks%20to%20Vietnam's%20swift%20actions,the%20highest%20in%20the%20world.
[66] *2018 IMF Article IV Consultation Staff Report*, 39.
[67] *Id.*
[68] *2019 IMF Article IV Consultation Staff Report*, 36.
[69] *Id.*
[70] *See Initiation Notice*, 85 Fed. Reg. at 63,638 ("In conducting its investigation, USTR will consult with the Department of the Treasury as to matters of currency valuation and Vietnam's exchange rate policy").

rigorous, multilaterally consistent method for assessing external imbalances, exchange rate misalignment, and the role of policy in contributing to both."[71] In other words, Treasury's GERAF model can identify and quantify the impact of specific government policies, including government intervention in FX markets, on a given currency's valuation, and the collective impact of other countries' policies on that given currency's valuation.[72] The GERAF model thus allows for a granular assessment of the extent to which a government's action on the exchange rate contributed, if at all, to REER undervaluation and nominal, bilateral undervaluation against the USD.[73] There are many models for examining currency valuation, and each carries its own features. The GERAF model, however, was developed and applied by Treasury, and the model can quantity the impact of specific government policies on a given currency, such as Vietnam's FX market interventions that are at issue in this investigation.

Treasury applied the GERAF model to estimate whether and to what extent the VND was undervalued during calendar year 2019, and the extent of any undervaluation that was attributable to Vietnam's interventions in FX markets that year.[74] By way of background, "[o]fficial purchases of foreign assets, or net outflows, push down the value of a currency," while [o]fficial sales of foreign assets, or net inflows, push up the value of a currency."[75] A build-up of official reserves—mainly through intervention in FX markets—can lower the value of the intervening country's currency, thus boosting its international competitiveness and trade surpluses.[76]

Treasury's analysis concluded that the VND was undervalued during 2019, based on the gap between Vietnam's REER and the REER that would achieve an external balance over the medium term and which reflects appropriate policies.[77] Moreover, Treasury determined that the State Bank of Vietnam's net FX purchases, which by Treasury's calculation totaled about $22 billion in 2019, had the effect of undervaluing Vietnam's REER by 4.2 percent,[78] and of undervaluing the VND on a bilateral basis against the USD by 4.7 percent that year.[79] These figures represent the amount of undervaluation of the VND (both on a real effective basis and against the USD) that is directly attributable to Vietnam's "net purchases of foreign exchange in 2019 totaling about $22 billion."[80] These figures do not include the impact of any other

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[71] *Global Exchange Rate Assessment Framework Methodology,* 1, U.S. Department of Treasury, Office of International Affairs, Global Economics and Debt (Aug. 2020), https://home.treasury.gov/system/files/206/Global-Exchange-Rate-Assessment-Framework-Methodology.pdf.
[72] Treasury 2019 Currency Undervaluation Finding at Treasury Framework for Assessing Currency Undervaluation: Summary.
[73] *Id.*
[74] *See id.* at Cover Letter, 1.
[75] Joseph E. Gagnon, *Combating Widespread Currency Manipulation*, 2, Policy Brief No. PB12-19, Peterson Institute for International Economics (July 2012), https://www.piie.com/sites/default/files/publications/pb/pb12-19.pdf.
[76] C. Fred Bergsten & Joseph E. Gagnon, *Currency Manipulation, the US Economy, and the Global Economic Order*, 1, Policy Brief No. 12-25, Peterson Institute for International Economics (Dec. 2012), https://www.piie.com/sites/default/files/publications/pb/pb12-25.pdf.
[77] Treasury 2019 Currency Undervaluation Finding at Cover Letter, 1.
[78] *Id.* (explaining that the uncertainty range around this assessment, based on one standard error, spans the real effective exchange rate undervaluation of 3.5 percent to 4.8 percent).
[79] *Id.* (explaining that the uncertainty range around this assessment, based on one standard error, spans from bilateral undervaluation of 4.2 percent to 5.2 percent).
[80] *Id.* at 1-2.

economic, policy, or structural factors that may have contributed to VND valuation in 2019. Moreover, these figures do not factor in the extent to which any portion of FX purchases may not be indicative of an "unreasonable" finding within the context of section 301; instead, these figures reflect the total impact of net FX purchases on the VND's valuation in 2019.

Treasury estimates the State Bank of Vietnam's net purchases of FX in 2020 totaled about $9 billion over the nine months from January to September 2020. These net FX purchases continued to put downward pressure on the VND REER valuation in 2020. However, it is not possible as of the time of this Report to make rigorous, analytically grounded assessments of VND REER valuation in 2020. This is due in part to data availability constraints, as making robust estimates of REER misalignments requires complete data for all economies in the relevant sample (*i.e.*, the approximately 50 economies included in the GERAF model). More importantly, the substantial impact of COVID-19 on exchange rates, economic outcomes, trade patterns, and optimal policies for all economies globally makes assessments of equilibrium exchange rates particularly challenging at the current juncture. However, anecdotal evidence suggests that VND undervaluation may have persisted in 2020. The VND was virtually flat against the USD on a nominal basis over the first ten months of 2020. On a trade weighted basis, the VND appreciated in nominal effective and real effective terms in the first half of 2020, but has weakened in recent months, resulting in year-to-date depreciation of 1.9 percent and 2.2 percent in nominal effective and real effective terms, respectively, over the first ten months of 2020.[81]

Taking a longer-term perspective, after appreciating strongly from 2011-2014, Vietnam's REER was broadly unchanged on net from early 2015 to late 2020. Vietnam's REER was generally flat in 2015 and 2016, depreciated notably in 2017, and appreciated gradually over 2018 and 2019. In early 2020, Vietnam's REER appreciated sharply, as the VND closely followed the USD higher amid a significant tightening of global financial conditions, but the REER retraced over the second half of 2020, leaving Vietnam's REER as of November 2020 broadly in line with its average level over the last five years.[82] As discussed above, both the IMF and Treasury have consistently assessed the VND to be undervalued during this period, notwithstanding some periods in which Vietnam's REER has appreciated over the last few years. Moreover, the State Bank of Vietnam's FX market interventions have directly contributed to VND undervaluation during 2019, as discussed above.

Certain interested persons argue in this investigation that differences in levels of inflation between Vietnam and the United States can explain the VND's movement.[83] Certain other interested persons argue that it is not the VND that is undervalued but rather it is the USD that is overvalued.[84] These arguments are unavailing. The GERAF model allows Treasury to isolate

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[81] *Treasury Report to Congress* (Dec. 2020), 53.
[82] *Id.* at 52-53.
[83] David Dapice public comments, 1 (Nov. 12, 2020) (on file at regulations.gov); *see also* Nathaniel Barker public comments (Oct. 13, 2020) (on file at regulations.gov); Nghia Le public comments, 3 (Nov. 4, 2020) (on file at regulations.gov).
[84] US Fashion Industry Association public comments, 4 (Nov. 12, 2020) (on file at regulations.gov); *see also External Sector Report: 2020*, 93, International Monetary Fund (Aug. 2020), https://www.imf.org/en/Publications/ESR/Issues/2020/07/28/2020-external-sector-report (explaining that the USD's "2019 average REER to be somewhat overvalued, in the 8 to 14 percent range, with a midpoint of 11 percent").

the effects of specific model factors and domestic macroeconomic policies, as well as the impact of foreign macroeconomic policies, on a currency's valuation. Under the GERAF model, the impact of Vietnam's interventions on the VND's valuation is independent from any potential amount of other currencies' misalignment, including any purported misalignment of the USD. The same applies to differences in inflation levels and relative productivity levels across countries.

On the other hand, the GERAF model purposefully does not include interest rate differentials. One of the key features of the GERAF model is its ability to account for a country's position in its business cycle when assessing external imbalances. The GERAF model does this by using data on output gaps. However, countries' output gaps tend to be correlated with their interest rates, especially in countries where the central bank sets interest rates in a way that seeks to minimize the output gap. For this reason, the GERAF model incorporates output gaps but does not include interest rate differentials. In its robustness checks for the GERAF model, Treasury staff included interest rate differentials in several alternative model specifications, which did not produce notably different results to the GERAF model baseline.[85]

In sum, the information developed in the investigation indicates that the VND has been undervalued since 2016, and that the State Bank of Vietnam's recent, rapid, and significant reserves accumulation contributed to the undervaluation of the VND on a real effective basis and bilaterally against the USD in 2019. The State Bank of Vietnam continued to take FX market interventions that put downward pressure on the value of the currency in 2020 through September.

D. AVAILABLE EVIDENCE INDICATES THAT VIETNAM'S INTERVENTIONS IN FX MARKETS TOOK PLACE IN A CONTEXT OF CURRENT ACCOUNT AND GOODS TRADE SURPLUSES (INCLUDING WITH THE UNITED STATES)

Vietnam's recent and large-scale FX market interventions, and the VND's undervaluation, have taken place in the context of a sustained current account surplus, record goods trade surpluses (including with the United States), and rapid productivity growth in the tradable goods sector. The following two graphs portray Vietnam's current account balance in nominal U.S. dollar terms and as a percentage of gross domestic product (GDP), respectively, over the past several years as published by the State Bank of Vietnam.[86]

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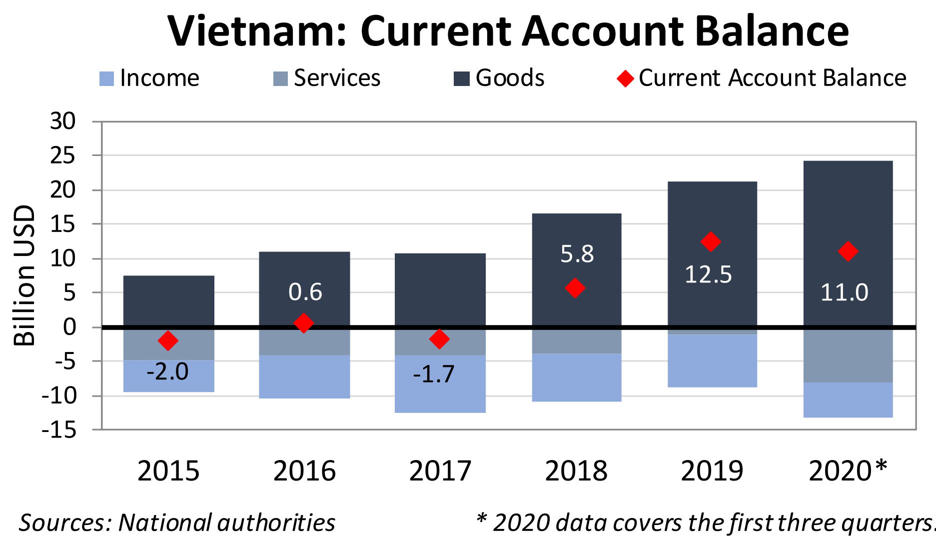
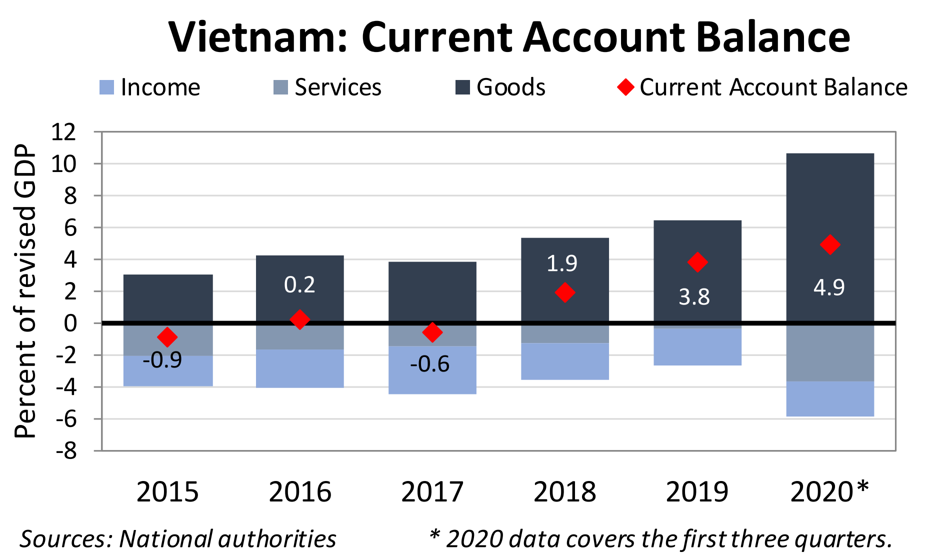
[85] *See Global Exchange Rate Assessment Framework Methodology*, 27, U.S. Department of Treasury, Office of International Affairs, Global Economics and Debt (Aug. 2020), https://home.treasury.gov/system/files/206/Global-Exchange-Rate-Assessment-Framework-Methodology.pdf (columns 2-5).

