Reflections from the Brink of Tax Warfare: Developing Countries, Digital Services Taxes, and an Opportunity for More Just Global Governance with the OECD’s Two-Pillar Solution

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Abstract: Starting in 2016, many countries enacted digital services taxes (DSTs), a turnover tax that applies to digital companies regardless of whether they have a physical presence in the taxing jurisdiction. After the Organization for Economic Cooperation and Development’s Inclusive Framework reached final agreement on its two-pillar solution to tax challenges in a global digital economy, these unilateral measures went on pause. This Note reflects on the recent DST phenomenon, reconceptualizing the DST debate as part of a broader discourse on global governance and globalization. Although DSTs first emerged in developed countries in the European Union, this Note analyzes developing country DSTs against the backdrop of vocal U.S. opposition. This Note demonstrates that the DST discourse confirms long-held suspicions of developing countries regarding the international economic law that shapes the course and outcomes of economic globalization more broadly. Nonetheless, this Note argues that the DST debate and the resulting Pillar One solution reflect important positive changes to the archetypal globalization and global governance narratives. Taking stock of these changes, this Note concludes that DSTs are and were a powerful negotiating tool for developing countries in their attempt to reorient the principles of international tax toward a more equitable distribution of taxing rights and to recognize broader tax goals beyond economic profit.

INTRODUCTION

On October 8, 2021, the Organization for Economic Cooperation and Development (OECD) announced an agreement with 136 countries on a global minimum tax rate of 15% for large multinational enterprises (Pillar Two), and new rules to tax multinational enterprises (MNEs) based on where their goods and services are sold (Pillar One) (collectively, the OECD Agreement).1

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1 International Community Strikes a Ground-Breaking Tax Deal for the Digital Age, OECD (Oct. 8, 2021), https://www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm [https://perma.cc/6HA4-6RNT]. Pillar One of the deal involves the redistribution of certain taxing rights to jurisdictions in which multinational enterprises (MNEs) have business activities but no physical presence; whereas Pillar Two, which is beyond the scope of this Note, involves the global minimum tax. Id. The Organization for Economic Cooperation and Development (OECD)
der to secure U.S. support for the OECD Agreement, countries committed to withdraw existing digital services taxes (DSTs) and refrain from implementing new ones in the future. Prior to the agreement, DSTs were a source of growing international tension, with the United States threatening retaliatory tariffs on countries that imposed them. The United States opposed DSTs as discriminatory measures targeted primarily to burden U.S.-based tech giants like Google LLC (Google), Amazon.com, Inc. (Amazon), Facebook, Inc. (Facebook), and Apple Inc. (Apple) (collectively GAFA). Unilaterally imposed


Although the commitment to withdraw existing digital services taxes (DSTs) may not yet be legally binding, several countries have reached political compromises with the United States to withdraw their DSTs in exchange for the United States committing not to impose retaliatory tariffs. See id. (requiring the signing of a Multilateral Convention that encompasses the DST withdrawal commitment in 2022 to implement the OECD’s Pillar One agreement regarding the taxation of MNEs based on where they sell goods and services); Termination of Action in the Section 301 Digital Services Tax Investigation of Turkey and Further Monitoring, 86 Fed. Reg. 68,295, 68,296 (Dec. 1, 2021) [hereinafter Termination of Turkey DST Investigation] (explaining that Turkey would suspend its DST, with existing liabilities under the DST creditable to liabilities to be owed under the new taxing rules once implemented); Termination of Action in the Digital Services Tax Investigation of India and Further Monitoring, 86 Fed. Reg. 68,526, 68,527 (Dec. 2, 2021) [hereinafter Termination of India DST Investigation] (reaching a similar agreement with India); Termination of Actions in the Section 301 Digital Services Tax Investigations of Austria, France, Italy, Spain, and the United Kingdom and Further Monitoring, 86 Fed. Reg. 64,590, 64,590–91 (Nov. 18, 2021) [hereinafter Termination of European DST Investigations] (reaching similar agreements with European countries).


DSTs sparking a global trade war was a real possibility. Although cooler heads prevailed, DSTs are not gone for good, as non-signatories to the deal, such as Nigeria, still plan to implement such taxes and some developing countries remain concerned about the DST withdrawal requirement. Moreover,
some countries could take Canada’s lead in enacting a DST that will automatically become effective should the Pillar One implementation drag on too long.7

Most early movements on digital taxation occurred in Europe.8 Consequently, most of the literature analyzes DSTs and other digital tax proposals from a developed-country perspective.9 This Note, however, analyzes the growth of DSTs in developing countries prior to the OECD Agreement.10 A change in


10 See generally OFF. OF THE U.S. TRADE REPRESENTATIVE, SECTION 301 INVESTIGATION: REPORT ON INDIA’S DIGITAL SERVICES TAX 3–5 (2021) [hereinafter REPORT ON INDIA’S DIGITAL SERVICES TAX], https://ustr.gov/sites/default/files/enforcement/301Investigations/Report%20on%20India%20%E2%80%99s%20Digital%20Services%20Tax.pdf [https://perma.cc/U8XR-PUGB] (announcing the results of an investigation of India’s DST); OFF. OF THE U.S. TRADE REPRESENTATIVE, SECTION 301 INVESTIGATIONS: STATUS UPDATE ON DIGITAL SERVICES TAX INVESTIGATIONS OF BRAZIL, THE CZECH REPUBLIC, THE EUROPEAN UNION, AND INDONESIA 4–6, 10–11 (2021) [hereinafter STATUS UPDATE ON DIGITAL SERVICES TAX INVESTIGATIONS], https://ustr.gov/sites/default/files/files/Press/Releases/StatusUpdate301InvestigationsBEUIndCR.pdf [https://perma.cc/3DTG-8N3M] (providing an update to the DST investigations for a mix of developed and developing countries, including Brazil and Indonesia); KPMG, TAXATION OF THE DIGITAL ECONOMY: DEVELOPMENTS SUMMARY 5–47 (2021), https://tax.kpmg.us/content/dam/tax/en/pdf/2020/digitized-economy-taxation-developments-summary.pdf [https://perma.cc/3JWE-NVZE] (listing all countries that have implemented direct digital taxes, including DSTs). For purposes of this Note, the distinction between developed and developing countries generally follows the classification scheme of the United Nations (UN), which uses data on gross domestic product (GDP), growth rates, currency fluctuations, and other economic conditions to categorize countries as developed, developing, or economies in transition. U.N. DEP’T OF INT’L ECON. & SOC. AFFAIRS ET AL., WORLD ECONOMIC SITUATION AND PROSPECTS, at 163–66, U.N. Sales No. E.20.II.C.1 (2020). Although substantial debate exists on the utility of such a distinction, the distinction generally refers to the level of economic development in a country as measured by GDP and GDP per capita. Cf. Marc Silver, If You Shouldn’t Call It the Third World, What Should You Call It?, NPR (Jan. 4, 2015), https://www.npr.org/sections/goatsandsoda/2015/01/04/372684438/if-you-shouldnt-call-it-the-third-world-what-should-you-call-it [https://perma.cc/HHL3-YA9N] (providing a dialogue among observers who understand the terminology, but sometimes take issue with its implications). Developed countries are generally richer and more industrialized according to these measures than
perspective is valuable because the same tax policies may have highly divergent motivating principles and impacts depending on the country imposing the tax.11 More important, the inclusion of developing countries in the OECD’s negotiations marked the first time that developing countries had a meaningful “seat ‘at the table’” in international tax negotiations.12 Thus, this Note presents a novel case study—through the lens of DSTs—for examining the advancement of developing country tax policy goals at the international level.13 Part I discusses DSTs as a byproduct of the broader, intersecting geopolitical phenomena of globalization, international tax reform, and the growth of the digital developing countries. Id. Notwithstanding critiques of the terminology, the distinction sometimes carries legal significance in international economic law. See, e.g., Special and Differential Treatment Provisions, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#legal_provisions [https://perma.cc/545Y-542N] (describing the preferential treatment the WTO accords to developing countries). Moreover, the distinction is useful when considering some of the primary criticisms to global governance institutions, especially because these institutions also use such terminology. See, e.g., id. (using the terminology in WTO rules); What Is BEPS?, OECD, https://www.oecd.org/tax/beps/beps-about.htm/ [https://perma.cc/KA55-SAMD] (discussing the substantial involvement of developing countries in global tax reform). See generally JOHN LINARELLI, MARGOT E. SALOMON & MUTHUCUMARASWAMY SORNARAJAH, THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY (2018) (examining the imbalances between developed and developing countries across a variety of international legal domains). For a discussion on the distortive impact of the developed-developing country dichotomy, see HANS ROSLING, OLA ROSLING & ANNA ROSLING RÖNNLUND, FACTFULNESS: TEN REASONS WE’RE WRONG ABOUT THE WORLD—AND WHY THINGS ARE BETTER THAN YOU THINK 19–46 (2018).

11 See JANE KELSEY, JOHN BUSH, MANUEL MONTES & JOY NDUBAI, HOW ‘DIGITAL TRADE’ WOULD IMPede TAXATION OF THE DIGITALISED ECONOMY IN THE GLOBAL SOUTH 95–97 (2020), https://www.twn.my/title2/latestwto/general/News/Digital%20Tax.pdf [HTTPS://PERMA.CC/A3SL-XL6N] (suggesting that simple application attracts developing countries to DSTs due to their simple application, whereas the peculiarities of value creation in the digital company business model motivates EU countries to utilize DSTs); Jennifer McLoughlin, Global Digital Tax Talks Juggling Developing Countries’ Goals, 93 TAX NOTES INT’L 659, 659 (2019) (emphasizing the importance of a technically simple solution to digital taxation to developing countries); Marcos Aurélio Pereira Valadão, The Contemporary International Tax System, Developing Countries, BEPs and Other Current Issues, 6 REVISTA DE FINANÇAS PÚBLICAS, TRIBUTAÇÃO E DESENVOLVIMENTO 122, 123–26 (2018) (arguing that the design of international tax solutions to emerging problems must include developing country perspectives because such problems, including the digital economy, may have different or more pernicious effects on developing countries); Thomas Baunsgaard & Michael Keen, Tax Revenue and (or?) Trade Liberalization 22 (Int’l Monetary Fund, Working Paper No. 112, 2005) (demonstrating that for each trade dollar lost to trade liberalization programs, developed countries have regained forty-five to sixty cents in domestic tax revenues, whereas developing countries have only regained closer to thirty cents). The USTR investigations do not explain the contextual differences between the impact or justification of DSTs in developing countries, as compared with more developed countries. See Initiation of Section 301 Investigations of Digital Services Taxes, 85 Fed. Reg. 34,709, 34,709–10 (June 5, 2020) (explaining the design of the DSTs in each country but omitting reference to contextual differences).


13 See infra notes 143–230 and accompanying text (presenting both sides of the DST debate).
economy.14 Part I concludes with a summary of the OECD Agreement and the developing country DSTs that preceded it.15 This contextual background frames the DST debate as a fight over whether the disproportionate influence of the corporate and financial interests of developed countries in managing global institutions will continue or whether concerns about sustainable economic and social development are gaining traction.16 Part II presents the primary U.S. objections to DSTs and conceptual concerns with the unilateral nature of DSTs.17 Part II then elaborates on developing country justifications for DSTs, while also introducing conceptual arguments favoring DSTs for developing countries.18 Part III contends that opposing arguments to DSTs reflect the same concerns that developing countries have lodged against the governance of economic globalization more broadly.19 Part III concludes, however, that, even in light of the moratorium on most DSTs, DSTs were (and may continue to be) an effective tool for reforming the rules of international economic law in a manner more reflective of global justice and equity.20

I. DSTS IN THE DEVELOPING WORLD: A BYPRODUCT OF GLOBAL FORCES

The proliferation of digital taxation measures, both within developed and developing countries, occurred within the context of three intersecting global phenomena: economic globalization, attempts at international tax reform, and rapid growth of the digital economy.21 This Part describes each of these phenomena.22 Section A provides a sketch of economic globalization and introduces its primary critiques.23 Section B of this Part describes the rise of the digital economy.24 Section C demonstrates how efforts to reform international tax principles reflect these two global trends.25 Section D notes the key mile-

14 See infra notes 21–94 and accompanying text.
15 See infra notes 95–142 and accompanying text.
16 See infra notes 28–55 and accompanying text.
17 See infra notes 147–186 and accompanying text.
18 See infra notes 187–230 and accompanying text.
19 See infra notes 235–266 and accompanying text.
21 See infra notes 28–94 and accompanying text.
22 See infra notes 28–94 and accompanying text.
23 See infra notes 28–45 and accompanying text.
24 See infra notes 46–55 and accompanying text.
25 See infra notes 56–94 and accompanying text.
stones in the development of the OECD Agreement, focusing on Pillar One. 26

Section E concludes with a survey of developing country DSTs. 27

A. Economic Globalization

Economic globalization is the process of increasing global economic integration, in terms of the breadth, volume, and speed of cross-border exchanges of goods and services. 28 Technological developments, especially information and communication technologies that allow businesses to control production chains almost instantaneously, drive growth in global trade volumes. 29 Additionally, the spread of capitalism and the market economy model increases economic integration, creating a global market. 30 In a globalized world,

26 See infra notes 95–112 and accompanying text.
27 See infra notes 113–142 and accompanying text.
28 David Held, Anthony McGrew, David Goldblatt & Jonathan Perraton, Rethinking Globalization, in THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE 67, 67–68 (David Held & Anthony McGraw eds., 2d ed. 2003). For example, while global trade volume increased rapidly from 1990 to 2007, the rate of increase was 2.1 times faster than the increase in global GDP. MCKINSEY GLOB. INST., GLOBALIZATION IN TRANSITION: THE FUTURE OF TRADE AND VALUE CHAINS 5 (2019), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/innovation/globalization%20in%20transition%20the%20future%20of%20trade%20and%20value%20chains/5mg-globalization%20in%20transition-the-future-of-trade-and-value-chains-full-report.pdf [https://perma.cc/TKY3-2FQ8]. Today’s form of globalization began in the 1950s. Peter Dicken, A New Geo-Economy, in THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE, supra, at 303, 303. There remains substantial debate whether the current period of economic globalization differs in any substantial way to the increase in global interconnectedness of 1890–1914. David Held & Anthony McGrew, The Great Globalization Debate: An Introduction, in THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE, supra, at 1, 19–28 (contrasting the skeptical view of modern globalization, that sees the current period of increased global flows as similar to prior periods of increased international interaction, with the globalist views, that sees the broad impact of the current global economy as historically unique); Michael D. Bordo, Barry Eichengreen & Douglas A. Irwin, Is Globalization Today Really Different from Globalization a Hundred Years Ago? 1–4 (Nat’l Bureau of Econ. Rsch., Working Paper No. 7195, 1999) (concluding that today’s global economic integration is unprecedented). Proponents of the skeptical argument emphasize that the magnitude and global scope of trade and capital flows during 1890–1914 was comparable to, if not higher than, current international flows. Held & McGrew, supra, at 19. The skeptical argument also contests the descriptive claims that today’s form of globalization represents a new level of global economic integration or that states no longer play as prominent a role in global economic governance. Id. at 22–24.
29 See Manuel Castells, Information Technology, Globalization, and Social Development 4–5 (U.N. Rsch. Inst. Soc. Dev. Working Paper, Paper No. 114, 1999) (emphasizing the role of technological advances to allow firms and the economy to operate “as a unit . . . on a planetary scale” for the first time). One sociologist points out that, although most jobs and people’s lives remain local rather than global in nature, such jobs and livelihoods now depend on their national economy’s ability to integrate with global economic networks across manufacturing, trade, and investment. Id.
30 See Held & McGrew, supra note 28, at 25 (discussing the globalist thesis’s emphasis on the role of market principles). Skeptics also contest the claim that capitalist market forces are the primary influence over the emergence of a global market; where globalists suggest that the global capital of international businesses now dictates the distribution of economic power and resources, skeptics argue that the state maintains its traditional dominance in shaping the economy. Id. at 23, 26.
MNEs headquartered in one country, but conducting business through subsidiaries around the world, thrive.31

Until recently, developed countries promoted a particular form of globali-
ization that incentivized trade liberalization and free capital flows in global in-
itutions, such as the OECD, the World Trade Organization (WTO), and the
International Monetary Fund (IMF).32 Although these institutions set rules for

31 See Dicken, supra note 28, at 305–06 (emphasizing the fundamental role that MNEs play in a
globalized economy). More formally, an MNE is a firm that coordinates and controls operations or
generates substantial revenues from multiple countries, even where it does not directly own operations
or assets in all of those countries. See id. at 306 (defining transnational companies). Some argue that
MNEs drive a deeper form of integration between national economies around the world than prior
periods of economic history that also witnessed dramatic increases in global trade. Id. at 304–05. See
(providing an analysis of the changing shape of MNEs and describing how such firms maintain differ-
ent locational hubs for the financial, legal, and talent aspects of their business).

32 JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS REVISTED: ANTI-GLOBAL-
IZATION IN THE ERA OF TRUMP 101–19 (2018) (discussing who sets the rules within the global insti-
tutions and describing how those rules advance trade liberalization and free capital flows); see supra
note 1 and accompanying text (providing a description of the OECD’s role in global governance). The
WTO, established in 1995 to build on the post-World War II General Agreement on Tariffs and Trade,
provides a forum for member states to negotiate binding agreements for trade in goods, services, and
some intellectual property rights. WTO in Brief, WORLD TRADE ORG., https://www.wto.org/english/
thewto_e/whatis_e/inbrief_e/inbr_e.htm [https://perma.cc/5KGG-28CP]. The WTO also provides a
dispute settlement mechanism for its 164 member states to enforce their rights under WTO agree-
ments. Id. Trade liberalization, a primary goal of the WTO, refers to the reduction of barriers to trade,
such as tariffs and quotas. See id. (discussing the use of the WTO to reduce trade barriers to connect
people and economies); IMF Staff, Global Trade Liberalization and the Developing Countries, INT’L
3HWC-DPXG] (promoting the benefits of trade liberalization for developing countries). Established
in the aftermath of World War II in 1944, the International Monetary Fund (IMF)’s founding mission
was to promote cooperation on currency exchange rates and thus stability in the international mone-
IMF-at-a-Glance [https://perma.cc/Y2GF-J22N] (Apr. 2022); see also STIGLITZ, supra, at 110–13
(describing the mission creep of the IMF from preventing economic crises like the Great Depression
through macroeconomic policies to a focus on pushing structural market economy reforms within its
lending programs, thereby infringing on the mission of the World Bank). One of the IMF’s primary
functions in accomplishing this goal is lending to member state governments with troubled balance-
of-payments conditions). What Is the IMF?, supra. The IMF has 190 member states. Id. Free capital
flows refers to the free movement of capital, a goal that countries achieve through the elimination
(noting an international effort to ban capital controls). Before the late 1990s, an orthodox view
emerged within institutions like the IMF that free capital flows benefited development because it
allocated resources efficiently, allowing finance to flow to developing countries to industrialize quick-
ly. Id.; see also Adam Feibelman, The IMF and Regulation of Cross-Border Capital Flows, 15 CHI. J.
INT’L L. 409, 416–19 (2015) (describing the exuberance behind the post-World War II consensus on
free capital flows, despite a lack of empirical evidence on whether they accelerate economic growth in
developing countries). The experience of the East Asian financial crises of the late 1990s and, more
recently, the 2008 global financial crisis, led international institutions to retreat from that view and
reassess the usefulness of capital controls for particular situations. See Feibelman, supra, at 431–39
international trade, tax, and investment, developing countries frequently express concern that the rules of global governance that international institutions establish benefit the rich countries and fail to account for the particular stage of development of the world’s developing countries.\(^\text{33}\) For example, one poignant critique attributes at least some of the economic growth of the United States to the selective protection of particular industries, thus allowing for the maturation of less competitive industries.\(^\text{34}\) Despite this domestic history, the United States and other developed countries today push for trade liberalization policies in countries whose firms are not equipped and whose industries have not matured enough to compete in a global market.\(^\text{35}\) Similarly, critics point out

\[^{33}\text{See Joseph E. Stiglitz, Making Globalization Work 70–73, 82–85 (2006) (explaining that developing countries need some barriers to trade to allow time for the growth of infant industries, and advocating an approach to global governance that treats developing countries differently according to their stage of development). This Note understands the term \textquote{global governance\textquote{ in a normative sense for understanding how global institutions and actors respond to the societal problems associated with increasing global integration. See Klaus Dingwerth & Philipp Pattberg, Global Governance as a Perspective on World Politics, 12 Glob. Governance 185, 193–96 (2006) (describing the normative use of the term global governance as a useful concept for responding to globalization). Moreover, this Notes utilizes global governance \textquote{not as a value-free term, but rather a highly politicized concept in the midst of a discursive struggle about who decides what for whom.\textquote{ Id. at 196 (emphasis added). See generally id. at 189–96 (comparing the normative use of global governance with a more analytical and observational use of the term in the literature).}

\[^{34}\text{See Stiglitz, supra note 33, at 70–73 (contrasting the U.S. position on infant industry protection in the nineteenth century with its position in free trade negotiations today). Some critics describe the inconsistency between the U.S. position to trade liberalization as applied to itself and as applied to developing countries as akin to \textquote{kick[ing] away the ladder [of development] so that others can’t follow.\textquot; Id. at 71. Alternatively, developed countries sometimes seek concessions as a precondition to reducing their own trade barriers to open their market to imports from developing countries. See id. at 83 (advocating for modification to the principle of reciprocity to allow for circumstantial differences among countries). These concessions, however, often ensure that the only imports from the developing country that might be competitive in the developed country market remain excluded from that market. See id. at 83 (providing an example of the United States offering to open its markets to Bangladeshi jet engines, which Bangladesh does not produce, but continuing to exclude Bangladeshi textiles and apparel, which Bangladesh does produce). Observers view this approach as not just unfair in a negotiating sense but also in terms of development outcomes. See id. at 85–87 (contrasting the impact of large U.S. subsidies to California cotton farmers with the real-life costs on cotton farmers in Burkina Faso who, as a result of U.S. subsidies, cannot compete globally and suffer depressed prices in their domestic market); Stiglitz, supra note 32, at 156–57 (citing a World Bank study that found that Sub-Saharan Africa countries witnessed declining incomes as a result of the Uruguay Round of trade negotiations at the WTO, and providing an example of the United States gaining substantial trade barrier reductions and concessions from Bolivia to eradicate coca, a higher-income producing crop, while ensuring alternative potential agricultural exports from Bolivia would remain shut off from the U.S. market).}

\[^{35}\text{See Stiglitz, supra note 32, at 114–15 (noting the role of selective protectionism in industrialized countries and describing the downsides to liberalizing markets in developing countries too quickly).}
that global institutions have a pattern of pursuing one-size-fits-all policies when assisting developing countries.36

Even while global institutions and the United States promoted trade liberalization policies and strict fiscal programs during financial crises in developing countries, the United States and other developed countries themselves did not always follow the policies they promoted.37 For example, during the East Asian financial crisis of the late 1990s, the U.S. Treasury and the IMF advocated increased interest rates, spending cuts, and discouraged bank bailouts.38 Yet during the Great Recession of 2008, both Europe and the United States slashed interest rates to zero, passed massive stimulus packages, and bailed out banks.39 Similarly, developed countries, especially the United States, maintain substantial agricultural subsidies, while encouraging developing countries to eliminate similar agricultural trade barriers.40

Another major critique of economic globalization, prevalent in both the developed and developing world, contends that MNEs based in developed countries have outsized influence over the law that shapes economic globaliza-

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36 See generally id. at 122–48 (providing examples and criticizing one-size-fits-all approaches). The experience of Ethiopia in the 1990s presents one case study of the failed one-size-fits-all approach. See id. at 122–33 (describing the lack of empirical support for the conditions the IMF imposed on Ethiopia and that led to the suspension of IMF aid to Ethiopia, despite strong macroeconomic performance). Although the IMF and Ethiopia had several disagreements, a particularly illustrative one related to Ethiopia’s concern with opening the domestic banking system to foreign competition. Id. at 127–29. The Ethiopian government feared that doing so would make it harder for its farmers to access credit and thereby reduce incomes, a particularly thorny problem in a country susceptible to severe droughts. Id. It also had seen the downsides of such an opening in its neighbor Kenya, where interest rates increased after Kenya liberalized its banking system. Id. at 128. The IMF dismissed these contextual concerns and suspended its lending to Ethiopia. Id. at 129. Even where developing countries participate in discussions on global governance issues, it is not always clear that developed countries take their perspectives seriously. See, e.g., Andrew Charlton, In Brief . . . The Collapse of the Doha Trade Round, CENTREPIECE, Autumn 2006, at 21, 21 (describing how the collapse of the Doha Round, the so-called development round of WTO negotiations, sowed distrust among developing countries and did not result in developed countries slashing their agricultural subsidies as hoped).

