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Trade Digitalisation and Taxation

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ABSTRACT

This chapter addresses the current developments in the taxation of the digital economy including the current unilateral, multilateral, and EU proposals including objectives, challenges, and problems arising when implementing these proposals. The chapter also provides some elements of analysis regarding the evolution from e-commerce to the digital economy, as well as addresses the concerns regarding the requirement of local presence that may constitute a barrier to trade and investment. The diversity of the proposals reveals that there is no clarity on the best way to deal with highly digitalised business, with the multilateral approaches facing similar scrutiny, especially by developing countries. Therefore, as in trade and investment, multilateral approaches will need to do more to gain legitimacy vis-à-vis developing countries. The chapter concludes with some recommendations regarding the steps that can be taken to address this topic by governments, as well as policymakers at the national, EU, and international levels.

KEYWORDS

Tax, trade, digital tax, digital levy, trade digitalisation

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Introduction

Due to the emergence of digitalised business, countries, and organizations at multilateral, regional (EU) and unilateral levels are discussing ways to tax the profit of these businesses. By definition, digital business are businesses using digital technologies and can generally be divided into two. For instance, for digital manufacturing, or automated service providers (e.g., social media platforms, search engines, online marketplaces, online content providers, intermediation platforms amongst others). Examples of the first include companies such as IBM or Siemens, and the second include companies such as Facebook, Google, Alibaba, Amazon, Netflix, Uber, Booking, Jumia, etc. These companies offer their business either directly to consumers (B2C) or to businesses (B2B).

Taxation of digital business has become an issue of great concern of both governments and international organizations. A major concern is whether the current tax system allows the taxation of digital businesses and whether digital companies pay their fair share. This concern arises out of (i) the lack of physical presence or a limited presence in the country that affects the revenue of countries and (ii) the use by (mainly) digital companies of favorable tax regimes to structure their activities and to pay less taxes. The latter has also resulted in extensive Parliamentary Discussions in the United Kingdom regarding Google and Amazon. [2] Further, the EU State Aid has made investigations regarding the use of rulings by Amazon (in Luxembourg), Apple (in Ireland), among others.[3]

To address these concerns, in 2013, the Organization for Economic Cooperation and Development (OECD), with the political mandate of the G20, introduced the Project to prevent base erosion and profit shifting (BEPS) 2013. This project includes a total of 15 Actions, with the first of these actions i.e., Action,1 addressing the taxation of the digital economy. [4] Action 1 received several objections (at that time) from the United States; therefore, it was decided that the implementation of this Action should be delayed.[5]

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[2] See Simon Bowers and Rajeev Syal, 'MP on Google Tax Avoidance Scheme: "I Think That You Do Evil"' *The Guardian* (16 May 2013) <https://www.theguardian.com/technology/2013/may/16/google-told-by-mp-you-do-do-evil> accessed 18 February 2022.

[3] See 'State Aid: Irish Tax Treatment of Apple Is Illegal'<https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923> accessed 18 February 2022. See also 'Luxembourg Gave Illegal Tax Advantage to Amazon'<https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3701> accessed 18 February 2022.

[4] The BEPS Project contains 4 Minimum standards that deal with harmful tax competition, tax treaty abuse, transfer pricing documentation, and dispute resolution (Actions 5, 6, 13, and 14), 10 best practices, and 1 multilateral instrument.

[5] See Robert Stack's interview in 'The BEPS Project: 5 Years Later - Tax Notes Talk' (*Listen Notes*) <https://www.listennotes.com/podcasts/tax-notes-talk/the-beps-project-5-years-later-P1crmUhJeWw/> accessed 18 February 2022. "Question On that point, the digital economy project is ongoing. Could more have been done under

Later, the G20 decided to continue with the taxation of the digital economy including highly digitalized business, and as result, the OECD introduced the so-called BEPS 2.0. Project [6]. This Project comprises Pillar 1 to tax highly digitalized business and Pillar 2 to address the remaining issues of BEPS including the introduction of a minimum tax rate. These proposals were discussed in the BEPS Inclusive Framework which consists (as of February 2022) of 141 jurisdictions including OECD, G20 and non-OECD, and non-G20 countries.

Despite the aim of the OECD and G20 to come to an agreement by the end of 2020, the reality is that reaching such an agreement has become more difficult than expected. The difficulties are mainly due to the different proposals presented by countries to tax the digital businesses as well as the different interests between developed countries and developing countries. Several examples that illustrate this are the proposed approach of significant economic presence by G24 countries for the taxation of highly digitalized business, the introduction of digital service taxes, and the discussions at the UN Tax Committee regarding the introduction of art. 12B UN 2021 Tax Treaty Model. These examples will be further explained in section 3 below.

Following the United States and G7 developments, in July 2021, 136 jurisdictions participating in the BEPS Inclusive Framework (at that time) agreed to the OECD proposals on Pillar 1 and Pillar 2 including the 15% minimum tax rate. This agreement has been endorsed by the G20 in October 2021.[7] In November, a new jurisdiction (i.e. Mauritania) has joined the BEPS Inclusive Framework and has also stated its commitment to Pillar 1 and Pillar 2 proposals increasing the number to 137 jurisdictions.[8] The OECD proposals have been also endorsed by the G20 meeting under the Italian presidency. The new rules will come into effect as of 2023.[9]

Despite this agreement, it is not yet clear how these proposals will come into place, as well as how these proposals will increase the revenue of not only developed but also developing countries. Due to these concerns, the African Tax Administration Forum (ATAF) has also presented, in July 2021,

action 1 or was that just not possible? Reply by Robert Stack: I don't think so at the time. If you look at the proposals at the time for the digital economy, what was largely debated was something like a digital permanent establishment. "See Audio at Tax Analysts, 'The BEPS Project: 5 Years Later (*Audio Only*)' <https://www.youtube.com/watch?v=G7TZqD8KoD0> accessed 218 February 2022 and find Text at 'The BEPS Project: 5 Years Later - Tax Notes Talk'.; See also Stephanie Johnston, 'BEPS 5 Years Later: Action 1 and the Quest to Tax Digital Activity' <https://www.taxnotes.com/featured-news/beps-5-years-later-action-1-and-quest-tax-digital-activity/2020/10/02/2d0lg> accessed 18 February 2022.

[6] Unlike Action 1 that introduced taxation of the digital economy targeting mainly Tech Giants such as Google, Amazon, Facebook, the Pillar 1 extends the scope to taxation of highly digitalized business. See 'Public Consultation Document: Secretariat Proposal for a "Unified Approach" under Pillar One (9 October - 12 November 2019)' 21, 7. para. 19.