[86] Vietnam is currently revising its GDP statistics and has thus far done so through 2017. The revised data published to date indicate that revised GDP is around 25 percent higher than the unrevised GDP series. The GDP series used in the current account balance chart calculates GDP for periods after 2017 by taking the unrevised data and increasing it by roughly 25 percent. Additional data about the GDP revisions are available from Vietnam's General Statistics Office at the following two links: (1) https://www.gso.gov.vn/en/events/2019/12/general-statistics-office-to-work-with-the-international-monetary-fund-imf-on-gross-domestic-product-gdp-revision/, and (2) https://www.gso.gov.vn/en/events/2019/12/general-statistics-office-to-officially-announce-the-results-of-the-revision-of-gdp-size-for-the-2010-2017-period/.





As the graph above illustrates, Vietnam's current account was in deficit or close to balance from 2015 to 2017, but has swung firmly into surplus since 2018.[87] The surplus has continued to rise in 2019 and 2020,[88] while Vietnam was making net purchases of FX reserves that contributed to VND undervaluation.

External developments in recent years have reflected persistent features of the underlying

[87] "Balance of International Payment," State Bank of Vietnam (hereinafter State Bank of Vietnam BOP Data), https://www.sbv.gov.vn/webcenter/portal/en/home/sbv/statistic/boip?_afrLoop=9318392951698224#%40%3F_afrLoop%3D9318392951698224%26centerWidth%3D80%2525%26leftWidth%3D20%2525%26rightWidth%3D0%2525%26showFooter%3Dfalse%26showHeader%3Dfalse%26_adf.ctrl-state%3Dvjtpccr6z_4 (last visited Jan. 15, 2021) (balance of payments statements are searchable by calendar year and quarter).
[88] *Id.*

components of the current account. Vietnam has consistently run goods trade surpluses, which have generally risen since 2015. Goods trade surpluses have stemmed in particular from a large and growing foreign direct investment sector of export-oriented firms. Vietnam has also run more modest services trade deficits. The income balance has also steadily remained in deficit, reflecting two structural features. First, the primary income balance has been persistently in deficit, reflecting profits in the foreign direct investment sector that are remitted to foreign owners abroad. The secondary income balance, meanwhile, has steadily been in surplus (at a lower level than the primary income deficit), as Vietnam is a significant recipient of remittances.

Balance of payments data from the State Bank of Vietnam (shown in the graph above) indicate that Vietnam's goods trade surplus widened notably in 2019, when Vietnam was making substantial FX purchases. The goods trade surplus reached its highest annual level ever in 2019 (both in nominal terms and as a share of GDP), expanding by almost 30 percent in nominal terms compared to 2018 to reach $21.2 billion. According to the General Statistics Office of Vietnam, the 2019 surplus was driven by Vietnam's foreign direct investment sector (including crude oil), while the domestic economic sector ran a goods trade deficit.[89]

While the COVID-19 pandemic caused substantial disruption to global trade, the State Bank of Vietnam's balance of payments data show that Vietnam's goods trade surplus widened in each of the first three quarters of 2020 on a year-over-year basis.[90] This brought Vietnam's goods trade surplus to $24.2 billion over the first three quarters of 2020, higher in nominal terms than the goods trade surplus for all of 2019.

The COVID-19 pandemic appears to have substantially impacted Vietnam's services trade. From 2015-2019, the services trade deficit had generally narrowed over time, from a $4.8 billion deficit in 2015 to a $1.2 billion deficit in 2019. In 2020, the collapse in global tourism stemming from the pandemic hit Vietnam's services exports hard, and the services deficit widened substantially (expanding in each of the first three quarters of 2020 on a year-over-year basis). Over the first three quarters of 2020, the services deficit reached approximately $8.2 billion, the widest deficit ever in both nominal terms and as a share of GDP.

Vietnam's income balance, meanwhile, has been relatively stable in recent years, including into 2020 despite the COVID-19 pandemic. As noted above, Vietnam has run a substantial primary income deficit "in recent years," "as the [foreign invested enterprise] sector remits profits to foreign owners abroad."[91] From 2015-2019, this primary income deficit has ranged from $12.1 billion to $17.0 billion. Data for the first three quarters of 2020 indicates that the primary income deficit remained within this range on an annualized basis through the third quarter of 2020. Vietnam's secondary income balance, meanwhile, has been steadily in surplus in recent years amid strong remittance inflows. The secondary income surplus grew very gradually from $7.5 billion in 2015 to $9.2 billion in 2019. Over the first three quarters of 2020, the secondary income surplus totaled $6.7 billion, almost exactly in line with its level over the

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[89] *Statistical Yearbook of Vietnam: 2019*, 26-27, General Statistics Office of Vietnam (June 30, 2020) (hereinafter *GSO Yearbook 2019*), https://www.gso.gov.vn/wp-content/uploads/2020/09/Nien-giam-thong-ke-day-du-2019.pdf.
[90] As of the time of this Report, balance of payments information from the State Bank of Vietnam is available for the first three quarters of 2020. *See* State Bank of Vietnam BOP Data.
[91] *Treasury Report to Congress* (Dec. 2020), 51.

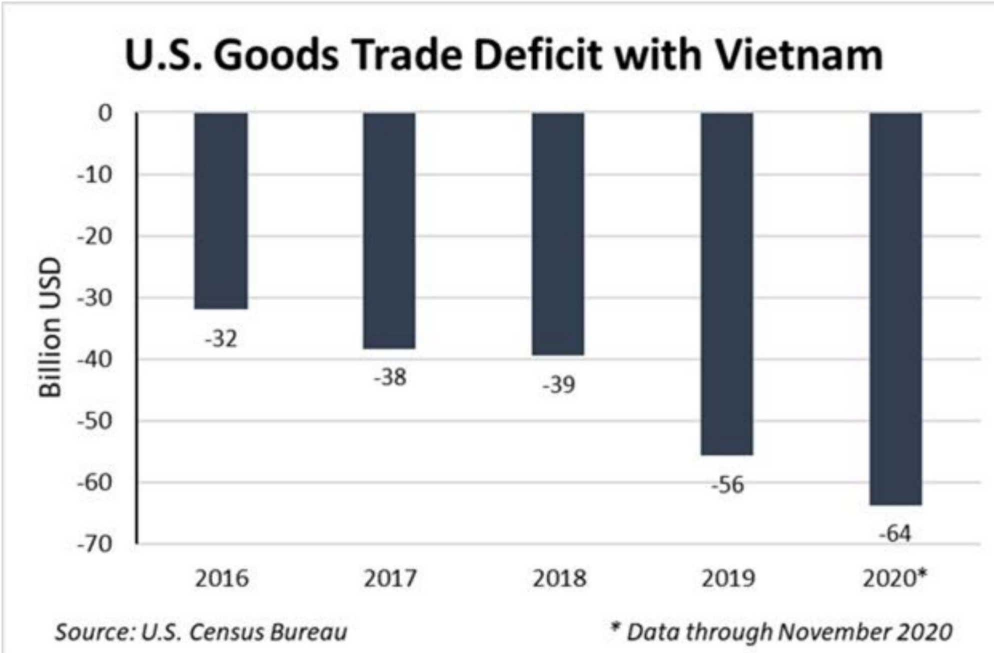
first three quarters of 2019. Thus, available evidence suggests a relatively limited impact of the COVID-19 pandemic on the income portion of Vietnam's current account.

Taking account of these developments in each of the components of Vietnam's balance of payments, Vietnam's current account surplus widened somewhat over the first three quarters of 2020 compared to the first three quarters of 2019, as a rising goods trade surplus more than offset the expansion of the services trade deficit, while the income balance remained broadly stable. These developments are somewhat at odds with earlier IMF forecasts that the COVID-19 pandemic might induce a substantial narrowing of Vietnam's current account surplus. For example, the IMF forecasted in October 2020 that Vietnam's current account surplus would narrow to 1.2 percent of GDP in 2020.[92] However, this forecast was made prior to the release of Vietnam's balance of payments data for the third quarter of 2020, which showed the current account surplus widening notably to approximately $8.4 billion.[93] This pushed Vietnam's current account surplus over the first three quarters of 2020 to almost 5 percent of GDP on an annualized basis. Thus, earlier projections that the COVID-19 pandemic would cause Vietnam's current account surplus to narrow substantially in 2020 appear highly questionable based on the evidence available as of the time of this Report.

Notably, Vietnam's purchases of FX reserves in 2019 and 2020 were made in the context of these large current account and goods trade surpluses.

In relation to trade with the United States in particular, the General Statistics Office of Vietnam explained that the United States represented Vietnam's largest export market in 2019.[94] The United States' goods trade deficit with Vietnam has expanded rapidly in recent years. The graph below depicts the United States' bilateral goods trade relationship with Vietnam over the past five years.

[92] *Current Account Balance, Percent of GDP*, International Monetary Fund, https://www.imf.org/external/datamapper/BCA_NGDPD@WEO/VNM (last visited Jan. 15, 2021).
[93] State Bank of Vietnam BOP Data.
[94] *GSO Yearbook 2019*, 605.



As illustrated above, the United States had a bilateral goods trade deficit with Vietnam of over $39 billion in 2018,[95] which rose to over $55 billion in 2019, according to the U.S. Census Bureau.[96] The United States' trade deficit with Vietnam in the first eleven months of 2020 exceeded the deficit with Vietnam for all of 2019; it amounted to over $63.68 billion USD.[97]

According to Treasury, Vietnam's growing goods trade surplus with the United States reflects some degree of production and supply chain shifting from China to Vietnam.[98] There is a correlation between rising imports from Vietnam to the United States and falling imports from China between 2018 and 2020.[99] Indeed, there may be a myriad of reasons to explain the growth in goods exports from Vietnam to the United States.[100] Nonetheless, it remains the case that

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[95] *Trade in Goods with Vietnam: 2018*, United States Census Bureau, https://www.census.gov/foreign-trade/balance/c5520.html#2018 (last visited Jan. 15, 2021).
[96] *Trade in Goods with Vietnam: 2019*, United States Census Bureau, https://www.census.gov/foreign-trade/balance/c5520.html#2019 (last visited Jan. 15, 2021).
[97] *Trade in Goods with Vietnam: 2020*, United States Census Bureau, https://www.census.gov/foreign-trade/balance/c5520.html#2020 (last visited Jan. 15, 2021).
[98] *Treasury Report to Congress* (Dec. 2020), 51.
[99] *Compare Trade in Goods with China*, United States Census Bureau, https://www.census.gov/foreign-trade/balance/c5700.html, *with Trade in Goods with Vietnam*, United States Census Bureau, https://www.census.gov/foreign-trade/balance/c5520.html; *see also Treasury Report to Congress* (Dec. 2020), 51; *see also, e.g.,* Euromarket Designs public comments, 2 (Nov. 12, 2020) (on file at regulations.gov); General Electric public comments, 8-9 (Nov. 12, 2020) (on file at regulations.gov); Hanes Brands public comments, 7-9, 10 (Nov. 6, 2020) (on file at regulations.gov); National Retail Federation public comments, 2-3 (Nov. 12, 2020) (on file at regulations.gov).
[100] *See, e.g.,* Nghia Le public comments, 3-5 (Nov. 4, 2020) (on file at regulations.gov) (referencing "Vietnam's economic structural shift to manufacturing supported by strong investment from the FDI sector in the past decade; other conditions that boost Vietnam's position in global supply chain; and the actual demand of the US" as purported reasons for Vietnam's trade surplus); Hearing Transcript, 43 ("the expansion of the Vietnamese trade surplus with the United States is a direct result of the successful application of President Trump's policies on China"); American Chamber of Commerce in Vietnam post-hearing comments (Jan. 7, 2021).

exports from Vietnam have been increasing during a time period in which the VND has been undervalued, including bilaterally against the USD in 2019, and during which time Vietnam was rapidly making significant purchases of FX that held down appreciation of its currency.

IV. The Investigation Supports a Finding that Vietnam's Acts, Policies, and Practices Related to Currency Valuation, Including through Excessive Government Intervention in FX Markets, Taken in Their Totality, are Unreasonable under Section 301 of the Trade Act

Based on the information, public comments, and testimony examined in this investigation, and based on the totality of the circumstances discussed below, the investigation supports a finding that Vietnam's acts, policies, and practices that have contributed to undervaluation of its currency, including through excessive government intervention in FX markets and other related actions, are unreasonable within the meaning of section 301 of the Trade Act. These circumstances include persistent undervaluation of the VND over a course of several years; Vietnam's more recent, rapid, and significant purchases of FX; and the conditions surrounding Vietnam's FX market interventions including current account and goods trade surpluses (including with the United States). Vietnam's acts, policies, and practices raise serious concerns in light of widely accepted norms, as evidenced in international agreements[101] and U.S. law, that exchange rate policy should not be used to gain an unfair competitive advantage in international trade, prevent exchange rates from reflecting underlying economic and financial conditions, or prevent balance of payments adjustment. Finally, such a finding is consistent with Treasury findings that during the period from July 2019 to June 2020 Vietnam engaged in currency manipulation.[102]

A. Factors Examined in Evaluating Whether Vietnam's Currency Valuation Policies are Unreasonable

1. Exchange Rate Policy Should not be Used to Gain an Unfair Competitive Advantage in Trade

Under widely accepted norms reflected in international agreements and U.S. law, exchange rate action should not be undertaken to derive an unfair advantage in international trade.