37 See, e.g., infra notes 38–40 and accompanying text (contrasting the U.S. approach to financial crises abroad and at home).

38 STIGLITZ, supra note 32, at 354.

39 Id. An illustrative example of this “do-as-I-say-not-as-I-do” behavior occurs with the plethora of emerging digital taxation measures within U.S. states, despite the federal government’s opposition to similar reforms on an international level. See infra notes 168–179 (identifying a number of domestic legal developments that stand in contrast with the U.S. position that digital business models should not pose any unique challenges that would require changes to international tax principles).

40 STIGLITZ, supra note 32, at 104–05. One prominent example of the double standard in agricultural subsidies occurred during the North American Free Trade Agreement, in which the United States kept its corn subsidies, and Mexico conceded to greater average tariff reductions than the United States overall. Id. at 23–24; see also supra note 34 and accompanying text (providing examples of how U.S. agricultural subsidies in Africa and Bolivia caused inequities); cf. TOM NICHOLAS, VC: AN AMERICAN HISTORY 315–17 (2019) (describing how selective U.S. government policies, including tax incentives, created a globally competitive domestic venture capital industry, from which today’s most dominant digital MNEs emerged).
tion due to their privileged place at the negotiating tables of international institutions. As a result, these entities influence the adoption of international trade and other economic agreements that over-emphasize economic growth at the expense of development-related goals. A corollary to this authorship critique is that, because corporate interests have an outsized influence in international negotiations, the costs of new regulations tend to outweigh other concerns. This encourages a regulatory “race to the bottom” where countries have an

41 See STIGLITZ, supra note 32, at 116–19 (discussing the overrepresentation of commercial and financial interests within policymaking at international institutions and underrepresentation of the interests of the poor in developing countries); Jeffrey Frieden, The Backlash Against Globalization and the Future of the International Economic Order, in THE CRISIS OF GLOBALIZATION: DEMOCRACY, CAPITALISM, AND INEQUALITY IN THE TWENTY-FIRST CENTURY 43, 43–52 (Patrick Diamond ed., 2019) (discussing the backlash against globalization in light of the election of President Donald Trump in the United States). Beyond merely lobbying, commercial interests gain representation in international institutions through direct involvement. STIGLITZ, supra note 32, at 116–19. For example, the U.S. banking community is the primary talent source for leaders at the IMF or the U.S. Treasury Department. Id. Moreover, central bankers and trade ministers each have business community constituencies within their own countries to satisfy, meaning the interests of the poor and other social interests are contemplated last, if at all. See id. (calling the voicelessness of the communities most susceptible to the impact of the decisions of international institutions “global governance without global government”); see also LINARELLI ET AL., supra note 10, at 3 n.4 (“[B]ankers and financial interests [are] the real makers and beneficiaries of [the rules of international economic law], while making everyone else effectively passive recipients . . . .”).

42 See LINARELLI ET AL., supra note 10, at 2–5, 242 (critiquing the siloed nature in which international economic law treats the economic realms of trade, investment, and finance with respect to non-economic concerns that reflect other values such as human rights and sustainable development); Caroline Henckels, Substantive and Procedural Reforms: Should Investment Treaties Contain Public Policy Exceptions?, 59 B.C. L. REV. 2825, 2843 (2018) (arguing that normalizing public policy exceptions in international investment agreements as permissions for welfare-driven sovereign action—rather than construing such exceptions as true exceptions to the treaty—is a necessary construction to promote such treaties as tools for sustainable economic growth). For example, recent international discussions note that although global institutions and powerful countries frequently promote the value of international investment agreements for development, it is not at all clear whether international investment agreements benefit any stakeholders other than MNEs seeking new markets. See EMMA AISBETT ET AL., RETHINKING INTERNATIONAL INVESTMENT GOVERNANCE: PRINCIPLES FOR THE 21ST CENTURY 35–51 (2018) (discussing the inconclusive empirical evidence that international investment agreements promote foreign direct investment). Bilateral or international investment treaties are agreements between countries to govern the investment rights and duties of nationals of one of the sovereign parties when investing in the other sovereign’s territory. 2 WILLIAM P. STRENG & JESWALD W. SALACUSE, INTERNATIONAL BUSINESS PLANNING: LAW AND TAXATION § 10.06[A] (Matthew Bender, rev. ed. 2021). These types of agreements principally aim to promote and protect investments abroad. Id. § 10.06[F][1]. Bilateral investment treaties originated in the 1960s with an impetus to provide investors from industrialized economies a stable regulatory environment in which to expand their operations into developing countries. Id. § 10.06[B]. Around three thousand bilateral investment treaties exist today. Id. § 10.06[F][1]. There is increasing concern that international investment agreements may not promote sustainable development for developing countries or adequately consider the concerns of workers or local populations. AISBETT ET AL., supra, at 31 (noting that even where investment treaties include terms indicating broader concerns related to development, the lack of specific investor or state duties maintains a “legal framework for investment [that] operates on an understanding of justice where fairness to investors is the dominant principle”).

43 STIGLITZ, supra note 32, at 27–29.
incentive to agree to terms that remove regulatory hurdles or cement the status quo. For example, some observers argue that the broad definition and interpretation of standard “fair and equitable treatment” provisions in international investment treaties induces regulatory chill in developing host countries for fear of becoming liable for a large arbitral award.

**B. Growth of the Digital Economy**

The growth of the digital economy adds new dimensions to the impact of globalization. Although flows in tangible goods across countries slowed in recent years, cross-border digital flows—digital commerce, search, communications, video, and data—are increasing rapidly.

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44 Id.; see Frank J. Garcia, Third-Party Funding and Investor-State Dispute Settlement: Third-Party Funding as Exploitation of the Investment Treaty System, 59 B.C.L. Rev. 2911, 2914 (2018) (arguing that the emerging phenomenon of third-party funding in investor-state-dispute settlement arbitration proceedings results in exploitative wealth transfers from developing country host states, and therefore recommending a ban on the practice). The regulatory race to the bottom critique is also particularly relevant to the international tax arena in that jurisdictions compete to lower their taxes or create other tax incentives to encourage corporations to relocate their operations or assets. See STIGLITZ, supra note 32, at 38–40 (illustrating how such tax competition compounds the tax burden on those least able to take advantage of globalization, while large corporate concerns flourish).

45 AISBETT ET AL., supra note 42, at 29–31 (providing case studies of the imposition of simple health and environment regulations in host countries resulting in large investor awards based on a violation of the fair and equitable treatment principle). Most international investment agreements impose a duty on host countries to provide fair and equitable treatment (FET) to foreign investors. Id. at 29. Investment tribunals tend to interpret this principle as requiring a regulatory environment that is both “stable and predictable” and accords with the “legitimate expectations” of the investor. Id. International arbitral tribunals often treat an FET violation as indirect expropriation, and some commentators suggest that the FET principle sometimes treats foreign investors more favorably than domestic firms. Id.; see also STIGLITZ, supra note 32, at 35–38 (arguing that corporate interests promoted the use of investment treaties not for the purported reason of deterring discrimination against foreign corporations but to dissuade foreign governments from passing socially beneficial regulations that hinder profits).

46 See generally MCKINSEY GLOB. INST., DIGITAL GLOBALIZATION: THE NEW ERA OF GLOBAL FLOWS (2016), https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/Digital%20globalization%20The%20new%20era%20of%20global%20flows/MGI-Digital-globalization-Full-report.pdf [https://perma.cc/ZM2U-4X3C] (providing an overview of the impact of the growth of the digital economy on globalization). The digital economy, as used here, simply refers to the commercial flow of goods, services, data, and information through internet-based communication technologies. See id. at 23. (discussing the various types of flows that are key features of globalization in the digital world economy). Although the digital economy as first understood referred to electronic commerce or online sales transactions, that conception broadened significantly as electronic networks evolved to allow for non-sales transactions, such as digital advertising or financial transactions. 3 STRENG & SALACUSE, supra note 42, § 27.01[A]. This much broader understanding of the digital economy is central to international tax reform efforts because such efforts address problems beyond merely online retail. See id. (discussing the OECD’s identification of relevant tax features of the digital economy beyond traditional electronic commerce).

47 MCKINSEY GLOB. INST., supra note 46, at 3–7.
On the one hand, a digital global economy may be more inclusive, as it allows smaller enterprises to engage in global commerce through digital marketplace platforms, such as Amazon or eBay. On the other hand, this inclusive potential seems contradicted by the overwhelming dominance of a handful of digital platform businesses, like GAFA, headquartered primarily in the developed world. Their dominance, in turn, enjoys substantial incumbency advantages unique in comparison to the market power of MNEs in prior eras and inherent in the structure of the digital economy and the core features of the digital business model. First, today’s digital MNEs enhance their competitive advantages through indirect network effects. This means that the more users on the first side of a digital platform, the more attractive the platform becomes to second side platform users interested in the activities of the users on the first side. Second, the digital incumbency advantage is predicated on extracting,
controlling, and analyzing data generated from these platforms.\textsuperscript{53} Finally, existing global economic policies may accentuate these incumbency advantages.\textsuperscript{54} Therefore, as with the failures of many developing countries to compete with industrialized countries in prior stages of globalization, the path for the developing world to catch up in a data-driven digital economy remains uncertain.\textsuperscript{55}

\section*{C. Reforming International Taxation}

This Section connects the themes of globalization and the digital economy to ongoing international tax reform debates.\textsuperscript{56} Subsection 1 illustrates the primary challenges that digital business models raise for traditional international tax principles.\textsuperscript{57} Subsection 2 introduces the DST as part of a broader set of digital tax reforms.\textsuperscript{58}
1. International Tax Challenges of Digital Companies

The supremacy of digital MNEs in a globalized world presents an additional concern of eroding tax revenues. MNEs aggressively seek to reduce their tax burdens in higher tax jurisdictions, often by legally transferring mobile, hard-to-value, intangible assets to lower tax jurisdictions.

The digitization of the global economy is an integral component of international tax concerns because it questions some of the core principles of international taxation, especially regarding: (1) the establishment principle; and (2) the allocation of taxing rights between source and residence countries. Pend-}

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60 Cockfield, supra note 5, at 354–56 (discussing well-publicized examples of companies like Google, Facebook, and Netflix shifting their tax burdens to lower tax jurisdictions). This Note does not focus on the issue of MNEs using intermediary tax havens, which is primarily an issue in developed countries. See Ashok K. Lahiri, Gautam Ray & D. P. Sengupta, Equalisation Levy 8–10 (Brookings India, Working Paper No. 2, 2017); Commission Staff Working Document Impact Assessment, at 19, SWD (2018) 81 final (Mar. 21, 2018) (showing the loss of developed country tax revenues to tax havens). Nevertheless, a basic tax-shifting strategy involves relocating a company’s intellectual property (IP) assets to a lower-tax jurisdiction and then attributing a disproportionate amount of the company’s profits to that IP. Commission Staff Working Document Impact Assessment, supra, at 133–35; STIGLITZ, supra note 32, at 39. A famous example of this strategy occurred with Google legally relocating much of its IP to Ireland so it could take advantage of a tax loophole that treats such IP as not domiciled in Ireland. Richard Waters, Google to End Use of ‘Double Irish’ as Tax Loophole Set to Close, FIN. TIMES (Jan. 1, 2020), https://www.ft.com/content/991f11ae-2c51-11ea-bc77-65e4aa615551 [https://perma.cc/BL7V-MWLU]. Although legally residing in Ireland, Google channeled the IP’s official domicile to the tax haven of Bermuda. Id. With Bermuda as its domicile, Google received an even lower tax rate on the profits allocated to the IP. Id. The digital business model accelerates the ability to use tax haven strategies. See Lahiri et al., supra, at 8–9 (coining the term “homeless income” to describe the prominence of strategies in the digital economy to generate income without a clear taxing jurisdiction). This is due first to the fact that digital companies operate with fewer physical assets than traditional companies, or sometimes none at all, as in the case of Apple subsidiary Apple Operations International. Commission Staff Working Document Impact Assessment, supra, at 115; Apple’s International Structure, N.Y. TIMES (May 21, 2013), https://archive.nytimes.com/www.nytimes.com/interactive/2013/05/21/business/apples-international-structure.html [https://perma.cc/8WCV-UR9P]. Second, digital businesses’ reliance on marketing intangibles to drive a greater proportion of their profits further exacerbates the shrinking corporate tax base resulting from fewer physical assets. See infra note 77 and accompanying text (discussing the importance of marketing intangibles in digital businesses). Relocating marketing intangibles—including IP assets like trademarks—is a common tax shifting strategy. STIGLITZ, supra note 32, at 39.  
61 See Cockfield, supra note 5, at 358–62 (referencing the concepts of source, residence, and permanent establishment while describing how the digital business model provided an impetus to modify international tax principles to reallocate more taxing rights to market jurisdictions).  
62 See Yariv Brauner, Treaties in the Aftermath of BEPS, 41 BROOK. J. INT’L L. 973, 975–76 (2016) (describing the current international tax regime); Org. for Econ. Coop. & Dev. [OECD], supra note 2, at 3 (requiring the adoption of a Multilateral Convention to change the current international tax regime). Bilateral tax treaties generally allocate corporate income taxing rights between the source country, where the investment activity takes place, and the resident country of the investor. STRENG & SALACUSE, supra note 42, § 16.04[B]. The treaty determines which kinds of income each sovereign
greater taxing rights to the jurisdiction of the investor’s residence, usually developed countries, than to source or market countries, more often developing countries.63 An overarching principle of international taxation is to tax profits in the jurisdiction of value creation.64

Bilateral tax treaties, however, only allow source states to tax corporate income that is connected to a permanent establishment (PE) within the source jurisdiction.65 If the business has no PE in the jurisdiction where it generated the income, only the residence jurisdiction may tax the income.66 One innova-

has the right to tax, and generally, source countries cede many of their income taxing rights to resident countries. Id. A governing policy underlying most bilateral treaties is avoiding double taxation of corporate income. Id.; see SOL PICCIOTTO, INTERNATIONAL BUSINESS TAXATION: A STUDY IN THE INTERNATIONALIZATION OF BUSINESS REGULATION 14–18 (2013) (providing historical background on the emergence of an international consensus against double taxation). Globalization, and especially the digitization of globalization, is placing the bilateral tax treaty regime under increasing strain as it must confront business practices that its core principles never predicted. Brauner, supra, at 975–76.

The OECD’s Base Erosion and Profit Shifting project is an attempt to reconfigure this regime given the current global digital economy. Id.; see infra notes 95–112 and accompanying text (describing the OECD’s newly agreed-upon tax rules).

63 Erica M. Zolt, Tax Treaties and Developing Countries, 72 TAX L. REV. 111, 112 (2018). The source or market jurisdiction is the location of an MNE’s investment. Faulhaber, supra note 5, at 179–80; see Org. for Econ. Coop. & Dev. [OECD], supra note 2, at 2 (referring to “market jurisdictions” as the MNE’s source of revenue and the location of the end user). The residence jurisdiction is the location of the investing MNE for tax matters. Faulhaber, supra note 5, at 179. Scholars debate as to whether this basic allocation of taxing rights means that somehow tax treaties are a bad proposition for developing countries, effectively siphoning tax revenues from poor countries to rich ones. Zolt, supra, at 112; Brauner, supra note 62, at 980–82 (explaining critical approaches to the competition view of the treaty system); Yariv Brauner, An International Tax Regime in Crystallization, 56 TAX L. REV. 259, 305–10 (2003) (summarizing and responding to critiques of the bilateral treaty system).


66 Addressing the Tax Challenges of the Digital Economy: ACTION 1: 2014 Deliverable, supra note 65, at 39. Residence location rules vary by jurisdiction, but generally a place of incorporation or where the primary management of the business takes place constitutes a residence. Faulhaber, supra note 5, 179–80. Either bilateral tax treaties between jurisdictions or domestic law addressing income that those treaties do not cover determine the portions of taxable income in either jurisdiction. Id. at 180; see supra notes 42–44 and accompanying text (explaining core features and critiques of bilateral tax treaties between developed and developing countries); infra notes 87, 92 and accompanying text (referring to consumption taxes that bilateral taxes do not cover and are thus a product of domestic
tion of digital business is the ability to operate and generate income around the world without setting up a PE in most countries. The ability of digital MNEs to more easily reach into jurisdictions without a PE is one reason that many believe in the utility of the PE principle as a proxy for taxing value at its source is declining. Moreover, to the extent that developed countries already maintain more taxing rights as a result of the bilateral tax treaty system’s reliance on the PE concept, the digital business model may exacerbate this developed country advantage.

Another reason that policymakers are scrutinizing the PE concept is that the value creation model of digital businesses contrasts with the value creation law. See generally PICCIOTTO, supra note 62, at 1–37 (providing a comprehensive history of how principles such as source, residence, and permanent establishment (PE) emerged).

See, e.g., U.N. CONF. ON TRADE & DEV., supra note 49, at 96 (emphasizing that despite Facebook’s large user base in developing countries, Facebook maintains no physical presence in those countries); Commission Staff Working Document Impact Assessment, supra note 60, at 112–13 (illustrating that digital companies have a higher ratio of international sales to physical operations abroad than do traditional brick-and-mortar businesses). The exclusion of several business arrangements from what constitutes a PE provides many mechanisms for companies to avoid corporate income tax liability in a source country. See Addressing the Tax Challenges of the Digital Economy: ACTION 1: 2014 Deliverable, supra note 65, at 19 (identifying Action 7 as redefining a PE to limit loopholes that allow businesses to easily circumvent PE status). The digital business model accelerates the ability of businesses to structure their activities in foreign jurisdictions such that they are excluded under the PE definition. See Preventing the Artificial Avoidance of Permanent Establishment Status: Action 7: 2015 Final Report, ORG. FOR ECON. COOP. & DEV. [OECD] 10 (2015), https://www.oecd-ilibrary.org/docserver/9789264241220-en.pdf?expires=1648769717&id=id&accname=guest&checksum=324682460872CA5EE00AA07D9B28D999 [https://perma.cc/RWU3-QUKA] (hereinafter Preventing the Artificial Avoidance of Permanent Establishment Status) (referencing the OECD’s work on digital tax challenges as interrelated with the need for definitional changes to the PE principle). The OECD recommended several definitional revisions in 2015 to prevent these tax avoidance problems. Id. at 9–11 (summarizing the impetus for the changes). For example, the OECD introduced a new anti-fragmentation rule intended to prevent exploitive business practices calculated to fit international business activities within a PE exception. Id. at 39–40. The United States, however, declined to adopt the revisions. U.S. DEP’T OF TREASURY, PREAMBLE TO 2016 U.S. MODEL INCOME TAX CONVENTION 9 (2016), https://home.treasury.gov/system/files/131/Treaty-US-Model-Preamble-2016.pdf [https://perma.cc/D755-676D]. Compare Model Tax Convention on Income and on Capital, supra note 65, art. 5(4.1), at M-19–M-20 (introducing the new anti-fragmentation rule), with U.S. DEP’T OF TREAS., supra note 65, art. 5 (excluding the anti-fragmentation rule under paragraph 4.1). The Department of Treasury worried that the revisions might increase compliance burdens on international businesses. U.S. DEP’T OF TREASURY, supra, at 9. This position echoes concerns about entrenching the status quo in the rules of international economic law and that digital business models do not generate international tax concerns. See supra note 44 and accompanying text (explaining the global governance critique that corporate and financial interests align to create incentives to maintain the legal status quo); infra notes 168–173 (describing the U.S. position that digital business models lack uniqueness).