[7] See 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy – 8 October 2021' [2021] OECD/G20 8.

[8] From the BEPS Inclusive Framework, the countries that have not endorsed this agreement are Kenya, Nigeria, Sri Lanka and Pakistan.

[9] 'G20 Rome Leaders' Declaration' (31 October 2021) <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/multilateral-system/g20/WCMS_826035/lang--en/index.htm> accessed 18 February 2022.

its proposal addressing the need to provide effective and equitable Pillar 1 and Pillar 2 rules.[10] In October 2021, considering the agreement at the BEPS Inclusive Framework, ATAF also highlighted the complexity of Pillar 1 and condemned the imposition of mandatory arbitration for developing countries including ATAF countries.[11]

In addition, the rise in popularity of some digital businesses due to the use of digital means during the COVID19 Pandemic (e.g. Netflix, Twitter, Zoom, Microsoft, Amazon, Google, etc.) has resulted in countries including the EU seeking whether these digital businesses can also contribute with a higher share of their profits to fund the recovery of the economy from the COVID19 Pandemic.[12] Therefore, even more than before, countries are questioning the fairness of taxation of these digital businesses and re-evaluating the need to tax these businesses.

In light of the above, this chapter aims to provide an overview of the past and current proposals to tax the digital economy from a tax perspective with added trade references. Section 2 will address the change from taxation of e-commerce to highly digitalized business. Section 3 will describe the current proposals of taxation of highly digitalized business including the multilateral, unilateral, and regional approaches. Finally, section 4 will present the way forward in the taxation of the digital economy.

2. From e-commerce to highly digitalized business

International organizations have dealt with e-commerce transactions from the beginning from a trade, tax, and investment perspective (see below). The OECD has defined an e-commerce transaction as, "the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online".[13]

At that time, the main feature was the use of the internet to purchase goods and services. Therefore, the rules applicable to these transactions considered the payment of customs duties or taxes if goods or services were paid/received abroad. The proposals at that time aimed to facilitate e-commerce from trade, tax, and investment perspectives.

From a **trade perspective**, a key example is the introduction in 1998 of the Programme on Electronic Commerce adopted by the WTO General Council to investigate the relationship

[10] '130 Inclusive Framework Countries and Jurisdictions Join a New Two-Pillar Plan to Reform International Taxation Rules – What Does This Mean for Africa?' (1 July 2021) <https://www.ataftax.org/130-inclusive-framework-countries-and-jurisdictions-join-a-new-two-pillar-plan-to-reform-international-taxation-rules-what-does-this-mean-for-africa> accessed 18 February 2022.

[11] 'A New Era of International Taxation Rules – What Does This Mean for Africa?' (8 October 2021) <https://www.ataftax.org/a-new-era-of-international-taxation-rules-what-does-this-mean-for-africa> accessed 18 February 2022.

[12]To be addressed in section 3 below.

[13] 'OECD Glossary of Statistical Terms - Electronic Commerce Definition' <https://stats.oecd.org/glossary/detail.asp?ID=4721> accessed 18 February 2022.

between existing WTO agreements and e-commerce.[14] Following this Programme, a provisional moratorium on customs duties on electronic transmissions was introduced. This provisional moratorium makes it possible that customs duties are not imposed on electronic transmissions used to deliver digitalized products (e.g., e-books, music etc.) and a variety of services.[15]

At the time of writing, there are ongoing discussions among WTO countries to make this moratorium permanent. [16] Some WTO countries (India and South Africa) have expressed (in 2018[17] and 2019[18]) their concerns regarding the revenue loss for developing countries if this moratorium continues to be applicable. This is mainly due to the increase of products that get digitalized and delivered digitally[19] and to which the moratorium will be applicable since "there is no agreed definition nor common understanding amongst the Membership of what is covered under 'electronic transmissions'.[20] In contrast, other WTO countries (Australia, Canada, Chile, Colombia, Hong Kong, China, Iceland, Republic of Korea, New Zealand, Norway Singapore, Switzerland, Thailand, and Uruguay) have expressed the importance of extending this moratorium since the benefits outweigh the revenue foregone by countries.[21]

From a **tax perspective**, the OECD introduced the Ottawa Taxation Framework for e-commerce in 1998.[22] Under this Framework, the OECD Committee of Fiscal Affairs introduced broad

[14] 'WTO Declaration on Global Electronic Commerce (Adopted on 20 May 1998)'<https://www.wto.org/english/tratop_e/ecom_e/mindec1_e.htm> accessed 18 February 2022.

[15] While "term "electronic transmissions" is not defined, it is commonly held to encompass anything from software, emails, and text messages to digital music, movies and videogames". See 'WTO Moratorium on Customs Duties on Electronic Transmissions - International Chamber of Commerce' <https://iccwbo.org/publication/wto-moratorium-on-customs-duties-on-electronic-transmissions-a-primer-for-business/> accessed 18 February 2022.

[16] On 10th December 2019, the WTO members agreed to extend e-commerce moratorium until the 12th Conference that will take place (30 Nov to 3 Dec 2021). See 'WTO Members Agree to Extend E-Commerce, Non-Violation Moratoriums' <https://www.wto.org/english/news_e/news19_e/gc_10dec19_e.htm> accessed 18 February 2022.

[17] 'Work Programme on Electronic Commerce| Moratorium on Customs Duties on Electronic Transmissions: Need for a Re-Think' (World Trade Organization (WTO) 2018) WT/GC/W/747 <https://bit.ly/3nRZ3Mx>. accessed 18 February 2022

[18] 'Work Programme on Electronic Commerce: The E-Commerce Moratorium and Implications for Developing Countries' (World Trade Organization (WTO) 2019) WT/GC/W/774 <https://bit.ly/3r9ytAA>. accessed 18 February 2022

[19] See Rashmi Banga, 'Growing Trade in Electronic Transmissions: Implications for the South' [2019] Research Paper Series <ps://unctad.org/system/files/official-document/ser-rp-2019d1_en.pdf>.that addresses the growing trade in electronic transmissions due to the use of digital technologies like 3D printing, robotics and big data analytics. This paper argues that this growth can have "serious implications for the South as most of the developing countries are net importers of electronic transmissions". It recommends among others to address the categorization of digital content in the WTO that should be excluded from the scope of electronic transmissions; See also 'WTO Moratorium on Customs Duties on Electronic Transmissions – International Chamber of Commerce' (n 15).; See also 'Work Programme on Electronic Commerce: The E-Commerce Moratorium and Implications for Developing Countries' (n 17).

[20] 'Work Programme on Electronic Commerce| Moratorium on Customs Duties on Electronic Transmissions: Need for a Re-Think' (n 17).