According to Article IV of the Articles of Agreement of the IMF, members shall "avoid manipulating exchange rates or the international monetary system in order to . . . gain an unfair competitive advantage over other members."[103] Vietnam has been an IMF member since 1956.[104] Article IV of the Articles of Agreement of the IMF does not define "manipulating

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[101] See, *e.g.*, *Articles of Agreement of the International Moneta*ry Fund art. IV, sec. 1(iii) (amended Jan. 26, 2016) (hereinafter IMF Articles of Agreement), https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf; *Accession of the Separate Customs Territory of Taiwan,* Penhgu, Kinmen and Matsu, at Annex II at art. I(2)(ii), (iii), WTO Doc. WT/L/433 (Nov. 23, 2001) (hereinafter Taiwan WTO Accession Protocol), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/433.pdf&Open=True.
[102] *Treasury Report to Congress* (Dec. 2020), 3-4.
[103] IMF Articles of Agreement, art. IV, sec. 1(iii).
[104] *See Vietnam*, International Monetary Fund, https://www.imf.org/en/Countries/VNM.

exchange rates." A July 2012 IMF Executive Board Decision on Bilateral Surveillance provides some further context:

> 2. A member would only be acting inconsistently with Article IV, Section 1(iii) if the Fund determined both that: (a) the member was manipulating its exchange rate or the international monetary system and (b) such manipulation was being carried out for one of the two purposes specifically identified in Article IV, Section 1(iii).
>
> (a) "Manipulation" of the exchange rate is only carried out through policies that are targeted at—and actually affect—the level of an exchange rate. Moreover, manipulation may cause the exchange rate to move or may prevent such movement.
>
> (b) A member that is manipulating its exchange rate would only be acting inconsistently with Article IV, Section 1(iii) if the Fund were to determine that such manipulation was being undertaken "in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members." In that regard, a member will only be considered to be manipulating exchange rates in order to gain an unfair competitive advantage over other members if the Fund determines both that: (A) the member is engaged in these policies for the purpose of securing fundamental exchange rate misalignment in the form of an undervalued exchange rate and (B) the purpose of securing such misalignment is to increase net exports.[105]

This norm is also expressed in the laws of the United States, including section 3004 of the Omnibus Trade and Competitiveness Act of 1988, which explains that countries should not "manipulate the rate of exchange between their currency and the United States dollar for purposes of . . . gaining unfair competitive advantage in international trade."[106]

Section 701 of the Trade Facilitation and Trade Enforcement Act of 2015 provides three criteria that, if satisfied by a foreign country, require Treasury to engage with that country to urge implementation of appropriate policies to address the causes of its currency undervaluation and trade surpluses.[107] These three criteria are: (1) a significant bilateral trade surplus with the United States, (2) a material current account surplus, and (3) engagement in persistent one-sided intervention in the FX market.[108] Accordingly, under U.S. law, currency policies that result in unfair trade advantages are of major concern to the United States. Indeed, in enacting the Trade Facilitation and Trade Enforcement Act of 2015, Congress, particularly the Senate Finance Committee, was "concerned that foreign countries have been using policies to undervalue their currencies in order to gain unfair trade advantages over the United States or prevent effective

[105] International Monetary Fund, *Public Information Notice: IMF Executive Board Adopts New Decision on Bilateral and Multilateral Surveillance* (July 30, 2012), https://www.imf.org/en/News/Articles/2015/09/28/04/53/pn1289.
[106] 22 U.S.C. § 5304(b).
[107] 19 U.S.C. § 4421.
[108] 19 U.S.C. § 4421(a)(2)(A)(ii).

balance of payments adjustments."[109]

These principles are based on the premise that, when a government engages excessively in FX market interventions or other actions that fundamentally misalign its currency at an undervalued level, the government is acting directly to change the relative price of exports and imports. This artificially distorts market-based competition, promoting exports and suppressing imports in ways that do not reflect the true competitiveness of traded goods.[110]

2. Exchange Rate Policy Should Not Prevent Exchange Rates from Reflecting Underlying Economic and Financial Conditions or Prevent Balance of Payments Adjustment

Existing U.S. and international norms also underscore that exchange rates should reflect underlying economic and financial conditions and that they should not prevent balance of payments adjustment. Section 3004 of the Omnibus Trade and Competitiveness Act of 1988 explains that countries should not "manipulate the rate of exchange between their currency and the United States dollar for purposes of preventing effective balance of payments adjustments . . ."[111] Section 3004 also states that if Treasury:

> [C]onsiders that such manipulation is occurring with respect to countries that (1) have material global current account surpluses; and (2) have significant bilateral trade surpluses with the United States, the Secretary of the Treasury shall take action to initiate negotiations with such foreign countries on an expedited basis, in the International Monetary Fund or bilaterally, for the purpose of ensuring that such countries regularly and promptly adjust the rate of exchange between their currencies and the United States dollar to permit effective balance of payments adjustments . . . .[112]

Because section 3004 of the Omnibus Trade and Competitiveness Act of 1988 links currency manipulation with current account and trade balances, this reflects that unfair currency practices should not be used to prevent balance of payments adjustments.

This principle is also expressed in Article IV of the IMF Articles of Agreement. According to Article IV, members shall "avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment."[113]

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[109] *See* S. Rep. No. 114-45, at 10 (2015).
[110] *See* Brad W. Setser and Dylan Yalbir, *Tracking Currency Manipulation*, Council on Foreign Relations (Oct. 7, 2020), https://www.cfr.org/article/tracking-currency-manipulation ("Currency manipulation is one way countries can shift patterns of trade in their favor. By buying foreign currency in the market, a country can artificially change the price of its imports and its exports. Countries do so to boost their own exports, especially if they otherwise have trouble generating the demand their economies need to grow"); David Beckworth and Joe Gagnon, *Currency Manipulation, Trade Imbalances and Libra*, Mercatus Center (July 15, 2019), https://www.mercatus.org/bridge/podcasts/07152019/currency-manipulation-trade-imbalances-and-libra (". . . the idea is, if you're buying a lot of foreign currency to keep your currency down, to have a large trade surplus, that's against the rules").
[111] 22 U.S.C. § 5304(b).
[112] *Id.*
[113] IMF Articles of Agreement, art. IV, sec. 1(iii).

Furthermore, the principle is reflected in the WTO Agreement. Under the WTO Agreement, all WTO Members must either be members of the IMF (which, as noted above, has disciplines on exchange rate policies), or if not, enter into a "special exchange agreement" with the WTO.[114] Taiwan is a major economy that is a Member of the WTO, but not the IMF. To accede to the WTO, Taiwan was required to enter into a special exchange arrangement. This arrangement, as is the case for other WTO accession documents, is an integral part of the WTO Agreement. Accordingly, the Taiwan exchange arrangement reflects internationally agreed norms. Taiwan's special exchange agreement with the WTO obligates Taiwan to "[p]ermit exchange rates to reflect underlying economic and financial conditions," and also to "[a]void manipulating exchange rates or the international monetary system in order to prevent effective balance-of-payments adjustment . . ."[115]

The underlying logic of these principles is that, when a country excessively uses FX market intervention to resist appreciation or lower the value of its currency and maintain a current account surplus, the government artificially suppresses consumption (and imports) and supports production (and exports). In such a situation, the exchange rate, and the conditions of production and consumption, do not reflect underlying economic and financial conditions in that country, such as productivity and competitiveness. This unfairly distorts market-based competition and prevents the country's balance of payments from adjusting to reflect market realities.

B. THE INFORMATION OBTAINED IN THE INVESTIGATION SUPPORTS A FINDING THAT VIETNAM'S ACTS, POLICIES, AND PRACTICES RELATED TO CURRENCY VALUATION, TAKEN IN THEIR TOTALITY, ARE UNREASONABLE UNDER SECTION 301

For the reasons below, the information obtained in the investigation, when considered in light of the U.S. and international norms discussed in the prior section, supports a finding that Vietnam's acts, policies, and practices related to currency valuation, including excessive foreign exchange market interventions and other related actions, taken in their totality, are unreasonable under section 301 of the Trade Act.[116]

The facts examined in this investigation show that Vietnam manages its exchange rate with an interest in achieving certain economic goals; that the exchange rate acts, policies, and practices it has chosen have contributed to undervaluation of the exchange rate; that Vietnam

[114] General Agreement on Tariffs and Trade 1994, art. XV.
[115] Taiwan WTO Accession Protocol, at Annex II at art. I(2)(ii), (iii).
[116] It has also been argued in this investigation that Vietnam has sought to peg the VND to the value of the USD, given that international trade is often conducted in USD. It is true that the USD is "the most widely used currency for international trade." *See* Anshu Siripurapu, *The Dollar: The World's Currency*, Council on Foreign Relations (Sept. 29, 2020), https://www.cfr.org/backgrounder/dollar-worlds-currency#:~:text=The%20Global%20Role%20of%20the%20U.S.%20Dollar,-Share&text=In%20addition%20to%20accounting%20for,their%20currencies%20to%20the%20dollar. The fact that, as a general matter, Vietnam's currency closely tracks the USD is not, in and of itself, inherently unreasonable or discriminatory under section 301 of the Trade Act.

uses FX market interventions as a key tool to manage the exchange rate in a manner that has contributed to persistent undervaluation; and that this undervalued exchange rate is accompanied by substantial current account and trade imbalances (including with the United States). Each of these matters, which were addressed more fully in section III of this Report, is summarized below.

First, as discussed above in section III.A, the State Bank of Vietnam specifically announces a daily VND/USD central exchange rate[117] on its website,[118] sets a tight +/-3 percent band within which licensed credit institutions can trade VND and USD in Vietnam,[119] and engages in the accumulation or decumulation of FX reserves to maintain the VND/USD exchange rate within +/-3 percent of the central exchange rate that it sets.[120] As noted above, one of the roles of the State Bank of Vietnam is to "to participate in the elaboration of national socio-economic strategies and plans."[121] Thus, the State Bank of Vietnam has the opportunity and incentive to adopt exchange rate policies that further policies of making Vietnam a major exporter of manufactured goods. Furthermore, the investigation has found no basis for concluding that the exchange rate is set solely for the purpose of ensuring the maintenance of adequate FX reserves.

Second, as the IMF and Treasury have found, and as discussed above in section III.C, the VND has been undervalued in recent years. According to Treasury, Vietnam has tightly managed the VND relative to the USD at an undervalued rate "consistently in periods of both appreciation and depreciation pressure."[122]

Third, Vietnam has taken concrete steps in FX markets that have contributed to the undervaluation of the VND, which in turn serves to perpetuate macroeconomic imbalances. As discussed above in section III.B, Vietnam evinced a discernable pattern of FX market intervention over 2019 and into 2020 that has predominantly taken the form of rapid and significant net FX purchases. Net purchases of FX reserves have the effect of putting downward pressure on a currency or preventing appreciation, as opposed to sales of FX reserves which have the opposite effect.[123] As discussed in section III.C, the State Bank of Vietnam's net purchases of FX during 2019 contributed to the undervaluation of the VND that year. Moreover, the State Bank of Vietnam continued its trend of making significant net purchases of FX during early- to mid-2020. Thus, these facts and circumstances indicate that Vietnam has engaged in recent, rapid, and significant purchases of FX to maintain the exchange rate at a level managed by the State Bank of Vietnam and which have contributed to undervaluation of the VND.

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[117] *State Bank of Vietnam Decision No. 2730 (2015)*, arts. 1, 4(1) (Dec. 31, 2015).
[118] *See Exchange Rate*, State Bank of Vietnam, https://www.sbv.gov.vn/TyGia/faces/ExchangeRate.jspx?_afrLoop=5332232089128224&_afrWindowMode=0&_adf.ctrl-state=zdvedm9u3_4 (last visited Jan. 15, 2021).
[119] *Treasury Report to Congress* (Dec. 2020), 52; *see also Treasury Report to Congress* (Jan. 2020), 36.
[120] *See 2019 IMF Article IV Consultation Staff Report*, 51.
[121] *Law on the State Bank of Vietnam (2010)*, art. 4(2).
[122] *Treasury Report to Congress* (Dec. 2020), 3.
[123] Joseph E. Gagnon, *Combating Widespread Currency Manipulation*, 2, Policy Brief No. PB12-19, Peterson Institute for International Economics (July 2012), https://www.piie.com/sites/default/files/publications/pb/pb12-19.pdf.

Fourth, Vietnam's management of its exchange rate, and the resultant undervaluation of the VND, has been recently accompanied by substantial current account and trade imbalances. As discussed above in section III.D, Vietnam's large-scale FX market interventions have taken place in the context of a sustained current account surplus, record goods trade surpluses (including with the United States), and rapid productivity growth in the tradable goods sector.