See Wei Cui, The Superiority of the Digital Services Tax Over Significant Digital Presence Proposals, 72 NAT’L TAX J. 839, 847 (2019) (identifying a primary rationale for DSTs as a reallocation of the misaligned current distribution of taxing rights); Zolt, supra note 63, at 112 (indicating the general advantage that the allocation of more rights to residence countries over source countries provides to developed countries).
model of traditional physical businesses. Rather than solely generating revenue directly, many digital businesses generate revenue indirectly, through user participation. For instance, many digital businesses provide free services to consumers for free or offer services at some price below the service’s marginal cost. The consumer service, say a social media platform, generates unique, personalized data on its consumers that subsequently serves as an input for selling services to other platform users, such as advertisers. The digital business can charge a price to advertisers that make up for its loss from the free consumer service. This creates the unique situation where a digital business generates value through the consumer’s participation on the platform in the consumer’s country but may not create taxable income in the source country because it does not have a PE there. This structural feature is most common in multi-sided businesses, in which a user on one side of the platform, such as a digital advertiser, is interested in the activities of users on the other side of the platform, such as the consumer. Although such a business model existed before the digital age, the digital element creates an international tax challenge

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71 Id. Prior to the OECD Agreement, one of the OECD’s international tax reform proposals focused precisely on this indirect user participation revenue stream. See infra note 103 and accompanying text (explaining the user participation proposal). Direct revenue generation is the receipt of an upfront payment for the immediate service or good sold. See Kristoffer Sthen, Indirect and Direct Business Models and Their Effect on Performance in IT Companies, at 6–7 (Feb. 15, 2014) (M.B.A. thesis, Blekinge Institute of Technology) (DiVA Portal), http://www.diva-portal.org/smash/get/diva2:830154/FULLTEXT01 [https://perma.cc/4TPX-ZGJ2] (defining direct and indirect business models). User participation represents indirect revenue generation when the consumer-user makes no upfront payment, but their interaction with the platform generates revenue for another platform service, such as digital advertising. See Sthen, supra, at 6–7 (describing an indirect business model wherein a car dealer indirectly generates revenue to its maintenance business by selling the cars themselves at a discount).

72 Commission Staff Working Document Impact Assessment, supra note 60, at 114–15; Cui, supra note 52, at 72. For example, most marketplaces like Amazon, social media platforms like Facebook, and search engines like Google offer their services free of charge to consumers. See Cui, supra note 52, at 85 (explaining the revenue and cost model of multisided digital businesses).

73 Cui, supra note 52, at 72. For instance, although Google provides its online search service free to consumers, the business’s moneymaker is the ad space it sells to advertisers, primarily on a per click basis. Matthew Johnston, How Google (Alphabet) Makes Money, INVESTOPEDIA, https://www.investopedia.com/articles/investing/020515/business-google.asp [https://perma.cc/6RSA-MRMJ] (Feb. 25, 2022). Its ad prices vary based on the competitiveness of the search terms. Id. Alphabet, Google’s parent company, does not report out the costs of its individual business holdings, but one can easily infer that Google’s ad pricing more than makes up for the loss it makes on the consumer-side of the platform. See Cui, supra note 52, at 85 (explaining the price differentiation platforms can utilize on either side of their user markets).


75 Cui, supra note 69, at 847–48.
as users can participate and generate value from multiple jurisdictions, often doing so without making a payment themselves. \footnote{Id. at 848. Although a payment may never come from the jurisdiction where first-side users, say Facebook consumers, reside, the amount or value of those consumer-users in that market will dictate what Facebook charges to users on the other side of the platform seeking access to those consumer-users. \textit{See id.} (explaining the pricing structure of multinational multi-sided digital platforms).}

Finally, the global dominance of a handful of digital MNEs in any given sector presents the perception and possibility that countries leave large amounts of tax revenue on the table. \footnote{See Commission Staff Working Document Impact Assessment, supra note 60, at 115–16. This challenge arises because digital businesses appear to rely more heavily on marketing intangibles than traditional businesses that rely on physical assets. \textit{Id.} Marketing intangibles include assets that aid a business in selling its services such as customer data, trademarks, trade names, and relationships with the customers in a particular market. \textit{Deloitte, Tax Challenges of Digitalization: OECD Paper Released 2} (2019), https://www2.deloitte.com/content/dam/Deloitte/au/Documents/tax/deloitte-au-tax-insights-challenges-digitalisation-consultation-200219.pdf [https://perma.cc/CCD9-ZUHY]. Reformers perceive an intrinsic connection between marketing intangibles and the market in which a company transacts business. \textit{Id.} Marketing intangibles are hard to value but it appears that they contribute more to firm value in a digital business than its physical assets. \textit{See Commission Staff Working Document Impact Assessment, supra note 60, at 115} (comparing the value of marketing intangibles in digital and traditional businesses). This is somewhat intuitive given that, for example, digital businesses use troves of customer data, a form of marketing intangible, to then sell customers better products. \textit{See id.} at 131 (demonstrating why the global nature of MNEs and their reliance on marketing intangibles to sell presents an international tax dilemma under the current rules). Naturally, some customer data depends on the distinctive tastes of consumers in a particular market. See McLoughlin, supra note 11, at 660 (quoting a U.S. official explaining the consensus that a natural connection exists between market jurisdiction and the value of marketing intangibles). Therefore, if digital businesses generate a greater proportion of the firm’s value through marketing intangibles, the value of which is specific to the jurisdiction of the intangible’s deployment, then there are reasons to doubt that the PE principle fairly allocates taxing rights between source and resident countries. \textit{See Commission Staff Working Document Impact Assessment, supra note 60, at 131} (describing the mismatch between the PE principle and the value creation associated with marketing intangibles within a source country); \textit{see infra} note 85 and accompanying text (discussing the marketing intangibles proposal for digital tax reform).

\footnote{See Commission Staff Working Document Impact Assessment, supra note 60, at 116 (explaining the monopolistic and oligopolistic tendencies of digital firms).}

\footnote{Id.}

\footnote{See \textit{id.} at 116–17 (discussing and illustrating the dominance of digital firms, not just within digital sectors, but within the global economy generally). Digital MNEs are firmly entrenched among the world’s most valuable corporations. \textit{Compare Commission Staff Working Document Impact Assessment, supra note 60, at 117} (providing a table that includes seven digital businesses among the top fifteen companies globally by market capitalization in 2017), \textit{with PWC, Global Top 100 Companies by Market Capitalization} 22 (2021), https://www.pwc.com/gx/en/audit-services/publications/}
hanced tax avoidance capabilities or the value creation system of such firms might shield an enormous amount of otherwise taxable income.81

Collectively, these disruptive business characteristics, combined with the forces of globalization, leave many world leaders with the impression that digital MNEs do not pay their fair share in taxes.82 Tax reform proposals and agreements attempt to adapt international tax practices to each of these features.83 Implicit and sometimes explicit in reform efforts is the proposition that the physical nexus used to allocate taxing rights is an outdated principle for the digital age.84 Thus, many reform proposals, including the OECD Agreement, modify the PE standard with a significant digital or economic presence test
that encompass digital MNEs and provides a new basis on which countries can tax corporate income.\textsuperscript{85}

2. DSTs in the Context of International Tax Principles

DSTs are anomalous from other attempts to tax digital businesses because they seek to tax revenues from specific types of transactions, rather than corporate profits.\textsuperscript{86} As a result, policymakers and scholars generally understand DSTs as a turnover tax.\textsuperscript{87} On their face, DSTs generally apply to both foreign

\textsuperscript{85} Tax Challenges Arising from Digitalisation—Interim Report 2018: Inclusive Framework on BEPS, supra note 5, at 135–39; see infra notes 95–112 (describing the nexus rule that the OECD Agreement adopts). A previous proposal of a significant economic presence test replaced the PE principle to allow for a taxable presence to arise when a non-resident business maintains “purposeful and sustained interaction” in a market jurisdiction resulting from digital means. Addressing the Tax Challenges Arising from the Digitalisation of the Economy, supra note 83, at 16. A primary but not dispositive factor in such a determination was revenue. Id. Other factors included the local user base and its associated data, content created within the jurisdiction, billing in the local currency, or the use of substantial marketing and sales campaigns to attract customers. Id. Separate from its temporary DST proposal, the EU proposed a more permanent significant digital presence solution. Communication on the EU Digital Taxation Directive, supra note 8, at 6. Under the proposal, a significant digital presence would exist if the entity: (1) supplies digital services to users in a Member State to the extent that it generates more than €7 million in revenue; (2) there are at least 100k users of the entity’s digital services in the Member State; or (3) the entity concludes more than three thousand business contracts to deliver digital services to users in the Member State in the relevant year. Proposal for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence, art. 4, at 16–17, COM (2018) 147 final (Mar. 21, 2018). Some commentators refer to these kinds of nexus tests as “virtual PE.” Faulhaber, supra note 5, at 161; KPMG, supra note 10, at 56. Another proposal within the OECD, that the United States initially favored, focused exclusively on the issue of marketing intangibles. McLoughlin, supra note 11, at 660. This approach allocated greater taxing rights to the market jurisdiction of marketing intangible deployment. Addressing the Tax Challenges Arising from the Digitalisation of the Economy, supra note 83, at 12. It did so by attributing all or a portion of the non-routine income that an MNE attributed to its marketing intangibles to the market jurisdiction, regardless of the legal title of such intangibles or where the assets underwent substantial business use, development, or upkeep. Id. at 15. Although this proposal had important implications for digital businesses, it targeted the more general phenomenon of companies shifting the legal residence of certain assets to lower tax jurisdictions. See id. at 11 (noting the broader scope of the proposal beyond digital business models); Commission Staff Working Document Impact Assessment, supra note 60, at 133–35 (noting that the tax shifting opportunities available for relocating intangible assets exist beyond digital MNEs).

\textsuperscript{86} KELSEY ET AL., supra note 11, at 95; Faulhaber, supra note 5, at 159. For example, a significant economic presence test would allocate taxing rights to a market jurisdiction for a formula-based proportion of the MNE’s overall income. Addressing the Tax Challenges Arising from the Digitalisation of the Economy, supra note 83, at 16.

\textsuperscript{87} Tax Challenges Arising from Digitalisation—Interim Report 2018: Inclusive Framework on BEPS, supra note 5, at 140–41; KELSEY ET AL., supra note 11, at 95; Andres Baez Moreno & Yariv Brauner, Taxing the Digital Economy Post BEPS . . . Seriously, 58 COLUM. J. TRANSNAT’L L. 121, 179–80 (2019); Faulhaber, supra note 5, at 159. Turnover taxes are taxes against the value of a firm’s sales revenue. Young Ran (Christine) Kim, Digital Services Tax: A Cross-Border Variation of the Consumption Tax Debate, 72 ALA. L. REV. 131, 159 (2020) (citing Turnover Tax, ROUTLEDGE DICTIONARY OF ECONOMICS (3d ed. 2013)). Although India, for example, terms its DST as an equalization levy, it structures it similarly to other DSTs as a tax against the value of a firm’s revenues.
and domestic businesses, but, like tariffs, DSTs do not apply equally to foreign and domestic companies due to their revenue thresholds. This differential treatment aligns with DST jurisdictions’ common policy objective to re-level a playing field that appears to allow digital firms to pay a lower tax burden—particularly foreign digital firms.

Although countries typically imposed DSTs only as temporary measures, they were particularly controversial because they operated outside the existing international framework on taxing the income of foreign suppliers. Whether

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88 See Tax Challenges Arising from Digitalisation—Interim Report 2018: Inclusive Framework on BEPS, supra note 5, at 140–41 (describing the general applicability of DSTs to foreign and domestic firms); Huber & Lu, supra note 4, at 8–10 (arguing that DSTs operate like tariffs under WTO law); infra notes 93–94 and accompanying text (describing the basic effect of revenue thresholds and statutory definition of digital services on the companies subject to the tax); infra notes 151–156 (explaining the U.S. position that such statutory thresholds effectively discriminate against U.S. companies). But see Equalisation Levy, 2016, § 165(2), amended by Finance Act, 2020, §§ 152–153 (India) (excluding domestic companies from DST liability). Because of the DST’s resemblance to a tariff, although it is technically a tax, it is no surprise that concerns about a global trade war intermixed with DSTs. See supra notes 2–5 and accompanying text (discussing how DSTs increased global trade war risks).

89 Tax Challenges Arising from Digitalisation—Interim Report 2018: Inclusive Framework on BEPS, supra note 5, at 141; see supra notes 59–85 and accompanying text (analyzing the tax challenges of digital MNEs).

90 Baez Moreno & Brauner, supra note 87, at 136, 178–79; see Tax Challenges Arising from Digitalisation—Interim Report 2018: Inclusive Framework on BEPS, supra note 5, at 179–80 (discussing reasons why countries believed interim measures were necessary in the absence of a global
DSTs were legal under international law was ambiguous because their structure clashed with at least two other interrelated international tax norms. First, DSTs may conflict with a longstanding international consensus against double taxation, at least without a consensus solution on how to implement them. Second, DSTs may appear to discriminate against foreign corporations because of their revenue thresholds and narrow application to a particular set of digital services sectors—primarily marketplaces and digital advertising—in which only a small subset of digital MNEs dominate. This narrow application raised consensus). Some analysts suggest that such measures violate tax treaty laws or even WTO rules. See KELSEY ET AL., supra note 11, at 104–05 (noting that whether DSTs violate international rules depends on classification interpretation); Pirlot, supra note 87, at 491–92 (summarizing the arguments for how destination-based taxes, like DSTs, might violate WTO rules, specifically the Global Agreement on Trade in Services, but concluding that such arguments are not as convincing as generally supposed). But see Katherine E. Karnosh, Comment, The Application of International Tax Treaties to Digital Services Taxes, 21 CHI. J. INT’L L. 513, 547 (2021) (concluding that DSTs are consumption taxes to which international tax treaties do not apply). The OECD did not make a recommendation for introducing interim measures but explicitly called on countries enacting such measures to design them under the legal constraints that bilateral tax treaties, WTO rules, and other international obligations impose. Tax Challenges Arising from Digitalisation—Interim Report 2018: Inclusive Framework on BEPS, supra note 5, at 181.

See Ruth Mason & Leopoldo Parada, The Legality of Digital Taxes in Europe, 40 VA. TAX REV. 175, 217 (2020) (arguing that national DSTs discriminate against foreign corporations, but concluding that Court of Justice of the European Union decisions indicated a willingness to uphold such taxes); Fetzer & Dinger, supra note 9, at 39–40 (emphasizing the double taxation challenges DSTs pose because they do not clearly fit within the scope of existing bilateral tax treaties).

92 See Addressing the Tax Challenges of the Digital Economy: ACTION 1: 2014 Deliverable, supra note 65, at 31, 36 (reiterating the importance of eliminating double taxation under bilateral tax treaties). Double taxation occurs when multiple jurisdictions impose tax liability against the same income of the same taxpayer. Id. at 36. The concern about double taxation from DSTs suggests that a profitable company is subject to tax on the DST revenue twice, once as revenue in the transaction and again as profit. REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 56–57; see infra notes 160–165 and accompanying text (explaining the U.S. objection to DSTs on double taxation grounds). Unless the resident country with the right to tax the income allows the DST as a deduction against its taxable income, a double taxation risk exists. REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 56–57; see Org. for Econ. Coop. & Dev. [OECD], supra note 2, at 2 (preventing double taxation by requiring a resident-jurisdiction exemption or credit when a company is subject to a source-jurisdiction Pillar One tax). This is a common critique of transaction taxes more generally. Brock, supra note 20, at 169. Avoiding double taxation, however, is a policy underlying the bilateral tax treaty system that generally covers only income tax, not transaction or consumption taxes. STRENG & SALACUSE, supra note 42, § 16.04[B]; Kim, supra note 87, at 166. Therefore, using the consumption tax conception of DSTs reduces the double taxation concern. Kim, supra note 87, at 171–72.

93 E.g., REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 35–47; see infra notes 151–159 and accompanying text (explaining the U.S. discrimination objection to DSTs). For instance, the French DST targeted only marketplace and digital advertising businesses of a certain size. See Loi 2019-759 du 24 juillet 2019 portant création d’une taxe sur les services numériques et modification de la trajectoire de baisse de l’impôt sur les sociétés [Law 2019-759 of July 24, 2019 on the Creation of a Tax on Digital Services and Modification of the Trajectory for the Reduction of Corporate Tax], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 25, 2019, art. 299-II(1)–(2), -III [hereinafter French DST Statute] (defining the scope of the tax). In July 2019, France became the first country to enact a DST, which applied retroactively to January 2019.
concerns over whether DSTs violated the WTO’s national treatment rules that require that member countries not treat locally-produced goods and services more favorably than foreign-produced goods and services.\textsuperscript{94}

D. The OECD Agreement

In 2013, the OECD, a group consisting of mostly developed countries that works to set global economic standards, began its Base Erosion and Profit Shifting (BEPS) project.\textsuperscript{95} The project sought to directly address some of the concerns that emerged from the rise of globalization and the ability of MNEs to reduce their tax burdens.\textsuperscript{96} In 2016, with the adoption of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (Inclusive Frame

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\textsuperscript{95} See supra note 1 (explaining the work of the OECD generally). The Base Erosion and Profit Shifting (BEPS) project responds to the challenges discussed in Part IC of this Note, as well as additional global tax issues. See supra notes 56–94 (explaining the disruptive impact of globalization and digitalization on the traditional international tax regime). See generally Addressing the Tax Challenges of the Digital Economy: ACTION 1: 2014 Deliverable, supra note 65 (explaining the scope of the BEPS project).

\textsuperscript{96} Addressing the Tax Challenges of the Digital Economy: ACTION 1: 2014 Deliverable, supra note 65, at 7–8. Specifically, BEPS aimed to promote tax fairness to individuals and resolve issues around declining government revenues that place constraints on public investment. Id. The project framed itself around the premise that BEPS harms: (1) governments in the form of reduced tax revenues, especially in developing countries; (2) individuals in the form of forcing them to bear a larger share of the tax burden; and (3) businesses in the form of reputational deterioration. Id. at 8. Other key action items included enhancing transparency for preferential tax regimes in order to deter harmful tax shifting strategies, countering tax treaty abuses, and stopping arbitrary PE avoidance. Id. at 18–20; see supra note 67 (discussing the changes that the OECD made to the PE definition under Action 7).
The project’s scope expanded beyond traditional OECD membership to include developing countries. The Inclusive Framework was the first time that developing countries received an invitation to meaningfully participate in such a global effort to design the rules of international corporate taxation.

The BEPS project organized international tax reform work around fifteen action items, the first of which deals exclusively with the taxation challenges of the digital economy. In 2019, the OECD revealed a two-pillar blueprint that proposed several policy options directed at various features of the global digital business model. Pillar One addressed the nexus and profit allocation challenges of digital company business models, while Pillar Two addressed broader BEPS issues related to MNEs that remained unaddressed in other BEPS workstreams. The OECD’s framework generally disfavored the proliferation

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99 Addressing the Tax Challenges of the Digital Economy: ACTION 1: 2014 Deliverable, supra note 65, at 14–15, 24. Many of the more specific BEPS project action items overlap with the broader issues of addressing tax challenges in the digital economy. See, e.g., Orly Mazur, Transfer Pricing Challenges in the Cloud, 57 B.C. L. REV. 643, 679–87 (2016) (identifying the unique challenges that cloud computing poses to the project’s work on transfer pricing); supra note 67 (discussing the OECD’s work on Action Item 7 modifying the definition of PE to prevent its exploitation to avoid corporate tax liabilities).


of DSTs. Pillar One instead focused on several distinct proposals, each of which presented new nexus and allocation rules that distributed greater taxing rights to the market jurisdiction in which customers or users are located.

On October 8, 2021, the OECD announced a final agreement on the two-pillar solution. Although the main headline was the Pillar Two solution for a global minimum tax, the OECD also announced the adoption of Pillar One’s nexus and allocation principles that shift more taxing rights to source countries. Although 137 developed and developing countries signed on to the agreement, four developing country members of the Inclusive Framework—Kenya, Nigeria, Pakistan, and Sri Lanka—decided not to join the global pact.

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102 Addressing the Tax Challenges Arising from the Digitalisation of the Economy: Highlights, supra note 97, at 34–35. The OECD estimated that the proliferation of DSTs or other unilateral tax measures absent an international consensus would negatively affect global GDP, increase global trade disputes and retaliation, and “undermine tax certainty and investment.” Id. at 35.