[21] 'Electronic Transmissions and International Trade - Shedding New Light on the Moratorium Debate', vol 233 (World Trade Organization (WTO) 2020) OECD Trade Policy Papers 233 <https://www.oecd-ilibrary.org/trade/electronic-transmissions-and-international-trade-shedding-new-light-on-the-moratorium-debate_57b50a4b-en> accessed 18 February 2022.

[22] 'Electronic Framework: Taxation Framework Conditions' (OECD Committee on Fiscal Affairs 1998) <https://www.oecd.org/ctp/consumption/1923256.pdf>. accessed 18 February 2022

taxation principles which should apply to electronic commerce i.e. neutrality, efficiency, certainty and simplicity, effectiveness and fairness, and flexibility. [23]

From an **investment perspective**, in 2000 the UNCTAD introduced the e-commerce and Law Reform Programme.[24] This programme aims to address the establishment of legal regimes to address the issues raised by e-commerce and digital technology in developing countries. In addition, UNCTAD introduced initiatives for e-trade for all that aims "to improve the ability of developing countries and particularly least developed countries, to use and benefit from e-commerce".[25]

Later on, with the development of digital technologies, it was possible to not only purchase goods/services via the internet but also to create digital business models and digital markets that resulted in 3 main features that are frequently observed in certain highly digitalized business models: (i) scale without mass; (ii) reliance on intangible assets; and (iii) data and user contributions.

The first feature makes it possible for businesses: to locate various stages of their production process across different countries, having access to consumers across the globe, and without needing any significant presence, thus "achieving operational local scale without local mass". [26] The second and third features result in the business being able to rely on their intangible assets including intellectual property assets such as software, and algorithms supporting their platforms, websites, and (iii) to introduce in their business models, the collection and analysis of data linked to a specific user/customer, "user participation, network effects and the provision of user-generated content".[27]

Due to these developments, the focus of governments and international organizations is no longer e-commerce, but digitalisation in general.[28] To address the different challenges arising from

[23] Ibid at 4.

[24] 'Review of E-Commerce Legislation Harmonization in the Economic Community of West African States' <https://unctad.org/system/files/official-document/dtlstict2015d2_en.pdf> accessed 18 February 2022.

[25] 'E-Trade for All Year in Review 2017-2018 Let's Make E-Commerce Inclusive and Drive Development' <https://unctad.org/system/files/official-document/dtlnone2018d1_en.pdf> accessed 18 February 2022.

[26] 'Tax and Digitalisation' [2019] OECD Going Digital Policy Note 8 at 3 <http://www.oecd.org/going-digital/tax-and-digitalisation.pdf>. accessed 18 February 2022.

[27] ibid. This is linked to the Automated Digital Services (ADS) that recognises that certain MNEs can generate revenue from the provision of ADS (including revenue from the monetisation of data) that are provided on an automated and standardised basis to a large and global customer or user base and can do so remotely to customers in markets with little or no local infrastructure. They often exploit powerful customer or user network effects and generate substantial value from interaction with users and customers. They often benefit from data and content contributions made by users and from the intensive monitoring of users' activities and the exploitation of corresponding data. In some models, the customers may interact on an almost continuous basis with the supplier's facilities and services". 'Tax Challenges Arising from Digitalisation- Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project' [2020] OECD at 19. <https://doi.org/10.1787/beba0634-en> accessed 18 February 2022.

[28] See also Rifat Azam, 'Global Taxation of Cross-Border E-Commerce Income', (2012) 31 VA. Tax Rev. 639 and Rifat Azam, 'Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS' (2017) 50 Suffolk U L REV 517.

digitalisation, governments and international organizations have endorsed several instruments/initiatives. For instance, in the field of data protection, some important instruments are the EU-Council of Europe Convention to protect the automatic processing of personal data and to regulate the cross-border flows of personal data (since 2018 includes also big data[29]),[30] the EU 2016 Directive[31], and the EU Regulation[32] on Data Protection (in force since May 2018). In the field of safety, some initiatives are the proposals (currently being discussed) for an EU Digital Services Act and Digital Market Acts to create a safer digital space and to ensure an equal level playing field of business.[33]

In the field of tax, in addition to the Pillar 1 proposal, some initiatives are the introduction by countries of the Digital Service Tax and the UN art. 12B 2021 Treaty Model. The EU has also proposed in 2018 the introduction of the Digital Service Tax[34] (not yet implemented). More recently in 2021, the EU has proposed the introduction of a Digital Levy[35] to ensure fair taxation and to fund the EU's recovery from the COVID19 Pandemic. These tax initiatives will be addressed in section 3 below.

In conclusion, this section highlights the changes that originated from digitalisation. In principle, the main concern of governments and organizations was to foster e-commerce from a tax, trade, and investment perspective. However, the increase of digitalisation has also resulted in governments and organizations addressing issues such as data protection, digital safety and ensuring that highly digitalized businesses pay their fair share of taxation. These changes will affect trade insofar as it will require some businesses to have a local presence, and/or local content requirements. In some cases, if these changes are only applicable to foreign businesses, it may

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[29] 'Protocol Amending the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data' [2018] Council of Europe <https://rm.coe.int/16808ac918>. accessed 18 February 2022

[30] See Filip Debelva and IJ Mosquera Valderrama, 'Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, but Few Solutions - Kluwer Law Online' (2017) 45 Intertax 362 <https://scholarlypublications.universiteitleiden.nl/access/item%3A2951900/view> accessed 18 February 2022.;See also IJ Mosquera Valderrama, 'Processing Personal and Business Data and the Rule of Law in the Era of Digital Trade' (2019) 20 Central European Political Science Review Journal 111 <https://hdl.handle.net/1887/73432> accessed 18 February 2022.

[31] 'Directive (EU) 2016/ 680 of the European Parliament and of the Council - of 27 April 2016 - on the Protection of Natural Persons with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, and on the Free Movement of Such Data, and Repealing Council Framework Decision 2008/ 977/ JHA' [2016] Official Journal of the European Union 43 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0680&from=EN>. accessed 18 February 2022

[32] 'General Data Protection Regulation (GDPR) – Official Legal Text' 2016 <https://gdpr-info.eu/> accessed 18 February 2022.

[33] 'The Digital Services Act Package | Shaping Europe's Digital Future' <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> accessed 18 February 2022.