When examined in light of the norms discussed in section IV.A above, these factors support a finding that Vietnam's acts, policies, and practices regarding the valuation of its currency, including excessive foreign exchange market interventions and other related actions, taken in their totality, are unreasonable under section 301. As explained above, such acts, policies, and practices that artificially enhance a country's exports, and restrict its consumption and imports, unfairly distort market-based competition and are inconsistent with U.S. and international norms.

Vietnam's exchange rate policies, in combination, appear to achieve this result. This finding is supported by the views of at least some observers of the U.S.-Vietnam economic relationship, who have stated the view that the valuation of the VND, and the mechanisms used to maintain it, have enhanced Vietnam's trade competitiveness. In September 2020, a Council on Foreign Relations publication stated that "Vietnam has a peg—but one set at a level that keeps its currency weak and supports its exports."[124] That same month, the Director of the Vietnam Institute for Economic and Policy Research was cited in Vietnamese media as stating that the State Bank of Vietnam's purchase of foreign currencies during 2020 helped prevent the strengthening of the VND, which would hurt exports.[125]

As also explained above, exchange rate policies that prevent exchange rates from reflecting underlying economic and financial conditions, or prevent balance of payments adjustment, are inconsistent with U.S. and international principles. Vietnam's exchange rate policies, in combination, appear to contribute to this result. As discussed above, Vietnam's acts, policies, and practices that contribute to the undervaluation of its currency have taken place in the context of current account and goods trade surpluses (including with the United States).

In summary, the totality of the circumstances discussed above supports a finding that Vietnam's acts, policies, and practices that have contributed to undervaluation of its currency, including through excessive FX market interventions and other related actions, are unfair and inequitable, and, thus, unreasonable under section 301 of the Trade Act.

C. Purported Explanations for Vietnam's Recent Interventions in FX Markets do not Undermine the Basis for Finding Actionability

A number of purported explanations have been put forward to justify Vietnam's recent

[124] Brad W. Setser, Blog Post, *Asian Intervention in the Foreign Market is Back. Bigly*, Council on Foreign Relations (Sept. 16, 2020), https://www.cfr.org/blog/asian-intervention-foreign-exchange-market-back-bigly.
[125] *VN's Forex Reserve Sets New Record*, Saigon Giai Phong Online (Sept. 9, 2020), https://sggpnews.org.vn/business/vns-forex-reserve-sets-new-record-88370.html; *see also* Brad Setser, Blog Post, *Asian Intervention in the Foreign Exchange Market is Back. Bigly*, Council on Foreign Relations (Sept. 16, 2020), https://www.cfr.org/blog/asian-intervention-foreign-exchange-market-back-bigly.

interventions in FX markets. These arguments do not undermine the basis for finding actionability.

First, certain commenters have argued that Vietnam's purchases of FX are simply intended to build or maintain adequate levels of reserves.[126] The overall composition of Vietnam's acts, policies, and practices regarding currency valuation belies this assertion. As discussed above, the State Bank of Vietnam sets the exchange rate, based on its economic policy goals. There is no evidence on the record that the central goal of the chosen exchange rate is to build or maintain FX reserves. To the contrary, the evidence indicates that the FX market interventions are meant to maintain the exchange rate at a level consistent with the reference rate and trading band set by the State Bank of Vietnam. As the IMF has written, reserves may be accumulated "for non-precautionary reasons," "such as due to exchange rate policy, or for intergenerational savings."[127] A build-up of official reserves through intervention in FX markets can contribute to undervaluation of the intervening country's currency, thus boosting its international competitiveness and trade surpluses.[128]

Furthermore, even if Vietnam's FX reserves had previously been below certain reserves adequacy metrics for several years, that is no longer the case. For earlier periods, Treasury observed that, between July 2018 and June 2019, Vietnam's FX purchases "came in a context in which reserves remained below standard adequacy metrics and there was a reasonable rationale for rebuilding reserves."[129] In its most recent Article IV consultation report, which covered 2018, the IMF opined that "over the next several years, [Vietnam] should continue gradual reserve accumulation."[130] As of the beginning of 2019, Vietnam's FX reserves were below standard reserves adequacy metrics.[131]

Similarly, during the period of currency market stress in 2015, Vietnam's reserves declined to $29 billion, equivalent to roughly 60 percent of the IMF's Assessing Reserves Adequacy metric for countries with fixed exchange rate regimes, and equivalent to 12 percent of GDP.[132]

However, Vietnam has built reserves from 2015 forward. At the beginning of 2019, under the IMF's Assessing Reserves Adequacy metric for countries with a fixed exchange rate regime, Vietnam's reserves stood at 76 percent of adequate levels.[133] By contrast, the IMF's Assessing Reserves Adequacy metric for floating exchange rate regimes would have assessed Vietnam's reserves to be "fully adequate" entering 2019.[134] The range of adequacy under this

[126] *See, e.g.,* Nghia Le public comments, 3 (Nov. 4, 2020) (on file at regulations.gov).
[127] *Assessing Reserves Adequacy*, 5, International Monetary Fund (Feb. 14, 2011) (hereinafter *Assessing Reserves Adequacy*), https://www.imf.org/external/np/pp/eng/2011/021411b.pdf.
[128] C. Fred Bergsten & Joseph E. Gagnon, *Currency Manipulation, the US Economy, and the Global Economic Order*, 1, Policy Brief No. 12-25, Peterson Institute for International Economics (Dec. 2012), https://www.piie.com/sites/default/files/publications/pb/pb12-25.pdf.
[129] *Treasury Report to Congress* (Jan. 2020), 8, 37.
[130] *2019 IMF Article IV Consultation Staff Report*, 20.
[131] *Treasury Report to Congress* (Dec. 2020), 53.
[132] *Id.*
[133] *2019 IMF Article IV Consultation Staff Report*, 36; *Treasury Report to Congress* (Dec. 2020), 53.
[134] *2019 IMF Article IV Consultation Staff Report*, 36; *Treasury Report to Congress* (Dec. 2020), 53.

metric is 100 to 150 percent.[135] Since the beginning of 2019, Vietnam's FX reserves have increased rapidly, and stood at $88.3 billion as of September 2020.[136] Although the IMF has not yet published an updated estimate as of October 2020, according to Treasury, Vietnam's reserves likely are at least at roughly adequate levels now relative to the IMF metric for fixed exchange rate regimes, given the substantial purchases since the beginning of 2019, as determined by Treasury.[137] Again, entering into 2019, Vietnam's FX reserves would have been assessed as adequate under this metric for floating exchange rate regimes.[138]

Reserves in months of imports was one of the earliest reserve adequacy metrics and is widely cited given it is based on data that tends to be readily available on a higher frequency than other metrics. One widely used benchmark is at least three months of import coverage.[139] However, this metric becomes less applicable to countries as they increase their level of development and access to global financial markets, as well as when they become more integrated into global production and supply chains rather than importing primarily for domestic consumption. As a result, this metric is less relevant for Vietnam, which is highly integrated into global supply chains, resulting in a large amount of imported inputs intended for subsequent re-export rather than domestic use, and much of which may be financed externally.

Based on the foregoing, Vietnam's FX reserve levels appear to be in the range of adequate levels. This situation, combined with the scale and speed of Vietnam's FX purchases during the recent period, and that these interventions took place in the context of current account and goods trade surpluses (including with the United States), furthermore undermines the rationales proffered in this investigation to justify Vietnam's level of FX reserves accumulation during the period examined.

V. VIETNAM'S ACTS, POLICIES, AND PRACTICES BURDEN OR RESTRICT U.S. COMMERCE

For an act, policy, or practice of a foreign country to be actionable under section 301 of the Trade Act, it must also burden or restrict U.S. commerce.[140] For the reasons below, the investigation supports findings that Vietnam's acts, policies, and practices that contribute to currency undervaluation, including excessive FX market interventions and other related actions, taken in their totality, burden or restrict U.S. commerce.

First, Vietnam's currency undervaluation effectively lowers the price of exported products from Vietnam into the United States. Currency undervaluation also suppresses the value of Vietnamese factors of production, lowering production costs. Among these is the value of labor, which reduces the purchasing power and consumption of workers. In turn, the undervaluation undermines the competitive position of firms in the United States that are

[135] *Assessing Reserves Adequacy*, 31.
[136] *See* IMF Data.
[137] *Treasury Report to Congress* (Dec. 2020), 53.
[138] *Id.*
[139] *Assessing Reserve Adequacy—Specific Proposals*, 16, International Monetary Fund (Apr. 2015), https://www.imf.org/external/np/pp/eng/2014/121914.pdf.
[140] 19 U.S.C. § 2411(b)(1).

competing with lower-priced Vietnamese imports.[141]

The notion that there has been an increase in imports from Vietnam despite REER appreciation[142] does not undercut the conclusion that the VND has been undervalued and lowers the price of imports from Vietnam into the United States. Comparisons between the relative size of imports from Vietnam and those from other United States trading partners,[143] or differences in import prices between Vietnam and other countries to the United States,[144] likewise do not undercut the conclusion that Vietnam's currency has been undervalued and that Vietnam has been making FX market interventions that push down the value of the VND.

Second, Vietnam's currency undervaluation raises the price of United States exports to Vietnam. This undermines the competitive position of U.S. firms in the Vietnamese domestic market. Claims that Vietnam is accounting for an increasing share of U.S. exports since 2016, despite undervaluation of the VND, do not impact this conclusion.[145] Similar to imports, there may be a myriad of reasons to explain fluctuations in exports from one country to another. Again, an increase in the levels of U.S. exports to Vietnam does not mean that the VND is not undervalued or that this undervaluation has no impact on U.S. commerce.

In addition, excessive FX market intervention undertaken while a country has a significant current account surplus undermines U.S. export opportunities. For example, a current account surplus may result from net exports, suggesting that domestic production exceeds domestic consumption. Without FX market intervention, all else being equal, the value of Vietnam's currency would tend to appreciate in the context of a current account surplus, enhancing domestic consumption in a manner more favorable to U.S. exports. In this manner, Vietnam's acts, policies, and practices that contribute to the undervaluation of its currency, including excessive foreign exchange market interventions and other related actions, taken in their totality, also burden or restrict U.S. commerce.

Certain arguments have been made in this investigation regarding the pass-through rate of exchange rate fluctuations into prices.[146] Similar arguments have also been made that, by

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[141] *See* U.S. Steel post-hearing comments, 2 (Jan. 7, 2021) (on file at regulations.gov) ("this practice lowers costs for Vietnamese manufacturers during periods of both appreciation and depreciation, thereby encouraging exports of cheap and unfairly traded manufactured goods including hundreds of thousands of metric tons ('MT') of steel each year—to the United States").

[142] US Fashion Industry Association public comments, 3 (Nov. 12, 2020) (on file at regulations.gov).

[143] *See* National Retail Federation public comments, 4 (Nov. 12, 2020) (on file at regulations.gov).

[144] *See, e.g.,* Hearing Transcript, 147 ("the average price for handbags from Vietnam is more than double the price from China, and significantly higher than most other major suppliers").

[145] National Retail Federation public comments, 4 (Nov. 12, 2020) (on file at regulations.gov).

[146] *Id.* at 3 ("The impact of Vietnam's currency depreciation, if any and however caused, has not likely impacted consumer prices of goods imported from Vietnam, or goods exported to Vietnam, to the detriment of the U.S. economy for at least three reasons. First, such an impact depends to some extent on the perceived duration of the shift in exchange rates. Research has shown that as short-term fluctuations of the exchange rate occur, companies are more likely to pass through only a small percentage of the currency change into the prices of their goods in order to preserve market share . . . Second, most trade today (more than 90%) is priced in U.S. dollars. The pass-through rate of currency appreciation or depreciation to the price of a good is only about 25% for items priced in U.S. dollars. On the other hand, for items priced in foreign currency, the pass-through rate of an exchange rate change to

holding down the value of its currency, Vietnam is raising the costs of production for its own producers by making their inputs in the form of imported intermediates and capital equipment more expensive, such that any boost to exports would be "wiped out."[147] Furthermore, arguments have been made that Vietnam is unlikely to benefit from an undervalued currency based on purported impacts of exchange rates on a country's trade balance.[148] All of these arguments go beyond the scope of this Report. The purpose of this Report is to determine whether the investigation supports findings that Vietnam's acts, policies, and practices that contribute to its currency undervaluation, taken in their totality, are actionable under section 301 of the Trade Act. The purpose of this Report is not to quantify the extent of the damages that stem from Vietnam's acts, policies, and practices that contribute to currency undervaluation.

In sum, the impact of Vietnam's unreasonable acts, policies, and practices that contribute to the undervaluation of its currency, taken in their totality, serve to reduce market opportunities for U.S. firms in both the United States and Vietnamese markets. For these reasons, the investigation supports findings that Vietnam's unreasonable acts, policies, and practices that contribute to its currency undervaluation, including excessive FX market interventions and other related actions, taken in their totality, burden and restrict U.S. commerce.