103 Id. at 9–17; Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy, ORG. FOR ECON. COOP. & DEV. [OECD] 11 (2019), https://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.pdf [https://perma.cc/4RH4-5E2A]; see supra note 85 (discussing the significant economic presence and marketing intangibles proposals). The third proposal under Pillar One, the user participation proposal, reallocated some taxing rights according to the location of a digital MNE’s “active and participatory user bases.” Addressing the Tax Challenges Arising from the Digitalisation of the Economy, supra note 83, at 10. This proposal derived from the proposition that digital businesses—especially social media platforms, marketplaces, and search engines—derive critical value in the form of brand building, data, content, and network effects from users. Id. at 9–10; see supra note 70–77 and accompanying text (explaining how users contribute value to digital businesses). The user participation proposal revised the traditional PE nexus rule to allow for taxable presence where a digital MNE has an active and participatory user base, regardless of the absence of a physical presence in that jurisdiction. Addressing the Tax Challenges Arising from the Digitalisation of the Economy, supra note 83, at 10. The proposal did not define what qualified for such a user base. See id. at 9–11 (leaving undefined what constitutes qualifying sustained user engagement that gives rise to taxable value). Recall that the current PE rule does not contemplate the allocation of taxing rights on any basis other than PE. See supra notes 65–66 and accompanying text (describing how the bilateral tax treaty system allocates taxing rights on the basis of the PE principle). Thus, each proposal constituted an attempt to develop a “novel concept of business presence.” ORG. FOR ECON. COOP. & DEV. [OECD], supra, at 11; cf. Direct Mktg. Ass’n v. Brohl, 575 U.S. 1, 18 (2015) (Kennedy, J., concurring) (acknowledging that a business can be substantially present in a jurisdiction regardless of whether that presence is physical).

104 International Community Strikes a Ground-Breaking Tax Deal for the Digital Age, supra note 1.


106 Rappeport & Alderman, supra note 105; Mauritania Joins the Inclusive Framework on BEPS and Participates in the Agreement to Address the Tax Challenges Arising from the Digitalisation of the Economy, OECD (Nov. 4, 2021), https://www.oecd.org/tax/beps/mauritania-joins-the-inclusive-
The adopted Pillar One solution allows market countries with nexus over an MNE to allocate a formulaic amount of the MNE’s residual profit to their jurisdiction for taxation. ¹⁰⁷ For the market country to obtain a nexus, the MNE must derive a minimum of €1 million in revenues in that market jurisdiction, with a lower threshold for jurisdictions with a low level of gross domestic product. ¹⁰⁸ Determining whether revenues arise in a particular jurisdiction depends on specific rules for different transaction types, including those for marketplace platforms, “digital goods,” and digital advertising. ¹⁰⁹ The new rule only applies to MNEs with global revenues over €20 billion and 10% profitability. ¹¹⁰ Finally, to avoid double taxation on the same profits in the residence country, resident countries must exempt or credit any taxes that the MNE pays pursuant to the Pillar One rule. ¹¹¹ The consensus on Pillar One only becomes binding on the signatories upon the adoption of a Multilateral Convention (MLC) that will more precisely outline the revenue allocation rules. ¹¹²

¹⁰⁷ See Org. for Econ. Coop. & Dev. [OECD], supra note 2, at 2 (explaining the amount of profit allocation, and deeming MNE revenue to originate in the jurisdiction where the company’s goods and services are “used or consumed”).

¹⁰⁸ Id. at 1. The nexus minimum is adjusted down to €250,000 for developing countries with less than €40 billion in GDP. Id.

¹⁰⁹ Pillar One—Amount A: Draft Model Rules for Nexus and Revenue Sourcing, ORG. FOR ECON. COOP. & DEV. [OECD] 5–6 (2022), https://www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-a-nexus-revenue-sourcing.pdf [https://perma.cc/5EEF-LF99]. Under the Pillar One Draft Model Rules for Nexus and Revenue Sourcing, “[d]igital [g]oods” refers to providing digital content, such as streaming entertainment, apps, and online news. Id. at 14. Generally, the rules source both digital goods and digital advertising revenues entirely to the location of the end-user or viewer. See id. at 6–7 (indicating that the source of revenue is the jurisdiction where a business customer uses the digital good, a consumer using digital goods is located, or the viewer of a digital ad is located). The Model Rules refer to marketplace platforms as “[o]nline [i]ntermediation [s]ervices” and source half the revenues earned from such a service to the location of the purchaser of items on the platform and half to the location of the seller of the items. Id. at 7; see id. at 31 (defining online intermediation services). Online intermediation services exclude the sale of items on an online platform that comprise part of the platform operator’s own inventory. Id. at 31. This effectively excludes the sales of traditional retailers who sell their own product on their own websites, such as Amazon’s sales of its own goods on Amazon. Id. (excluding sales of inventory that the platform owns from the definition of online intermediation services).

¹¹⁰ Id. at 2. MNE revenue and profitability is “calculated using an averaging mechanism,” while the thresholds may reduce to €10 billion if the OECD deems implementation of the tax successful and certain after seven years. Id.

¹¹¹ Id. at 2.

¹¹² Id. at 3. The OECD expects to have the Multilateral Convention (MLC) ready for signing in 2022, allowing the tax to take effect in 2023. Id.
E. The Emergence of DSTs in Developing Countries

This Section introduces some notable DSTs that developing countries across Asia, the Middle East, Latin America, and Africa adopted or proposed prior to the OECD Agreement. Understanding developing country DSTs provides an important evaluative benchmark from which to assess whether and how the OECD Agreement incorporated developing country concerns about the tax implications of a globalizing and digitalizing world economy.

Table 1. Sampling of Developing Country DSTs

<table>
<thead>
<tr>
<th>Country</th>
<th>Tax Rate</th>
<th>Services</th>
<th>Thresholds</th>
<th>Treatment</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>India</td>
<td>6%</td>
<td>Digital advertising</td>
<td>₹100k INR ($1,300 USD) in annual digital advertising revenues</td>
<td>Non-resident companies</td>
<td>Effective May 14, 2016</td>
</tr>
</tbody>
</table>

113 See infra notes 115–119 and accompanying text. The sample of DSTs discussed in detail in this Section represents prominent developing country DSTs across major world regions as well as those for which there was sufficient accessible documentation available for study. See generally KPMG, supra note 10 (providing a more robust cross-section of digital tax measures, including but not limited to DSTs, around the world). The table in Subsection 1 of this Section uses the following terms to compare DSTs among developing countries. See infra notes 115–119 and accompanying text (explaining different DSTs in developing countries). “Tax rate” refers to the amount of tax that a country charges against any digital transaction to which the DST applies. See Tax Rate, BLACK’S LAW DICTIONARY, supra note 87 (defining “tax rate” as the percentage expression that determines the amount of tax that someone owes). “Services” refers to the scope of digital transactions that the DST covers. See supra notes 93–94 (explaining that DSTs primarily apply to digital advertising and marketplace transactions, two digital sectors that a select group of MNEs dominate). “Thresholds” refers to the revenue requirements for the DST to apply to a particular company. See supra notes 93–94 and accompanying text (noting how the revenue threshold serves as a potential mechanism to discriminate between domestic and foreign companies). “Treatment” refers to the scope of the DST in terms of whether it applies to resident or non-resident companies that meet the thresholds. See supra notes 88–89 and accompanying text (discussing the general approach of DSTs to resident and non-resident companies). Note: because not all platforms support tabular material, Table 1 is archived at https://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/63-5/connor_table.pdf [https://perma.cc/Q3PF-EUM8].

114 See Termination of Turkey DST Investigation, supra note 2, at 68,296 (suggesting sufficient Turkish satisfaction for Turkey to suspend their DST); Termination of India DST Investigation, supra note 2, at 68,527 (suggesting that there is sufficient satisfaction with the OECD Agreement for India to suspend their DST); Johnston, supra note 6, at 1280 (noting Nigeria’s decision not join the OECD Agreement); Onu, supra note 6 (showing that after declining to join the OECD Agreement, Nigeria opted to adopt its own DST); infra notes 267–286 (analyzing whether the OECD Agreement makes progress toward a more just global governance that takes heed of developing country concerns).

115 See generally Equalisation Levy, 2016, § 165(2), amended by Finance Act, 2020, §§ 152–153 (India). As the world’s second largest country by population and with a burgeoning digital economy projected to account for $355 billion to $425 billion in GDP by 2025, India was the first developing country to adopt a DST. Id.; KPMG, supra note 10, at 6–13 (illustrating the timeline of developing and developed country DSTs); MCKINSEY GLOB. INST., DIGITAL INDIA: TECHNOLOGY TO TRANSFORM A CONNECTED NATION 1 (2019), https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/Digital%20India%20Technology%20to%20
<table>
<thead>
<tr>
<th>Country</th>
<th>Rate</th>
<th>Service</th>
<th>Amount</th>
<th>Non-resident</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>India</td>
<td>2%</td>
<td>Online marketplaces</td>
<td>₹20 thousand INR ($275 thousand USD)</td>
<td>Non-resident companies</td>
<td>Apr. 1, 2020</td>
</tr>
<tr>
<td>Brazil</td>
<td>10.6%</td>
<td>Digital advertising, electronic communications, online marketplaces</td>
<td>$20 million worldwide monthly revenues and R$6.5 million BRL monthly revenues</td>
<td>Applies to services targeting Brazilian users and businesses</td>
<td>Proposed in 2020</td>
</tr>
</tbody>
</table>

Under this forecast, India’s digital economy would account for 8–10% of total GDP by 2025. MCKINSEY GLOB. INST., supra, at 10. India’s DST took the form of a 6% equalization levy on non-resident entities for revenues that a specific service generated, regardless of the existence of a PE. Equalisation Levy, § 165(1) (India). Specified services included online advertising and providing digital advertising space. Id. § 164(i). Although the tax generally applies to non-residents, it excludes non-residents with a PE if the entity’s digital advertising revenues effectively connect to the entity’s PE. Id. § 165(2)(a). Business residents, or those with a PE in India who receive a specified service from a non-resident, deduct the amount of the tax from the amount they owe for the service and then pay the accrued deductions to the government once a month. Id. § 166(1)–(2). The levy excludes non-resident businesses that generate less than ₹100 thousand INR (~$1,300 USD) in covered revenues from a resident Indian business or non-resident Indian business with PE. Id. § 165(2)(b). Finally, the levy only applies to business-to-business transactions of the specified services. Id. § 165(c).

In 2020, India expanded the equalization levy to revenues that “e-commerce operators” receive from “e-commerce supply or services” provided to Indian residents or targeted to individuals using an internet protocol address in India. Equalisation Levy, § 165A (India). The statute essentially defines e-commerce operators as non-resident marketplace platforms. Id. § 164(ca). Covered revenues include those generated from the platform operator selling its own goods online, the platform operator facilitating the sale of third-party goods or services online, or the platform operator providing online services. Id. § 164(cb). The two percent levy on such services excludes marketplace platforms that generate their Indian revenues through a PE in India or those with annual revenues under ₹20 million INR (~$270,000 USD). Id. § 165A(2)(i), (iii). The e-commerce tax also excludes any services that are otherwise subject to the 6% digital advertising tax. Id. § 165A(2)(ii). In contrast to the digital advertising tax, the platform operator pays the government the two percent tax on e-commerce directly each quarter, rather than the payee deducting the tax from its payment and remitting to the government each month. Compare id. §§ 165(1), 166(1) (requiring payee to deduct the tax and remit to government), with id. §§ 165A(1), 166A (requiring direct payment by operator).

The Brazilian DST proposed in 2020 would segregate the digital economy, subjecting digital service businesses to different tax rules than traditional brick-and-mortar businesses. Id. The Brazilian proposal applies a 10.6% tax on revenues derived from targeted digital advertising, electronic communications, and online marketplaces for goods and services. Id. The rate for the covered businesses is 3% higher than that applicable for other businesses. Id. An entity subject to the tax must have worldwide monthly revenues above $20 million and Brazilian monthly revenues over R$6.5 million BRL (~$1.2 million USD). Id. Revenues unrelated to the covered services would continue to receive a lower existing rate of 7.6%. Ericson Amaral et al., COFINS-Digital - Bill of Law #131/2020, KPMG, https://midia.kpmg.com.br/Arquivos/06/290575-int3.html [https://perma.cc/VED8-K7BM].
As Table 1 suggests, these DSTs vary in design, often in terms of their revenue thresholds, tax rate, scope of covered digital services, and applicability.
The Digital Tax War Goes Global

120 See infra notes 121–136 and accompanying text (discussing the similarities and differences of the developing countries DSTs presented in Table 1).

121 Equalisation Levy, § 165(1) (India) (applying the DST only to revenues accruing to non-residents); REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 3–5.

122 Law Regarding Digital Service Tax and the Amendment of Various, arts. 1(1), 2(d) (Turk.); (2020) Cap. 470 §§ 4(1), 5(1) (Kenya); see KPMG, supra note 10, at 18 (explaining that the proposed Brazilian DST defines taxpayers without regard to their nationality).

123 COMM. ON TAX’N OF E-COM., PROPOSAL FOR EQUALIZATION LEVY ON SPECIFIED TRANSACTIONS 84 (2016), https://incometaxindia.gov.in/news/report-of-committee-on-taxation-of-e-commerce-feb-2016.pdf [https://perma.cc/W2SR-47WB]. India’s particular concern was that where both foreign and domestic suppliers have a significant economic presence in India, foreign digital businesses have the tax advantage of operating without a PE. Id. Although this model reflects a concern similar to nexus-related solutions, like the OECD’s significant digital presence test, the equalization levy still taxes revenues rather than corporate incomes. See id. at 85 (clarifying that the tax is not a tax “on income” but on the “gross amount of transactions”). As a result, the Indian government believes international tax treaties do not cover the tax. See id. (noting that the OECD’s work on BEPS distinguishes equalization levies from corporate income tax obligations under tax treaties).

124 Compare Equalisation Levy, § 165A(3)(ii) (India) (bringing into scope transactions between multiple non-residents selling the data of Indian residents or users located in India), with (2020) Cap. 470 § 3(1)(c) (Kenya) (including in the DST’s scope the monetization of Kenyan user data on a marketplace platform).

125 See Equalisation Levy, § 165A(1)(ii), (3)(i)–(ii) (India) (applying the DST when neither party is a resident of India, but the business entity is selling Indian user data or targeting digital advertising to users in India). The 2020 amendment added these provisions and may have corrected for an anomalous result which some commentators pointed out. See Cui, supra note 52 at 82. Prior to the amendment, the DST on digital advertising appeared to only apply when an Indian resident purchased digital advertising from a non-resident in order to target users anywhere in the world (in India or another country), but not when two non-residents transacted to specifically target Indian users. Id.


The unique feature of Turkey’s DST is the discretionary authority that it delegates to Turkey’s President to raise or reduce the DST from 1% to 15% or to change the revenue thresholds. Both the Turkey and Kenya DSTs allow the taxpayer to deduct their payment of the tax for corporate income tax purposes.

Kenya’s DST goes further than Turkey’s in its applicability to an even more expansive list of digital services. Similar to Turkey’s DST and Brazil’s proposal, the tax applies to the provision of qualifying digital services to a user in Kenya, regardless of whether the provider is a resident or non-resident. Similar to Turkey’s DST, Kenya’s DST makes provisions for deducting the tax from annual income tax if the taxpayer is a resident or a non-resident with a PE in Kenya. Kenya’s law notably omits any revenue threshold. The Kenya Revenue Authority identified two primary intentions behind the tax. First, noting that traditional tax principles may no longer apply, the DST seeks to

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128 Law Regarding Digital Service Tax and the Amendment of Various Laws, Civil Code, Law No.: 7194 R.G., arts. 4(4), 5(5), 7 Dec. 2019 No. 30971, enacted: 5 Dec. 2019 (Turk.). It is unclear precisely why Turkey decided to make the applicability of the DST subject to such wide executive discretion, or whether the president must consider certain factors in order to make the authorized changes. REPORT ON TURKEY’S DIGITAL SERVICES TAX, supra note 127, at 10–11, 23.

129 Law Regarding Digital Service Tax and the Amendment of Various Laws, art. 6(7) (Turk.); (2020) Cap. 470 § 4(2) (Kenya); General Communique on Digital Services Tax Application, R.G. No. 31074, at III.D (Turk.) (clarifying the deduction provision). A deduction is a legally permitted amount by which a company can reduce its income when determining its total taxable income. Deductions, WEST’S TAX LAW DICTIONARY (2021). As Kenya’s provision makes clear, such a deduction only applies if the company has a PE in the country that would otherwise subject them to Kenyan corporate income tax. (2020) Cap. 470 § 4(2)–(3) (Kenya). Those businesses that do not have a PE are not otherwise subject to corporate income tax under international principles and thus the DST represents a “final tax” for such businesses. Id. § 4(3).

130 See (2020) Cap. 470 § 3 (Kenya) (including all digital marketplace services, downloadable digital content, streaming services, sales of data derived from a digital marketplace, subscription media services, electronic data management, online booking and ticketing, and providing search engine, automated online help, and e-learning services).

131 Id. §§ 4(1), 5(1).

132 Id. § 4(2)–(3).

133 See generally id. (omitting any provision restricting the DST’s application to businesses of a certain size). The broad applicability of the Kenya DST combined with its very small 1.5% tax rate may suggest greater concern about tax equity between the digital sector and traditional business models. See infra notes 194–197 and accompanying text (discussing horizontal tax equity concerns with DSTs). If Kenya were more interested in infant industry protection through the DST as a form of tariff, one might expect a higher tax rate or revenue thresholds. See infra notes 198–203, 262 (discussing the local industry justification for DSTs).

adapt to the challenges of the digital business model.\footnote{Id.; Phanice Munandi, Digital Service Tax an Indicator of Changing Business Processes in Kenya, KENYA REVENUE AUTH. (Sept. 22, 2020), https://www.kra.go.ke/news-center/blog/digital-service-tax-an-indicator-of-changing-business-processes-in-kenya [https://perma.cc/WC8B-7J3Q].} Second, the DST intends to attain tax “equity, fairness and neutrality” between digital and non-digital businesses.\footnote{KENYA REVENUE AUTH., supra note 134, at 2. It is unclear whether the equity that the Kenya Revenue Authority mentioned when justifying Kenya’s DST refers to horizontal tax equity or vertical tax equity. See infra notes 194–197 and accompanying text (discussing the tax equity justification in light of Kenya’s DST design).}


Similar to Kenya’s DST, the ATAF model template taxes gross turnover and includes a large swathe of digital services beyond digital advertising and marketplace platforms.\footnote{See supra note 137, § 3(2), at 3 (providing a definition of digital services that includes digital advertising, online gaming, e-commerce marketplaces, as well as “any other digital services” that “is delivered over the internet” (emphasis added)). ATAF also acknowledged the possibility that DSTs would not generate substantial revenues for African countries. Id. at 1.} ATAF noted several benefits to a DST, including simplicity, rectifying under-taxation of MNEs, and increasing voluntary compliance by ensuring the public perceives the tax system as fair.\footnote{Other developing countries have adopted or proposed solutions that do not take the form of a DST, such as withholding taxes or some general income taxes that utilize variations on the significant digital presence concept. See KPMG, supra note 10, at 14–47 (describing non-DST digital taxation measures that Costa Rica, Indonesia, Malaysia, Mexico, Nigeria, Pakistan, Paraguay, Thailand, Uruguay, Vietnam, and Zimbabwe implemented or proposed). Indonesia opted for a significant digital presence solution but also indicated a willingness to impose a DST if the significant digital presence policy faced legal challenges under the country’s existing tax treaties. Eisya A. Eloksari, Indonesia Taxes Tech Companies Through New Regulation, JAKARTA POST (Apr. 1, 2020), https://www.the
African non-signatories to the OECD Agreement and non-participants in the Inclusive Framework, including Nigeria, Kenya, and Tanzania, continue to maintain interest in DSTs.\(^{140}\) Meanwhile, signatories India and Turkey agreed with the United States to credit any liabilities accruing under their existing DSTs against the new Pillar One tax once implemented, effectively committing to withdraw their DSTs.\(^{141}\) Nevertheless, understanding why the United States and each of these countries initially disagreed about the value of DSTs is critical to evaluating whether the OECD Agreement incorporates developing country concerns.\(^{142}\)

II. THE DST DEBATE

Many of the primary objections to DSTs rely on long-held principles of international taxation, whereas many arguments in favor of DSTs tend to recognize that such principles need tinkering in the digital age.\(^{143}\) This Part elaborates on the policy debate about the efficacy, legality, and practicality of DSTs.\(^{144}\) To illustrate this contrast, Section A begins with a discussion of the primary objections to DSTs, drawing primarily from the United States Trade
Representative’s (USTR) DST investigations. Section B discusses both the justifications embedded within developing country DSTs as well as relevant conceptual defenses to DSTs in the developing country context.

A. Primary U.S. Objections to DSTs

As this Note is most concerned with the implications of the DST debate for how global governance debates occur between developed and developing countries, this Section focuses primarily on legal arguments underlying U.S. opposition to DSTs. Subsection 1 presents U.S. legal arguments opposing DSTs. Subsection 2 introduces a select number of other DST critiques that relate more broadly to the global governance implications of DSTs in international relations.

145 See infra notes 147–186 and accompanying text. The USTR initiated each investigation pursuant to its powers to impose certain remedial trade actions, such as imposing tariffs, if it finds that another country’s actions violate trade agreements, lack justification against international legal rights, or discriminate or burden U.S. commerce. See 19 U.S.C. § 2411(c) (providing the USTR the authority to take various trade actions); see, e.g., REPORT ON TURKEY’S DIGITAL SERVICES TAX, supra note 127, at 7 (citing § 2411(a)–(b)) (referencing USTR’s legal authority to conduct the investigation).

146 See infra notes 187–230 and accompanying text.

147 See infra notes 150–179 and accompanying text. For a survey of more general empirical critiques of DSTs, see, for example, Fetzer & Dinger, supra note 9, at 39–40 (critiquing DSTs on double taxation, ring-fencing, and administrability grounds); John Vella, Digital Services Taxes: Principle as a Double-Edged Sword, 72 NAT’L TAX J. 821, 823 (2019) (objecting to the U.K.’s DST on the grounds of complexity, enforceability, arbitrariness, and its departure from the fundamental principle of taxing at the point of value creation); JOE KENNEDY, INFO. TECH. & INNOVATION FOUND., DIGITAL SERVICES TAXES: A BAD IDEA WHOSE TIME SHOULD NEVER COME 11–23 (2019), https://itif.org/sites/default/files/2019-digital-service-taxes.pdf [https://perma.cc/6Q6F-VBLY] (rejecting the value creation rationale behind DSTs and critiquing DST design for a lack of neutrality with respect to industry, country, business function, and business size); Johannes Becker & Joachim Englisch, EU Digital Services Tax: A Populist and Flawed Approach, KLUWER INT’L TAX BLOG (Mar. 16, 2018), http://kluwertaxblog.com/2018/03/16/eu-digital-services-tax-populist-flawed-proposal/ [https://perma.cc/4W2A-6A3M] (arguing that the limited applicability of the DST fails to equal the playing field as suggested and misconceives value creation in the digital economy). Although some countries recognize these critiques, developing countries perhaps opted for DSTs as a “rough justice” solution due to the potential that developing countries would have difficulty effectively administering an overly technical Pillar One solution. See McLoughlin, supra note 11, at 660 (quoting Lafayette G. “Chip” Harter, III, Deputy Assistant Sec’y for Int’l Tax Affs., U.S. Dep’t of the Treasury) (discussing the tradeoffs of a less precise consensus approach).