[34]'Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services' [2018] European Commission <https://ec.europa.eu/taxation_customs/system/files/201803/proposal_common_system_digital_services_tax_21032018_en.pdf>. accessed 18 February 2022

[35] 'A Fair & Competitive Digital Economy – Digital Levy' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12836-A-fair-&-competitive-digital-economy-digital-levy_en> accessed 18 February 2022.

constitute a discriminatory trade measure. One example of the latter is the US Section 301 Trade Investigations that will be addressed in section 3.3. below. The following section will address the tax developments.

3. Taxation of highly digitalized business

3.1. Developing countries vs. developed countries perspective

Digitalisation has made it possible for multinationals to carry out business abroad without having a physical presence in the country where the digital business is being carried out or the services are being rendered (source country). In general, if there is a physical presence, the company will be deemed to carry out its business throughout a permanent establishment (PE). Permanent establishments are taxed in the source country for the profits that could have been allocated to the permanent establishment. To determine the profit, the arm's length principle (ALP) will be used which will tax the profit of this permanent establishment as it was an independent (third) party based on their assets, functions, and risks.

Multinationals mainly headquartered in developed countries have made use of tax structuring to move the intangibles to countries with favorable tax regimes, and in that way minimizing the economic activities in the source country even though the services/users are located in that country. In some cases, multinationals have chosen to have a limited physical presence but only with administrative functions. Since the intangibles of these businesses are abroad, taxation at the country of source will not exist or be limited to an amount for the administrative services in accordance with the arm's length principle.

One example highlighted by Ndajiwo is, for instance, Uber in Nigeria that has a physical presence but is limited to administrative functions. Therefore, the profit received by Uber Nigeria will be sent to Uber Netherlands, which will retain 25% of these profits, and thereafter the remainder is sent back to the Uber drivers in Nigeria. Nigeria does not tax the 25% retained by Uber Netherlands, and it only taxes a small amount for the administrative functions of Uber Nigeria, which will be decided in accordance with the arm's length principle (cost plus).[36]

This example shows that (fair) taxation of the digital business activities will be limited (if physical presence) or non-existent (in the absence of physical presence). The result is thus less revenue for the countries where the digital business activities take place (source (developing) country) which favors taxation in the countries where (i) the digital businesses are being headquartered (residence (developed) country) or (ii) where the intangibles are being located (mostly a developed country).

The above description highlights that there is an urgent need by countries to tax income originating from digital businesses (either highly digitalized business in general, or automated digital services

[36] Mustapha Ndajiwo, 'The Taxation of the Digitalised Economy: An African Study' [2020] ICTD, WP 107 <https://www.ictd.ac/publication/taxation-digitalising-economy-africa-study/> accessed 18 February 2022.

in particular). This concern is legitimate for both developed and developing countries, and to a general extent will need the agreement of countries where the digital business is being headquartered (i.e., residence (mostly developed) countries) and where the income is being generated (i.e., source (mostly developing) countries).

To address fair taxation and to raise revenue, countries are seeking ways to tax these digital businesses regardless of the physical presence or limited (administrative) functions in the country, for instance, through multilateral, regional, or unilateral measures to tax highly digitalized businesses.

Examples of multilateral and regional measures are the Pillar 1 proposal, the UN art. 12B 2021 Tax Treaty Model (Section 3.2.), and the EU Proposal for a Digital Levy (Section 3.4.). Unilateral measures are equalization levy, significant economic presence, withholding tax, digital service tax (Section 3.3.).

3.2. Multilateral approaches

In 2013, the OECD and the G20 introduced the Project to tackle base erosion and profit shifting (BEPS) by multinationals. Later on, as earlier mentioned, in 2015, the OECD published 15 Actions with Action 1 addressing the tax challenges brought about by the Digital Economy. This Action 1 analyzed the direct and indirect (VAT) consequences of taxation of the digital economy. Action 1 also addressed the key features of the digital economy and its business models that are potentially relevant from a tax perspective, and that can exacerbate base erosion and profit shifting (BEPS) risks.

These features include "mobility, reliance on data, network effects, the spread of multisided business models, a tendency toward monopoly or oligopoly and volatility. The types of business models include several varieties of e-commerce, app stores, online advertising, cloud computing, participative networked platforms, high-speed trading, and online payment services. The digital economy has also accelerated and changed the spread of global value chains in which MNEs integrate their worldwide operations". [37]

The lack of a physical presence or a limited physical presence, (i.e. Permanent Establishment (PE), in the source country has exacerbated BEPS risks, therefore, several measures were proposed including: to modify the definition of PE and the list of PE exceptions; to revise transfer pricing guidelines, and to include the taxation of CFC (Controlled Foreign Corporation) income in the jurisdiction of the ultimate parent company and income that is typically earned in the digital

[37] 'Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report | OECD' (OECD Publishing 2015)11 <https://www.oecd.org/tax/beps/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report-9789264241046-en.htm> accessed 18 February 2022.

economy. These measures were adopted in Action 7, 8 to 10, and 3 dealing with PE, transfer pricing, and CFC rules respectively.[38]

In addition, the BEPS Action 1 report stated that the use of business models in the digital economy has also resulted in opportunities to "achieve BEPS to reduce or eliminate tax in jurisdictions across the whole supply chain, including both market and residence countries. For example, the importance of intangibles in the context of the digital economy, combined with the mobility of intangibles for tax purposes under existing tax rules, generates substantial BEPS opportunities in direct taxes. Further, the ability to centralise infrastructure at a distance from a market jurisdiction and conduct substantial sales of goods and services into that market from a remote location, combined with increasing ability to conduct a substantial activity with minimal use of personnel, generates potential opportunities to achieve BEPS by fragmenting physical operations to avoid taxation".[39]

Therefore, in addition to the above BEPS Actions (3, 7, 8, 10) mentioned above, some rules were considered necessary to ensure that "profits will be reported where the economic activities that generate them are carried out and where value is created".[40]

Nevertheless, due to the lack of consensus on concrete proposals and (at that time) the United States' objections Action 1 became a topic to be addressed at a later stage [41]. Since the introduction of the BEPS Project, a new project (so-called BEPS 2.0) has been proposed by the OECD which aims to address the taxation of highly digitalized business (Pillar 1) and tax competition through the introduction of a minimum tax rate (Pillar 2).