VI. CONCLUSION

The evidence collected in this investigation indicates that:

(1) Vietnam's acts, policies, and practices that contribute to undervaluation of its currency, including excessive FX market interventions and other related actions, taken in their totality, are unreasonable; and

(2) Vietnam's acts, policies, and practices that contribute to undervaluation of its currency, including excessive FX market interventions and other related actions, taken in their totality, burden or restrict U.S. commerce.

It follows that USTR's investigation supports a finding that Vietnam's acts, policies, and practices are actionable under section 301 of the Trade Act.[149]

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the U.S. dollar price jumps to approximately 95%. Third, . . . competition to move sourcing from China to suppliers in Vietnam is fierce. Vietnam has limited labor and capital capacity to produce all the goods that U.S. companies want to move out of China. Therefore, Vietnamese producers have very little incentive to lower their prices to these buyers") (citations omitted).

[147] Bryan Riley public comments, 2 (Nov. 11, 2020) (on file at regulations.gov); *see also* US Fashion Industry Association public comments, 3 (Nov. 12, 2020) (on file at regulations.gov).

[148] Nghia Le public comments, 5 (Nov. 4, 2020) (on file at regulations.gov) ("Moreover, Vietnam trade is unlikely to benefit from an undervalued currency. According to an IMF research in the external sector report in 2019, the impact of exchange rates on the trade balance is generally weak. Specifically, a 10% depreciation of the local currency (for all currencies), on average, improves the trade balance by only 0.3% of GDP in *the short term* (and the effect is mainly *through a reduction in import demand of the economy*)") (emphasis in original).

[149] 19 U.S.C. § 2411(b)(1).

ANNEX: LETTER FROM AMBASSADOR ROBERT E. LIGHTHIZER TO THE GOVERNMENT OF VIETNAM

THE UNITED STATES TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON

October 2, 2020

H.E. Tran Tuan Anh
Minister of Industry and Trade
Ministry of Industry and Trade
Hanoi, Viet Nam

Dear Minister Anh:

I am writing to inform you that, in accordance with Chapter 1 of Title III of the Trade Act of 1974 (known as Section 301), I have determined to initiate a Section 301 investigation regarding acts, policies, and practices of the Government of Vietnam with respect to currency valuation.

Available evidence indicates that Vietnam's currency has been significantly undervalued over the past three years, and that the Government of Vietnam, through the State Bank of Vietnam, has contributed to the undervaluation by actively intervening in the exchange market. The investigation will focus on whether Vietnam's currency interventions and other related actions are unreasonable or discriminatory and burden or restrict U.S. commerce.

The United States has drawn no conclusions on these matters, and we hope to gain further information in discussions with your Government. Accordingly, and as provided under Section 303 of the Trade Act of 1974, I hereby request consultations with the Government of Vietnam. These issues are of great concern to the Government of the United States. I look forward to working with you or another appropriate official in a cooperative manner to resolve this matter.

Sincerely yours,

Robert E. Lighthizer

Robert E. Lighthizer

CC:
H.E. Le Minh Hung
Governor, State Bank of Vietnam
Hanoi, Viet Nam

EXHIBIT 70

OFFICE *of the* UNITED STATES TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT

Section 301 Investigation

Report on Austria's Digital Services Tax

January 13, 2021

Contents

REPORT ON AUSTRIA'S DIGITAL SERVICES TAX PREPARED IN THE INVESTIGATION UNDER SECTION 301 OF THE TRADE ACT OF 1974

I. EXECUTIVE SUMMARY

On June 2, 2020, the U.S. Trade Representative initiated an investigation of Austria's Digital Tax Act of 2020 (DST) under Section 301 of the Trade Act of 1974, as amended (the Trade Act). Austria's DST imposes a 5% tax on gross revenues from digital advertising services provided in Austria. The DST applies only to companies with annual global revenues of €750 million or more, and annual revenues from digital advertising services in Austria of €25 million or more.

In this report, the Office of the United States Trade Representative (USTR) presents its findings on actionability. The applicable standard for actionability under Section 301 is whether Austria's DST is unreasonable or discriminatory and burdens or restricts U.S. commerce. As described in this report, our investigation suggests that Austria's DST satisfies this standard. If the U.S. Trade Representative determines that the DST is actionable, Section 301 would authorize "all appropriate and feasible action … to obtain the elimination of" the DST.[1]

As explained in the Federal Register notice launching the investigation (the Notice of Initiation),[2] USTR focused on various aspects of the DST over the course of the investigation, including whether the DST discriminates against U.S. companies, if the DST is unreasonable as tax policy, and whether the DST burdens or restricts U.S. commerce. The Notice of Initiation requested public comments on these points, and 383 comments from interested persons, including companies, organizations, and governments, are available in the public docket. USTR also participated in direct, government-to-government consultations with Austria regarding the DST on December 21, 2020. These and other investigatory steps indicate that Austria's DST discriminates against U.S. companies, unreasonably contravenes international tax principles, and burdens or restricts U.S. commerce.

First, our investigation indicates that Austria's DST discriminates against U.S. digital services companies. The primary mechanism of this discrimination is the DST's revenue thresholds, which shield smaller firms from taxation (including many Austrian firms), while creating tax liability for an inordinate number of large, U.S.-based companies. Statements from the highest levels of the Austrian Government—including Chancellor Sebastian Kurz—indicate that this targeting of U.S. companies was deliberate. In December 2018, Chancellor Kurz was unambiguous, explaining that: "We will introduce a digital tax in Austria… The aim is clear: taxation of companies that make large profits online but barely pay taxes—such as Facebook and

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[1] 19 U.S.C. § 2411(b).

[2] USTR, "Initiation of Section 301 Investigations of Digital Services Taxes" 85 FED. REG. 34709, June 5, 2020 ("Notice of Initiation").

Amazon."[3] Four months later, the Chancellor reiterated his intentions, characterizing the DST as "a national tax on digital giants like #Google or #Facebook …."[4]

For these and other reasons explained further in Section IV(A) below, our investigation would support a finding that Austria's DST discriminates against U.S. companies.

<u>Second, our investigation indicates that Austria's DST unreasonably contravenes international tax principles</u>. At least two aspects of the DST appear to be inconsistent with principles of international taxation:

- The DST taxes companies with no permanent establishment in Austria, contravening the international tax principle that companies should not be subject to a country's corporate tax regime absent a territorial connection to that country.
- The DST taxes companies' revenue rather than their income. This is inconsistent with the international tax principle that income—not revenue—is the appropriate basis for corporate taxation.

For these and other reasons explained further in Section IV(B) below, our investigation would support a finding that Austria's DST unreasonably contravenes international tax principles.

<u>Third, our investigation indicates that Austria's DST burdens or restricts U.S. commerce</u>. The DST is burdensome or restrictive in at least three ways:

- The DST creates an additional tax burden for U.S. companies. USTR estimates that the aggregate DST tax bill for U.S. companies could amount to tens of millions of dollars each year. Aspects of the DST that exacerbate this tax burden include the DST's extraterritorial application and its taxation of revenue rather than income.
- The DST forces U.S. companies to undertake costly measures to comply with the tax's new payment and reporting requirements. This includes the reengineering of existing systems to collect and organize new and different types of information. USTR's analysis indicates that compliance costs could run into the millions of dollars for each affected company.
- The DST burdens U.S. companies by subjecting them to double taxation.

For these reasons, which we discuss further in Section IV(C) below, our investigation suggests that Austria's DST burdens or restricts U.S. commerce.

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[3] *Reuters*, "Austria plans digital tax while EU keeps working on its own levy," December 29, 2018, available at: https://de.reuters.com/article/eu-tax-digital-austria/austria-plans-digital-tax-while-eu-keeps-working-on-its-own-levy-idUKL8N1YY086

[4] Twitter account of Chancellor Sebastian Kurz (@sebastiankurz), April 3, 2019, available at: https://twitter.com/sebastiankurz/status/1113361541938778112.

In summary, as set out in detail in this report, USTR's investigation indicates that Austria's DST is discriminatory, unreasonable, and burdens or restricts U.S. commerce, and thus, actionable under Section 301.

II. BACKGROUND

This section provides background on the adoption of Austria's DST and on USTR's investigation. Subsection A summarizes the historical context of the DST, with a focus on the multilateral tax negotiations that were ongoing when Austria adopted its DST and the legislative and procedural history of the DST. Subsection B describes the relevant elements of Section 301 of the Trade Act, the focus of this investigation, and the investigatory process USTR followed.

A. AUSTRIA'S ADOPTION OF THE DST IN THE MIDST OF ONGOING, MULTILATERAL NEGOTIATIONS REGARDING DIGITAL SERVICES TAXES

In 2013, the Secretary-General of the Organisation for Economic Co-operation and Development (OECD) released an action plan on base erosion and profit sharing (BEPS).[5] The BEPS action plan discussed the "spread of the digital economy" and noted that this "poses challenges for international taxation."[6] That plan led to the establishment of the OECD/G20 Inclusive Framework, a group of countries and jurisdictions working to address issues raised in the BEPS action plan. The inaugural meeting of the OECD/G20 Inclusive Framework was held in Kyoto, Japan in June, 2016.[7]

The work of the OECD/G20 Inclusive Framework continues today. As of July 2020, the OECD/G20 Inclusive Framework negotiations involved over 135 countries and jurisdictions—including Austria and the United States—along with 14 observer organizations.[8] The United States remains actively engaged in the OECD Inclusive Framework process, and supports bringing those negotiations to a successful conclusion. As of now, the official position of the OECD is that, "[t]here is no consensus on either the merit or need for interim measures," such as country-specific digital services taxes like Austria's DST.[9]

Despite these long-running and ongoing negotiations, Austria has chosen to move forward with its own tax on digital advertising services. Austria's DST is related to a 5% tax on revenues from advertising on "TV, radio, print media, or posters," which Austria implemented in

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[5] Org. for Economic Co-operation and Development, *Action Plan on Base Erosion and Profit Sharing*, at 2, 11 (OECD Publishing 2013), available at: https://read.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en.

[6] Org. for Economic Co-operation and Development, *Action Plan on Base Erosion and Profit Sharing*, at 12 (OECD Publishing 2013), available at: https://read.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en.

[7] Org. for Economic Co-operation and Development, *OECD/G20 Inclusive Framework on BEPS: Progress report July 2019 – July 2020*, at 2 (OECD 2020), available at: https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2019-july-2020.pdf.

[8] Org. for Economic Co-operation and Development, *OECD/G20 Inclusive Framework on BEPS: Progress report July 2019 – July 2020*, at 7, 35 (OECD 2020), available at: https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2019-july-2020.pdf.

[9] Org. for Economic Co-operation and Development, *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, at 178 (OECD Publishing 2018), available at: https://read.oecd-ilibrary.org/taxation/tax-challenges-arising-from-digitalisation-interim-report_9789264293083-en.

2000.[10] Austria introduced a new, separate tax focused only on digital advertising on April 4, 2019. The lower chamber of the Austrian Parliament passed this digital tax proposal on September 19, 2019, and the upper chamber passed the measure on October 10, 2019. Austrian President Van der Bellen signed the DST into law shortly thereafter. The tax went into effect on January 1, 2020, and the first DST payments were due on March 15, 2020.

Unilateral laws like Austria's DST undermine progress in the OECD by making an agreement on a multilateral approach to digital taxation less likely. If unilateral measures proliferate while negotiations are ongoing, countries lose the incentive to engage seriously in the negotiations. For this reason, among others, the United States has discouraged governments from adopting country-specific DSTs. Nonetheless, Austria has chosen to create and implement its own unilateral tax on digital advertising services.

B. USTR's Investigation of the DST Pursuant to Section 301 of the Trade Act

On June 2, 2020, the U.S. Trade Representative initiated an investigation of Austria's DST under section 301 of the Trade Act.[11] Below, we describe: (i) the legal basis for this Section 301 investigation; (ii) the substantive focus of the investigation; and (iii) the process that USTR has followed in carrying out the investigation.

1. Relevant elements of Section 301

Section 301 sets out three types of acts, policies, or practices of a foreign country that are actionable: (i) trade agreement violations; (ii) acts, policies or practices that are unjustifiable (defined as those that are inconsistent with U.S. international legal rights) and burden or restrict U.S. Commerce; and (iii) acts, policies or practices that are unreasonable or discriminatory and burden or restrict U.S. Commerce.[12] Section 301 defines "discriminatory" to "include . . . any act, policy, and practice which denies national or most-favored nation treatment to United States goods, service, or investment."[13] "[U]nreasonable" refers to an act, policy, or practice that "while not necessarily in violation of, or inconsistent with, the international legal rights of the United States is otherwise unfair and inequitable."[14] The statute further provides that, in determining if a foreign country's practices are unreasonable, reciprocal opportunities to those denied U.S. firms "shall be taken into account, to the extent appropriate."[15]

If the Trade Representative determines that the Section 301 investigation "involves a trade agreement," and if that trade agreement includes formal dispute settlement procedures,

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[10] Austrian Advertising Tax Law 2000 at para. 1(2); Austrian Finance Ministry, "Digital Tax Act 2020," available at: https://www.bmf.gv.at/en/topics/taxation/digital-tax-act html.