149 See infra notes 181–186 and accompanying text.
1. Principal Objections from the USTR DST Investigations

Prior to the OECD Agreement, the United States lodged two primary complaints against DSTs: first, that they discriminate against U.S. companies, and second, that they contravene accepted international tax principles.150 The discrimination argument focuses on the revenue thresholds and the scope of digital services that DSTs cover.151 For example, in the investigation of Turkey’s DST, the USTR provides substantial analysis demonstrating that no Turkish companies meet the revenue thresholds for DST liability.152 Notwithstanding the facial neutrality of the Turkey DST between foreign and domestic companies, the USTR investigation found that over two-thirds of the compa-

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150 REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 13–22. Although the details of the arguments presented in this section draw from USTR’s investigations of the India and Turkey DSTs, these are the primary arguments that the United States asserts against DSTs more broadly. See Press Release, Off. of the U.S. Trade Representative, USTR Releases Findings and Updates in DST Investigations (Jan. 14, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/january/ustr-releases-findings-and-updates-dst-investigations [https://perma.cc/US3P-AF6X] (concluding that Austria’s, Spain’s, and the U.K.’s DSTs were discriminatory, violated international principles, and burdened U.S. commerce); Press Release, Off. of the U.S. Trade Representative, USTR Releases Findings in DST Investigations (Jan. 6, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/january/ustr-releases-findings-dst-investigations [https://perma.cc/SNR9-2KGA] (concluding the same for India, Italy, and Turkey DSTs). The United States also advances the argument that DSTs burden U.S. commerce. See, e.g., REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 22–28. This Note does not address the burdensome claim in any substantial way because many of its components closely relate and overlap with the argument that DSTs violate international tax principles, which is an argument this Note does highlight. See infra note 254 and accompanying text (responding briefly to the burdensome argument). Compare, e.g., REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 27 (discussing double taxation under the burdensome argument), with supra note 62 and accompanying text (explaining that avoidance of double taxation is a core international tax principle embedded in bilateral tax treaties).

151 REPORT ON TURKEY’S DIGITAL SERVICES TAX, supra note 127, at 14–18. Section 301 of the Trade Act of 1974 allows the United States to impose retaliatory duties or other fees on goods or services from a country if it finds that country has enacted a discriminatory policy toward U.S. commerce. 19 U.S.C. § 2411(b)–(c). The discrimination argument also finds justification in principles embedded in bilateral tax treaties that require that countries not engage in discrimination against particular nationals in their tax policies. Tax Challenges Arising from Digitalisation—Interim Report 2018: Inclusive Framework on BEPS, supra note 5, at 183 (discussing the circumstances when Article 24 of the OECD’s Model Tax Convention applies). The non-discrimination principle, however, typically applies only in narrow circumstances and unilateral and interim DST policies do not clearly violate the principle. Id. States generally may enact some tax measures that discriminate between domestic and foreign taxpayers, so long as the measure does not target a particular group of taxpayers on the basis of nationality. Id. In the investigation of the French DST, the USTR found that U.S. resident companies comprised nearly two-thirds of the companies likely facing liability, while only one French resident company, Criteo, likely faced liability. REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 26–27. The USTR report also took issue with the carve outs for other digital services categories, such as digital content or online retailing in which French or other European companies might otherwise have DST liability. See id. at 38 (objecting on the grounds that DSTs specifically target a business model in which U.S. companies excel).

152 REPORT ON TURKEY’S DIGITAL SERVICES TAX, supra note 127, at 14–16.
nies likely facing liability for the Turkey DST resided in the U.S. 153 Building on this finding, the United States contends that the DST targets the U.S.-based GAFA and other well-known U.S. digital businesses. 154 The USTR also implies that the Turkey DST is protectionist because of the Turkish president’s broad discretion to adjust revenue thresholds to protect Turkish companies. 155 Finally, the United States concludes that it is definitionally discriminatory that DSTs cover only digital services, while excluding the non-digital provision of analogous services. 156

Another component of the discrimination argument is that, in many cases, the DST is deductible from other tax liabilities only in the country exacting the DST, such as from income tax. 157 The United States asserts that this discriminates against U.S. companies because the DST liability is not similarly deductible from, say, U.S. income tax liability. 158 This final discrimination claim ap-

153 Id. at 15. Recall that Turkey’s DST applies to all covered services “offered in Turkey,” subject to revenue thresholds. See Law Regarding Digital Service Tax and the Amendment of Various Laws, Civil Code, Law No.: 7194 R.G., arts. 1(1), 2(d), 7 Dec. 2019 No. 30971, enacted: 5 Dec. 2019 (Turk.) (defining covered services and what constitutes providing services in Turkey). By contrast, the discrimination argument is more straightforward regarding the India DST because India’s DST explicitly applies only to non-resident companies. See REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 15 (finding the India DST represents “clear-cut” discrimination).

154 See REPORT ON TURKEY’S DIGITAL SERVICES TAX, supra note 127, at 18 (claiming that U.S. companies face the most discrimination under the DST because of their success in Turkey and globally).

155 Id. at 16.

156 See, e.g., id. at 18; REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 15. The investigation of France’s DST more extensively draws out the implication of protectionism in the USTR’s discussion of the difference between the digital revenues U.S. companies, like GAFA, generate and those that French companies, like Havas or Publicis, generate. REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 40–46. Most of the covered U.S. companies are digitally native—companies that began their existence online—with digital sources comprising the majority of their total company revenues. Id. at 43; Robert Victor, 50+ Digitally Native Companies, HOLLINGSWORTH (Oct. 9, 2019), https://www.hollingsworthllc.com/50-digitally-native-companies [https://perma.cc/2UDR-JCXV]. By contrast, the non-U.S. companies began with traditional business models and have had to play catch-up in the digital age by developing digital revenue sources “to compete with the U.S.-based pioneers in the space.” REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 44.

157 REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 47–49. Of the developing country DSTs described previously, this non-deductibility argument applies to Turkey’s and Kenya’s DST. See supra notes 129, 132 and accompanying text (noting the deductions available from host country income tax).

158 REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 47–49. The argument that countries will not allow digital MNEs to deduct their DST liabilities from home country corporate income tax appears circular. Cf. Faulhaber, supra note 5, at 191 (explaining how unilateral digital tax mechanisms could spark coordination among countries). A country cannot claim that other countries will not deduct the DST for corporate income tax purposes by simply stating that the country with the most liable companies refuses to do so. Cf. id. (envisioning a scenario in which the costs of not implementing a DST could force international cooperation). The argument seems to refuse coordination in order to claim discrimination. Cf. id. (emphasizing that other BEPS initiatives spurred “interlocking unilateral measures” which incentivized global consensus). After all, the entire premise behind global negotiations at the OECD level is to develop a coordinated approach to digital taxation. Brauner, supra note 62, at 991; see Org. for Econ. Coop. & Dev. [OECD], supra note 2, at 2 (imposing a credit or
pears to more directly address the unilateral nature of such taxes, rather than their design or rationale.\textsuperscript{159}

The second primary argument that DSTs undermine international tax principles focuses on the double taxation feature of turnover taxes and the lack of a PE requirement.\textsuperscript{160} The USTR notes that U.S. bilateral tax treaties follow model international tax conventions that do not provide for turnover taxes.\textsuperscript{161} The USTR infers from that omission a principle that income taxation is the only proper ground for corporate taxation.\textsuperscript{162} Moreover, the USTR claims that developed countries have universally abandoned turnover taxes because they
are unfair and act as inefficient barriers to growth.\textsuperscript{163} Perhaps realizing that the absence of provisions for turnover taxes in the relevant model tax treaties does not itself create an international tax principle, the USTR notes that turnover taxes will likely lead to double taxation, a result that the model tax treaties stand firmly against.\textsuperscript{164} Double taxation refers to when, if the taxed entity is profitable, a company faces tax liability twice, once for revenue in the country exacting the DST, and again for that revenue as income in the country where it pays corporate income tax.\textsuperscript{165}

The second part of the international tax principles argument merely makes a largely undisputed claim—that DSTs do not conform to the PE principle to allocate taxing rights because companies may face DST liability without a PE in the relevant jurisdiction.\textsuperscript{166} After all, that is the point of DSTs.\textsuperscript{167}


\textsuperscript{164} See id. (noting that eliminating double taxation across countries is a primary goal of the model tax treaties).

\textsuperscript{165} Id. at 27; REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 57. The argument assumes that the resident country of the company liable for a foreign DST will not allow companies to deduct their DST liability when calculating corporate income tax. REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 48, 57; see REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 27 (omitting any reference to the possibility that a deduction for DST liability in one country could mitigate double taxation concerns); supra note 129 and accompanying text (defining tax deduction). Due to the assumption that other countries will fail to coordinate an approach to DSTs, it is hard to disentangle whether the double taxation critique is really one about international tax principles or about the DST’s unilateral nature of the tax. See supra note 158 and accompanying text (noting the circularity of this assumption as a basis for the argument).

\textsuperscript{166} See, e.g., REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 19–20. Recall, however, that DSTs, when interpreted as a turnover tax, rather than an undercover form of income tax, may avoid a clash with the PE principle altogether. See Kim, supra note 87, at 166–67 (rendering the concerns and principles governing bilateral tax treaties moot if DSTs are consumption taxes).

\textsuperscript{167} See supra notes 63–77 and accompanying text (discussing how the value creation of digital business models do not fit easily within the permanent establishment framework). In its investigation of the French DST, the argument regarding non-compliance with the PE principle went further to suggest that DSTs tax revenues beyond that for which a company with a PE in the relevant jurisdiction might otherwise be liable. REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 63–64. For example, the United States worries that a company with a PE in the DST jurisdiction, and thus already liable to income tax in that jurisdiction, will still be liable for the DST regardless of whether its physical presence in the jurisdiction is responsible for creating the taxable digital services revenues. Id. Nor will the DST always capture the true value of a particular digital transaction to a company. Id. at 64–65. The DST could generate a higher effective tax rate against a company’s digital activities in the jurisdiction than the nominal rate. Id. This is an empirical argument against the DST that may or may not apply depending on the formula the DST uses to calculate the taxable revenues generated in the jurisdiction. See id. (providing a hypothetical in which the relative value of ad placements in France are less than the relative value of U.S. ad placements for a company that primarily does business in the United States but places some ads in France). This point has not appeared in more recent DST investigation results but might apply to the India DST because it only excludes non-residents with a PE if that PE is generating the covered revenues. See Equalisation Levy, 2016, § 165(2)(a), amended by Finance Act, 2020, §§ 152–153 (India) (stating that the Equalisation Levy...
Finally, the United States disputes the justifications of DST proponents, essentially suggesting that there is nothing unique about digital business models that warrant a novel tax. First, the USTR refutes the perception that digital businesses do not pay their fair share of the tax burden. Second, the Unit-

does not subject foreign companies with a PE in India to liability). Ostensibly, some non-residents with a PE would still face DST liability and thus face liability for an impermissible tax under international principles because the taxed revenues lack a connection to the firm’s PE. See REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 64–65 (demonstrating that the DST may tax income in excess of the normal amount of income attributable to a business’s PE in their jurisdiction). Recall that the Kenya and Turkey DSTs allow companies to deduct the DST from corporate income tax in the circumstance that the firm has a PE in their jurisdiction. See supra note 129 and accompanying text (explaining the deductibility of the Kenya and Turkey DSTs). Therefore, this line of argument would be unavailing vis-à-vis these DSTs. Compare, e.g., Equalisation Levy, § 165 (2)(a) (India) (excluding from DST non-residents with a PE “effectively connected” to the generation of covered digital revenues), with Income Tax (Digital Service Tax) Regulations (2020) Cap. 470 § 4(2) (Kenya) (allowing for the deduction of a DST for non-residents with a PE in Kenya).

REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 71–76. The claim that digital business models are not unique for tax purposes is often referred to as the ring-fencing objection—that is, there is no special reason, nor a workable way in which to ring-fence the digital economy because digital business features are taking over all industries. See Letter from KPMG’s Glob. Int’l Tax Servs. Grp. on the OECD Discussion Draft on the Tax Challenges of the Digital Econ., to Comm. on Fiscal Affs. Task Force on the Digital Econ. (Apr. 14, 2014), https://assets.kpmg/content/dam/kpmg/pdf/2014/06/digital-economy-discussion.pdf [https://perma.cc/H7PQ-88A6] (supporting the goal to avoid ring-fencing measures in digital tax reform efforts). In advancing its ring-fencing argument, the USTR frequently cites to OECD documents and other international organizations that also caution against ring-fencing. E.g., REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 15–16 (first citing Addressing the Tax Challenges Arising from the Digitalisation of the Economy, supra note 83, at 24–25; and then citing Digital Tax Rules Should Be Global and Long-Term in Scope, INT’L CHAMBER OF COM. (Mar. 22, 2018), https://iccwbo.org/media-wall/news-speeches/icc-digital-tax-rules-global-long-term-scope/ [https://perma.cc/B69Q-EN8K]). But see Cui, supra note 69, at 849–51 (rejecting ring-fencing objections because they spring from the faulty premise that DSTs make an arbitrary distinction between digital and non-digital businesses). Other parts of the USTR’s French DST investigation reflect these general objections to the premises of DSTs, especially when the investigation focuses on international tax principles. See REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 64 (disputing the idea that digital transactions have an appropriate nexus to DST-enacting jurisdictions). For instance, the USTR claims that, unlike value-added taxes or excise taxes, DSTs apply to transactions that lack any relevant connection to the taxing jurisdiction. Id. In other words, the United States claims that a digital connection to a jurisdiction is no connection at all, thus refuting a basic DST premise. See id. (arguing that DSTs have no legitimate connection to the taxing jurisdiction as compared to other forms of taxation); see also Press Release, Steven T. Mnuchin, Sec’y, U.S. Dep’t of Treasury, Statement on OECD’s Digital Economy Taxation Report (Mar. 16, 2018), https://home.treasury.gov/news/press-releases/sm0316 [https://perma.cc/ZB7Q-54J8] (objecting to isolating digital companies for tax reform). General objections to the premise of DSTs, did not appear in the most recent developing country investigations, and therefore, these positions draw primarily from the investigation of the French DST. Compare, e.g., REPORT ON TURKEY’S DIGITAL SERVICES TAX, supra note 127, at 2 (outlining the legal arguments without reference to the premise of DSTs), with REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at ii–iii (outlining legal arguments with inclusion of a section disputing the premises justifying DSTs).

REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 71–73. The USTR cites empirical evidence that digital businesses pay at least the same, if not higher, average tax rates than traditional companies and strongly disputes contradictory studies that French and EU assessments use. Id. at 72–73 (citing Matthias Bauer, Digital Companies and Their Fair Share of Taxes: Myths and Mis-
ed States rejects theories that users systematically contribute value to digital businesses either through content creation, data, or network effects. For example, the United States challenges the argument that users create value in the form of their data by claiming that the data is merely a form of payment for an otherwise free service that the platform provides, such that the value of the service to the user does not go uncompensated. Where the United States concedes that some user value creation may exist on digital platforms, the argument doubts that the claimed user value is sufficiently valuable to the company to outstrip the value of the service that the company provides in exchange. Thus, the United States concludes that user value is not a sufficient rationale for DSTs.

Notably, the U.S. position on the superiority of existing international tax principles contrasts, or even contradicts, with domestic legal developments. In 2016, South Dakota passed a sales tax that would allow it to tax remote sellers who lack physical presence in South Dakota to prevent further tax base erosion. The tax set revenue thresholds, similar to DSTs, as well as transaction volume thresholds, to determine whether the tax applied to a particular taxpayer. In 2018, in South Dakota v. Wayfair, Inc., the U.S. Supreme Court upheld the tax against a constitutional challenge, overruling precedents that...
had required physical presence. In requiring only that the taxpayer have a substantial nexus to the state for tax liability to attach, the Court reasoned that a nonsensical physical presence requirement is “unfair and unjust” in an increasingly digital economy. The Court specifically noted the problems of tax evasion and the exacerbation of state revenue shortfalls that the growth of the digital economy caused. After the Court’s greenlight on digital tax measures, Maryland became the first state to adopt a tax on digital advertising revenues in 2021, and other states are considering similar digital tax measures.

177 Wayfair, Inc., 138 S. Ct. at 2099. The digital marketplace businesses Wayfair LLC (Wayfair), Overstock.com, Inc. (Overstock.com), and Newegg Commerce, Inc. (Newegg), that had no employees or property in South Dakota, challenged the constitutionality of the law on the undisputed basis that it conflicted with two U.S. Supreme Court precedents requiring that an entity have a physical presence in order for a state to subject it to state tax liability. Id. at 2089 (first citing Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill., 386 U.S. 753 (1967), overruled by Wayfair, Inc., 138 S. Ct. 2080; and then citing Quill Corp. v. North Dakota, 504 U.S. 298 (1992), overruled by Wayfair, Inc., 138 S. Ct. 2080).

178 Id. at 2094–96 (claiming that the differential tax treatment between physical and digital businesses “simply makes no sense”). The Court appeared to pick up on additional rationales that echo in developing country arguments in the international DST debate, including increasing compliance and reducing administrative costs. Compare id. at 2100 (discussing the compliance and administrability benefits of the South Dakota tax), with supra note 139 and accompanying text (noting ATAF’s compliance consideration in advancing its model DST), and infra notes 209–211 and accompanying text (identifying simplicity, efficiency, and compliance concerns of DST-enacting jurisdictions). But see Wayfair, Inc., 138 S. Ct. at 2103–04 (Roberts, C.J., dissenting) (arguing that compliance costs of new nexus rules that do not require physical presence may unfairly overburden small businesses). The Court also appeared to recognize, obliquely, the value that location-specific users contribute to digital businesses. See id. at 2095 (majority opinion) (explaining that a company is physically present in a jurisdiction through their ability to track data on customers located in the state).

179 Wayfair, Inc., 138 S. Ct. at 2096–97. Three years prior to the Court’s decision in 2018 in South Dakota v. Wayfair, Inc., the Court contemplated overruling the physical nexus rule. Direct Mktg. Ass’n v. Brohl, 575 U.S. 1, 16–19 (2015) (Kennedy, J., concurring). In 2015, in Direct Marketing Ass’n v. Brohl, the U.S. Supreme Court allowed a suit challenging a Colorado tax law that required online businesses that sold into the state without collecting taxes to make customers aware of the state’s sales and use taxes. Id. at 4–7 (majority opinion). Prior to Direct Marketing Ass’n, in 1992, in Quill Corp. v. North Dakota, the Court had reaffirmed precedent requiring physical nexus to impose use taxes on out-of-state catalogue businesses. See Quill Corp., 504 U.S. at 311–12, 314 (citing Nat’l Bellas Hess, Inc., 386 U.S. 753) (declaring the continuing vitality of the rule under the Commerce Clause in the face of an attempt to overturn it). The procedural posture of Direct Marketing Ass’n, however, did not allow for direct review of Quill Corp. or its progeny when examining the Colorado tax. Direct Marketing Ass’n, 575 U.S. at 18–19 (Kennedy, J., concurring) (citing Quill Corp., 504 U.S. 298). Justice Anthony Kennedy’s concurrence, however, expressed substantial concern about the harm that the rule caused to states. Id. at 18. He noted substantial losses in collectible revenues among states and the “far-reaching systemic and structural” economic changes that the internet wrought. Id. at 17–18. In writing the majority opinion in Wayfair, Inc., Justice Kennedy reprised these concerns. Compare id. (justifying the rejection of the physical nexus rule due to technological change and harm to state revenues), with Wayfair, Inc., 138 S. Ct. at 2087, 2095 (emphasizing the new ways in which businesses can have physical presence within a jurisdiction in the digital economy and citing massive increases in projected state revenue shortfalls attributable to the physical presence rules as an urgent reason for judicial action). But see Wayfair, Inc., 138 S. Ct. at 2103–04 (Roberts, C.J., dissenting) (arguing that data on state revenue shortfalls may be misleading).

2. Other Objections to DSTs

Another primary objection to DSTs is their unilateral and interim nature, which opponents attack on three basic grounds. First, going it alone risks inefficiency and a lack of international tax coordination, thus undermining the fundamental principles that initiated digital tax reform efforts at the OECD level. Some claim that a lack of coordination may harm consumers and workers, reduce foreign investment, and impede growth because the tax may increase the cost of doing business internationally and companies may pass that cost onto html States, including Connecticut, Indiana, and New York may soon pass similar taxes. Id. These domestic developments parallel digital tax reform efforts occurring internationally. Compare supra notes 95–112 and accompanying text (explaining digital tax reform proposals and the ultimate consensus solution at the OECD), with Taxing Digital Goods and Services: Recent Shifts and Trends, SALES TAX INST. (Oct. 16, 2020), https://www.salestax institute.com/resources/taxing-digital-goods-and-services-recent-shifts-and-trends (describing the growth in interest among U.S. states in digital advertising and digital product taxes), and Kelly Phillips Erb, Will Post-Wayfair Sales Taxes Keep Changing, as More Shoppers Go Online?, FORBES (Aug. 2, 2020), https://www.forbes.com/sites/kellyphilipserb/2020/08/02/will-post-wayfair-sales-taxes-keep-changing-as-more-shoppers-go-online (indicating that forty-three states have enacted a new economic nexus rule to allow them to collect sales tax on digital sales).