Unlike Action 1, Pillar 1 expanded the scope from digital economy to highly digitalized business (including digital manufacturing and automated digital services). For this purpose, the OECD and the BEPS Inclusive Framework presented in February 2019 in a public consultation document 3 proposals to establish a nexus to tax highly digitalized business: (i) user participation, (ii) marketing intangibles, and (iii) significant economic presence (G24 developing countries proposal). [42]

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[38] CFC rules aim to tackle the use of Controlled Foreign Companies which are "companies, usually located in low tax jurisdictions, that are controlled by a resident shareholder. CFC legislation is usually designed to combat the sheltering of profits in companies' resident in low- or no-tax jurisdictions. An essential feature of such regimes is that they attribute a proportion of the income sheltered in such companies to the shareholder resident in the country concerned. Generally, only certain types of income fall within the scope of CFC legislation, i.e. passive income such as dividends, interest and royalties" 'Glossary of Tax Terms - OECD'<https://www.oecd.org/ctp/glossaryoftaxterms.htm> accessed 18 February 2022.
[39] 'Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report | OECD' (OECD Publishing 2015) 144 <https://www.oecd.org/tax/beps/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report-9789264241046-en.htm> accessed 18 February 2022.
[40] ibid.
[41] See introduction and Tax Analysts (n 5).
[42] OECD (2019), Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy, OECD/G20 Inclusive Framework on BEPS, OECD, Paris, <www.oecd.org/tax/beps/programme-of-work-to-develop-a-

Later on, due to the lack of consensus for one of the three proposals, the OECD Secretariat presented a unified approach that changed the content of the proposals mainly leaving behind the G24 country's proposals.[43] Pillar 1 unified approach addressed consumer-facing business, and introduces a new nexus, "distinct and separate from the existing concept of the permanent establishment, which would ensure a company is taxable in a jurisdiction where its sales exceed a certain threshold even if it is not physically present in that market".[44]

Pillar 1 Unified approach provides a three tier-mechanism with 3 amounts to tax income from the highly digitalized business as follows:

- Amount A: Consisting of residual profit,
- Amount B: Including fixed return to routine distribution and marketing activities,
- Amount C: To cover cases where there are more functions in the market jurisdiction than those accounted for under the local entity's baseline marketing and distribution functions and includes ways to solve tax disputes including mandatory binding arbitration.[45]

Some of the concerns from developing countries and scholars regarding this unified approach included the following:[46]

- Amount A would include a formulary apportionment and thus it deviates from the arm's length principle and the OECD Transfer Pricing Guidelines which developing countries have been required to follow.[47]
- Significant economic presence (G24 proposal) was dismissed in the unified approach[48]
- Changes to tax treaties and introduction of mandatory binding arbitration (difficult to accept due to experiences by developing countries in investment arbitration) [49]

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consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.htm> accessed 18 February 2022

43 'Public Consultation Document: Secretariat Proposal for a "Unified Approach" under Pillar One (9 October - 12 November 2019)' (n 6).'

44 ibid.

45 ibid.

46 For a comparison see A Oguttu, 'A Critique from a Developing Country Perspective of the Proposals to Tax the Digital Economy | IBFD' (2020) (Volume 12), No. 4 IBFD.org <https://www.ibfd.org/shop/international-critique-developing-country-perspective-proposals-tax-digital-economy> accessed 18 February 2022.

47 'Tax and Development Programme's Work on Transfer Pricing and BEPS in Developing Countries - OECD' <https://www.oecd.org/tax/tax-global/work-on-transfer-pricing-and-beps-in-developing-countries.htm> accessed 18 February 2022.

48 'Comments of the G-24 on the OECD Secretariat Proposal for a Unified Approach to the Nexus and Profit Allocation Challenges Arising from the Digitalisation (Pillar 1)' (2019) <https://www.g24.org/wp-content/uploads/2019/12/G-24_Comments-on-OECD-Secretariat-Proposal-for-a-Unified-Approach.pdf>. accessed 18 February 2022

49 See section 1 above. See also 'A New Era of International Taxation Rules – What Does This Mean for Africa?' (n 11).

- The imbalance in the allocation of taxing rights between residence (mainly developed) countries and source (mainly developing) countries. [50]

This unified approach was discussed in the framework of the BEPS Inclusive Framework. However, between 2019-June 2021 these discussions were leading nowhere until the change of US Presidency (from Trump to Biden) and the introduction of a minimum tax for multinationals proposed by Biden. The US proposal will be addressed in section 3.3 below.

The G7 agreed on the US proposal for a minimum tax.[51] In the meantime, the OECD stated the urgent need to address the taxation of the digital economy within the BEPS Inclusive Framework.[52] The result is that in October 2021, 136 of the countries participating in the BEPS Inclusive Framework agreed in an Statement to introduce Pillar 1 and Pillar 2. The number has increased to 137 with Mauritania (a new member of the BEPS Inclusive Framework) committing to Pillar 1 and Pillar 2 proposals. Nevertheless, some features of the content of the Pillar 1 and Pillar 2 are different from the unified approach (e.g., use of a multilateral convention and carve-outs).[53]

The Statement address amount A to tax profits obtained in market jurisdictions by multinational enterprises with global turnover above 20 billion euros and profitability above 10% (i.e., profit before tax/revenue) and amount B for baseline marketing and distribution activities. This Amount A does not apply to extractive and financial services. In addition, a multilateral convention (MLC) to facilitate swift and consistent implementation of Amount A.[54]

[50] Accordingly, the briefing from African Union stated that: "African countries are generally source countries and tax on a source basis. ATAF members often report that they consider the current nexus and profits allocation rules are weighted too heavily in favor of the residence jurisdiction to the detriment of the source (African) jurisdiction. Hence the need for a solution on taxing digital sales/services due to their virtual nature that negates this physical presence". See 'Briefing Paper for the Ministers on Taxing the Digital Economy and the Global Tax Debate' (African Union 2020)<https://au.int/sites/default/files/newsevents/workingdocuments/39572-wd-briefing_paper_on_global_tax_debate_for_1st_extraordinary_stc.pdf>. 8 accessed 18 February 2022

[51] David Milliken and Kate Holton, 'Tech Giants and Tax Havens Targeted by Historic G7 Deal | Reuters' (5 June 2021) <https://www.reuters.com/business/g7-nations-near-historic-deal-taxing-multinationals-2021-06-05/> accessed 18 February 2022.

[52] David Bradbury, 'Globalisation & Digitalisation: Interconnections between Taxation, Trade, and Investment. Session 2: Digital Taxes and Trade in Services' <https://globtaxgov.weblog.leidenuniv.nl/files/2021/06/20210610-Bradbury-GLOBTAXGOV-Workshop-Slides.pdf>. Video available at *Digital Taxes and Trade in Services - YouTube* <https://www.youtube.com/watch?v=UoNiK3dhwpA> accessed 18 February 2022.

[53] 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy – 8 October 2021' (n 7).