[11] *See* Notice of Initiation.

[12] 19 U.S.C. § 2411(a)-(b).

[13] 19 U.S.C. § 2411(d)(5).

[14] 19 U.S.C. § 2411(d)(3)(A).

[15] 19 U.S.C. § 2411(d)(3)(D).

USTR may pursue the investigation through consultations and dispute settlement under the trade agreement.[16] Otherwise, USTR will conduct the investigation without recourse to formal dispute settlement.

If the Trade Representative determines that the act, policy, or practice falls within any of the three categories of actionable conduct under Section 301, the Trade Representative must also determine what action, if any, to take. If the Trade Representative determines that an act, policy or practice is unreasonable or discriminatory and that it burdens or restricts U.S. commerce:

> "The Trade Representative shall take all appropriate and feasible action authorized under [section 301(c)], subject to the specific direction, if any, of the President regarding such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under the subsection, to obtain the elimination of that act, policy, or practice."[17]

Actions authorized under Section 301(c) include: (i) suspending, withdrawing, or preventing the application of benefits of trade agreement concessions; (ii) imposing duties, fees, or other import restrictions on the goods or services of the foreign country; (iii) entering into binding agreements that commit the foreign country to eliminate or phase out the offending conduct or to provide compensatory trade benefits; or (iv) restricting or denying the issuance of service sector authorizations, which are federal permits or other authorizations needed to supply services in some sectors in the United States.[18]

2. The focus of USTR's investigation

As set out in the Notice of Initiation, the investigation involves determinations of whether the act, policy, or practice at issue—namely Austria's DST—is actionable under section 301 of the Trade Act, and if so, what action, if any, to take under Section 301. More specifically, this investigation focuses on discrimination against U.S. companies and unreasonable tax policy. With respect to unreasonableness, USTR investigated whether the DST diverges from principles reflected in the U.S. tax system and the international tax system, such as extraterritorial reach and taxing revenue rather than income.[19]

3. USTR's investigatory process

Throughout the investigation, USTR followed the process provided for under Section 301. That included, for instance, requesting consultations with the Austrian Government. The

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[16] 19 U.S.C. § 2413(a)(2).

[17] 19 U.S.C. § 2411(b).

[18] In cases in which USTR determines that import restrictions are the appropriate action, preference must be given to the imposition of duties over other forms of action. 19 U.S.C. § 2411(c).

[19] *See* Notice of Initiation, at 34710 (setting out a list of the types of issues that the USTR might address through the ten investigations discussed in the notice). The Notice of Initiation also invited interested parties to submit comments on other aspects of the DST that may warrant a finding of actionability under Section 301. Notice of Initiation, at 34710.

U.S. Trade Representative requested consultations on the same date that he initiated the investigation.[20] Austria's Minister of Digital and Economic Affairs accepted the request for consultations in a letter dated July 17, 2020.[21] The consultations took place on December 21, 2020.

USTR also provided interested persons with an opportunity to present their views and perspectives on the Austrian DST. The Notice of Initiation invited written comments on this investigation (as well as the investigations of nine other jurisdictions' DSTs) by July 15, 2020.[22] Interested persons filed 383 written submissions, the majority of which related (either implicitly or explicitly) to Austria's DST.[23] Several of these public comments were lengthy and detailed, and analyzed Austria's DST specifically.[24]

Of the comments that addressed whether Austria's DST is actionable under Section 301, the vast majority supported a positive finding on actionability.[25] Commenters provided evidence and argumentation supporting actionability based on several of the areas of concern outlined in the Notice of Initiation. As explained in more detail later in this report, commenters provided argumentation and evidence that, *inter alia*, Austria's DST discriminates against U.S. companies, that it is unreasonable, and that it burdens or restricts U.S. commerce.

III. DESCRIPTION OF AUSTRIA'S DIGITAL SERVICES TAX

This section, which describes Austria's DST in detail, is based on USTR's review of public comments and a detailed analysis of the DST text itself. In general terms, Austria's DST is a 5% tax on digital advertising services targeting the Austrian market. In the subsections below, we address: the companies that are subject to the DST (Section A); the scope of the taxable services under the DST (Section B); and the DST's payment and reporting requirements, as well as the use of DST revenue (Section C).

A. COMPANIES SUBJECT TO THE DST

Austria's DST only applies to digital services companies that meet or exceed two revenue thresholds.[26] If, "within a financial year," a company did not: (i) generate at least €25 million in

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[20] *See* Annex 2.

[21] *See* Letter from Minister Margarete Schramböck to Ambassador Robert Lighthizer, July 17, 2020 (on file with USTR).

[22] Notice of Initiation, at 34709.

[23] The submissions can be viewed on the Federal eRulemaking Portal, https://www.regulations.gov.

[24] *See, e.g.*, Public comment submitted by the Information Technology Industry Council, July 15, 2020; Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020; Public comment submitted by the Computer & Communications Industry Association, July 14, 2020.

[25] *See, e.g.*, Public comment submitted by Americans for Tax Reform, July 11, 2020; Public comment submitted by the National Retail Federation, July 15, 2020; Public comment submitted by the Information Technology Industry Council, July 15, 2020; Public comment submitted by the Computer & Communications Industry Association, July 14, 2020; Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020.

[26] DST at Section 2(2).

revenue in Austria for covered digital advertising services; and (ii) generate at least €750 million globally for all services, then the tax does not apply.[27] These thresholds are much higher than the single revenue threshold in Austria's 2000 tax on television, radio, and print advertising, which stands at €10,000 in taxable revenue.[28] One public commenter noted that the DST's "local threshold of €25 million is very high for the relative population size of Austria."[29]

The DST's revenue thresholds contain one important carve-out: "[r]evenues based on financial liabilities established by law are not included" when determining whether a company meets the revenue thresholds.[30] This provision operates to exempt Austrian state-owned broadcaster Österreichischer Rundfunk (ORF) from DST liability. We understand that ORF would meet the €750 million global revenue threshold, except that approximately half of its annual revenue (*i.e.*, its revenue from compulsory subscription fees) is excluded pursuant to the above-referenced provision.[31]

USTR's analysis indicates that many—if not all—of the companies likely to meet the DST's revenue thresholds are U.S. companies.[32] USTR was unable to identify any Austrian company with revenues sufficient to meet the DST's thresholds.

B. Services Subject to the DST

Austria's DST covers "online advertising services," a term it defines as "[a]dvertising insertions on a digital interface, particularly in the form of banner ads, search engine advertising and comparable advertising services."[33] With respect to determining what services qualify as "comparable advertising services," the DST states that "[t]he Federal Minister of Finance is authorized to establish online advertising services as comparable by regulation, particularly to ensure equal treatment of comparable services or to take technical developments into account."[34]

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[27] DST at Section 2(2).

[28] Austrian Advertising Tax Law 2000 at para. 4(1).

[29] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 27.

[30] DST at Section 2(1).

[31] *See Dun & Bradstreet*, "Corporate Profile of Österreichischer Rundfunk," available at: https://www.dnb.com/business-directory/company-profiles.%C3%B6sterreichischer_rundfunk.a10ef3b8b9522dd6734962820927ff58 html (stating that ORF's annual revenue is US$1.17 billion); *ORF Website* "ORF – The Austrian Broadcasting Corporation," available at: https://zukunft.orf.at/show_content.php?hid=37&language=en (explaining that "half of [ORF's revenue] comes from radio and TV licence fees").

[32] USTR's analysis of companies likely covered under Austria's DST was based on a review of publicly available regulatory filings, corporate annual reports, press articles, and other sources. Using these sources, USTR identified which firms would likely meet the DST's revenue thresholds. Where possible, USTR isolated revenue attributable to covered services in Austria, but this information was not available for many firms. Where that specific information was not accessible, USTR used the data available to assess the likely revenue derived from digital advertising services provided in Austria.

[33] DST at Sections 1(1) and 1(2).

[34] DST at Section 1(3).

The DST only applies to advertising services provided "domestically" in Austria. Per the DST, "[o]nline advertising services are considered provided domestically if they are received on a device belonging to a user with a domestic IP address and, based on their content and design, are aimed at domestic users (as well)."[35] It follows that not all digital advertising that appears on devices in Austria is taxable under the DST. If, for instance, a standard, English-language advertisement in a digital version of *The New York Times* appears on a device in Austria, the revenue for that ad would not be taxable, because the ad was not "aimed at" Austrian users.

Aside from the text of the law itself, the Austrian Government has released no regulations or any other guidance to clarify the precise scope of the services covered under the DST.

C. Payment and Reporting Requirements, and Use of DST Revenue

Companies must pay the DST by the 15th day of the second month after they provide taxable digital advertising services.[36] Each year, companies are also required to prepare and submit an annual tax return setting out "the types of online advertising services provided and the compensation due for them as well as worldwide revenues."[37] In addition, the DST mandates that companies create and maintain specific types of records, including logs of IP addresses or other geolocation-related information, as well as copies of all online advertising service contracts. Companies must provide these records to the Austrian Government on request.

Lastly, we note that the DST reserves €15 million in tax revenue for a fund "to finance the digital transformation process of Austrian media companies."[38] The DST does not specify who will administer this fund, how companies will be selected to receive funding, or how much funding those companies might receive.

IV. USTR's Findings Regarding Austria's DST

This section set outs USTR's findings on the question of actionability, *i.e.*, whether Austria's DST is unreasonable or discriminatory and burdens or restricts U.S. commerce. As explained below, our investigation would support a finding that: the DST discriminates against U.S. companies (Section A); the DST is inconsistent with international tax principles and therefore unreasonable (Section B); and the DST burdens or restricts U.S. commerce (Section C). It follows that our investigation would support a positive actionability finding under Section 301.

A. Austria's DST Discriminates Against U.S. Digital Services Companies

Our investigation indicates that the DST is intended to, and by its structure and operation does, discriminate against U.S. digital companies. The principal mechanism of this discrimination is the DST's revenue thresholds. Below, we explain how the DST's revenue

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[35] DST at Section 1(1).

[36] DST at Section 5(1).

[37] DST at Section 5(3).

[38] DST at Section 8(4).

thresholds function to target U.S. digital services companies, while shielding many—if not all—Austrian companies from tax liability.

As noted above, under the DST's revenue thresholds, a company only pays the tax if, within a year, that company generated at least: (1) €750 million in global revenues; and (2) €25 million in in-country revenues from covered digital services.[39] Revenue from "financial liabilities established by law" is excluded for the purposes of determining whether a company meets the revenue thresholds.[40] This exclusion effectively exempts the Austrian Broadcasting Corporation (ORF), a major Austrian State-owned company, from liability under the DST. As explained in Section II(A) above, we understand that ORF would meet the €750 million global revenue threshold, except that approximately half of its annual revenue is excluded under the above-quoted provision.[41] We are not aware of any other company that benefits from the carve-out for "financial liabilities established by law" in this way.

USTR's analysis indicates that the effect of the revenue thresholds (and the carve-out discussed above) is to focus the DST's tax burden on non-Austrian companies, and in particular, on U.S. firms.[42] In fact, we have been unable to identify a single Austrian company that likely meets the DST's revenue thresholds, and therefore is subject to the tax. This result is consistent with a January 2019 article from *Reuters*, which reported that Austrian Chancellor Sebastian Kurz had confirmed that "no Austrian firms would be hit by the tax."[43]

Numerous stakeholders submitted public comments regarding the discriminatory nature of the revenue thresholds, noting that:

- "[T]he revenue thresholds support a discrimination argument given that local Austrian firms selling digital advertising, which are smaller, will likely be excluded from the scope of the [DST]."[44]

[39] DST at Section 2(2).

[40] DST at Section 2(2).

[41] *See Dun & Bradstreet*, "Corporate Profile of Österreichischer Rundfunk," available at: https://www.dnb.com/business-directory/company-profiles.%C3%B6sterreichischer_rundfunk.a10ef3b8b9522dd6734962820927ff58 html (stating that ORF's annual revenue is US$1.17 billion); *ORF Website* "ORF – The Austrian Broadcasting Corporation," available at: https://zukunft.orf.at/show_content.php?hid=37&language=en (explaining that "half of [ORF's revenue] comes from radio and TV licence fees").

[42] As noted above, USTR's analysis of companies likely covered under Austria's DST was based on a review of publicly available regulatory filings, corporate annual reports, press articles, and other sources. Using these sources, USTR identified which firms would likely meet the DST's revenue thresholds. Where possible, USTR isolated revenue attributable to covered services in Austria, but this information was not available for many firms. Where that specific information was not accessible, USTR used the data available to assess the likely revenue derived from digital advertising services provided in Austria.