181 See Faulhaber, supra note 5, at 189–91 (surveying common political, legal, and technical objections to unilateral digital tax proposals); infra notes 182–186 and accompanying text (explaining that coordination, ability to repeal, and causing global trade frictions constitute three major attacks against DSTs); supra note 5 and accompanying text (describing the unilateral nature of DSTs). Additionally, some prevalent objections to DSTs, less relevant for the global governance concerns of this Note, make more technical arguments. See, e.g., Jason Osborn, Michael Lebovitz & Astrid Pieron, Unilateral Taxation of the Digital Economy: The Fight Is Not Over Yet—It’s Only Beginning, TAX EXEC., May/June 2020, at 27, 32–34 (identifying issues of locating tax liable entities due to disguised IP addresses, potential double counting, and tax incidence with DSTs). For example, one concern is whether digital MNEs can adequately geolocate users or do so without double counting users with multiple devices to determine their liabilities. Id. If the latter is not possible, DSTs might have the opposite of their intended effect by shifting additional taxing rights to more developed jurisdictions where users tend to have multiple devices. Id. at 34. Some also worry that these taxes will especially burden low-margin or loss-making digital companies. REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 4; Osborn et al., supra, at 34; Matthias Bauer, Five Questions About the Digital Services Tax to Pierre Moscovici 7–8 (Eur. Ctr. for Int’l Pol. Econ. Occasional Paper, Paper No. 04, 2018), https://www.econstor.eu/bitstream/10419/202460/1/1025140117.pdf (disputing that tax incidence will constitute a downside of DSTs and suggesting the tax incidence will fall on business-users, not consumers). But see Kim, supra note 87, at 138–39, 172 (disputing that tax incidence will constitute a downside of DSTs and suggesting the tax incidence will fall on business-users, not consumers).

182 Brauner, supra note 62, at 991–94. The first assumption of the BEPS project is that achieving substantial tax reform requires international coordination. Id. at 991; see supra notes 157–159 and accompanying text (explaining the U.S. position that DSTs are unlikely to result in a deduction against a taxpayer’s corporate income tax in a resident jurisdiction).
local consumers.183 Second, countries may find it difficult to repeal interim measures once the OECD Agreement comes into full effect as local constituents come to rely on the existing measure or favor it over the OECD Agreement.184 Third, unilateral measures invite the possibility of retaliation in the form of tariffs or other actions, as the numerous USTR investigations illustrate.185 Other problems with the unilateralism of DSTs include their potential to decrease economic certainty for businesses conducting cross-border transactions, increase compliance costs for such businesses, or create economic distortions.186

B. Developing Country Justifications for DSTs

This Section focuses on the reasons why developing countries implemented DSTs.187 Government pronouncements from these countries are not nearly as thorough as those that the OECD or the United States provided, and therefore, this section is broken into two subparts.188 Subsection 1 focuses on

183 *Tax Challenges Arising from Digitalisation—Interim Report 2018: Inclusive Framework on BEPS, supra* note 5, at 178–79; Osborn et al., *supra* note 181, at 34; see Bauer, *supra* note 181, at 8–10 (suggesting the EU’s DST may be a drag on investment in the EU, harm innovation, transform successful businesses into loss-making firms, and slow movement toward economic convergence in the EU).

184 *Tax Challenges Arising from Digitalisation—Interim Report 2018: Inclusive Framework on BEPS, supra* note 5, at 179; Press Release, Steven T. Mnuchin, *supra* note 168. But see Termination of Turkey DST Investigation, *supra* note 2, at 68,296 (describing the United States’ political solution with Turkey to replace its DST with the OECD Pillar One solution and credit DST liabilities incurred until then against the new tax); Termination of India DST Investigation, *supra* note 2, at 68,527 (providing the same for India). Although this concern might be mitigated by the OECD Agreement’s Pillar One requirement that signatories repeal DSTs, the Pillar One solution does not bind countries until they sign an implementing MLC requiring DST withdrawal. See Org. for Econ. Coop. & Dev. [OECD], *supra* note 2, at 7 (clarifying that the MLC will require the repeal of DSTs). Thus, at least some room remains for maneuvering around that commitment. See Dep’t of Fin. Can., *Digital Services Tax Act*, GOV’T OF CAN., https://www.canada.ca/en/department-finance/news/2021/12/digital-services-tax-act.html [https://perma.cc/LM67-6SVH] (Feb. 14, 2022) (explaining Canada’s new proposed DST as becoming automatically effective in 2024, but only if Pillar One remains unimplemented).

185 See, e.g., Proposed Action in Section 301 Investigation of India’s Digital Services Tax, 86 Fed. Reg. 16,824, 16,825 (Mar. 31, 2021) (proposing 25% retaliatory tariffs on goods from India following the USTR’s investigation of India’s DST); *supra* note 4 and accompanying text (discussing developments in the U.S.-France digital tax dispute). But see Termination of Turkey DST Investigation, *supra* note 2, at 68,296 (withdrawing the U.S. tariff threat for Turkey’s DST); Termination of India DST Investigation, *supra* note 2, at 68,527 (providing the same for India). The United States wielded this threat against both developing and developed countries with its investigations into numerous unilateral DSTs. Faulhaber, *supra* note 5, at 189; see *supra* note 5 and accompanying text (discussing trade tensions and numerous ongoing USTR DST investigations in both developed and developing market jurisdictions). Especially where some DSTs may fail to raise substantial revenues, the impact of retaliation would also undermine or even eliminate the DST’s intended political or economic benefits. Faulhaber, *supra* note 5, at 189.

186 *Tax Challenges Arising from Digitalisation—Interim Report 2018: Inclusive Framework on BEPS, supra* note 5, at 177–92 (discussing thoroughly the relevant policy considera-
the direct or implicit rationales drawn from government authorities. Subsection 2 discusses conceptual arguments developed in legal and other scholarship most relevant to developing countries.

1. Developing Countries Rationales for DSTs

Developing countries’ have unsurprisingly diverse rationales for implementing DSTs that vary by jurisdiction. This rationale variance emerges from the varying designs of developing country DSTs, some of which cover nearly all potentially digital revenues, while others narrowly target marketplace or digital advertising businesses. The variance among the covered services implies that some countries believe that the user value creation occurring in their jurisdiction is more substantial and tax-relevant for certain digital business models than others. Some DSTs, like Kenya’s, apply across all digital

dictions of interim digital tax measures), and REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 30–76 (presenting numerous arguments against DSTs), with KENYA REVENUE AUTH., supra note 134, at 2 (providing two bullets on the benefits of DSTs).

189 See infra notes 191–211 and accompanying text.

190 See infra notes 212–230 and accompanying text.

191 See infra notes 192–230 and accompanying text (identifying various inferred rationales from the designs of developing country DSTs).


193 See supra Table 1 (showing in Table 1 that India’s DST only covers digital advertising and online marketplaces, while other developing country DSTs are much broader). But see supra notes 168–173 and accompanying text (presenting the U.S. position objecting to DST’s as inappropriate and discriminatory ring-fencing). Some DSTs exclude traditional online retail, where, say, Nike, sells its own goods online, rather than providing a marketplace for third parties to sell their goods. See, e.g., REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 38–39 (discussing the discriminatory nature of the online retail exclusion). There may be some intuition behind this exclusion in that they benefit only from direct, rather than indirect network effects, because they are one-sided businesses. See Cui, supra note 52 at 91–92 (defining direct network effects as those generated between the same kinds of users). It may be more difficult to measure the value of customer reviews, for example, from a particular jurisdiction in generating profit from additional customer interest in a firm’s online products. Id. Still, the same conceptual reasons that justify taxing digital services with indirect effects may also justify taxing digital services generating direct effects. See id. (arguing that, despite the measurement difficulty, online retailers may still generate rents from their activities just as marketplace platforms do). With limited information available on the specific policy justifications for the scope provisions of developing country DSTs, it is not clear what policymakers felt was different from a tax perspective between included digital services and excluded digital services. See supra note 188 and ac-
sectors and without revenue thresholds, implying broad concerns about tax equity between digital and traditional revenue streams.  

Although countries advanced their DSTs with equity in mind, it is unclear whether governments refer to horizontal or vertical tax equity. One potential argument is that DSTs seek to attain both forms of equity. For instance, the very name of India’s DST as an equalization levy suggests a horizontal equity concern that similarly-situated suppliers of goods do not currently pay similar amounts of tax because of their business model.

Vertical equity concerns might also play a role in the justification that the DST’s design can provide time for the development of globally competitive, local digital startups. Because DSTs operate similarly to tariffs, countries

194 See supra note 136 and accompanying text (citing equity-based government justifications for the Kenya DST).

195 See supra note 136 (referring to equity, fairness, and neutrality). Horizontal tax equity refers to the goal of ensuring similar taxation for similarly situated tax entities. Bradley T. Borden, The Like-Kind Exchange Equity Conundrum, 60 FLA. L. REV. 643, 659 (2008). In other words, if two entities have identical pre-tax income, they should also have identical tax liability. Ira K. Lindsay, Tax Fairness by Convention: A Defense of Horizontal Equity, 19 FLA. TAX REV. 79, 80–81 (2016). Vertical equity refers to ensuring dissimilar taxation of dissimilarly situated tax entities in a manner proportional to their differing positions. Borden, supra, at 659. Those who advocate for vertical tax equity over horizontal tax equity worry less about tax discrimination between different types of companies. See Lindsay, supra, at 85 (explaining that vertical tax equity proponents would not necessarily object to arbitrary tax distinctions made according to ice cream flavors). Vertical equity is therefore primarily concerned with achieving a just post-tax distribution of income. Id. For example, it tends to focus on a taxpayer’s ability to pay by distributing more tax liability to higher income taxpayers and less liability to lower income taxpayers. Adam H. Rosenzweig, International Vertical Equity, 52 LOY. U. CHI. L.J. 471, 473 (2021). The general digital tax reform discussion incorporates the idea of vertical tax equity in its concern that digital MNEs, due to their size and success, have more ability to pay such taxes, but appear to escape having more tax responsibility. See id. at 494–500 (advocating for a new “[i]nternational vertical equity” concept based on the ability of richer countries to tax themselves more than poor countries and suggesting the usefulness of the concept in informing tax policies to finance “global public goods” (citing P.B. Anand, Financing the Provision of Global Public Goods, 27 WORLD ECON. 215, 216–17 (2004)); see supra notes 59–85 (describing the various ways in which the international tax system struggles to effectively capture tax revenues from digital MNEs, despite their large size, dominance, and incumbency advantages).


197 See Faulhaber, supra note 5, at 159–60, 178 (suggesting that transactional taxes, like DSTs, aim to ensure more equal treatment of the services covered within the international tax regime). Alternatively, the concerns about digital companies avoiding taxes and increasing their market dominance through the value of user contribution and network effects suggests DSTs might also target vertical equity because these features are tax and market advantages that other taxpayers arguably do not have. See supra notes 49–53, 60 (discussing the tax avoidance perception and incumbency advantages of digital MNEs).

198 See, e.g., Stephanie Soong Johnston, Saint-Amans Urges Kenya to Work Toward Global Tax Revamp Deal, 100 TAX NOTES INT’L 843, 844 (2020) (quoting a Kenyan government official defend-
often design them not to hamper local innovation in the digital economy.\footnote{199}{See, e.g., REPORT ON TURKEY’S DIGITAL SERVICES TAX, supra note 127, at 16 (quoting commenters to the investigation as expressing concern that the Turkey DST sought to shield smaller, local digital competitors).} Although such a justification also holds in the developed country context, the argument takes on particular salience in the developing country context, where fostering the growth of a domestic digital economy with local champions may have more pronounced impacts on local economic and social development.\footnote{200}{See KELSEY ET AL., supra note 11, at 12–13 (explaining the market-level obstacles to digital industrialization in Africa); Deborah James, Anti-Development Impacts of Tax-Related Provision in Proposed Rules on Digital Trade in the WTO, 62 DEV. 58, 64 (2019) (arguing for tax rules that allow developing countries to promote digital economic development). Evidence suggests that import taxes play a more vital role in developing rather than developed countries because developing countries tend to have fewer revenue-raising options than developed countries. James, supra, at 61. This is because many developing countries remain commodity exporters with small portions of the population in the taxable formal sector. Id.} In contrast, it is not clear why France’s DST excludes successful European-based digital MNEs, like Spotify, since such companies seem similarly-situated to U.S.-based MNEs in their ability to compete both globally and in their home markets with other MNEs.\footnote{201}{REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 22–23, 26–27; see also REPORT ON THE UNITED KINGDOM’S DIGITAL SERVICES TAX, supra note 158, at 16 (questioning the potential exclusion of U.K.-based food delivery marketplaces, Deliveroo and Just Eat, which also have global operations).} This questionable DST premise is not necessarily as dubious when applied to the local digital champions in developing countries because the local digital champions typically have no or very limited global reach and thus do not benefit from global network effects of digital MNEs.\footnote{202}{See KELSEY ET AL., supra note 11, at 12–13 (describing the challenges to building thriving digital economies in developing countries in Africa); James, supra note 200, at 64 (advocating for a tax system that facilitates digital economy maturation in developing countries). Compare, e.g., REPORT ON THE UNITED KINGDOM’S DIGITAL SERVICES TAX, supra note 158, at 16 (noting that the U.K. DST may exempt revenues from U.K.-based MNEs Deliveroo and Just Eats), \textit{with} REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 13–14 (criticizing the exclusion of all Indian-based companies from India’s DST).} Therefore, consistent with vertical equity, those companies may need dissimilar tax treatment to compete fairly \textit{in their home markets} against large, digital MNEs that benefit from strong global network effects.\footnote{203}{See, e.g., Top 10 Ecommerce Sites in India 2020, ECOMMERCEGUIDE.COM, https://ecommerceguide.com/top/top-10-ecommerce-sites-in-india/ [https://perma.cc/FY82-HW2A] (showing the competitive advantage of Amazon India against local Indian e-commerce champions such as Flipkart or Snapdeal); Top 10 E-Commerce Sites in Brazil 2019, DISFOLD, https://disfold.com/top-e-commerce-sites-brazil/ [https://perma.cc/DPJ7-7ZFN] (July 9, 2021) (showing the competitive advantage of Argentine digital MNE Mercado Libre over the local Brazilian e-commerce champion B2W Digital).}
More practical concerns leading to DSTs in developing countries also exist.\textsuperscript{204} One is a broad concern about gaining a larger share of the tax revenues that products and services sold in their markets generate.\textsuperscript{205} A redistribution of taxing rights from developed to developing countries could substantially increase revenues in larger developing countries.\textsuperscript{206} Another practical concern is simply the worry that, without some interim digital tax reform measures, developing countries will continue to struggle to tax income from digital companies, thus exacerbating existing tax revenue shortfalls.\textsuperscript{207} DSTs offer a short-term fix to such problems, especially for developing countries that remain skeptical about how much tax revenue redistribution the OECD Agreement will actually achieve.\textsuperscript{208} A third practical concern, especially in countries that may have poorly designed corporate income tax regimes, is simplicity and administrability, as it is easy to identify the transactions covered and calculate liability under a DST.\textsuperscript{209} Other solutions suggested in OECD negotiations, although perhaps better at precisely allocating value and subsequent taxing rights, raised concerns about whether developing countries could effectively administer them because of their conceptual complexity.\textsuperscript{210} Finally, some developing

\textsuperscript{204} See infra notes 205–211 and accompanying text (identifying the practical benefits of DSTs in developing countries).

\textsuperscript{205} McLoughlin, supra note 11, at 659; see Brauner, supra note 62, at 982–83 (discussing the recent pressures from developing countries to reallocate taxing rights). Recall that international tax principles favor the taxing rights of the residence country over that of the source of payment, which generally favors the taxing rights of developed countries over developing countries. See supra notes 62–63 and accompanying text (referring to the scholarly debate on the fairness of the current allocation of taxing rights).

\textsuperscript{206} McLoughlin, supra note 11, at 659.

\textsuperscript{207} See McLoughlin, supra note 137, at 370 (discussing the tax revenue shortages in Latin America and the implementation of unilateral measures by some Latin American countries in response).

\textsuperscript{208} See, e.g., Sarah Paez, OECD Tax Plan Offers Developing Countries Little, Panelists Say, 104 TAX NOTES INT’L 1278, 1279 (2021) (describing skepticism from Jamaican and Indian tax officials that the new Pillar One nexus and allocation rules will still disproportionately benefit developed countries, only leaving “scraps” for developing countries (quoting Marlene Parker, Chief Couns., Jamaican Tax Admin.)); Onu, supra note 6 (noting that Nigeria’s DST is part of a plan to cover increasing budget shortfalls); see also Sarfo, supra note 5, at 1261 (suggesting that African countries wanted to move quickly when digital revenues exploded in the remote COVID-19 world); Stephanie Soong Johnston, ATAF Advises African Countries Mulling Digital Services Taxes, TAX NOTES TODAY INT’L (June 15, 2020), https://www.taxnotes.com/tax-notes-today-international/digital-economy/ataf-advises-african-countries-mulling-digital-services-taxes/2020/06/15/2cmcp [https://perma.cc/5R9Z-ME79] (analyzing the motivations behind increased interest among African countries to implement DSTs).

\textsuperscript{209} See COMM. ON TAX’N OF E-COM., supra note 123, at 84 (identifying the reduction of tax compliance and administrative costs as an objective of India’s equalization levy); McLoughlin, supra note 11, at 659–60 (emphasizing the importance to developing countries of a technically simple solution to digital taxation, leading them to favor those with an easy-to-understand formulaic approach).

\textsuperscript{210} See McLoughlin, supra note 11, at 660 (noting some developing country ambivalence regarding administratively complex reform proposals such as the marketing intangibles proposal, due to its conceptual complexity). But see Vella, supra note 147, at 834 (suggesting that some DST designs, with the U.K. DST as an example, lack ease of implementation or enforcement). Even if DSTs lack the promised ease of administration, as some scholars suggest, developing countries may still view
countries view DSTs as a policy innovation capable of bolstering public confidence in tax fairness, thereby improving voluntary tax compliance in tax systems otherwise prone to tax avoidance.\footnote{AFR. TAX ADMIN. F., supra note 137, at 1; cf. South Dakota v. Wayfair, Inc. 138 S. Ct. 2080, 2088, 2096, 2100 (2018) (suggesting that tax compliance may improve by imposing a new collection obligation on firms with digital nexus rather than relying on consumers to remit a use tax when transacting with non-resident firms; and referencing the role that fair taxation plays in establishing consumer confidence). This potential compliance and public perception benefit is especially pertinent in developing countries in which the revenue generation from DSTs may not be very substantial. AFR. TAX ADMIN. F., supra note 137, at 1; Sarfo, supra note 5, at 1261–62.}

2. Conceptual and Global Governance-Related Arguments Related to Developing Country DSTs

Prior to the OECD Agreement, developing countries could also justify DSTs on the basis of several conceptual arguments.\footnote{See infra notes 214–230 and accompanying text (identifying more conceptual arguments for developing country DSTs).} The first is an argument about the provision of public goods, which expands the DST debate from one about facilitating global commerce through liberal trade rules to one about broader socio-economic development goals.\footnote{See generally Brock, supra note 20 (proposing several global tax innovations as means to address global poverty and imbalances between developed and developing countries).} Digital and traditional MNEs both rely on the public goods available in foreign jurisdictions.\footnote{See Wayfair, Inc., 138 S. Ct. at 2096 (discussing the tax-funded public goods on which Wayfair relies, notwithstanding whether it maintains a physical presence in South Dakota).} For instance, digital MNEs rely on the public goods that developing countries provide, such as internet infrastructure and access, transportation networks, market regulation, and monetary stability.\footnote{See Brock, supra note 20, at 168–69 (justifying global tax proposals based on the concept that global commerce relies on government-provided public goods).} Thus, the PE principle appeared to arbitrarily allow digital MNEs to escape their duty to contribute to these public goods.\footnote{ Cf. Wayfair, Inc., 138 S. Ct. at 2096 (stating that the physical presence rule provides some online businesses an arbitrary advantage over brick-and-mortar businesses, therefore undermining confidence that the tax system is fair). In discussing the arbitrary nature of a physical presence test to allow a U.S. state to tax a digital business such as Wayfair, the Supreme Court noted that, much like a brick-and-mortar business, Wayfair depends on numerous public goods in the state seeking to exercise a right to tax. Id. State taxes fund police and fire departments that ensure the safety of Wayfair furniture when it enters the customer’s home; road maintenance and improvement to ensure delivery of Wayfair products to its customers; and courts to enforce customer contracts. Id. According to the}
Moreover, because unilaterally adopting a significant digital presence nexus principle likely violated bilateral tax obligations that relied on the PE concept, DSTs offered developing countries a faster path to raising revenues critical to achieving economic and social development objectives as countries awaited consensus on the OECD Agreement.217 Because the achievement of such public goods also benefits digital MNEs because it improves their ease of doing business in a particular country, it seems sensible to use tax law to ensure that digital MNEs contribute to their attainment.218

A second conceptual argument relies on the theory of user-generated value in digital businesses in the form of data.219 If data is the valuable component that a digital MNE generates in a jurisdiction, the extraction of that data may be exploitative in a manner reminiscent of natural resource extraction in developing countries.220 This argument suggests that digital MNEs mine developing countries for a free raw material input—data—that magnifies network effects and enhances the company’s dominance over a particular sector.221 The potential result is developing country dependency within the digital economy because MNEs located outside the country will control their data—arguably the most important resource necessary to thrive in a digital global economy.222

Court, each of these public goods contributes to consumer confidence in the economy, which in turn makes the growth of Wayfair’s business possible. Id. (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 328 (1992), overruled by Wayfair, Inc., 138 S. Ct. 2080).