[54] "As stated in the Annex of the Statement "The MLC will contain the rules necessary to determine and allocate Amount A and eliminate double taxation, as well as the simplified administration process, the exchange of information process and the processes for dispute prevention and resolution in a mandatory and binding manner between all jurisdictions, with the appropriate allowance for those jurisdictions for which an elective binding dispute resolution mechanism applies with respect to issues related to Amount A, thereby ensuring consistency and certainty in the application of Amount A and certainty with respect to issues related to Amount A" Annex Detailed Implementation Plan at 6.

In February 2022, the OECD has released the first set of implementation rules i.e. draft rules for nexus and revenue sourcing.[55] For Amount B, a public consultation document will be issued mid-2022[56]. These rules are being drafted by the Tax Force on the Digital Economy (TFDE) and it is expected that the rules will enter into force as of 2023. [57]

While discussions were taking place at the OECD and the UN Tax Committee mainly to address the concerns of developing countries discussed and approved a new article i.e., article 12B UN 2021 tax treaty model that will provide for withholding tax on automated digital services.[58] Article 12B will allow the allocation of taxing rights between residence countries and source countries in the absence of physical presence. This article provides for a choice between (i) withholding tax (a gross amount) that will be determined in accordance with bilateral negotiations or (ii) 30% of the net income of automated digital services.

However, due to the recently agreed Pillar 1 and Pillar 2 proposal, it is not clear whether countries will still decide to introduce art. 12B UN or if countries will rather choose the multilateral convention that will be used to implement Pillar 1. However, since the threshold of Pillar 1 is high (above EUR 20 billion), it may be possible that countries will choose to implement both the Pillar 1 approved proposal and its Multilateral Convention and make changes to their tax treaties to also include article 12B UN.

3.3. Unilateral approaches

While the developments at a multilateral level were being discussed, developed and developing countries were introducing other unilateral measures. Some examples of this are: the equalization levy, the changes to the permanent establishment (adding a digital P.E. or introducing the significant economic presence) in the domestic law provisions, withholding tax on profits

[55] 'Draft Rules for Nexus and Revenue Sourcing - OECD'< https://www.oecd.org/tax/beps/oecd-launches-public-consultation-on-the-tax-challenges-of-digitalisation-with-the-release-of-a-first-building-block-under-pillar-one.htm> accessed 18 February 2022.

[56] Ibid.

[57] Accordingly, "the IF has mandated the Task Force on the Digital Economy (TFDE) to define and clarify the features of Amount A (e.g., elimination of double taxation, Marketing and Distribution Profits Safe Harbor) and develop the MLC and negotiate its content, so that all jurisdictions that have committed to the Statement will be able to participate. The TFDE will seek to conclude the text of the MLC and its Explanatory Statement by early 2022, so that the MLC is quickly open to signature and a high-level signing ceremony can be organized by mid-2022. Following its signature, jurisdictions will be expected to ratify the MLC as soon as possible, with the objective of enabling it to enter into force and effect in 2023 once a critical mass of jurisdictions as defined by the MLC have ratified it.". Annex Detailed Implementation Plan at 6.

[58] Automated services are defined as "Any service provided on the Internet or another electronic network, in either case requiring minimal human involvement from the service provider. It includes especially: Online advertising services; Supply of user data; Online search engines; Online intermediation platform services; Social media platforms; Digital content services; Online gaming; Cloud computing services; and Standardized online teaching services". See 'Tax Consequences of the Digitalized Economy – Issues of Relevance for Developing Countries' (Committee of Experts on International Cooperation in Tax Matters 2021) Co-Coordinators' Report E/C.18/2021/CRP.1<https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2021-04/CITCM%2022%20CRP.1_Digitalization%206%20April%202021.pdf>. accessed 18 February 2022

originated on automated services and/or online digital services, and the digital service tax. One drawback of these unilateral approaches is the differences in the measures (scope, rate, base, type of tax) introduced by countries which increase the complexity of taxation of digital business. See some examples below.

Equalization Levy

In India

- 2016 Finance Act: 6% tax on business-to-business transactions in the digital advertising space.
- 2020 Finance Act expands the scope of Equalisation Levy to any online sale or provision of services or their facilitation The rate is 2% of the consideration received or receivable for e-commerce supply or services made or provided or facilitated on or after the 1st day of April 2020.

Significant economic presence

In Nigeria (and also in Israel and Indonesia)

- Nigeria: 2019 Finance Act: Non-resident companies providing digital, technical, management, consultancy, or professional services would be deemed to have a taxable presence in Nigeria if they have a significant economic presence and profit can be attributed to the business activity carried out in Nigeria.
- Nigeria: 2020 Order to provide guidance on the definition of Significant Economic Presence (SEP), in relation to taxation of income derived from Nigeria by foreign companies.

Withholding tax

Examples of Argentina, Peru, and Uruguay. Other countries are Paraguay, Mexico, Pakistan, the Philippines and Thailand.[59]

- Argentina (Buenos Aires) 5% WHT on online content supplier
- Peru: 3% WHT on digital services provided by non-residents in Peru and accessed via the internet and used in Peru
- Uruguay: 12% WHT levied on payments made for digital services (rendered via the internet, technology platforms, software apps, and similar means) supplied by a non-resident to customers located in Uruguay

Digital Service Tax

In countries such as France, Spain, Kenya.

[59] For a comparison see Oguttu (n 46).

- Digital service tax is a turnover tax that is imposed on income derived throughout a digital business.
- Levied on the supply of certain defined categories of e-services and imposed on the parties to the supply without reference to the particular economic or tax position of the supplier.
- Imposed on the consideration paid (gross-turnover) and not on the net profit.
- There is no treaty relief since it is not an income tax. However, taxes paid could be deducted as a business expense in the country of residence.

This tax has been supported by the African Tax Administration Forum[60] and proposed (not yet adopted) in 2018 by the European Commission (see section 3.4. below).

A white paper by the WEF has analyzed the effects of DSTs on trade, investment, and competition, drawing from multistakeholder interviews and a survey of firms facing these measures.[61] This report highlighted the need for more evidence on the incidence and impact of DSTs in the taxation of the digital economy. This report highlighted the challenges identified by businesses regarding the DSTs as follows:

"Recurring challenges regarding DSTs included complex or unclear rules, onerous reporting requirements, and differences across jurisdictions, which could be facilitated through better coordination and exchange between countries. In the absence of this, there will be increased costs on digital services trade, the uncertainty that may affect investment in the long term, and unintended effects on smaller players in digital ecosystems".[62]

Change of US Presidency and approach

From the above-mentioned measures, the one that has received a great amount of attention is the digital service tax mainly due to the objections of the United States. For the United States, the digital service tax is a barrier to trade that targets mainly US companies. Therefore, the US Trade Representative initiated trade investigations under section 301. These investigations could lead to tariffs being imposed on these countries' exports to the United States.[63] However, the situation has substantially changed from the Trump to the Biden administration.