[43] *Reuters*, "Austria says will tax internet giants 3 percent of ad revenue," January 10, 2019, available at: https://fr.reuters.com/article/uk-austria-economy-digital-tax-idUKKCN1P41MG

[44] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 27.

- The DST "impose[s] high thresholds intended to exclude domestic enterprises."[45]

- "[T]he Austrian [DST] discriminates through the application of the turnover thresholds that result in the taxes being concentrated on the globally successful American firms …."[46]

- "[T]he Austrian [DST] revenue thresholds are discriminatory in their effect, as they are designed to capture large global digital advertising service providers while excluding smaller local competitors, even if such competitors have a significant local market presence."[47]

Our investigation also indicates that the DST's discriminatory targeting of U.S. companies was intentional. Public statements from government officials demonstrate that focusing the tax burden on specific U.S. firms was Austria's goal. For instance, in December 2018, Austrian Chancellor Sebastian Kurz was explicit about his intentions: "[w]e will introduce a digital tax in Austria… The aim is clear: taxation of companies that make large profits online but barely pay taxes—such as Facebook and Amazon."[48] Chancellor Kurz also stated that:

> Austria will introduce its own digital tax on Internet giants in addition to the European plans. Because it cannot be that corporations like #Facebook or #Amazon make big profits in Austria, but pay almost no taxes here.[49]

Later, upon introduction of the DST in April 2019, Chancellor Kurz reiterated that U.S. companies were the specific target of the tax, characterizing the DST as "a national tax on digital giants like #Google or #Facebook …."[50]

Other Austrian Government officials have made similar statements:

- On October 10, 2019, Member of the upper house of the Austrian Parliament Elisabeth Mattersberger explained that under the DST: "internet giants such as Facebook, Google or Amazon will in the future be charged a 5 percent tax on online advertising sales. Presumably nobody can have anything against that."[51]

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[45] Public comment submitted by the United States Council for International Business, July 15, 2020 at 3.

[46] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 22.

[47] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 27.

[48] *Reuters*, "Austria plans digital tax while EU keeps working on its own levy," December 29, 2018, available at: https://de.reuters.com/article/eu-tax-digital-austria/austria-plans-digital-tax-while-eu-keeps-working-on-its-own-levy-idUKL8N1YY086.

[49] Twitter account of Chancellor Sebastian Kurz (@sebastiankurz), December 29, 2018, available at: https://twitter.com/sebastiankurz/status/1078995659414556672.

[50] Twitter account of Chancellor Sebastian Kurz (@sebastiankurz), April 3, 2019, available at: https://twitter.com/sebastiankurz/status/1113361541938778112.

[51] Statement by Federal Councilor Elisabeth Mattersberger, 897th meeting of the Federal Council of the Republic of Austria, October 10, 2019.

- On October 10, 2019, Member of the upper house of the Austrian Parliament Dr. Doris Berger-Grabner made a statement in support of the DST, noting that the tax should target "digital giants … from Silicon Valley" such as "Google, Apple, Facebook and Co…."[52]

- A public statement from the Austrian Parliament regarding the passage of the DST referred specifically and exclusively to U.S. companies as those that would face a tax burden, explaining that: "[i]nternet giants like Facebook, Google or Amazon must now pay a five percent tax on online advertising sales from 2020."[53]

The prescribed use of funds collected by the DST also indicates that the tax is intended to favor Austrian companies. Specifically, the DST provides that "[t]he sum of EUR 15 million from income from digital tax must be allocated to finance the digital transformation process of Austrian media companies."[54] In April 2019, Austrian Finance Minister Hartwig Loeger explained the purpose of this "digital transformation" fund as follows:

> In order to strengthen Austria as a media location and to secure the country's identity for the future, a digitalisation fund will be set up. We will use this to support the digital transformation process of Austrian media companies.[55]

If, as Minister Loeger states, a goal of the tax is to "support" Austrian companies, this suggests that those same Austrian companies are not the intended taxpayers. Indeed, it would have been illogical for Austria to design the DST to tax its domestic media companies, only to then distribute that same tax revenue to those very same Austrian companies.

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[52] Statement by Federal Councilor Doris Berger-Grabner, 897th meeting of the Federal Council of the Republic of Austria, October 10, 2019.

[53] Parliamentary Correspondence No. 914, National Council: digital tax on online advertising sales decided, August 20, 2019, available at: https://www.parlament.gv.at/PAKT/PR/JAHR_2019/PK0914/.

[54] DST at Section 8(4).

[55] *Orbitax*, "Austria Announces Digital Tax Package Including 5% Digital Tax on Advertising for Large Corporations and VAT Obligations for Digital Retail Platforms," April 5, 2019, available at: https://www.orbitax.com/news/archive.php/Austria-Announces-Digital-Tax--37200.

Numerous commenters took issue with the DST's "digital transformation" fund for Austrian companies.[56] One commenter explained that this fund is "direct[] evidence" of the "protectionist intent" of the DST.[57]

In sum, as described above, the DST's discriminatory nature is apparent from the structure of the tax itself, the tax's inordinate impact on U.S. companies, and the above-quoted statements from Austrian Government officials. For these reasons, our investigation suggests that Austria's DST discriminates against U.S. companies.

B. AUSTRIA'S DST IS UNREASONABLE, BECAUSE IT IS INCONSISTENT WITH INTERNATIONAL TAX PRINCIPLES

The statute defines an "unreasonable" measure as one that "while not necessarily in violation of, or inconsistent with, the international legal rights of the United States is otherwise unfair and inequitable."[58] USTR's analysis indicates that two aspects of Austria's DST are inconsistent with international tax principles, and thus, unreasonable under Section 301: the DST's extraterritorial application (Section 1); and the DST's application to revenue rather than income (Section 2).

1. The DST's extraterritorial reach contravenes international tax principles

Our investigation indicates that the DST's extraterritorial application—*i.e.*, its targeting of revenues unconnected to a physical presence in Austria—contravenes prevailing international tax principles. As described in section III(B) above, the DST applies to digital advertising with a nexus to Austria, *i.e.*, advertising that: (i) is received on a device belonging to a user with a domestic IP address; and (ii) is aimed at domestic, Austrian users."[59] However, no <u>physical</u> presence in Austria is required for the DST to apply. Our investigation shows that this taxation of revenue absent a physical presence in Austria is inconsistent with principles of international tax policy.

The international tax system reflects the principle that companies are not subject to a country's corporate tax regime in the absence of a territorial nexus to that country. This is reflected in international tax treaties, which typically establish that a company need not pay a

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[56] Public comment submitted by Engine Advocacy, July 15, 2020, at 4 ("[T]he Austrian DST—while similar in nature to that of France—goes one step further in favoring domestic companies by funneling 15 million Euros generated by the tax to Austrian media companies—effectively the competitors of taxed companies."); Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 22 (explaining that the fund "channels revenues from [the DST] to subsidize domestic print advertising platforms."); Public comment submitted by the Computer & Communications Industry Association, July 14, 2020, at 6 (noting that "it is poor policy to subsidize local firms by taxing foreign companies.").

[57] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 27. *See also* Public comment submitted by the Computer & Communications Industry Association, July 14, 2020, at 5 (stating that "[t]he discriminatory motivations underlying [the DST] are clear.")

[58] 19 U.S.C. § 2411(d)(3)(A).

[59] DST at Section 1(1).

country's corporate income tax unless it has a "permanent establishment" in that country. For instance:

- The OECD model tax treaty provides that the profits of an enterprise "shall be taxable" only in the country of which the enterprise is a national "unless the enterprise carries on business in [another country] through a permanent establishment situated therein."[60]

- The UN Model Treaty similarly provides that the profits of an enterprise are taxable in a country only if "the enterprise carries on business in [that country] through a permanent establishment situated therein."[61]

- The U.S. Model Tax Treaty and the U.S.-Austria Tax Treaty both contain similar provisions barring taxation absent a permanent establishment.[62]

Each of these treaties defines "permanent establishment" as "a fixed place of business through which the business of an enterprise is wholly or partly carried on."[63] These treaties also provide that the term includes a place of management, branch, office, factory, workshop, and "place of extraction of natural resources."[64] A "permanent establishment" does not include, *inter alia*, the maintenance of a fixed place of business solely for the purpose of "purchasing goods or merchandise or of collecting information for the enterprise" or of "carrying on, for the enterprise, any other activity" "provided that … the overall activity of the fixed place of business, is of a preparatory or auxiliary character."[65] Other sources confirm that the requirement of a permanent establishment is the general rule in international tax policy.[66] Austria's DST—which taxes companies irrespective of whether they maintain a permanent establishment in Austria—contravenes this principle of international taxation.

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[60] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 7(1).

[61] UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7(1).

[62] *United States Model Income Tax Convention*, art. 7 ("Profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein."); U.S.-Austria Tax Treaty, art. 7(1) ("The business profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein.").

[63] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 5(1); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 5(1); *United States Model Income Tax Convention*, art. 5(1); U.S.-Austria Tax Treaty, art. 5(1). Note that the treaty in paragraph 5 of Article 5 may also deem a permanent establishment to exist notwithstanding the general rule in paragraphs 1 and 2 of Article 5 if there is a dependent agent conducting certain activities on behalf of the foreign enterprise.

[64] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 5(2); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 5(2); *United States Model Income Tax Convention*, art. 5(2); U.S.-Austria Tax Treaty, art. 5(2).

[65] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 5(4); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 5(4); *United States Model Income Tax Convention*, art. 5(4); *see also* U.S.-Austria Tax Treaty, art. 5(4).

[66] *See, e.g.*, OECD, Inclusive Framework on Base Erosion and Profit Sharing, Action 7: Permanent establishment status, https://www.oecd.org/tax/beps/beps-actions/action7/.

Public comments received in this investigation noted that the DST's extraterritorial reach is inconsistent with international taxation principles.[67] One commenter explained that the "[DST]'s extraterritoriality is inconsistent with international tax principles and unusually burdensome for U.S. affected companies."[68] A second commenter similarly observed that the DST "impos[es] taxes without regard to the existence of a permanent establishment [which] continue[s] to breach international tax principles."[69]

In summary, our investigation suggests that the DST's extraterritorial application to revenues not connected to a company's physical presence in Austria contravenes international taxation principles.

2. The DST's application to revenue rather than income contravenes international tax principles

As described in Section III above, the DST applies to gross revenues generated from covered digital advertising services.[70] Thus, it differs from taxes on income (also called net profit), which tax a company's gross revenues minus its business expenses.[71] Our investigation indicates that the DST's application to revenue rather than income is inconsistent with prevailing principles of international taxation, which recognize income—not gross revenue—as an appropriate basis for taxation.

A variety of international tax treaties reflect the principle that corporate income, and not corporate gross revenue, is a proper basis for taxation. For instance, the OECD Model Treaty provides for the taxation of "business profits" and other types of income streams (dividends, interest, royalties, capital gains, etc.), but makes no provision for taxes on gross revenues.[72] The UN Model Treaty likewise has disciplines on taxing business profits and numerous other types of income, but has no such disciplines for taxes on gross revenues.[73] Moreover, the U.S. Model Tax Treaty, and scores of bilateral tax treaties—including the U.S.-Austria Tax Treaty—make no

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[67] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 28; Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 15-16.

[68] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 28.

[69] Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 16.

[70] DST at Section 3(1).

[71] *See, e.g.* United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7, 2017.

[72] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 7, December 18, 2017 (on business profits); *see id*. arts. 6, 8-21.

[73] United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7, 2017 (setting out disciplines on taxes of business profits); *id.* arts. 6, 8-21 (covering other types of income).

reference to taxes on gross revenues.[74] Thus, the system of international tax treaties reflects the international principle that income, not revenue, is the appropriate basis for corporate taxation.

Other sources confirm that the taxation of corporate income comports with international tax principles, but that the taxation of gross revenue does not. For example, Chapter 2 of the OECD publication *Addressing the Tax Challenges of the Digital Economy*, which is entitled "Fundamental Principles of Taxation," lists two bases for corporate taxation: income and consumption.[75] Taxation of gross revenue is not recognized. In practice, taxes on revenue are rare. One tax policy organization noted that "there are few recent empirical studies on gross [revenue] taxes because of their near-universal abandonment in developed countries."[76]

Public comments received in this investigation highlighted the inconsistency between the DST's taxation of revenue and international tax principles. One commenter noted that the "[DST']s application to gross revenue rather than net income is inconsistent with international tax principles and unusually burdensome for U.S. affected companies."[77] Another commenter observed that digital services taxes: "abandon the long-held standard of taxing profits by taxing revenues of the targeted technology companies. This contravenes the principle that companies should only be taxed on their actual gains from doing business, and leaves open the possibility to being taxed on a loss."[78]

In sum, our investigation suggests that the DST's application to revenue instead of income is inconsistent with principles of international taxation.