217 See James, supra note 200, at 64 (suggesting that prohibition on such revenue sources will impede developing country improvements in areas such as health, education, infrastructure, and technology); supra notes 62–66, 85 and accompanying text (discussing virtual PE tests as alternatives to the traditional PE requirement underpinning bilateral tax treaties).

218 See Wayfair, Inc., 138 S. Ct. at 2096 (emphasizing the tax-funded public goods on which Wayfair relies to operate in any given state, regardless of physical presence); Brock, supra note 20, at 168–69 (justifying the use of international tax mechanisms to ensure that MNEs pay their fair share for the production of public goods because they rely on those goods to do business).

219 See supra notes 70–77 and accompanying text (articulating the mechanics of the user value creation theory of digital business models).

220 See supra notes 53–55 (analyzing the role of data in the international tax debate).

221 PARMINDER JEET SINGH, IT FOR CHANGE, DEVELOPING COUNTRIES IN THE EMERGING GLOBAL DIGITAL ORDER—A CRITICAL GEOPOLITICAL CHALLENGE TO WHICH THE GLOBAL SOUTH MUST RESPOND 2 (2017), https://itforchange.net/sites/default/files/Developing-Countries-in-the-Emerging-Global-Digital-Order.pdf [https://perma.cc/AUG9-6V7T]. Given the risk that developing countries may fall behind, perhaps permanently, in the digital economy, one scholar emphasizes the need to create global governance rules, including in tax, that help developing countries build a self-sufficient “digital society.” Id. at 2, 15.

222 Id. at 2. Such a scenario echoes the circumstances under which MNEs tend to control the valuable extractive resources in developing countries. See Nate Singham, Mining Corporations Loot the Global South—No Consequences, SALON (June 10, 2019), https://www.salon.com/2019/06/10/mining-corporations-loot-the-global-south-no-consequences_partner/ [https://perma.cc/3NPR-WNA7] (citing various studies indicating that developing countries retain very little of the wealth generated from their extractive industries due to the control of highly concentrated MNEs in those sectors). Taken to its most extreme, this data exploitation argument foresees a scenario in which the digital business model, unchecked from fair international economic law, will result in digital MNEs and powerful states exploiting poorer countries’ data resources and establishing monopoly power over such resources.
DSTs and international tax reform efforts may prevent such dependency from becoming embedded because they could allow for homegrown, local digital champions that might compete more effectively with MNEs to capture local consumer data. The emphasis on taxing data monetization in the India and Kenya DSTs, for example, lends itself to this theory, as those DSTs may incentivize MNEs to minimize the extent to which they collect and sell Indian or Kenyan user data. A related and more empirical argument focuses on the propensity for multi-sided digital businesses to generate rent—earnings in excess of economic value—within a source jurisdiction, which DSTs seek to tax. Understanding the DST as a tax on rent fits more neatly within well-accepted principles of

SINGH, supra note 221, at 4. See generally FRANK J. GARCIA, CONSENT & TRADE: TRADING FREELY IN A GLOBAL MARKET 16–51 (2019) (providing a theoretical account for understanding exploitation and coercion as key characteristics of modern international economic flows); Mathias Risse & Gabriel Wollner, From Theory to Practice I: Passing Judgments of Exploitation, 52 SAN DIEGO L. REV. 1035 (2015) (applying the theory of economic exploitation to thinking about the role of justice in international trade relationships).

223 See SINGH, supra note 221, at 15 (including global corporate tax reform as a critical policy arena in which to shape a more equitable global digital order).

224 See Equalisation Levy, 2016, § 165A(3)(ii), amended by Finance Act, 2020, §§ 152–153 (India) (applying DST to the sale of data); Income Tax (Digital Service Tax) Regulations (2020) Cap. 470 § 3(1)(c) (Kenya) (applying a DST to the monetization of Kenyan user data that companies derive from a marketplace platform).

225 See Cui, supra note 52, at 84, 94–95 (arguing that DSTs seek to tax “location-specific rent” and speculating that the rent concept may also be relevant to data extraction concerns); Adam Hayes, Economic Rent, INVESTOPEDIA, https://www.investopedia.com/terms/e/economicrent.asp [https://perma.cc/WH5L-HG4Y] (Nov. 18, 2021) (defining “[e]conomic rent” and explaining that policymakers generally understand rent as unearned and arising from inefficient markets, scarcity, or information asymmetry problems); cf. Singham, supra note 222 (discussing how the rent-seeking strategies of MNEs in resource extraction industries work to the detriment of developing economies). A simplified version of the argument goes as follows: recall that the multi-sided nature of digital businesses requires that users on one side of the platform have interest in the activities of users on the other side of the platform. See supra notes 70–77 and accompanying text (describing the basic design of digital platform business model). This design allows the platform to charge one user-side a premium for access to the other user-side of the platform, which likely receives platform services for free (or well below marginal cost). Cui, supra note 52, at 85. A substantial portion of the platform’s ability to make a profit is possible only because of the platform’s interactions with users on the non-paying side of the platform, interactions occurring virtually in those users’ jurisdiction. Id. at 84–91 (providing examples of how profits arise in the non-paying user jurisdictions for online advertising and marketplace businesses). Thus, the source of user-value creation—the jurisdiction with the users whom other users want access to—is a form of rent. Id. This argument firmly distinguishes DSTs from destination-based taxes because the surplus is not always generated on the consumer-side or purchaser-side of the platform. See id. at 89–91 (describing how location-specific rent is generated on the producer-side in a business such as Airbnb where hosts also generate important user value). Unlike destination-based taxes, understanding some DSTs as a tax on location-specific rent makes it possible to advance DSTs on grounds of fairness and efficiency. Id. at 102 (finding fair the criticism that destination-based taxes inadequately explain why the country that produced a particular good or service should not share in corporate profits); cf. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2095–96 (2018) (grounding the decision to overrule domestic physical nexus requirement for tax rights on the grounds of justice and fairness).
international taxation because those principles have long allowed countries to utilize tax and other measures to raise revenues from rent-seeking sectors of the economy, such as natural resource extraction industries common to developing countries.226

Finally, developing countries potentially favored DSTs instrumentally to achieve other goals.227 For one, the unilateral implementation of DSTs had the effect of setting the agenda in global discussions on reforming international tax principles.228 Unilateral implementation forced the OECD to seriously grapple with DSTs and, by implication, developing country claims about the inequities in the allocation of taxing rights.229 Furthermore, experimenting with interim DSTs prior to the OECD Agreement may have helped developing countries determine whether such taxes actually advance development-related goals, solve budget shortfalls, simplify tax collection, or improve tax compliance and tax equity.230

Each of the foregoing developing country justifications for DSTs, as juxtaposed against U.S. critiques, provide the reference point from which to assess not who was correct about DSTs per se, but whether the OECD Agreement re-
flects a compromise that meaningfully incorporates developing country views.  

III. ANALYZING THE DST DEBATE IN THE CONTEXT OF GLOBAL GOVERNANCE

This Part reconceptualizes the DST debate not as one about trade wars or proper tax design, but one that reflects the broader debates over the impacts of globalization and the fairness of global governance. Section A of this Part describes how U.S. opposition to DSTs echoes the critical narrative of global governance. Section B, however, provides an optimistic view that developing country DSTs helped craft an OECD Agreement less reflective of these old and oft-criticized global governance patterns.

A. The Familiar Global Governance Narrative in the DST Debate

Although the United States only officially commented on two developing country DSTs—India and Turkey—both of which this Note outlines, the U.S. position in these two Investigations reflect four common critiques of global governance in a globalized world, as discussed in Part I, Section A. First, the arguments that the United States posits in the developed country DST Investigations closely resemble those that it posits in the developing country DST Investigations. As such, the lack of contextual nuance reprises the oft-

231 See infra notes 232–286 (analyzing the extent to which traditional global governance narratives prevailed and transformed in the culmination of the OECD Agreement).
232 See infra notes 235–286 and accompanying text.
233 See infra notes 235–266 and accompanying text; supra note 35 and accompanying text (summarizing this Note’s use of the term global governance).
234 See infra notes 267–286 and accompanying text.
235 See generally REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10 (investigating and commenting on India’s DST); REPORT ON TURKEY’S DIGITAL SERVICES TAX, supra note 127 (investigating and commenting on Turkey’s DST); see supra notes 235–266 and accompanying text (comparing the U.S. position to global governance critiques). In preliminary comments, the USTR indicated that it was deeply concerned about both Brazil’s and Indonesia’s proposed DSTs with regards to discrimination, international tax principles, and burdens on U.S. commerce. STATUS UPDATE ON DIGITAL SERVICES TAX INVESTIGATIONS, supra note 10, at 4–6, 10–11. The USTR later terminated its investigations into the Brazilian and Indonesian DST proposals because the DSTs had not become law in either jurisdiction. Termination of Section 301 Digital Services Tax Investigations of Brazil, the Czech Republic, the European Union, and Indonesia, 86 Fed. Reg. 16,828, 16,828 (Mar. 31, 2021). Even if these jurisdictions enacted their proposed DSTs during the one-year statutory period of the investigation, the USTR said it would not have had enough time to evaluate whether the enacted DST was actionable. Id. at 16,829. The USTR, however, left open the possibility of re-initiating an investigation into any enacted DST from Brazil or Indonesia in the future. Id.
236 Compare, e.g., REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 30–67 (arguing that the DST discriminates against U.S. companies, violates international tax principles, and unreasonably burdens U.S. commerce), with REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note
criticized one-size-fits-all approach to global governance.\footnote{See supra note 36 and accompanying text (discussing how global governance institutions often apply rigid policy prescriptions to developing countries).} According to the United States, each DST intentionally discriminated against U.S. companies and contravened international tax principles.\footnote{REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 1–3; REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 3–4; REPORT ON TURKEY’S DIGITAL SERVICES TAX, supra note 127, at 3–4.} Understandably, USTR’s arguments track the legal findings necessary before the United States may impose retaliatory trade measures.\footnote{See Section 301 of the Trade Act of 1974, 19 U.S.C. § 2411(b)–(c) (requiring a finding that the foreign country’s policy discriminates against U.S. interests before allowing the U.S. to exact retaliatory measures).} Even so, the desire to find discrimination is palpable, regardless of the DST design.\footnote{See, e.g., REPORT ON TURKEY’S DIGITAL SERVICES TAX, supra note 127, at 15–16 (concluding that the tax singles out U.S. companies for discrimination, even though 31% of the companies that the DST affected were non-U.S.).}  

Take, for example, the Turkey DST Investigation.\footnote{Id. at 16–17; see also REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 14 (illuminating the DST’s application to several firms based in developed countries, including the U.K., France, and Japan, yet still finding the tax overwhelmingly discriminatory against U.S. firms).} Despite finding that many non-U.S.-based companies faced DST liability, the fact that the majority of companies affected were based in the United States constituted discrimination, according to the USTR.\footnote{REPORT ON TURKEY’S DIGITAL SERVICES TAX, supra note 127, at 18. The USTR suggests that even Brazil’s proposed DST, which also would apply to both Brazilian and non-Brazilian companies, would likely discriminate against U.S. companies because of their leadership position in digital sectors.} Moreover, the USTR uses the mere fact that the DST covered digital services in which U.S. firms dominate as evidence of the DST’s discriminatory nature.\footnote{REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 14 (indicating that India’s DST would apply to several non-U.S. companies); Top 100 Digital Companies 2019 Ranking, FORBES, https://www.forbes.com/top-digital-companies/list/#tab:rank [https://perma.cc/3ADT-4S9N] (illustrating the top digital companies based within and outside the United States). Other prominent, non-U.S. digital MNEs include China-based Baidu, Inc. (Baidu), Germany-based Zalando SE (Zalando), and Canada-based Shopify Inc. (Shopify).} The discrimination argument, although intuitive, overlooks the fact that such DSTs, even those like India’s that impact only non-resident companies, apply to large digital MNEs beyond the U.S.-based GAFA, such as China-based Alibaba Group Holding Ltd. (Alibaba) or Japan-based Rakuten Group, Inc. (Rakuten).\footnote{About Baidu: Company Overview, Baidu, https://ir.baidu.com/company-overview [https://perma.cc/KT2A-MYHS]; Who We Are, ZALANDO, https://corporate.zalando.com/en/company/who-we-are [https://perma.cc/6SCA-Y8CW]; see David Silverberg, Shopify: The Canadian Tech Champion Taking on Amazon, BBC (July 24, 2020), https://www.bbc.com/news/business-53304241 [https://perma.cc/LN4G-6W5S] (profiling the growth of Shopify).} There is no doubt that U.S.
companies dominate the digital marketplace and advertising sectors, but that does not mean a sector-specific tax necessarily discriminates against them.\textsuperscript{245} Today, the United States maintains the majority of the taxing rights over which DST-enacting countries seek a greater share.\textsuperscript{246} At least from the developing country view, reallocating such rights hardly strikes as discrimination when the original distribution of such rights tends to benefit a dominant group of developed countries.\textsuperscript{247}

The logic of the discrimination argument is also heavy-handed because it suggests that, under the U.S. view, most other digital tax reform proposals were similarly discriminatory.\textsuperscript{248} Most reforms proposed prior to the OECD

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\textsuperscript{245} PWC, \textit{supra} note 80, at 22; \textit{cf.} Cui, \textit{supra} note 69, at 849–51 (counterarguing against ring-fencing objections with the observation that international tax principles have used ring-fencing concepts for many types of sector-specific or profession-specific income). The logic behind the ring-fencing argument also implies that there is no purpose behind the DSTs other than to capture more tax from GAFA. \textit{See} Cui, \textit{supra} note 69, at 850 (reasoning that the objection that singling out digital economy businesses is arbitrary only makes sense if one assumes that new digital taxes, like DSTs, are arbitrary and have no purpose). But, many justifications exist to support DSTs that vary across countries. \textit{See, e.g.}, \textit{supra} notes 212–230 (exploring a variety of practical, theoretical, and equity-based justifications for DSTs). The discrimination argument appears even weaker against DSTs like Kenya’s, which has no revenue thresholds and covers a wide variety of digital services that will likely capture far more companies than just U.S. companies. \textit{See generally} Income Tax (Digital Service Tax) Regulations (2020) Cap. 470 § 3(1) (Kenya) (defining digital services subject to the tax broadly).

\textsuperscript{246} See PWC, \textit{supra} note 80, at 22 (showing the dominance of U.S. resident firms in the digital economy); \textit{supra} notes 62–63 and accompanying text (explaining the status quo as to the allocation of international taxing rights over corporate income).

\textsuperscript{247} See Zolt, \textit{supra} note 63, at 139–49 (analyzing the tradeoffs and contextual factors that developing countries must consider when entering bilateral tax treaties that cede source-based taxing rights, and noting the potential benefits that developing countries may receive from the BEPS project’s movement to increase the taxing rights of source jurisdictions).

\textsuperscript{248} See \textit{supra} notes 85, 103 and accompanying text (discussing the EU’s significant digital presence approach, the OECD’s significant economic presence proposal, the OECD’s user participation proposal, and the OECD’s marketing intangibles proposal).
Agreement ceded some taxing rights to other countries.\textsuperscript{249} The locus of reallocation in those proposals and the OECD Agreement shifts taxing rights from the United States and other developed countries, where most dominant digital MNEs reside, to source countries, many of which are developing countries.\textsuperscript{250} Furthermore, even bilateral tax treaties provide for differential treatment for a variety of types of income across different sectors, such as for natural resource extraction.\textsuperscript{251} Yet those specialized rules do not result in cries of discrimination.\textsuperscript{252} In sum, the U.S. position firmly implies that no matter the context, design or justification, any DST is a bad DST.\textsuperscript{253}

Second, the U.S. position sought to entrench the status quo by rejecting any argument that new standards for allocating taxing rights should replace or modify international tax principles.\textsuperscript{254} The USTR provided a circular argument

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\textsuperscript{249} See, e.g., Addressing the Tax Challenges Arising from the Digitalisation of the Economy, supra note 83, at 10 (describing the user participation proposal’s reallocation of some taxing rights from the residence jurisdiction to source jurisdictions where an “active and participatory user base[ ]” of the business existed). It is also worth noting that the discrimination claim contradicts the DST justification of ensuring tax neutrality and equity between foreign suppliers of digital goods without PE, domestic suppliers of digital goods with a PE, and brick-and-mortar suppliers of similar goods. See Tax Challenges Arising from Digitalisation—Interim Report 2018: Inclusive Framework on BEPS, supra note 5, at 141 (noting the common policy objective of tax neutrality across a variety of DST designs).
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\textsuperscript{250} See infra note 252 and accompanying text (recounting a historical reallocation of taxing rights in the oil sector that did not result in claims of discrimination). Recall that source countries usually cannot tax income on businesses like GAFA because of the PE principle as most digital MNEs can operate in source countries without a PE. See supra notes 65–67 and accompanying text (explaining the PE principle and the difficulty of taxing digital MNEs under that principle). Each of the OECD and EU proposals provided a new basis on which source countries could tax the income of some digital MNEs operating in their jurisdictions. See, e.g., supra note 103 and accompanying text (describing how the user participation proposal allocated source country taxing rights on the basis of an existing active and participatory user base).
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\textsuperscript{251} See Cui, supra note 69, at 851 (arguing that commentators tend not to view sector-based tax distinctions as arbitrary in other contexts).
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\textsuperscript{252} See PICCIOTTO, supra note 62, at 42–44 (explaining the emergence of a new allocation of taxing rights with regards to oil). The development of new principles in the 1940s for allowing oil producing states more taxing rights against oil companies headquartered in the United States and the U.K. is analogous to the DST debate. See id. (describing the historical events leading to new taxing rights and practices relating to oil production). Despite initial resistance to the potential loss in tax revenues and taxing rights that would result from recognizing new Gulf country taxes, the U.K. and United States both came to an agreement on providing their own oil companies credits against U.K. and U.S. corporate income taxes. Id. If the argument that digital business models create location-specific rents that DSTs seek to tax is correct, then the analogy to the emergence of a coordinated international oil taxing regime gains persuasive force as to the validity and agenda-setting power of DSTs. See Cui, supra note 52, at 96–97 (comparing DSTs to other rent-related policy mechanisms for raising government revenues); Cui, supra note 69, at 840 (remarking on the agenda-setting success of DSTs).
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\textsuperscript{253} See supra notes 236–252 and accompanying text (discussing how the USTR arguments against DSTs overlook the differences in designs and justifications for DSTs).
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\textsuperscript{254} See REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 16 (“[T]he general rules should be applied or adapted so that ‘digital’ companies are treated the same way as others.”) (emphasis added) (footnote omitted) (citing EUR. COMM’N EXPERT GRP., COMMISSION EXPERT GROUP ON
about the inappropriateness of using DSTs because they do not conform to international tax principles, despite the fact that countries used DSTs precisely to change international tax principles. In this way, the U.S. position talks past and ignores, rather than addresses, the argument that DSTs aim to modify international tax principles. Furthermore, the suggestion that it violates international tax principles to enact revenue-based taxes because of their absence from model treaty conventions and developed countries do not use them ignores their potential usefulness as simple and administrable taxes for developing countries.

Third, domestic developments in the United States suggest once again that the rules of globalization include double standards, one for developing

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255 See KELSEY ET AL., supra note 11, at 101–02 (describing the U.S. position as treating the PE requirement as an unchangeable international tax principle).


257 REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 21–22; REPORT ON TURKEY’S DIGITAL SERVICES TAX, supra note 127, at 21–22; see KELSEY ET AL., supra note 11, at 97, 102 (identifying the ease of application as an attractive feature of DSTs for developing countries, and characterizing the U.S. position as invalidating attempts to correct international tax principles in response to a changed global economic reality); supra notes 204–211 and accompanying text (explaining the practical considerations for developing countries enacting DSTs, such as simplicity and a need to cover revenue shortfalls).
countries, and another for developed countries. After the U.S. Supreme Court overruled a longstanding tax principle requiring physical presence to tax in *South Dakota v. Wayfair, Inc.* in 2018, states clamored to implement sales taxes for goods purchased digitally, taxes on digital products, and digital advertising taxes. Simultaneously, the United States invoked anti-protectionist arguments against developing countries considering or implementing DSTs. Thus, there was a hint of disingenuousness in the United States opposing similar measures internationally. Just as the United States built its industrial prowess by selectively shielding certain industries from global competition to help them mature, there is an analogous argument on the part of developing countries that seek to use DSTs to jumpstart the growth of their digital sectors. For the United States to claim that such an argument is discriminatory turns a blind eye to its own historical development.

258 See supra notes 37–40 and accompanying text (illustrating the double standards of globalization as to fiscal austerity and trade liberalization).

259 See 138 S. Ct. 2080, 2099 (2018) (overruling a physical presence requirement for allocating state taxing rights and requiring only that the taxed entity intended to have a substantial nexus to the taxing jurisdiction); supra note 180 and accompanying text (discussing domestic digital tax innovations).

260 See STATUS UPDATE ON DIGITAL SERVICES TAX INVESTIGATIONS, supra note 10, at 4–6, 10–11 (expressing concerns over the discriminatory impacts of proposed DSTs on U.S. companies relative to resident Brazilian or Indonesian companies); REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 13–17 (emphasizing the discriminatory impact of India’s implemented DST on U.S. companies); REPORT ON TURKEY’S DIGITAL SERVICES TAX, supra note 127, at 14–18 (decrying the use of revenue thresholds and digital ring-fencing in the Turkey DST to discriminate against U.S. companies).