In 2019, the Trump Administration in addition to the section 301 investigations above, proposed through the Secretary of Treasury the implementation of Pillar 1 on a safe harbor (voluntary) basis). This proposal was rejected by the OECD, since if accepted it would undermine the global

[60] *See* 'Digital Services Taxation in Africa' June 2020 *ATAF Policy Brief* <https://events.ataftax.org/index.php?page=documents&func=view&document_id=61> accessed 18 February 2022.

[61] Jimena Sotelo and Aditi Verghese, 'Digital Trade in Services and Taxation' (*World Economic Forum 2021*)at 23 <https://www3.weforum.org/docs/WEF_Digital_Trade_in_Services_and_Taxation_2021.pdf>. accessed 18 February 2022

[62] ibid.

[63] 'Initiation of Section 301 of Digital Services Tax' (*Office of the United States Trade Representative 2020*) <https://ustr.gov/sites/default/files/enforcement/301Investigations/DST_Initiation_Notice_June_2020.pdf> accessed 18 February 2022.

consensus needed for that proposal. Later on, in June 2020, the US proposed a pause in the negotiation due to the public health (COVID19) crisis.[64]

With the new Biden Administration, in April 2021, the US Secretary of Treasury proposed in the Made in America Tax Plan a 15% minimum tax.[65] This proposal represents a change of direction of the US in respect of the Trump Administration which is no longer advocating for safe harbor implementation.[66]

As a result of the change of position from the US Administration, and the approval by most of the countries participating in the BEPS Inclusive Framework of Pillar 1 and Pillar 2, countries have committed to collective measures and to leave behind unilateral measures such as the DSTs. In the statement where jurisdictions participating in the BEPS Inclusive Framework committed to the implementation of the Pillar 1 proposal (October 2021), the countries have also agreed to repeal Digital Service Taxes and other relevant measures stating:

"The Multilateral Convention (MLC) will require all parties to remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future. No newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC. The modality for the removal of existing Digital Services Taxes and other relevant and similar measures will be appropriately coordinated. The IF notes report from some members that transitional arrangements are being discussed expeditiously".[67] The Annex also adds that the definition of related measures will be provided in the MLC and its explanatory statement. [68]

From the text above, it can be concluded that countries may be repealing their digital service tax, if that happens, then the multilateral measures of Pillar 1, article 12B UN Model will coexist with unilateral measures withholding tax, significant economic presence, equalization levy among others.

Time will tell whether the digital service tax is effectively repealed, and what entails any other related measures. In addition, since the multilateral convention that deals with the Amount of Pillar 1 that needs to be developed and open for signature by 2021, and come into effect by 2023, it is still too soon to assess the feasibility of this Convention and the concern of developing countries regarding this convention.

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[64] 'Treasury Secretary Mnuchin Seeks "Pause" in OECD Pillar 1 Discussions of Digital Economy' 2 <https://assets.kpmg/content/dam/kpmg/us/pdf/2020/06/20399.pdf>. accessed 18 February 2022.

[65] 'The Made in America Tax Plan' (US Department of the Treasury 2021) at pg 1-3 <https://home.treasury.gov/system/files/136/MadeInAmericaTaxPlan_Report.pdf>. 3 accessed 18 February 2022

[66] James Politi and Aime Williams, 'US Removes Stumbling Block to Global Deal on Digital Tax' *Financial Times* <https://www.ft.com/content/c2a6808e-ec6d-41d5-85e9-3a27c2b2c1bc> accessed 18 February 2022.

[67] See 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy – 8 October 2021' [2021] OECD/G20 8. at 3

[68] Annex Detailed implementation at 7.

For instance, some developing countries have expressed in the past their concerns regarding arbitration (see section 3.2. above) and the question is whether their concerns will be addressed in this Multilateral Convention. Therefore, reaching an agreement to tax the highly digitalized business sees far from being complete, and the time will tell whether the Multilateral Convention will be successful.

3.4. EU approach

In the taxation of highly digitalized business, the EU has also played an important role. For instance, in 2018, the EU proposed rules to ensure that digital business activities are taxed in a fair and growth-friendly way in the EU.[69] These proposals were to introduce a Significant Economic Presence[70] and a Digital Service Tax (as an interim tax).[71] The EU Commission stated that these proposals were needed since "international corporate tax rules are not fit for the realities of the modern global economy and do not capture business models that can make profit from digital services in a country without being physically present". [72]

However, while presenting these proposals, the EU Commission also stated that "the EU will also continue to actively contribute to the global discussions on digital taxation within the G20/OECD, and push for ambitious international solutions."[73] These proposals were not implemented, but instead, some EU countries decided to introduce Digital Service Tax (e.g., France, Austria, Hungary, Spain).[74]

The current need to find sources of revenue to finance the economy recovery of the COVID19 Pandemic resulted in the 2021 proposal by the EU Commission of an EU Digital levy. [75] The EU Commission stated that "lower taxes, or even no taxes at all, paid by companies engaged in the digital economy weaken the sustainability of public finances. This is particularly blatant at a moment when the EU and Member States are facing a greater fiscal and debt burden as they tackle the COVID-19 crisis and support a recovery. The EU and Member States will need to avail

[69] 'Communication from the Commission to the European Parliament and the Council - Time to Establish a Modern, Fair and Efficient Taxation of the Digital Economy' <https://primarysources.brillonline.com/browse/human-rights-documents-online/communication-from-the-commission-to-the-european-parliament-and-the-council;hrdhrd46790058> accessed 18 February 2022.
[70] 'Proposal for a Council Directive Laying down Rules Relating to the Corporate Taxation of a Significant Digital Presence' [2018] *COM (2018) 147 final* <https://ec.europa.eu/taxation_customs/system/files/2018-03/proposal_significant_digital_presence_21032018_en.pdf>. accessed 18 February 2022
[71]ibid.
[72] 'Fair Taxation of the Digital Economy' <https://ec.europa.eu/taxation_customs/fair-taxation-digital-economy_en> accessed 18 February 2022.
[73] ibid.
[74] Amie Ahanchian, 'Digital Services Tax: Why the World Is Watching' (21 January 2021) <https://news.bloombergtax.com/daily-tax-report/digital-services-tax-why-the-world-is-watching> accessed 18 February 2022.
[75] European Commission Directorate-General for Taxation and Customs Union, 'Proposal of a Council Directive on a "Digital Levy" EUR-Lex - Ares(2021)312667 - EN - EUR-Lex' <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=PI_COM%3AAres%282021%29312667> accessed 18 February 2022.

themselves of all major instruments to ensure a sustainable and fair recovery, and that stable future revenues are secured in a manner well aligned with the significant economic changes to come”. [76]

The description above shows that even though the EU Commission has the same objectives to achiever fair taxation of the companies engaged in the digital economy, the need to obtain revenue to overcome the COVID19 crisis has resulted in the EU Commission proposing his own levy.[77] This Digital Levy has not yet been implemented mainly waiting for consensus regarding Pillar 1. Nonetheless, the EU has stated that if not consensus is being reached, the EU will also introduce its own proposal for taxation of the digital economy.[78]

Notwithstanding the above, since agreement on Pillar has been reached in October 2021, the question is whether the EU still consider the introduction of this EU Digital Levy as necessary and legitimate to finance the recovery of the economy due to the COVID-19 crisis.