3. Conclusion

As explained above, our investigation indicates that the DST's extraterritorial application and application to revenue rather than income are inconsistent with international tax principles. It follows that these same aspects of Austria's DST are unreasonable under Section 301.

C. AUSTRIA'S DST BURDENS OR RESTRICTS U.S. COMMERCE

USTR's investigation also addressed the question of whether Austria's DST burdens or restricts U.S. commerce. Our investigation suggests that it does. More specifically, the DST burdens U.S. commerce by, *inter alia*: obligating U.S. companies to pay tens of millions of

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[74] *See United States Model Income Tax Convention*, art. 2, 2016 (setting out disciplines on "total income, or on elements of income"); *id.* art. 7 (establishing disciplines on taxes of "business profits"); U.S.-Austria Tax Treaty, arts. 2, 7.

[75] OECD, *Addressing the Tax Challenges of the Digital Economy*, ch. 2: "Fundamental Principles of Taxation," at 32-47 (2014). There are, of course, other appropriate bases for taxation besides income. Consumption is one generally accepted basis for taxation. Value-added taxes and sales taxes are examples of consumption taxes. However, the Austrian DST is not structured as a tax on consumption.

[76] *See* Justin Roxx, "Gross Receipts Taxes: Theory and Recent Evidence," *Tax Foundation*, available at: https://taxfoundation.org/gross-receipts-taxes-theory-and-recent-evidence/.

[77] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 28.

[78] Public comment submitted by Americans for Tax Reform, July 11, 2020, at 2.

dollars in new taxes (Section 1); forcing U.S. companies to undertake costly compliance measures (Section 2); and subjecting U.S. companies to double taxation (Section 3).

1. U.S. companies face an additional tax burden under the DST

Our investigation indicates that the DST burdens or restricts U.S. commerce by subjecting U.S. companies to additional tax burdens. USTR's analysis indicates that U.S. companies, in the aggregate, may face tens of millions of dollars in new tax payments each year under the DST.

Aspects of the DST discussed in this report exacerbate this financial burden on U.S. companies. For example, at a basic level, and as described in Section IV(A), the DST creates this tax burden by discriminatorily targeting non-Austrian companies. Furthermore, Austria's decision to disregard international tax principles by taxing revenue rather than profit exacerbates the burden on U.S. companies further still. This is most apparent in the case of low margin businesses. For example, if Company A generates US$100 million in revenue in Austria, it must pay US$5 million under the DST (a 5% tax on Company A's revenue). But if we assume that Company A incurred US$90 million in costs, and thus received just US$10 million in profit, it would still pay US$5 million under the DST—a sum equal to 50% of Company A's profits.

In sum, and as explained above, additional tax liability under the DST represents a burden for U.S. companies.

2. U.S. companies face considerable compliance costs in connection with the DST

U.S. companies also face significant costs to comply with the DST's payment and reporting requirements. As one commenter explained, DSTs create "substantial administrative burdens in terms of compliance costs and greater uncertainty. Companies will need to engage in significant re-engineering of their internal business and financial reporting systems to ensure that they can accurately capture required information and comply with the DSTs."[79] One reason this sort of "reengineering" is necessary, is because Austria's DST only applies to revenue for digital advertising services provided "domestically" in Austria.[80] This requires companies to revamp their systems to capture and track the information needed to determine whether specific instances of service provision meet the definition of "domestically" under the DST. Companies were not previously required to categorize their work in this way. In addition to these direct "re-engineering" costs, companies also incur substantial opportunity costs whenever they divert valuable (and often scarce) engineering resources away from their core products.

All told, commenters estimate that compliance costs for Austria's DST will be "in the millions" for each company,[81] and note that "[t]he administrative burden associated with

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[79] Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 17.

[80] DST at Section 1(1).

[81] Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 17.

compliance is significant, even if firms can pay the tax."[82] In sum, the compliance challenges posed by the DST represent a significant burden for U.S. companies.

3. U.S. companies face double taxation under the DST

The DST also burdens U.S. companies by subjecting them to double taxation. U.S. companies that pay the DST in Austria will still be subject to U.S. corporate income tax, creating two layers of taxation. Take, for example, hypothetical Company A discussed above. To recall, Company A earned US$100 million from Austria-connected services, and incurred US$90 million in Austria-related costs. Company A must pay US$5 million (5% of Austrian revenue) to Austria pursuant to the DST, leaving it with just US$5 million in remaining profit. Company A must then also pay U.S. corporate income tax on its residual US$5 million. Avoiding double taxation of this sort is the focus of prominent model tax treaties as well as the U.S.-Austria Tax Treaty.[83]

The risk of double taxation was a concern noted in several public comments. For instance, commenters explained that there exist "risks of multiple taxation intrinsic to an extraterritorial tax on revenue,"[84] and that "DSTs cause companies to be taxed twice, hindering innovation and economic growth."[85]

Furthermore, in some circumstances, companies subject to the DST could face triple taxation. Consider, for example, a French digital advertising company that directs advertising to Austrian users. That company may be liable to pay the French digital services tax, the Austrian DST, and French income tax on the revenue from a single advertising placement. Although the United States has no digital services tax, U.S. companies could nonetheless face triple taxation risk if they own subsidiaries in countries with national digital services taxes.

In sum, the DST exposes firms to multiple layers of taxation, which represents a clear burden on U.S. digital services companies.

4. Conclusion

As explained above, USTR's investigation would support a finding that the DST burdens or restricts U.S. commerce by negatively impacting U.S. companies' operations in Austria. More specifically, our investigation suggests that the DST creates a significant new tax burden for U.S. companies, forces U.S. companies to undertake costly compliance measures, and subjects U.S. companies to multiple layers of taxation.

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[82] Public comment submitted by the Computer & Communications Industry Association, July 14, 2020, at 14.

[83] *See, e.g.*, OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, preamble, December 18, 2017; United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, preamble, 2017; *United States Model Income Tax Convention*, preamble, 2016; U.S.-Austria Tax Treaty, preamble.

[84] Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 17.

[85] Public comment submitted by CompTIA, July 15, 2020, at 2.

V. Conclusions

USTR's investigation indicates that:

1. Austria's DST is discriminatory against U.S. companies;

2. Austria's DST contravenes prevailing international tax principles, and is therefore unreasonable; and

3. Austria's DST burdens or restricts U.S. commerce.

It follows that USTR's investigation would support a finding that Austria's DST is actionable under Section 301.

ANNEX 1: AUSTRIA'S DIGITAL TAX ACT OF 2020

Complete legal text of the Digital Tax Act of 2020, Version of December 3, 2019

(Provisional Translation)

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Long title

Digital Tax Act of 2020 (DiStG 2020)
First publication version: BGBl. I Nr. 91/2019 (NR: GP XXVI IA 983/A AB 686 S. 88. BR: AB 10251 S. 897.) [CELEX-Nr.: 32011L0016, 32018L0822]

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Text

Items subject to the tax

§ 1. (1) Online advertising services are subject to digital tax if these services are provided by online advertising providers domestically for pay. Online advertising services are considered provided domestically if they are received on a device belonging to a user with a domestic IP address and, based on their content and design, are aimed at domestic users (as well).

(2) Advertising insertions on a digital interface, particularly in the form of banner ads, search engine advertising and comparable advertising services, are considered online advertising services. Advertising services that are subject to advertising tax under the Advertising Tax Act of 2000, BGBl. I Nr. 29, are not considered online advertising services.

(3) The Federal Minister of Finance is authorized to establish online advertising services as comparable by regulation, particularly to ensure equal treatment of comparable services or to take technical developments into account.

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Definitions

§ 2. (1) Online advertising providers are companies,

1. that provide online advertising services for pay or contribute to doing so and
2. within a financial year attain

   a) worldwide revenues of at least EUR 750 million and

   b) revenues of at least EUR 25 million domestically from conducting online advertising services

   Expenditures for preliminary services under the second sentence of § 3(1) are not to be included in the revenue under b). If a company is part of a multinational group within the meaning of § 2 of the Transfer Price Documentation Act, BGBl. I Nr. 77/2016, the revenues of the group must be applied. The authoritative measure is the most recent annual financial statements/consolidated financial statements. Revenues based on financial liabilities established by law are not included in this revenue.

(2) User means any individual or legal entity that uses a device to access a digital interface.

(3) Digital interface means any type of software (including web sites or parts thereof as well as mobile apps) that users can access.

(4) IP address (Internet Protocol address) is a series of alphanumeric symbols assigned to a network device to allow it to communicate through the internet. Determination of the location for providing online advertising services based on the IP address is equivalent to using other technologies to geolocate the devices.

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Assessment base and tax amount

§ 3. (1) The assessment base for digital tax is the compensation that the online advertising provider receives from a client. This base is reduced by expenditures for preliminary services by other online advertising providers that are not part of its multinational group.

(2) The tax is 5% of the assessment base.

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Taxpayer, onset of the tax entitlement

§ 4. (1) The taxpayer is the online advertising provider that has an entitlement to compensation for conducting an online advertising service within the meaning of § 1. This applies even if the online advertising provider is not the owner of the digital interface.

(2) The tax entitlement arises at the end of the month in which the taxable service is provided.

(3) If the compensation for performing the tax is changed later, an adjustment must be made during the taxation period in which the change occurred.

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Collection of the tax

§ 5. (1) The taxpayer must compute the tax himself and pay it no later than the 15th of the second month after the tax liability arose.

(2) A tax established under § 201 of the Federal Tax Rules, BGBl. Nr. 194/1961, has the due date indicated in Paragraph 1.

(3) The taxpayer must provide an annual tax return for the previous year three months after the end of the financial year. It must list the types of online advertising services provided and the compensation due for them as well as worldwide revenues under § 2(1)(2)(a).

(4) Collection of digital tax is up to the Finance Office responsible for collecting sales tax for the taxpayer.

(5) The Federal Minister of Finance is empowered to establish more specific rules through regulations to simplify procedures or to take the special features of online advertising services into account. That applies in particular to cases in which taxpayers are companies that do not have a headquarters, senior management or an operating location domestically.

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Recording and reporting obligations

§ 6. (1) The taxpayer is obligated to record online advertising services taken over, additional companies it has contracted with in this regard, the client and the basis for computation of the digital tax.

(2) Records of IP addresses or other information on geolocation of devices must be kept, for the purposes of this Act, in a form that is limited to permitting a conclusion as to whether an online advertisement was provided domestically. If the tax authorities so request, these data must be provided. Other records and the vouchers and other documents for the books and records, particularly contracts to provide online advertising services, must be maintained as indicated in the Federal Tax Rules and provided if the tax authority so requests.

Effective date and transitional provisions

§ 7. (1) This Act must be applied to online advertising services that are provided after December 31, 2019. As an exception to § 5(3), the annual tax return for financial years ending before July 1, 2020 must be provided by September 30, 2020.

(2) Regulations based on this Act may be issued starting on the day following its publication. However, they may not be applied until January 1, 2020.

Also applicable for the following provision

concerning the reference period cf. § 7(1)

Final provisions

§ 8. (1) The Federal Minister of Finance is entrusted with implementing this Act.

(2) At regular intervals, with the first time being December 31, 2021, the Federal Minister of Finance must evaluate taxation of online advertising services within the meaning of this Act in regard to its application, equality of taxation, and implementation as well as its effects on companies in light of any more comprehensive steps to tax the digital economy at the EU or OECD level.

(3) If this act refers to provisions of other federal acts and does not indicate otherwise, those provisions must be applied in their respective versions.

(4) The sum of EUR 15 million from income from digital tax must be allocated to finance the digital transformation process of Austrian media companies.

ANNEX 2: LETTER FROM AMBASSADOR ROBERT LIGHTHIZER TO THE AUSTRIAN GOVERNMENT DATED JUNE 2, 2020

THE UNITED STATES TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON

June 2, 2020

Margarete Schramböck
Ministry for Digital and Economic Affairs
Vienna, Austria

Dear Minister Schramböck:

I am writing to inform you that, in accordance with Chapter 1 of Title III of the Trade Act of 1974 (known as Section 301), I have determined to initiate a Section 301 investigation of the digital services tax (DST) adopted by Austria in October 2019. In particular, the investigation addresses Austria's 5% tax on revenues from online advertising services.

The investigation will initially consider several problematic aspects of DSTs: (1) whether the tax amounts to *de facto* discrimination against U.S. companies; (2) whether the tax has retroactive elements; and (3) whether the tax diverges from norms reflected in the U.S. tax system and the international tax system due to, *e.g.*, possible extraterritorial application, or a purpose of penalizing certain technology companies for their commercial success. Depending on the course of the investigation, other aspects and features of the measure might also be included.

In accordance with Section 303 of the Trade Act of 1974, I hereby request consultations with the Government of Austria regarding this matter. These issues are of great concern to the Government of the United States. I look forward to working with you or another appropriate official in a cooperative manner to resolve this matter.

Sincerely yours,

Robert E. Lighthizer

cc: Minister Gernot Blümel, Minister of Finance

EXHIBIT 71