262 See STIGLITZ, supra note 32, at 114–15 (noting that countries like the United States and Japan benefitted from selective protectionism and explaining the risks, largely to local jobs, of requiring developing countries to open their economies to competitive imports in strategic industries); James, supra note 200, at 64 (emphasizing the importance of using “infant industry protection” in developing countries to generate revenues for development-related purposes, such as reducing the global digital divide or funding health, education, and infrastructure initiatives); cf. NICHOLAS, supra note 40, at 315–17 (describing the important role of U.S. government policies, including tax policy, to incentivize the growth of the domestic venture capital industry that has generated the world’s most prominent digital MNEs).

263 See STIGLITZ, supra note 32, at 114–15 (noting the role of selective protectionism in developed countries to create a stronger domestic economy); supra note 40 and accompanying text (discussing the prominent example of agricultural subsidies in the United States).
Fourth and finally, is the overwhelming influence of corporate interests in the USTR investigations. Not only do the DST investigations reveal an overriding concern about the tax burdens on companies like GAFA, but they do so with no acknowledgment of the development-related benefits that DSTs might provide to the jurisdictions enacting them—benefits from which such companies themselves benefit. In this way, the U.S. position reflects the common critique that corporate and financial interests are the true authors of the rules of international economic law.

B. An Improving Global Governance Narrative Reflected in the DST Debate and the OECD Agreement

Despite these recurrent patterns, the OECD Agreement provides reasons to be optimistic that the involvement of developing countries in global digital tax reform efforts marks a meaningful change to the narrative of globalization and global governance, shifting the rules of the game in a more just and equitable manner. One key reason for optimism is the Pillar One Agreement itself, reflecting the significance of DSTs as an agenda-setting and negotiating tool for developing countries. Although developing countries remain unco-

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264 See, e.g., REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 52–55, 58–60, 65–67 (finding that the DST overly burdens U.S.-based digital MNEs, and supporting its findings with reference to comments and news from large U.S. digital companies like Google, Amazon, Facebook, and Uber).

265 See REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 22–28 (citing the burdens for Amazon and Uber); REPORT ON TURKEY’S DIGITAL SERVICES TAX, supra note 127, at 24–27 (same); supra notes 212–218 and accompanying text (emphasizing that digital companies also benefit from the public goods provided even in jurisdictions in which they lack a PE and therefore that they should contribute to the cost of providing such goods).

266 See supra notes 41–44 and accompanying text (explaining the corporate influence critique).

267 See Cui, supra note 52, at 100–02 (arguing that the underpinnings of DSTs are more equitable than the existing PE and profit allocation rules); Zolt, supra note 63, at 143–46 (implying that the BEPS project would be a net positive for developing countries, even should it fail to produce massive change for them). Recall that the involvement of developing countries in debates about issues of global governance has not always manifested in the desired results. See, e.g., supra notes 32–63 and accompanying text (introducing the downsides of the governance of international economic law from the perspective of developing countries, including in the areas of tax, international investment, and trade liberalization). See generally LINARELLI ET AL., supra note 10 (describing the failures of international economic law to produce equitable outcomes for developing countries).

268 See Cui, supra note 69, at 840 (describing how DST proliferation forced the hand of the OECD to respond); Ward et al., supra note 261 (referring to Pillar One as a “de facto” DST before noting that the proposal still requires parties to remove their DSTs). It is also a sign of progress that the OECD Agreement came together at all with the support of so many developing countries given that the last high-profile attempt to include developing countries in international lawmaking—during the so-called development round of WTO negotiations—ended in spectacular failure. See Charlton, supra note 36, at 21 (explaining that the abandonment of the WTO’s Doha Round of negotiations for new development-oriented trade rules sowed distrust among developing countries, and quoting a Brazilian official who called the failure to reach an agreement “as near to a catastrophe as one can imagine” (quoting Celso Amorim, Foreign Minister of Braz.)).
vinced that Pillar One will increase their jurisdictional taxing power, Pillar One’s design is in some sense a “de facto” DST. For example, Pillar One replaces the PE requirement with a new nexus rule that allows a taxing right to attach to the jurisdiction where the consumption of various digital goods or services takes place. That broad scope, coupled with the different revenue sourcing rules for different digital transaction types, suggests that Pillar One considers the multiplicity of developing country views regarding what kinds of digital interactions create tax distortions within their jurisdictions. Furthermore, whatever the magnitude of the shift, the OECD’s nexus modification achieves the shared interest of DST-enacting jurisdictions: to redistribute some taxing rights from resident to source countries. This modification will pro-

269 See Johnston, supra note 6, at 1280 (describing Nigeria’s decision not to join the pact because of a gap between the impact for which Nigeria hoped and the ultimate compromise solution); Paez, supra note 208, at 1279 (explaining some developing country doubts about the impact of Pillar One); Ward et al., supra note 261 (describing Pillar One as a “de facto” DST).

270 Compare Model Tax Convention on Income and on Capital, supra note 65, art. 7(1), at M-27 (requiring a PE for parties to a bilateral tax treaty to tax a business of the other party), with Org. for Econ. Coop. & Dev. [OECD], supra note 2, at 1–2 (defining an alternative nexus rule without a PE requirement and allocating revenues to source jurisdictions for tax calculation purposes).

271 See Pillar One—Amount A: Draft Model Rules for Nexus and Revenue Sourcing, supra note 109, at 6–7 (providing different revenue sourcing rules for digital goods, digital advertising, and online intermediation services); Org. for Econ. Coop. & Dev. [OECD], supra note 2, at 2 (specifying sourcing rules for various forms of digital commerce in Pillar One Model Rules 6, 8(b), and 8(c)); see supra Table 1 (detailing the narrow and broad developing country DSTs that, as a whole, encompass transactions for digital advertising, online marketplaces electronic communications, and audiovisual content and services); supra notes 204–210 (describing the various equity concerns that might motivate inclusion of certain subsets of digital transactions to the exclusion of others). The varied treatment for different digital transactions may buck the trend of one-size-fits-all approach that apply toward developing countries in global governance. See supra notes 33–36 and accompanying text (presenting the one-size-fits-all critique to global governance in the age of globalization).

272 See Pillar One—Amount A: Draft Model Rules for Nexus and Revenue Sourcing, supra note 109, at 6–7 (reallocating revenues for taxation purposes to the jurisdiction of the consumer’s location upon the sale of digital goods, pursuant to Pillar One Model Rules 6 and 8(g)); Faulhaber, supra note 5, at 179–82 (explaining that a core commonality among the diverse set of reform proposals is an interest in reallocating taxing rights between source and residence countries). For example, splitting revenues derived on marketplace platforms between the purchaser’s and seller’s location provides a taxing right over such transactions that developing countries did not previously have, absent a DST or the platform having a PE in their country. Compare Pillar One—Amount A: Draft Model Rules for Nexus and Revenue Sourcing, supra note 109, at 7 (splitting revenue allocation between the location of the seller and purchaser for marketplace platforms), with Model Tax Convention on Income and on Capital, supra note 65, art. 7(1), at M-27 (allowing a source country to tax business income only if the business operates in that jurisdiction with a PE), and Commission Staff Working Document Impact Assessment, supra note 60, at 112–13 (illustrating that internet platform businesses operate abroad with very few physical assets located in their operating jurisdictions, thus depriving source countries of the ability to tax such businesses). Concededly, the Pillar One applicability thresholds are high, limiting the rule’s applicability to a handful of companies and therefore the amount that developing countries will actually collect. See Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, ORG. FOR ECON. COOP. & DEV. [OECD] 18 (2021), https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf [https://perma.cc/FC69-Y9HM] (explaining that
vide more taxing rights to developing countries—a sign of incremental, yet worthy, progress toward equity.273

Moreover, the rule’s impact on primarily U.S. tech giants due to its high revenue thresholds suggests that the United States accepted what, under the view it expressed in its DST investigations, constitutes a discriminatory tax.274 That is, the United States’ aggressive posture against DST-enacting jurisdictions did not win the day, as it often has in setting global governance rules.275 This concession implies that, in contrast to the development of other global governance rules, the United States did not succeed in establishing one ap-

Pillar One will only pertain to about one hundred companies); BQ Desk, OECD Tax Reform to Impact Only 78 of 500 Largest Companies: Study, BLOOMBERG QUINT, https://www.bloombergquint.com/ law-and-policy/oecd-tax-reform-to-impact-only-78-of-500-largest-companies-study [https://perma.cc/ ZH9X-6ZAD] (July 6, 2021, 7:33 PM) (citing a report estimating that only seventy-eight companies will face source-country taxing liability under Pillar One, and explaining the threshold requirements for Pillar One to apply to a company); Paez, supra note 208, at 1279 (expressing skepticism that Pillar One will have a substantial impact on developing countries); Goni & Miyandazi, supra note 140 (finding that the Kenya DST covers far more companies than Pillar One).

273 See Robert Goulder, The Price of Tax Reform: Pillar 1 Reduced to the Back of a Napkin, FORBES (July 6, 2021), https://www.forbes.com/sites/taxnotes/2021/07/06/the-price-of-tax-reform-pillar-1-reduced-to-the-back-of-a-napkin [https://perma.cc/ZZ9Q-8SY5] (calculating projected net revenues under Pillar One and finding net increases for many developing countries, but net declines for developed countries, such as the United States, Canada, and Switzerland)). One analysis estimated that Pillar One would result in sizeable net revenue gains for the world’s least developed countries as well as larger developing countries such as India, Pakistan, Indonesia, Turkey, and Brazil. Id. At the same time, the analysis showed that Pillar One would result in a substantial net revenue loss for the United States. Id.

274 See, e.g., REPORT ON INDIA’S DIGITAL SERVICES TAX, supra note 10, at 13–17 (finding that India’s DST discriminates against U.S. companies); BQ Desk, supra note 272 (referencing a report that found that U.S. companies would generate 64% of Pillar One tax revenues); Ward et al., supra note 261 (explaining how the Biden Administration had to change its stance on Pillar One, despite longstanding opposition to Pillar One’s potential impact on U.S. tech giants).

275 See Proposed Action in Section 301 Investigation of India’s Digital Services Tax, 86 Fed. Reg. 16,825, 16,825 (Mar. 31, 2021) (putting out a call on March 31, 2021 for public comments on a proposal to exact retaliatory 25% tariffs on goods from India); Ward et al., supra note 261 (describing how the U.S. now supports Pillar One after years of staunch opposition); Brauner, supra note 62, at 983 & n.44 (citing the failure of the United States to win approval for its recent international tax proposals); supra notes 32–44 (explaining the critiques to the global governance system). At the micro-level of tax, in recent years, the United States failed to win support for its highest priority issues on the BEPS agenda. See Brauner, supra note 62, at 983 n.44 (citing the United States’ failure to gain support for tax reforms for “controlled foreign corporation[s]” and mandatory arbitration for tax disputes). At a global level, there is some sense that the United States has lost some of its international policy-making influence. See, e.g., Brendan Cole, Joe Biden to Address Munich Conference as Poll Shows Europe Lacks Trust in U.S., NEWSWEEK (Feb. 19, 2021), https://www.newsweek.com/joe-biden-europe-munich-security-trust-survey-1570498 [https://perma.cc/UU4K-5UQB] (discussing a poll finding that only 10% of Europeans believed the United States to be a reliable security partner and 67% believed the United States would not provide assistance during a crisis); Tom McTague, The Decline of the American World, THE ATLANTIC (June 24, 2020), https://www.theatlantic.com/international/archive/2020/ 06/americas-image-power-trump/613228/ [https://perma.cc/W3VZ-CXEJ] (questioning the continuing ability of the United States to project power abroad).
proach domestically and a different one abroad.\textsuperscript{276} As such, increasing domestic pressure from U.S. states to tax tech giants coincides with the Pillar One solution.\textsuperscript{277}

A second implication is that developed country interests in a digital global economy no longer clearly align as a bloc, thus creating new leverage for developing countries to amplify their interests with the backing of developed countries.\textsuperscript{278} The fact that many jurisdictions in the developed world, primarily Member States of the European Union (EU) and the EU itself, shared an interest in DSTs prior to the OECD Agreement, suggests that common ground exists between the developed and developing world on the core principles behinds DSTs.\textsuperscript{279} For example, both developed and developing countries empha-

\textsuperscript{276} Compare, e.g., \textit{supra} notes 37–40 and accompanying text (noting the different approaches the United States took to issues such as agricultural subsidies and bank bailouts at home versus abroad), \textit{with} South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018) (rejecting a physical presence requirement for allocating state taxing rights and replacing it with a substantial nexus requirement to accommodate changes to the digital economy), and Ward et al., \textit{supra} note 261 (characterizing Pillar One as a “de facto” DST to which the United States agreed).

\textsuperscript{277} See \textit{Wayfair, Inc.}, 138 S. Ct. at 2099 (upholding South Dakota’s tax on e-commerce sales despite the taxed entities lacking physical presence in the state); McCabe, \textit{supra} note 180 (reporting that Maryland became the first state to adopt a digital advertising tax); Tax Notes Staff, \textit{The Fight Over Maryland’s Digital Advertising Tax, Part 1}, FORBES (Nov. 17, 2021), https://www.forbes.com/sites/taxnotes/2021/11/17/the-fight-over-marylands-digital-advertising-tax-part-1 [https://perma.cc/8873-JGRX] (drawing the parallel between international digital services taxes and Maryland’s digital tax reform effort); Ward et al., \textit{supra} note 261 (explaining that the Biden Administration, despite prior opposition, signed up for what effectively constitutes a DST when agreeing to Pillar One).

\textsuperscript{278} See \textit{supra} note 8 and accompanying text (detailing the initial emergence of DSTs as a phenomenon in developed countries in the EU); \textit{REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra} note 4, at 1–5 (demonstrating U.S. opposition to France’s DST). In fact, the EU as a bloc previously proposed the enactment of a bloc-wide DST. \textit{Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services}, art. 4(1), COM (2018) 148 final (Mar. 21, 2018). The scope of the proposed tax was narrow, aimed primarily at large digital MNEs deriving substantial revenues from digital advertising services and marketplace platforms. \textit{Id.} art. 3(1), 4(1). The EU DST proposal applied a 3% tax on businesses that had worldwide revenues of €750m and €50 million in covered digital services revenue generated within the EU in the relevant tax year \textit{Id.} art. 4(1), 5(1). In part, the EU proposed the DST as an agenda-setting tool for OECD negotiations. \textit{See Communication on the EU Digital Taxation Directive, supra} note 8, at 8 (suggesting that implementing an EU-wide DST would spur forward stalled international negotiations).

\textsuperscript{279} See \textit{KELSEY ET AL., supra} note 11, at 97–99 (providing a synopsis of DST interest and adoption in developing countries, including India, Pakistan, Turkey, Indonesia, Zimbabwe, Vietnam, Malaysia, and Kenya); Kim, \textit{supra} note 87, at 152 (providing a table detailing DSTs among developed countries, including Europe, including France, Italy, Spain, Czech Republic, Belgium, the U.K., Austria, Hungary, and Poland). The EU justified its DST proposal by emphasizing the value that certain digital services derive from user participation and user data. \textit{Communication on the EU Digital Taxation Directive, supra} note 8, at 9; \textit{see supra} notes 191–197 (assessing the user value creation rationale in the developing country context). As in some developing countries, the EU justified the high revenue threshold as a measure to preserve the existing tax rules for small and startup enterprises. \textit{Communication on the EU Digital Taxation Directive, supra} note 8, at 9; \textit{see supra} notes 198–203 (evaluating the role of nurturing a local digital economy as a rationale for developing country DSTs).
sized providing room for the growth of domestic digital industries when enact-
ing DSTs. Moreover, this new interest alignment between developed and
developing countries could act as a powerful tool to ensure that the MLC im-
plementing Pillar One accommodates shared developed and developing coun-
try interests by meaningfully taxing the digital economy in source jurisdic-
tions. For example, developing countries could follow Canada’s lead and
enact DSTs that automatically take effect should Pillar One implementation
fail expectations.

None of this analysis is to suggest that DSTs are the best solution or better
than the OECD Agreement, technically or pragmatically, for solving the chal-
 lenges of taxing digital MNEs. The globally-coordinated solution that Pillar

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280 See REPORT ON FRANCE’S DIGITAL SERVICES TAX, supra note 4, at 2 (quoting a French official
justifying the DST’s design with reference to protecting domestic startups); supra note 200 and
accompanying text (explaining the salience of using tax measures to stimulate a local digital industry
in developing countries). See generally, James, supra note 200 (analyzing how the proposed WTO
restrictions on the ability to tax the digital economy could inhibit the growth of digital economies in
developing countries).

281 See supra note 112 and accompanying text (explaining that Pillar One only becomes binding
upon the adoption of the MLC, which will in turn implement Pillar One); supra note 280 and accom-
panying text (identifying one shared interest between developed and developing countries in DSTs as
incubating a successful local digital economy); cf. Dep’t of Fin. Can., supra note 184 (proposing a
contingent DST in Canada that takes effect in 2024 on the condition that Pillar One implementation
fails); Nyawira, supra note 140 (describing Kenya’s continued engagement in discussions to poten-
tially sign on to the OECD Agreement); supra note 106 and accompanying text (identifying the four
developing countries, including Kenya, that declined to adopt the OECD Agreement). In other words,
there remain some negotiating levers through which both developed and developing countries can
signal their views on whether the MLC goes far enough—and simultaneously shape it accordingly—
to achieve their goals for Pillar One. See, e.g., Dep’t of Fin. Can., supra note 184 (signaling Canada’s
remaining interest in DSTs should Pillar One implementation not come to fruition); Nyawira, supra
note 140 (signaling Kenya’s potential interest in joining the OECD Agreement, despite not signing it
initially); Onu, supra note 6 (signaling Nigeria’s preference for an immediate DST solution over the
OECD Agreement after refusing to sign on to the deal). In the United States, some worry that the
OECD Agreement may constitute a treaty that constitutionally requires the consent of the Senate and
if so, that the agreement will not gain the requisite Senate consent. Ward et al., supra note 261; see
Tax Notes Staff, supra note 277 (suggesting that the deal could otherwise become binding on the
United States through an executive agreement). Developing countries, on the other hand, might assess
whether the MLC implementing rules are as expansive or beneficial as a DST option before binding
themselves to the MLC. See Goni & Miyandazi, supra note 140 (determining that Kenya’s DST would
impact more companies than Pillar One).

282 See Dep’t of Fin. Can., supra note 184 (proposing that a DST that would only take effect if
Pillar One implementation remains incomplete in 2024).

283 Compare, e.g., Kim, supra note 87, at 171–73 (suggesting that understanding the DST as a
consumption tax overcomes common objections to DSTs), and Cui, supra note 69, at 839–42 (advocat-
ing the superiority of DSTs over a significant digital presence approach), with Cockfield, supra
note 5, at 396 (advocating “[a] quantitative economic presence permanent establishment . . . test” for
nexus over unilateral measures like DSTs), and Fetzer & Dinger, supra note 9, at 55–56 (concluding
that DSTs are too flawed and expressing a preference for a withholding tax solution). Some scholars
believe that the DST is a superior policy solution to merely modifying the PE principle because it has
never served as a logically coherent method of accurately attributing taxable profit to the appropriate
One embodies remains preferable because it reduces tax uncertainty and harmonizes national tax mechanisms. Notwithstanding Pillar One’s shortcomings, it, like DSTs, goes some way toward more equitably addressing the broad structural issue regarding the allocation of corporate income taxing rights between resident and source countries. The takeaway is that, despite the bleakness of many globalization critiques as to whose interests global governance and international economic law represents, the DST debate and the OECD Agreement represent a promising and welcome opportunity to capture broader, nuanced, and development-related interests within a critical area of international economic law.

CONCLUSION

This Note reorients the debate over DSTs through the lens of globalization and the structures of global governance. Under such a lens, this Note suggests that the recent debate over DSTs in the context of OECD negotiations was about more than trade wars and technical tax policy. Instead, the Note argues that the DST debate created a meaningful opportunity to reconsider whose interests gain representation in debates about global governance issues. The United States staked out policy positions against DSTs that reflect many of the same suspicions that critics have long held about who makes the rules of economic globalization and for whose interests. Despite those reprised positions, this Note concluded optimistically about what the DST debate and the ultimate OECD Agreement mean for global governance. There is good reason

jurisdiction. Cui, supra note 69, at 840–41 (summarizing the argument that the bilateral tax treaty criteria for allocating profit upon establishing nexus are faulty).

284 See William Horobin & Christopher Condon, World Tax Talks Turn to Getting U.S. Passage: We’re Not ‘Stupid,’ BLOOMBERG, https://www.bloomberg.com/news/articles/2021-11-22/global-tax-negotiators-got-a-deal-now-they-have-to-sell-it [https://perma.cc/J7YR-ZN9G] (Nov. 22, 2021, 7:21 AM) (citing a commentator who emphasized the predictability that the OECD Agreement provides over the “chaos” of recent years). Compare, e.g., Termination of India DST Investigation, supra note 2, at 68,527 (announcing a coordinated approach to existing DSTs involving the crediting of current liabilities against future liabilities until Pillar One implementation), with supra notes 157–159, 164–165 and accompanying text (explaining how U.S. opposition to DSTs assumed the non-deductibility or non-crediting of DSTs across different income tax jurisdictions).

285 See Horobin & Condon, supra note 284 (quoting a commentator arguing for the U.S. to accept the OECD Agreement as stating “that the status quo is not on offer”); supra notes 62–63 and accompanying text (explaining the status quo as to the allocation of international taxing rights over corporate income).

286 Compare supra notes 32–44 and accompanying text (introducing several global governance critiques that broadly take issue with the imbalance in representation between powerful developed countries, the corporate and financial interests within those developed countries, and developing countries), with supra notes 267–286 and accompanying text (noting promising characteristics of the DST debate and OECD Agreement that indicate a more equitable global governance narrative, including support for DSTs in developed country jurisdictions, the need for the United States to compromise on Pillar One, and the ability of DSTs to improve the negotiating power of developing countries).
to believe that the DST debate and the OECD Agreement will not only result in a more equitable reallocation of taxing rights, but a new and more just narrative of globalization and global governance.

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