4. The way forward in the taxation of the digital economy

This chapter has addressed the proposals that countries, international and supranational (EU) organizations are facing to tax income by companies engaged in the digital economy. These proposals can also be viewed as having an influence on trade. For instance, the introduction of significant economic presence, or digital permanent establishment, or digital services tax may result in companies being required to have a local presence or to comply with local requirements that may constitute a barrier to trade and investment.

Countries and organizations are facing several challenges, on the one hand, the premise of ‘digital trade for all’ implies the use of the internet to facilitate e-commerce which can benefit companies as well as countries. However, the use of highly digitalized business results in countries not being able to tax these businesses (in the absence of a physical presence) or to tax them at a lower level (due to the limited activities in the countries). Therefore, countries have introduced several measures such as digital service tax, withholding tax, significant economic presence requirements. From among these measures one that has raised objections (mainly from the United States) is the digital service tax introduced in countries such as Spain, France and Kenya (see section 3.3. above).

Since the introduction of Action 1 in 2015 until 2020, very little progress was being made towards the taxation of the digital economy. However, the situation changed with the US Biden Presidency, and the proposal of the US to introduce a minimum tax of 15% as well as the commitment to adhere to multilateral rules to tax highly digitalized business. However, countries need to commit to repealing the digital services tax.

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[76] Ibid..

[77] ‘Special Meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions’ (*EUCO 10/20 2020)* <https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf>. accessed 18 February 2022

[78] ‘A Fair & Competitive Digital Economy – Digital Levy’ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12836-A-fair-&-competitive-digital-economy-digital-levy_en> accessed 18 February 2022.

In October 2021, under the auspices of the OECD, more than 130 jurisdictions, members of the BEPS Inclusive Framework, have agreed to tax highly digitalized business (Pillar 1) including the drafting of a Multilateral Convention and the repeal of digital services tax and related tax measures.

In taxation, despite these proposals, there are concerns from developing countries regarding the feasibility of these proposals and their benefits. In trade, the proposal to make an e-commerce moratorium is also being challenged by some developing countries regarding the need to update the "electronic transmissions" definition so that digital content which is also electronically transmitted can be excluded from this moratorium. However, it is not yet clear whether these concerns will be considered, primarily since the WTO is now proposing to make this e-commerce moratorium a permanent solution. [79]

This description shows that while digital trade is good, there should also be a fair allocation of revenue among countries of profits obtained from the digital economy. In taxation, the complexity of the rules introduced make it difficult for governments and business to have one single standard to follow and to apply. Therefore, one way forward could be to review the proposals for taxation of the digital economy in light of the Ottawa Taxation Framework for e-commerce which provides for principles such as neutrality, efficiency, certainty, simplicity, effectiveness and fairness, and flexibility. [80] The use of these principles may shed light on the way that these proposals can be feasible and acceptable by countries and businesses. The OECD and academics could contribute to this review.

Finally, it is expected that in the future more disputes on the way to tax the income from digital business will take place. For this purpose, the Multilateral Convention (Pillar 1) proposes arbitration. However, the use of arbitration has also raised legitimacy concerns by countries that have not yet a well-developed system of dispute resolution, or which do not want to commit to arbitration. One of the reasons is that arbitration in trade[81] and investment[82] has been regarded by developing countries as being unfair and illegitimate, and the question will be whether this will be also the case in taxation and the Pillar 1 proposals.

[79] The approval will take place in the 12th Ministerial Conference scheduled for December 2021, and postponed due to COVID 19. See ' E-Commerce' < https://www.wto.org/english/thewto_e/minist_e/mc12_e/briefing_notes_e/bfecom_e.htm> accessed 18 February 2022.

[80] 'Electronic Framework: Taxation Framework Conditions' (OECD Committee on Fiscal Affairs 1998) <https://www.oecd.org/ctp/consumption/1923256.pdf>. accessed 18 February 2022

[81] Donald McRae, 'Developing Countries and "The Future of the WTO"' (2005) 8 *Journal of International Economic Law* 603-610 <https://doi.org/10.1093/jiel/jgi035> accessed 18 February 2022.,

[82] See Stephan W Schill and Geraldo Vidigal, 'Cutting the Gordian Knot: Investment Dispute Settlement À La Carte' [2019] *SSRN Electronic Journal* <https://www.ssrn.com/abstract=3507385> accessed 18 February 2022. See also Manfred Elsig, Rodrigo Polanco and Peter Van den Bossche, 'International Economic Dispute Settlement: Demise or Transformation?' at 220-263<http://www.wti.org/research/publications/1326/international-economic-dispute-settlement-demise-or-transformation/> accessed 18 February 2022.

One way forward is to review the experience of trade and investment in arbitration and the concerns of countries which could also be useful when drafting the Multilateral Convention. [83]In addition, the input and experience of regional organizations in Africa, Latin America, Asia, and Europe could be useful to learn how the solving of disputes can take into account the differences among countries, and regions, as well as the culture of dispute resolution available or not in the country. Some issues that may be considered are (i) whether the country has a very hierarchical government which does not leave room to engage in (productive and useful) discussions between government officials and business or not (ii) whether the judges are well trained in international disputes or not, or (iii) whether the country has a reputation of enforcing decisions agreed by international tribunals or not.

[83] The exchange of ideas among trade, investment, and taxation have taken place in the 5-day workshop Globalization and Digitalisation: Interconnections between Taxation, Trade, and Investment. See Session 3*: The Settlement of Tax and Tax Treaty Disputes by the International Courts and Tribunals*. Available at 'Globalization and Digitalisation: Interconnections between Taxation, Trade and Investment – GLOBTAXGOV' <https://globtaxgov.weblog.leidenuniv.nl/globalization-and-digitalization-interconnections-between-taxation-trade-and-investment/> accessed 18 February 2022.